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(1901 — 1969)

ADVOCATE,

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SRINAGAR MUNICIPAL COUNCIL

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THE CODE OF CIVIL PROCEDURE.

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THE CODE OF CIVIL PROCEDURE

(ACT V OF 1908)

WITH

EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

BY

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AND

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—:o:—

VOLUME II

THE FIRST SCHEDULE
ORDER I TO ORDER XXX

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1933

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PRINTED AT
THE MADRAS LAW JOURNAL PRESS
MYLAPORE, MADRAS

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THE CODE OF CIVIL PROCEDURE, 1908
(ACT V of 1908)

VOLUME II

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Title [redacted]

Author [redacted]

Accession No.

Call No. [redacted]

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DAT
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THE FIRST SCHEDULE

Title [redacted]
Author [redacted]
Accession No.
Call No. [redacted]

BORROWER'S NO.	ISSUE DATE	BORROWER'S NO.	ISSUE DAT
[redacted]			

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Advocate High Court
Jammu & Kashmir
Srinagar.

THE CODE OF CIVIL PROCEDURE

ACT V OF 1908.

VOLUME II.

THE FIRST SCHEDULE.

ORDER I.

GENERAL.

Synopsis.

1. Scope of the Order. 2. "Party," Meaning of.

1. Scope of the Order.—"If we turn to the Code," said Sir Lawrence Jenkins, C.J., in *Krishnappa* v. *Shivappa*,[1] "We find, as the essentials of a suit opposing parties, a subject in dispute, a cause of action and a demand of relief". This Order deals with the subject of *parties to suits* and *inter alia* with the joinder, misjoinder and non-joinder of parties and to a certain extent with the joinder of causes of action.[2] **O. 1, Note 1.**

Joinder of parties.—All persons may be joined as *plaintiffs* in whom any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist, where if such persons brought separate suits, any common question of law or fact would arise (R. 1). Where there are *numerous persons*, however, having the same interest in one suit, one or more of such persons may, with the leave of the Court, sue *on behalf of* all such persons (R. 8). If the joinder of the plaintiffs is likely to embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or

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Order 1—General—Note 1.

(1) (1907) 31 Bom 393 (398): 9 Bom L R 530.

(2) *Ramendra Nath* v. *Brajendra Nath* (1917) 41 Ind Cas 944 (946): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158 [Dissenting from 33 Bom 120 and 3 Ind Cas 165 (168)]; *Jethanand* v. *Chetumal*, 1926 Sind 66 (68): 90 Ind Cas 970: 19 Sind L R 395; *Harendra Nath* v. *Purna Chandra*, 1928 Cal 199 (201): 55 Cal 161: 32 Cal W N 885: 109 Ind Cas 755; *Bullock* v. *L G O Co*, (1907) 1 K B 264 ref. in 15 Cal 111: 41 Ind Cas 911 (916). Also 19 Mad 536 (F B).

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O. 1, Notes 1—2.

order separate trials (R. 2). All persons may be joined as *defendants* against whom any such relief is claimed, where, if separate suits were brought against them any common question of law or fact would arise (R. 3), though it is not necessary that *every* defendant should be interested in *all the reliefs* claimed in the suit (R. 5). A plaintiff who is in doubt as to the person from whom he is entitled to relief may, however, join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined between all the parties (R. 7). The Court can give judgment for or against any one or more of the parties, for such relief as they may be found entitled to, or liable (R. 4).

Misjoinder and non-joinder of parties.—If the joinder of parties in the suit is not such as is permitted by O. 1, Rr. 1 and 3, there is a *misjoinder of parties.* If persons who ought to be made parties are not made parties there is a *non-joinder of parties.* All objections to the misjoinder or non-joinder of parties should be taken at the earliest possible opportunity or at or before the settlement of issues (R. 13). No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it (R. 9). The Court may also, at any stage of the suit strike out the name of any party improperly joined or may add a necessary or a proper party, or may, where the suit has been instituted in the name of the wrong person, substitute any other persons as the plaintiff (R. 10).

As to who are necessary or proper parties, *see* O. 1, R. 10.

Though O. 1 in terms refers only to "suits" its provisions are also applicable to joinder of parties to appeals.[3]

2. "Party," Meaning of.—A person can become a party to a suit only by his name appearing on the record of the suit as a party.[1] The mere fact that he is the person really interested in the suit and that the party on the record is only his *benamidar*, does not make him a party.[1a] The introduction of a party at one stage of a suit, is good for all subsequent stages thereof.[2] The mere fact that a person is joined as a plaintiff in a suit does not entitle him to be associated in a decree in favour of the person who alone has the real title.[3]

The same person cannot appear as plaintiff and defendant unless he appears on the record in different capacities.[4]

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(3) *Bulaqi Mal* v. *Abdul Rahim*, 1923 Lah 638 (639): 75 Ind Cas 950.

Note 2.

(1) *Biswambar* v. *Nitambar*, 1930 Cal 263 (264): 33 Cal W N 997: 125 Ind Cas 861.

(1a) *Ibid.*

(2) *Brij Indar* v. *Kanshi Ram*, 45 Cal 94 (110) P C; *Sundaramma* v. *Sundara Reddi*, 1927 Mad 560 (561): 38 Mad L Tim 148: 100 Ind Cas 338.

(3) *Mt. Lajwanti* v. *Safachand*, 1925 P C 168 (168): 23 All L J 643: 52 Ind App 211: 6 L R P C 125: 1925 Mad W N 534: 88 Ind Cas 198: 6 Lah 388: 22 Mad L W 304: 30 Cal W N 56: 26 Pun L R 524: 50 Mad L Jour 118 P C.

(4) *Premji Ladha* v. *Dossa Dongersey*, (1886) 10 Bom 358 (361); *Jivraj Lakhamal* v. *Dinanath & Co*, 1926 Sind 4 (4): 93 Ind Cas 214; *Md Faiz Choudry* v. *Upendra Lal Singh*, (1909) 2 Ind Cas 597 (598) Cal. But see *Jamshedji Naoroji* v. *Sorabji Naoroji*, 1921 Bom 414 (415): 25 Bom L R 1137: 85 Ind Cas 504 [Even in different capacities, the same person cannot be both plaintiff and defendant in a suit].

PARTIES TO SUITS.

O. 1, R. 1, Notes 1—2.

R. 1. [S. 26.] All persons may be joined *in one suit* as plaintiffs[2] in whom *any* right to relief[4] *in respect of or arising out of the same act or transaction*[5] *or series of acts or transactions is alleged to exist*, whether jointly,[7] severally[8] or in the alternative,[9] *where, if such persons brought separate suits, any common question of law or fact*[6] *would arise.*

Who may be joined as plaintiffs.

[1877—S. 26, R. S. C., O. 16, R. 1. *See* O. 2, R. 3.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Plaintiffs having different interests.
4. "Person in whom any right to relief exists."
5. Same act or transaction.
6. Any common question of fact or law.
7. "Jointly."
8. "Severally."
9. "In the alternative."
10. Appeal.
11. Necessary and proper parties. See Notes under O. 1, R. 10.

Co-owners or co-sharers for arrears of rent, etc., Suit by. See Note 5, Pt. (4) and O. 1, R. 10, Notes 18 and 20.
Co-trustees to recover trust property or for enforcement of trust, Suit by. See Note 7, Pt. (5) and O. 1, R. 10, Note 27.
Executors—Agents and managers, Suit by. See Note 7, Pt. (4).
Joint Hindu family, Suit by. See Note 7, Pt. (9).
Joint owners of property, Suit by. See Note 7, Pt. (3) and O. 1, R. 10; Note 18.
Parties in mortgage suits. See O. 34, R. 1.
Suit by benamidar. See O. 1, R. 10; Note 27.
Suit by creditors to set aside alienations. See Note 7, Pt. (8).
Suit by committee appointed under Religious Endowments Act. See Note 7, Pt. (6) and O. 1, R. 10.
Suit by member of Malabar Tarwad. See Note 5, Pt. (3) and O. 1, R. 10; Note 18.
Suit by reversioner. See Note 5, Pt. (5).
Suit on torts. See O. 1, R. 10; Note 21.
Suit regarding partnership. See O. 1, R. 10; Note 15.

1. Legislative changes.—

1. The words "in respect of, or arising out of, the *same act or transaction or series of acts or transactions*" have been substituted for the words "in respect of the *same cause of action*".

2. The words "*any* right to relief" have been substituted for the words "*the* right to any relief".

2. Scope of the rule.—Under the old S. 26 several persons could not join as plaintiffs in one suit, unless their *causes of action were identical*[1] even

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Order 1, Rule 1—Note 2.

(1) *Mohima Chandra* v. *Atul Chandra*, (1897) 24 Cal 540 (543); *Baru Mal* v. *Radha Kishen*, 1881 Pun Re No 3; *Khawas Khan* v. *Rasul Khan*, 1894 Pun Re No 29; *Girdar* v. *Syed Nyaz Ali*, (1870) 2 N W P 306; *Kesho Das* v. *Bankatesh*, 1884 All W N 46 (46); *Hodges* v. *D & L Bank Ltd.*, (1900) 2 Bom L R 967 (968): 24 All 137: 27 Ind App 168: 5 Cal W N 1: 10 Mad L Jour 279: 7 Sar 767 P C [Same principle applied to appeals]; *Ali Serang* v. *Beadon*, (1885) 11 Cal 521 (526); *Rajjo Kuar* v. *Debi Dial*, (1896) 18 All 432 (434): 1896 All W N 139 [*A*, *B* and *C*, creditors of *D*, suing *D* to avoid transfer by *D* in fraud of creditors]; *Ramanuja* v. *Devanayaka*, (1885) 8 Mad 361 (364): 9 Ind Jur 261; *Aldridge* v. *Barrow*, (1907) 31 Cal 662 (668): 11 Cal W N 680; *Baijnath* v. *Chhowaro*, (1904) 26 All 218 (220): 1903 All W N 210. In the following cases it was held, that the cause of action was the same, and that there was no misjoinder:—*Assan* v. *Pathumma*, (1899) 22 Mad 494

O. 1, R. 1, Note 2.

though the plaintiffs may have been injured by the *same act* of the defendant[2] and even if the cases of the plaintiffs are to be proved by the *same evidence*.[3] Thus where the plaintiffs, owning separate parcels of land, sued the defendant for trespass on their lands, it was held that they could not join as plaintiffs in one suit inasmuch as their causes of action were different.[4] There was also a difference of opinion as to whether the words "cause of action" referred only to the *infringement* of the right claimed, or whether it included also the facts constituting the *right* itself.[4-a]

The present rule makes it clear that, for several plaintiffs to join in one suit, it is not necessary, that their *causes of action should be identical*.[5] It, however, imposes two other conditions *both* of which must be fulfilled in order to enable them to join in one suit as plaintiffs,[6] namely,

(1) the right to relief must arise out of the *same act or transaction* or series of acts or transactions, and

(2) the matter must be such that, if the plaintiffs brought separate suits any *common question of law or fact would arise*. The policy of the rule is that, even in cases where the plaintiffs seek individual reliefs, where the investigation would to a great extent be identical in each individual case, they may unite as co-plaintiffs and thus avoid needless expense.[6-a]

Under the old English rule corresponding to the present rule it was held in England that several plaintiffs having *distinct and separate causes of action* could not join in one suit as plaintiffs.[7] The rule was amended in October, 1896, which now reads as follows:—

> "All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons

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(199); 9 Mad L Jour 37 [Tenants-in-common can sue in one suit for possession against trespasser]; *M R Raja Tevar* v. *Chokkalingam Chetti*, (1896) 19 Mad 335 (336); *Allah Baksh* v. *Sadiq Ali*, 1903 Pun Re No 38: 87 Pun L R 1903; *Girijanath Ray* v *Surendra Nath Ray*, (1912) 16 Ind Cas 84 (85): 16 Cal L Jour 1: *Shamsundar* v. *Kanjoban*, (1900) 13 C P L Rep 130 (136); *Tulsha* v. *Gopal Rai*, (1884) 6 All 632 (633): 1884 All W N 208: 9 Ind Jur 155 [Suit for common maintenance of three persons—Held it was a *joint matter* and that there was no misjoinder].

(2) *Aldridge* v. *Burrow*, (1907) 34 Cal 662 (668): 11 Cal W N 680.

(3) *Yamuhai Bhaishanker* v. *Ramdat Hariram*, (1902) 26 Bom 259 (261) [A and B sued C for simultaneous assault on them].

(4) *Aiyaru* v *Vellaya*, (1910) 6 Ind Cas 15 (15): 34 Mad 55: 1910 Mad W N 229: 8 Mad L Tim 6.

(4-a) *Ram Narak* v. *Nakched Singh*, (1882) 4 All 264 (269, 270) [Does not necessarily include the facts constituting the right]; *Sundar Jha* v. *Banaman Jha*, (1906) 33 Cal 367 (370): 10 Cal W N 508, (Do); *Haramoni* v. *Harichura*, (1895) 22 Cal 833 (840), (Do.); *Aldridge* v. *Burrow*, (1907) 34 Cal 662 (668): 11 Cal W N 680; *Akbarkhan* v. *Wazir Khan*, (1900) 3 Oudh Cas 176 (180); *Nusserwanji* v. *Gordon*, (1881-82) 6 Bom 266 (275) [Includes facts constituting the right]; *Salima Bibi* v. *Sheik Mohammad*, (1896) 18 All 131 (138): 1896 All W N 2, (Do.).

(5) *Alla Ramalingier* v. *Subramania Pillai*, 1923 Mad 331 (332): 17 Mad L W 25: 32 Mad L Tim 46: 69 Ind Cas 402; *Kanakammal* v. *Panchapakesa Odayar*, (1914) 23 Ind Cas 82 (84): 26 Mad L Jour 343: 1914 Mad W N 329.

(6) *Stroud* v. *Lawson*, (1898) 2 Q B 44: 67 L J Q B 718: 78 L T 729: 46 W R 626: 14 T L R 421 C A.

(6-a) *Radha Rani* v. *Sukdeb Battacharji*, 1928 Cal 92 (93): 103 Ind Cas 811; *Katha Pillai* v. *Kanakasundaram Pillai*, (1918) 45 Ind Cas 423 (424): 24 Mad L Tim 20: 8 Mad L W 160 [Claim for damages].

(7) *Smurthwaite* v. *Hannay*, 1894 App Cas 494: 63 L J Q B 737: 71 L T 157: 43 W R 113: 7 Asp M L C 485: 10 T L R 649: 6 R 299; *Carter* v. *Rigby*, (1896) 2 Q B 113: 65 L J Q B 537: 74 L T 744: 44 W R 566: 60 J P 581 C A; *P & O Steam Navigation Co* v. *Isune Kinna*, 1895 App Cas 661.

brought separate actions any common question of fact or law would arise . . ."

O. 1, R. 1, Notes 2—3.

It has accordingly been held in England after the date of the said amendment, that even plaintiffs having distinct causes of action can join in one suit as plaintiffs, provided that the right to relief arises out of the same transaction or transactions and the case is one where if separate suits were brought any common question of law or fact would arise.[8] Thus, where several debenture-holders sued the directors of a company for damages for misrepresentation in the prospectus, it was held that though the plaintiffs had made *separate* contracts their right to relief arose out of the issue of the prospectus and therefore out of the *same transaction* and they could all join in one suit.[9] Similarly, where the Universities of Oxford and Cambridge jointly sued the defendant to restrain him from using the words "Oxford and Cambridge" in the title of his publications, it was held that the right to relief arose out of one transaction, or series of transactions, if each publication was a separate transaction, and that the question of publication and the belief that would be induced by such publication were common questions of fact.[10]

The rule lays down who *may* be joined as plaintiffs in the same suit. It does not say that any person *must* join as plaintiff to a suit; nor does it say anything as to who are necessary or proper parties to a suit, whom it may be essential or advisable to join.[11]

3. Plaintiffs having different interests.—Where *A* and *B* are entitled to different interests in a property, as when *A* is the *melwaramdar* and *B*, the *kudiwaramdar* of certain property it has been held that they can sue together for the recovery of the property from a third person *C*, where the *ground* of their action is common.[1] Where *A* is originally the owner of property and he alienates a portion of it to *B*, can *A* and *B* sue together for the recovery of the property, where the ground of their action is common? Upon this question there was a conflict of decisions under the old Code. It was held by the Allahabad High Court[2] that *A* and *B* could not join in the same suit in such a case as they did not have the same cause of action. But it was held by the High Court of Calcutta,[3] the Chief Court of Punjab[4] and the Oudh Judicial Commissioner's Court[5] that they could join as plaintiffs in such a case. Under the present rule such a

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(8) *Duke of Bedford* v. *Ellis*, 1901 App Cas 1; *Walters* v. *Green*, (1899) 2 Ch 696: 63 J P 742: 68 L J Ch 730: 81 L T 151: 48 W R 23: 15 T L R 532; *Harwood* v. *Statesman Publishing Co, Ltd*, 1929 W N 38: 141 L T 54: 45 T L R 237 C A; *Thomas* v. *Moore*, (1918) 1 K B 555 (565): 118 L T 298 C A.

(9) *Drincqbier* v. *Wood*, (1899) 1 Ch. 393: 68 L J Ch 181: 47 W R 252: 79 L T 518: 15 T L R 19: 6 Manson 76.

(10) *Oxford & Cambridge Universities* v. *Gill*, (1899) 1 Ch 55 (59): 68 L J Ch 31: 79 L T 338: 47 W R 218: 15 T L R 21.

(11) *Gobind Prasad* v. *Chandar Sekhar*, (1887) 9 All 486 (491): (1887) 7 All W N 133.

Note 3.

(1) *M Raghunadha Raju Tevar* v. *Chokkalingam Chetti*, (1895) 19 Mad 335 (336); *Beresford* v. *Ramasubba*, (1890) 13 Mad 197 (202) [Suit for setting aside instrument]

(2) *Salima Bibi* v. *Sheik Mohammad*, (1896) 18 All 131 (140): 1896 All W N 2; *Rahim Baksh* v. *Amiran Bibi*, (1896) 18 All 219 (221): 1896 All W N 33.

(3) *Sundar Jha* v. *Ramman Jha*, (1906) 33 Cal 367 (370): 10 Cal W N 508 [Suit by A and his vendee of portion of property].

(4) *Nihal Singh* v. *Changalla Singh*, 1908 Pun W R 9.

(5) *Kazim Hussain Khan* v. *Lal Achal Ram*, (1899) 2 Oudh Cas 119 (174); *Mata Prasad* v. *Musammat Audan Kuar*, (1906) 3 Oudh Cas 215 (219).

O. 1, R. 1, Notes 3—5.

joinder is clearly permissible. Thus, in a suit for possession, where one of the plaintiffs is the purchaser from the co-sharer of the other plaintiff, there is no misjoinder.[6]

Similarly, the rule permits a suit being filed by persons in a double capacity, provided the conditions in O. 1, R. 1 are not transgressed.[7] Thus a person may seek in the same suit, to recover possession of certain properties in his individual capacity and certain other properties in his capacity as the shebait of an idol.[8]

4. "Person in whom any right to relief exists."—The words "*any* right to relief" are wider than the words "the right to relief" used in the old section.[1]

5. Same act or transaction.—The present rule enables different plaintiffs to join in one suit where the right to relief alleged to exist in each of them arises out of the same transaction and there is a common question of fact or law to be decided.

The following are some of the cases decided under this rule:—

(1) *A* sold to *B* a certain property which was in the wrongful possession of *C*. *B* sued *C* for profits realised by *C* both before and after the transfer, impleading *A* as a *pro forma* plaintiff. The plaintiff asked for amendment of the plaint so as to add a prayer for a decree in favour of *A* for the profits realised by *C* before the transfer. *Held*, that the amendment could be allowed.[1]

(2) Co-sharers suing the lambardar for profits may join in the same suit. The reason is that their several rights arise out of the *same act, viz.*, the lambardar's failure to divide the profits among the co-sharers on the due date.[2]

(3) A mother and her sons, members of a Malabar tarwad, residing together may maintain a joint suit for recovery of their maintenance-amounts.[3]

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(6) *Bhagwan Chandra Dey* v. *Dayal Hari Das*, (1912) 16 Ind Cas 623 (624) Cal. See also *Sahdeo Singh* v. *Ram Nawal Singh*, 1929 All 790 (790).

(7) *Nirupendra Nath* v. *Birendra Nath*, (1917) 41 Ind Cas 615 (625): 21 Cal W N 939 [Claim arising out of same transaction maintainable by plaintiff as shebait or in the alternative in his own right as owner]; *Bai Bhicaiji* v. *Perojshaw*, (1916) 33 Ind Cas 192 (194): 40 Bom 401: 17 Bom L R 1040 [Plaintiffs suing as trustees and as tenants]; *Ebrahimbhai* v. *Fulbhai*, (1902) 26 Bom 577 (582): 4 Bom L R 180.

(8) *Harendra Nath* v. *Purnachandra*, 1928 Cal 199 (202): 55 Cal 161: 32 Cal W N 885: 109 Ind Cas 755; *Nirupendra Nath* v. *Birendra Nath*, (1917) 41 Ind Cas 615 (625, 626): 21 Cal W N 939.

Note 4.

(1) *Hannay & Co* v. *Smurthwaite*, (1893) 2 Q B 412. Also *Gort* v. *Rowney*, (1886) 17 Q B D 625.

Note 5.

(1) *Bhogilal Tarachand* v. *Jethalal*, 1929 Bom 51 (53): 30 Bom L R 1588: 114 Ind Cas 262.

(2) *Piare Lal* v. *Jhabba Lal*, 1929 All 668 (669): 1929 All L J 1098: 51 All 994.

(3) *Raman Menon* v. *Ittimayamma*, (1899) 9 Mad L Jour 153 (154). See also *Nilmadhab Mitra* v. *Jotindranath Mitra*, (1913) 18 Ind Cas 764 (765): 17 Cal W N 341 [Single suit for maintenance, by an excluded co-parcener, his wife and after-born son is maintainable]. See also *Amir Bibi* v. *Abdul*, (1901) 3 Bom L R 658 (660) [Mohamedan widow and her daughter can sue jointly husband's heir for their shares of inheritance].

(4) Co-sharers, although they have been collecting rents separately, may join in the same suit for rent against the tenant, though the rents refer to different periods.[4] O. 1, R. 1, Notes 5—6.

(5) A contingent reversioner may join as co-plaintiff in the presumptive reversioner's suit to set aside an alleged invalid adoption. The object of the suit is to remove an apprehended injury which is common to the interests of all reversioners, presumptive as well as contingent.[5]

In each of the above cases the plaintiffs' rights arose out of the same transaction or series of transactions and hence, they were held entitled to join in the same suit. Conversely, where the rights of the several plaintiffs do not arise out of the same transaction or series of transactions but arise out of *different transactions*, there can be no valid joinder of such plaintiffs under this rule.[6]

6. Any common question of fact or law.—As has been observed already in Note 2 above, it is also necessary that a *common question of law or fact* should arise in the suit. Thus, although the plaintiffs may be suing the same defendant and for a similar relief, and their right may arise out of the same transaction, they cannot join in one suit where the case of each plaintiff gives rise to *different questions of fact and law*.[1]

Illustrations.

1. The plaintiffs in a suit were holders of a piper service in a temple and filed a suit for setting aside an order of dismissal passed by the trustee of the temple. The different plaintiffs were entitled to different shares in the inam. The charges of misconduct against the several plaintiffs on which they were dismissed were not identical. *Held*, that the plaintiffs could not sue together as each of their cases gave rise to different questions.[2]

2. Plaintiffs instituted a suit for the establishment of occupancy rights in their various holdings against the *shrotriemdar*. The genuineness of the *muchilikas* alleged to have been executed by some of the plaintiffs was denied and certain decrees obtained against some of the plaintiffs were challenged as having been fraudulently obtained. *Held*, that the suit was bad for misjoinder as it gave rise to *different questions of fact and law* in the case of the different plaintiffs.[3]

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(4) *Bholanath* v. *Belchamber*, (1911) 10 Ind Cas 891 (892): 14 Cal L Jour 373.

(5) *Venkatanarayana* v. *Subbammal*, 1917 P C 124 (127): 38 Mad 406: 42 Ind App 125: 17 Bom L R 468: 21 Cal L Jour 515: 19 Cal W N 641: 28 Mad L Jour 535: 17 Mad L Tim 435: 21 Mad L W 596: 1915 Mad W N 555: 29 Ind Cas 298 P C. See *Harbans Singh* v. *Haraam Singh*, 1898 Pun Re 84 F B [Remote reversioner can sue if nearer reversioner colludes or refuses to join]: *And Budh Singh* v. *Musst Dhan Kuar*, 1898 Pun Re 57 [Reversioner colluding—Next reversioners can sue but not more remote reversioners]. See also *Anantan* v. *Nanu karan*, (1891) 14 Mad 101 (102) [Malabar tarwad—Karnavan's alienations—Not questioned by seniors—Junior members can sue]; *V K Kunju Kombi Achan* v. *Ammu*, 1932 Mad 31 (32): 61 Mad L Jour 549: 135 Ind Cas 8: 34 Mad L W 548 [Karnavan's petition to withdraw appeal not *bona fide*—Junior members can be substituted]. But see *Mahomed* v. *Krishnan*, (1888) 11 Mad 106 (114) [No fraud or collusion of nearer reversioners of a stanam of Malabar Remote reversioners no *locus standi*].

(6) *Ramjas Agarwalla* v. *Linton Holdsworth*, 1923 Pat 411 (412): 73 I C 71. *Chandulall* v. *Dayda Mahada*, 1925 Bom 312 (312): 27 Bom L R 472: 87 Ind Cas 435; *Jethanand* v. *Chetumal*, 1926 Sind 66 (68): 90 Ind Cas 979: 19 Sind L R 395.

Note 6

(1) *Ramjas Agarwalla* v. *Linton Holdsworth*, 1923 Pat 411 (412): 73 Ind Cas 71.

(2) *Madura etc Dist Co-operative Bank* v. *Sundaram Ammal*, 1926 Mad 57 [illegible] 16: 1925 Mad W N 60[illegible] 91 I C [illegible].

(3) *Atchi Reddi* v. *Venkata Reddi*, 1926 Mad 1140 (1140): 1926 51 M L J 52 [illegible] 163.

O. 1, R. 1, Note 7.

7. "**Jointly.**"—Even in the case of persons *jointly* entitled to any relief the rule only says that all such persons *may* be joined as *plaintiffs* in one suit. This however does not affect the general principle of law that all such persons *must* be made *parties* to the suit *either as plaintiffs or as defendants*.[1] The reason is that all such persons together represent a *single and indivisible* right which cannot be adjudicated upon and no effective decree passed by the Court in the absence of all such persons.[2] The following are all illustrations of persons in whom the right to relief jointly exists and who, therefore, must be made parties to the suit in order that an effective decree may be passed therein :—

(1) Joint owners of property suing to recover the same.[3]

(2) All executors who have proved the will suing to recover the property belonging to the estate of the testator.[4]

(3) Co-trustees suing to recover trust property.[5]

(4) Members of a committee appointed under the Religious Endowments Act (1863) suing for the removal of a person acting as a trustee of the endowment.[6]

(5) Joint promisees under a contract suing to enforce the contract.[7] (*See* Contract Act, S. 45.)

A suit by creditors to set aside an alienation as being fraudulent within the meaning of S. 53 of the Transfer of Property Act must be *by* or on behalf of all.[8] So also a suit by members of a Hindu joint family to recover a property belonging to the joint family must be by or on behalf of all the members.[9]

Where a number of persons are jointly entitled to the same relief in respect of a transaction, and one of them wishes to sue to enforce that relief,

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Note 7.

(1) *Wilkins* v. *Fry*, 1 Mer 244 (262); *Pramada Nath Roy* v. *Ramani Kantha Roy*, (1908) 35 Cal 331 (344): 35 Ind App 73: 12 Cal W N 249: 10 Bom L R 66: 7 Cal L Jour 139: 18 Mad L Jour 43: 3 Mad L Tim 151; *Bhuban Mohan Nikdar* v. *Dhanaraj Oswal*, (1913) 20 Ind Cas 329 (330) Cal. See cases cited in foot-notes (3) to (11) below. See also *Kaliappa Nadar* v. *Muthu Vijaia Thumbayasami*, 1927 Mad 984 (984): 39 Mad L Tim 442: 106 Ind Cas 140; *Kandhia Lal* v. *Chandar*, (1885) 7 All 313 (315, 317): 1885 All W N 34: 9 Ind Jur 314 F B.

(2) See *Syed Mohamad Hasan* v. *Kazi Nasjar Mohammad*, (1917) 38 Ind Cas 13 (13): 1 Pat L Jour 437: 3 Pat L W 31.

(3) *Balkrishna* v. *Municipality of Mahad*, (1886) 10 Bom 32 (34); *Balkrishna* v. *Moro*, (1897) 21 Bom 154 (158, 159); *Mir Tapurah* v. *Gopi Narayan*, (1908) 7 Cal L Jour 251 (260); *Narhari* v. *Shek Jamal*, (1903) 5 Bom L R 577 (578); *K P K Pisharody* v. *V M N Samayajipad*, (1881) 3 Mad 234 (235); *Jagadamba Dassee* v. *Haran Chander*, (1868) 10 Suth W R 108 (109, 110): 6 Beng L R 526.

(4) *Mohanavelu Mudaliar* v. *Annamalai*, 1923 Mad 337 (338).

(5) *Kakilasari* v. *Rudranand*, (1907) 5 Cal L Jour 527 (533); *Bhuban Mohan Koly and others* v. *Narendra Nath Konwar and others*, 1932 Cal 27 (29): 35 Cal W N 478: 135 Ind Cas 865; *Shanmuga* v. *Subbayya*, 1922 Mad 317 (318, 319); *Narendra Nath Kumar* v. *Atul Chandra Bandopadha*, (1917) 41 Ind Cas 837 (838) Cal; *C T N Narayanan Chettiar* v. *V S V Lakshmanan Chettiar*, (1915) 29 Ind Cas 1 (2): 28 Mad L Jour 571: 39 Mad 456; *Bachu Lal* v. *Oliullah*, (1885) 11 Cal 338 (340); *Rajendranath Dutt* v. *Mahomed Lal*, (1882) 8 Cal 42 (50): 8 Ind App 135: 4 Sar 254: 5 Ind Jur 548 [Suit to set aside alienation of trust property].

(6) *Md Hasan* v. *Kazi Nazar Muhammad*, (1917) 38 Ind Cas 13 (14): 1 Pat L Jour 437: 3 Pat L W 31 (Pat); *Virasami Nayudu* v. *Arunachella Chetti*, (1878-80) 2 Mad 200 (201): 4 Ind Jur 337.

(7) *Ram Gopal Dey* v. *Raghu Nath Ghosal*, (1905) 2 Cal L Jour 496 (498); *Parbutti Nath* v. *Tejomoy*, (1880) 5 Cal 303 (307).

(8) *Lala Hakim Lal* v. *Moohbas Sahoo*, (1907) 34 Cal 999 (1006): 11 Cal W N 889: 6 Cal L Jour 410.

(9) *Collector of Monghyr* v. *Hurdai Narain*, (1880) 5 Cal 425 (436): 5 Cal L Rep 112: 5 Ind Jur 251; *Ramayya* v. *Venkatarathnam*, (1894) 17 Mad 122 (126): 4 Mad L Jour 52 [Debt due to joint family]; *Shamrathi* v. *Kishan Prashad*, (1907) 29 All 311 (317): 1907 All W N 58: 4 All L J 194 (Do.).

the proper course is for him to ask the other persons to join in the suit as co-plaintiffs. If they refuse to join in the suit as plaintiffs, they must be joined as defendants.[10] But the really essential point is that all the persons jointly interested must be on the record as parties whether as plaintiffs or defendants. Hence, a suit should not be dismissed merely because the plaintiff fails to prove that before joining the persons jointly interested with him as defendants, he asked them to join as co-plaintiffs and they refused to do so.[11]

O. 1, R. 1, Notes 7—9.

8. "**Severally.**"—Where the same transaction entitles each one of a number of persons to relief severally, *i.e.*, individually and not jointly, they may all join as plaintiffs in the same suit under the present rule if the questions to be decided are common.[1] But this course is not obligatory. One or more of such persons may sue separately to enforce the relief.[2] Thus, where every member of the community has an individual right to worship on a platform round a sacred tree, he may sue alone for the removal of any obstruction placed upon the platform.[3] The other members of the community may also join as plaintiffs in the suit. But this is not necessary for the maintainability of the suit.

9. "**In the alternative.**"—*A* and *B* sue *C* alleging that either *A* or *B* is entitled to relief against *C* in respect of a certain transaction. The present rule permits the joinder of *A* and *B* in one suit in such a case.[1] Thus, in the

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(10) *Safiur Rahaman* v. *Maharamunnessa*, (1897) 24 Cal 832 (833); *Guru Prasad* v. *Ras Mohan*, (1879) 1 Cal L Rep 431 (432); *Dinturini Dasi* v. *Mr. L P D Broughton*, (1899) 3 Cal W N 225 (226); *Premchand* v. *Mokshoda*, (1887) 14 Cal 201 (203); *Dwarka Nath* v. *Tara Prosunna*, (1890) 17 Cal 160 (162); *Vaithilinga* v. *Vaithilinga*, (1892) 15 Mad 111 (116); *Abdul Gufar* v. *Shahabuddin*, 1886 Pun Re No 87; *Ram Asra* v. *Gurditta*, 1891 Pun Re 42; *Harvans Singh* v. *Harnam Singh*, 1898 Pun Re 84 F B; *Ram Sarup* v. *Musst Rikhi*, 1905 Pun Re 12: 1905 Pun L R 73: 1905 Pun W R 24; *Ashtamurti Nambudri* v. *Raman Menon*, (1899) 9 Mad L Jour 312 (312); *Bhosai* v. *Aminuddi*, (1917) 37 Ind Cas 847 (849): 21 Cal W N 371: 25 Cal L Jour 469 Cal; *Bhulli Mal* v. *Jhakha*, 1925 Lah 504 (505): 7 Lah L Jour 280: 26 Pun L R 699: 92 Ind Cas 569: *Sho Murat* v. *Seth Jhabhu Mal*, (1930) All L J 247 (248): 1930 Notes 22-d: *Aga Gulam* v. *Sassoon*, (1897) 21 Bom 412 (421, 422) [Legal representative of deceased partner can sue, if surviving partner impleaded as defendant]; *Biru Ram* v. *Muran Baksh*, 1927 Lah 129 (129): 99 Ind Cas 565; *Indrapal Singh* v. *Rameswar Baksh Singh*, 1925 Oudh 71 (71): 80 Ind Cas 285; *Bissonath Ruckitt* v. *Gunnesh Chunder*, 2 Ind Jur N S 203.

(11) *Rasu Mudaliar* v. *Veerasami Pillai*, (1908) 18 Mad L Jour 495 (496): 4 Mad L Tim 194; *Ponnambala Pillai* v. *Muthu Chettiar*, (1916) 33 Ind Cas 52 (53): 30 Mad L Jour 619: (1916) 1 Mad W N 181; *Periya Karuppan* v. *Vellayutham Chetti*, (1906) 29 Mad 302 (303); *Mariyil Raman* v. *Narayanan*, (1903) 26 Mad 461 (462) [Contrary proposition only doubted]; *Karattole Edamana* v. *Unni Kannan*, (1903) 26 Mad 649 (653): 13 Mad L Jour 322 F B [Decided "on the *terms* of the T P Act]"; *Birsingh* v. *Nawal*, (1902) 24 All 226 (228): 1902 All W N 31; *Pyari Mohan* v. *Kedar Nath*, (1899) 26 Cal 409 (412): 3 Cal W N 271; *Nazir Ahmad* v. *Rabat Ali*, (1919) 53 Ind Cas 478 (478): 1919 Pun Re 136; *Ram Chand* v. *Shadi Ram*, 1931 Lah 445 (446): 32 Pun L R 385: 133 Ind Cas 871; *Bisseswar Roy Chowdry* v. *Broja Kant Roy Chowdry*, (1897) 1 Cal W N 221 (222); *Tarini Kant* v. *Nand Kishore*, (1878) 12 Cal L Rep 588 (590); *Kamini Mohan* v. *Nibaranchandra*, 1923 Cal 506 (507): 76 Ind Cas 577. The contrary view held in the following cases is not good law:—*Raja Shoshee Shekareswar Roy* v. *Giris Chandra Lahiri*, (1897) 1 Cal W N 659 (660); *Parameswaran* v. *Shangaran*, (1891) 14 Mad 489 (490); *Savitri Antarjanam* v. *Raman Nambudri*, (1901) 24 Mad 296 (299); *Puramathan Sankarapajipad* v. *Sankara Menon*, (1900) 23 Mad 82 (84).

Note 8.

(1) *Rahim Baksh* v. *Brijbhukhan Saran*, (1904) 1 All L J 188 (191); *Basharat Beg* v. *Hira Lal*, 1932 All 401 (402): 1932 All L J 497: 138 Ind Cas 77.

(2) *Baiju Lal* v. *Gulak Lal*, (1897) 24 Cal 385 (388); *Thakersey Dewraj* v. *Hurbhum Narsey*, (1884) 8 Bom 432 (450); *Manna* v. *Nasrat Ullah Khan*, 1901 All W N 36 (36); *Gujarmal* v. *Ram Richpal*, 1901 Pun Re No 91: 113 Pun L R 1901; *Harihar* v. *Bhoti*, (1907) 6 Cal L Jour 383 (391); *Hurdeo* v. *Ganeshee Lall*, (1867) 1 Agra 36.

(3) *Baijulal* v. *Gulablal*, (1897) 24 Cal 385 (388).

Note 9.

(1) *Shankar* v. *Sonoo*, 1921 Nag 9 (10): 4 Nag L J 58: 63 Ind Cas 419; *Velappa Nadar* v. *Chidambara Nadar*, 1922 Mad 174 (176): 1922 Mad W N 316: 43 Mad L Jour 277: 70 Ind Cas 684; *Rukman Devi* v. *Shib Devi*, (1916) 32 Ind Cas 526 (527): 10 Pun Re 1916: 69 Pun L R 1917 Lah; *Moolchand Gupta* v. *Bhup Singh*, 1927 Oudh 481 (485): 1 Luck Cas 546: 105 Ind Cas 473; *Lakshmakka* v. *Nagi Reddi*, (1905) 28 Mad 500 (503); *Nanakchand* v. *Durant*, 1906 Pun Re No 9: 19 Pun L R 1906: 12 Pun W R 1906; *Haramoni Dassi* v. *Hari Churn Chowdry*, (1895) 22 Cal 833 (841); *Ishwarappa* v. *Rudrappa*, (1892) 16 Bom 119 (122, 123) [The plaintiffs—Widow and adopted son—Were

O. 1, R. 1, Notes 10—11.

undermentioned case.[2] *A*, the widow, and, *B* the adopted son of *C*, a deceased person, sued for a debt due to *C*. The adoption was questioned by *C's* reversioners. But *A* did not dispute the adoption and joined with *B* in instituting the suit praying that if the adoption was established a decree should be passed in *B's* favour but that if the adoption was held not proved, a decree should be passed in favour of *A*. It was *held*, that the suit was not bad for misjoinder as it came within the expression "alternative" in the present rule. But if in the above case the widow disputed the adoption, she and the adopted son could not be joined as plaintiffs in one suit.[3] The reason is that the rule does not warrant the joinder, as plaintiffs in one suit, of rival claimants each of whom denies the right of the other. Where again, it is not alleged that the right to relief exists in the alternative but the plaintiffs are joined in the hope of getting a decree by something like a mass attack on the defendants and of afterwards dividing the fruits of victory among the plaintiffs by further litigation *inter se*, such a suit, their Lordships of the Privy Council observe, is inconvenient in plan and must be condemned.[4]

10. Appeal.—The rule contained in O. 1, R. 1 applies to appeals also. Hence, where a suit is filed on foot of a promissory note executed by the first defendant in favour of the second defendant and assigned by the latter to the plaintiff and is dismissed as against the first defendant but is decreed in full against the second defendant, the plaintiff and the second defendant can prefer a joint appeal to have the first defendant *also* made liable.[1]

11. Necessary and proper parties.—*See* Notes under O. 1, R. 10.

O. 1, R. 2. Note 1.

R. 2. [New.] *Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.*

Power of Court to order separate trials.

[R. S. C., O. 16, R. 1.]

Synopsis.

1. Power of Court to order separate trials.

1. Power of Court to order separate trials.—This rule is new and empowers the Court in suits in which more plaintiffs than one are joined, to order separate trials, or require any one plaintiff to elect to carry on the suit or to make any other appropriate order.[1] It, however, applies only to cases

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held to be *jointly interested* in the object of the suit); *Amirbibi* v. *Abdul*, (1901) 3 Bom L R 658 (660).

(2) *Yakirappa* v. *Rudrappa*, (1892) 16 Bom 119 (122-123). See also *Ningawa* v. *Ramappa*, (1904) 28 Bom 94 (99): 5 Bom L R 708; *Pinapathi Venkanmajuru* v. *Pinapati Janakamma*, (1903) 26 Mad 647 (649) F B.

(3) *Linganmal* v. *Venkatamal*, (1883) 6 Mad 239 (243): 7 Ind Jur 244. See also *Brenna* v. *Sundarabai*, 38 Bom 272: (1914) 23 Ind Cas 221 (224).

(4) *Mewa Singh* v. *Basant Singh*, (1918) 48 Ind Cas 540 (541): 1918 P C 49: 21 Bom L R 232: 28 Cal L Jour 530: 24 Mad L Tim 429: 9 Mad L W 416: 28 Pun L R 1919: 1 Pun W R 1919 P C; *Dadabhai* v. *Cowasji*, 1923 Bom 177 (180): 24 Bom L R 1111: 77 Ind Cas 83: 47 Bom 349.

Note 10.

(1) *Bulaqi Mal* v. *Abdul Rahim*, 1923 Lah 638 (639): 75 Ind Cas 950.

Order 1, Rule 2—Note 1.

(1) *Sandes* v. *Wildsmith*, (1893) 1 Q B 771; *Varajlal Bhaishanker and another* v. *Ramdat Hari-*

in which the plaintiffs are *properly joined* in a suit under R. 1, but in which separate trials or election is necessary for avoiding embarrassment or inconvenience or delay. It has no application to cases of misjoinder of plaintiffs.[2] Where the same plaintiff sues for possession of several properties in separate capacities as for instance, in a personal capacity and in the capacity of a trustee, the Court may order separate trials.[3] O. 1, R. 2, Note 1.

The High Court can, in revision, subject to the *conditions* laid down in S. 115 *ante*, interfere with an order under this rule.[4]

R. 3. [S. 28] All persons[3] may be joined[3] as defendants against whom *any* right to relief[3] in respect of *or arising out of the* same act *or transaction*[6] *or series of acts or transactions* is alleged[5] to exist,[6] whether jointly,[7] severally[9] or in the alternative,[10] *where, if separate suits were brought against such persons, any common question of law or fact would arise.* O. 1, R. 3, Note 1.

Who may be joined as defendants.

[1877, S. 28. *Cf.* R. S. C., O. 16, R. 4. *See* O. 11, R. 3.]

Synopsis.

1. Legislative changes.
2. Scope and object of the rule.
3. "All persons may be joined as defendants against whom any right to relief . . . . exists."
4. The parties must be within the jurisdiction of the Court.
5. "Alleged."
6. "In respect of the same act or transaction."
7. "Jointly."
8. Joint tort feasors.
9. "Severally".
10. "In the alternative."
11. Award of costs in claims of alternative reliefs. See S. 35, Note 9.
12. Ancillary relief.
13. Separate trials.
14. Appeal.
15. Classes of cases illustrating the above principles. See O. 1, R. 10.

Misjoinder of defendants. See O. 1, R. 10.
O. 2, R. 3, compared. See Note 2.

Several kinds of suits—Joinder of defendants in . . . . . See O. 1, R. 10.

1. Legislative changes.—

1. The words "in respect of the same matter" have been substituted by the words "in respect of or arising out of the same act or series of acts or transactions". Under the old Code there was a conflict of opinion as to the interpretation of the words "same matter". One view held that it was equivalent to "same cause of action".[1] According to another view, it was used in a more comprehensive sense than the words "cause of action" and was intended to allow a joinder of defendants even where relief was sought

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krishna and another, (1902) 26 Bom 259 (266): 3 Bom L R 878; *Baijnath* v. *Chhowaro*, (1904) 26 All 218 (220): 1903 All W N 240.

(2) *Krishnappa* v. *Maung Hman*, (1913) 18 Ind Cas 181 (182) Rang. But see *Gur Prasad* v. *Gur Prasad*, (1914) 25 Ind Cas 438 (438) Cal; *Baijnath* v. *Chhowaro*, (1904) 26 All 218 (220): 1903 All W N 240.

(3) *Herendra* v. *Purna*, 1928 Cal 199 (202): 55 Cal 164: 109 Ind Cas 755.

(4) *Sitaramaya* v. *Ramappaya*, 5 Mad L W 207; *P S S A R A R Arunachalam Chettiar* v. *Arunachalam Chettiar*, 16 Mad L W 175.

Order 1, Rule 3—Note 1.

(1) *Narasinga Das* v. *Mangal*, (1883) 5 All 163 (168): 1882 All W N 202 F B; *Muthappa* v. *Muthu Pulani*, (1904) 27 Mad 80 (83); *Ramendra Nath Roy* v. *Brojendra Nath Das*, 45 Cal 111.

O. 1, R. 3, Notes 1—2.

in respect of *separate* causes of action against the different defendants so long as they all arose "in respect of the same matter".[2] This conflict has now been removed by giving legislative recognition to the latter view.

2. The words "where if separate suits were brought against such persons any common question of law or fact would arise" are new. This alteration lays down a condition for the applicability of the rule.

3. The words "*the* right to any relief" have been changed into "*any* right to relief", thus giving the rule a wider scope.[3]

2. Scope and object of the rule.—This is the main rule governing the joinder of defendants. The object of this rule and that of O. 1, R. 1 is to avoid multiplicity of suits and needless expense, if it could be done without embarrassment to the parties and the Court.[1] *All* persons may therefore be joined as defendants against whom any right to relief is alleged to exist provided that

(1) such right arises in respect of the same act or transaction or series of acts or transactions, and,

(2) the case is one where if separate suits were instituted against the defendants *any common question of law or fact would arise.*

It is not necessary that all the defendants should be interested in *all* the reliefs and transactions comprised in the suit or that the liability of all the defendants should be the same.[1-a] Nor is it necessary that the *evidence* as regards each of the defendants should be the same[2] or that the *cause of action* against each of the defendants should be the same.[2-a] But it is necessary that *both* the conditions set forth above should exist[3] though in order to satisfy the second condition, it is enough if there is *one* question common to all the defendants which is of sufficient importance in proportion to the rest of the action.[4]

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(2) *Dampanaboyina* v. *Addala Ramasami*, (1902) 25 Mad 736 (745): 12 Mad L Jour 103; *Aiyathurai Rowthan* v. *S Meera Rowthan*, (1908) 31 Mad 252 (256): 18 Mad L Jour 238; *Mohamad Ali Sultan* v. *Abdul Kaelvi Rowthar*, (1911) 9 Ind Cas 565 (566): (1911) 2 Mad W N 302; *Narsingh Das* v. *Mangal Dubey*, (1883) 5 All 163 (175): 1882 All W N 202 F B; *Maung Meik* v. *K A Meyappa Chetti*, (1905-06) 3 L B R 191 (191); *Haranand Moozumdar* v. *Prosonno Chandar Biswas and others*, (1883) 9 Cal 763 (765): 12 Cal L Rep 556 [Defendants with one common defence though under different sales].

(3) *The Universities of Oxford and Cambridge* v. *George Gill & Sons*, (1899) 1 Ch 55; *Stroud* v. *Lowson*, (1898) 2 Q B 44; *Ramendra Nath Roy* v. *Brojendra Nath Dass*, (1917) 41 Ind Cas 944 (949): 45 Cal 111: 21 Cal W N 794.

Note 2.

(1) See *Radha Rani Dasi* v. *Sukdeb Bhattacharji*, 1928 Cal 92 (93): 103 Ind Cas 811; *Ramendra Nath Roy* v. *Brojendra Nath Das*, (1917) 41 Ind Cas 944 (950): 45 Cal 111: 21 Cal W N 794.

(1-a) See Rule 5 infra. See also *Narsingh Das* v. *Mangal Dubey*, (1883) 5 All 163 (177): 1882 All W N 202; *Allu Ramalingier* v. *Subramania*, 1923 Mad 331 (332): 17 Mad L W 25: 32 Mad L Tim 46: 69 Ind Cas 402.

(2) *Kondiba Gopal* v. *Mestrejean*, 1928 Bom 91 (93, 94): 30 Bom L R 162: 109 Ind Cas 191; *Ramendra Nath* v. *Brajendra Nath*, (1917) 41 Ind Cas 944 (946, 951): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158.

(2-a) *Harendra Nath* v. *Puranchandra*, 1928 Cal 199 (201): 55 Cal 164: 32 Cal W N 885: 109 Ind Cas 755. But see the dissentient judgment of Coxe, J. in *Bal Gobind Singh* v. *Gaja Lakshmi Dasi*, (1913) 21 Ind Cas 438 (441) Cal and also *Narsingh Das* v. *Mangal Dubey*, (1883) 5 All 163 (170): 1882 All W N 202 F B; *Mowji Monji* v. *Kuverji Nanaji*, (1907) 31 Bom 516 (522): 9 Bom L R 482 [Case under the old Code].

(3) *Ramendra* v. *Brojendra*, (1917) 41 Ind Cas 944 (951): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158; *Krishnajiban* v. *Hasiuddin*, 1921 Cal 653 (655): 33 Cal L Jour 369: 63 Ind Cas 244; *Govindaraja Mudaliar* v. *Alagappa*, 1926 Mad 911 (912): 51 Mad L Jour 194: 24 Mad L W 186: 1926 Mad W N 642: 97 Ind Cas 212: 49 Mad 836; *Sham Behari* v. *Maha Prasad*, 1930 All 180 (185): 1930 All L J 99: 123 Ind Cas 324; *Jethanand* v. *Chetumal*, 1926 Sind 66 (68): 90 Ind Cas 970: 19 Sind L R 395; *Umabai* v. *Bhavu Balwant*, (1909) 3 Ind Cas 165 (168): 34 Bom 358: 11 Bom L R 499; *Stroud* v. *Lowson*, (1898) 2 Q B 44 (54); *Ahmedbhai* v. *Dinshaw*, (1911) 12 Ind Cas 813 (822): 13 Bom L R 1061.

(4) *Payne* v. *British Time Recorder Co*, (1921) 2 K B 1 (15); *Harendra Nath* v. *Purna Chandra*, 1928 Cal 199 (201): 55 Cal 164: 32 Cal

O. 1, R. 3, Notes 2—3.

The provisions of this rule, like those of O. 1, R. 1 *ante* are not *imperative* and *obligatory*[5]; nor are they *exhaustive* of all cases of joinder of defendants. Additional power to make certain persons defendants is expressly given by Rr. 6, 7 and 10 *infra* although no right to any relief is alleged or can be alleged against them.[6]

As has already been observed in Note 1 to O. 1, this order though headed "parties to suits" deals also to some extent with joinder of causes of action, inasmuch as when a plaintiff frames his suit he joins persons as defendants because he claims to have a cause of action against them. O. 2, R. 3 deals exclusively with the joinder of causes of action. O. 1, Rr. 1 and 3 and O. 2, R. 3 really deal with the same problem from two different standpoints. The former two rules are barred upon the fundamental principle that needless multiplicity of suits should be avoided while the latter aims at the principle that the trial of the suit should not be embarrassed. O. 2, R. 3 must therefore be read so as not to clash with this rule.[7]

3. "All persons may be joined as defendants against whom any right to relief . . . exist."—

"Persons."—The word "persons" includes corporations whether incorporated or not.[1] For the purpose of Admiralty proceedings a ship has been held to be a "person".[2]

"May be joined."—The rule is not imperative.[3] A plaintiff is not bound to sue every possible adverse claimant in the same suit. He is "*dominus litis*" and may choose to implead only those persons as defendants against whom he wishes to proceed and may leave the questions as against others to be decided on a future occasion or allow them to be barred at his own risk.[4] In cases of *joint* tort-feasors it is open to the plaintiff to sue any or all of the tort-feasors in one suit though by suing some persons only his remedy against others might become barred.[5] Similarly in the case of joint contractors. *See* O. 1, R. 6.

"Right to relief."—Whether a person can have relief, against a particular person or persons is a matter that is governed by the substantive law. As a general rule only those persons can be joined as parties to a suit against

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W N 885: 109 Ind Cas 755; *Jiwansingh* v. *Garbha Singh*, 1921 Jour 12 (1): 59 Ind Cas 522: 1921 Pun W R 25: 30 Pun L R 1921; *Bhagavan Gokulji & Co* v. *Balku Babaji and another*, 1932 Bom 1 (2): 33 Bom L R 1291: 136 Ind Cas 497.

(5) *See* Note 3 *infra*.

(6) *See* Rules 6, 7 and 10.

(7) *Dattatraya Govind Shaligram* v. *Gopal Sakharam Pandhare*, 1931 Bom 330 (330): 33 Bom L R 624: 134 Ind Cas 689; *Bhagavan Gokulji & Co* v. *Balku Babaji and another*, 1932 Bom 1 (2): 33 Bom L R 1291: 136 Ind Cas 497; *Compania Sansinena* v. *Houlder Bros*, (1910) 2 K B 354; *Ramendra Nath* v. *Brajendra Nath*, (1917) 41 Ind Cas 944 (946, 950): 45 Cal 111: 1 Cal W N 794: 27 Cal L Jour 158; *Mahadeo* v. *Nago*, (1911) 12 Ind Cas 357 (358, 359): 7 Nag L R 130. See also *Tinkarhi Dassee* v. *Narendranath*, 1932 Cal 512 (513): 59 Cal 548 [O 1, R 3 not subject to O 34, R 1].

Note 3.

(1) Act X of 1897, S. 3 (39).

(2) *Bombay & Persia Steam Co* v. *Shephard*, (1888) 12 Bom 237 (241).

(3) *Lodai Mollah* v. *Kally Dass*, (1882) 8 Cal 238 (245): 10 Cal L Rep 581: 4 Shom L R 275.

(4) *Jotiram* v. *Ramkrishna Mandal*, (1903) 27 Bom 31 (41): 4 Bom L R 754; *Raza Hussain* v. *Hasanjan*, (1915) 29 Ind Cas 245 (246): 13 All L J 632; *Mussamut Dhapi* v. *Barham Dev Pershad*, (1900) 4 Cal W N 297 (303).

(5) *Harihar* v. *Bholi Pershad*, (1907) 6 Cal L Jour 383 (390); *Kanderao* v. *Sukharam*, (1900) 2 Bom L R 283 (285); *Maharaj Bahadur* v. *Raja Bhupendra*, 1926 Cal 1233 (1234): 44 Cal L Jour 182: 98 Ind Cas 198; *Rahoubhoy* v. *Turner*, (1890) 14 Bom 408 (416).

O. 1, R. 3, Notes 3—5.

whom any right to relief is alleged to exist.[6] But in certain cases[7] as for example where the right to relief exists in the plaintiff, *jointly* with others and such others refuse to join him as plaintiffs, it will be necessary to add them as defendants though no right to relief is alleged to exist against them. *See* O. 1, R. 10 *infra*.

4. The parties must be within the jurisdiction of the Court.—In a suit against *A* and *B* in which the Court had jurisdiction against *A* but none against *B*, Mr. Justice Woodroffe said as follows:—"In my opinion O. 1, R. 3 has no bearing on the case. That rule of the order is a provision which relates to a joinder of parties; and it assumes the existence of a suit in a proper *forum*, the Court having jurisdiction to try the suit. If the Court has such jurisdiction, the O. 1, R. 3 may come into play."[1]

5. "Alleged."—The question of misjoinder of defendants in any particular case must be judged from the fact whether it is *alleged* in the plaint that there is against the defendants any right to relief arising out of the same act or transaction.[1] Whether that allegation is right or wrong is not a question to be considered, the question is whether upon the facts as *alleged* in the plaint and having regard to the relief asked for, there is any misjoinder.[2] It does not depend upon the defence set up[3] or on the evidence[4] or on the decree awarded to the plaintiff.[5] It is submitted that the undermentioned case[6] so far as it held that the Court could go into the evidence and then hold that there was misjoinder in spite of the fact that all the necessary allegations were made in the plaint, cannot be accepted as correct.

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(6) See the following cases:—*Arumugam Chetti* v. *Sundararaja Ayyangar*, (1898) 8 Mad L Jour 3 (4); *Seshayya* v. *Subbaji Ayyar*, (1896) 6 Mad L Jour 186 (187); *Md Zuhoor Ali* v. *Thakoorance Rutta*, (1868) 9 Suth W R 9 (10): 11 M I A 468 P C; *Bisheshur Pershad* v. *Ramchurn*, (1873) 5 N W P 25; *Hutteram* v. *Govind Ram*, (1868) 3 Agr 131; *Maung Bya* v. *Maung Santhi*, (1911) 10 Ind Cas 779 (779): 4 Bur L Tim 74; *Mohamed Bibi* v. *Sulaman Ahmed*, 1926 Mad 1110 (1117): 24 Mad L W 425: 98 Ind Cas 838; *Sabirer Ma* v. *Behari Mohan Pal*, 1928 Cal 23 (24): 104 Ind Cas 845; *Poonit Singh* v. *Kamal Singh*, 1924 Pat 172 (173): 72 Ind Cas 1038; *Maharanee Surno Moyee* v. *Bykontchunder*, (1876) 25 Suth W R 17 (18); *Koylash Chandra* v. *Golakchunder*, (1897) 2 Cal W N 61 (62); *Mt Durga Deri* v. *Girwar Singh*, 1923 All 11 (12): 70 Ind Cas 958; *Nagurchand* v. *Doorga Dass*, (1869) 11 Suth W R 137 (137); *Kali Prosanna* v. *Hemantakumari*, 1924 Cal 977 (978, 979): 79 Ind Cas 1038; *Karnam Singh* v. *Sarup Singh*, 1888 Pun Re No 41; *Wazir Singh* v. *Mehtab Singh*, 1889 Pun Re No 108; *Kristo Sunkur Dutt* v. *Koylashnath*, (1871) 15 Suth W R 6 (6); *Wazira* v. *Bakshi*, 1930 Lah 45 (46): 116 Ind Cas 186; *Surja Narain* v. *Chandra Bera*, 1924 Cal 1050 (1051): 40 Cal L Jour 74: 84 Ind Cas 467; *Amritanath Biswas* v. *Jogendrachandra*, 1924 Cal 369 (369): 69 Ind Cas 183; *Mt Sarban* v. *Phudo Sahu*, 1923 Pat 65 (70): 4 Pat L Tim 81: 1922 P H C C 305: 2 Pat 110: 4 U P L R (Pat) 105; 69 Ind Cas 947; *Bhusan Shahana* v. *Upendranath*, 1926 Cal 1201 (1201); 96 Ind Cas 665; *Upendra Nath* v. *Bhusan Sahana*, 1926 Cal 462 (463): 88 Ind Cas 970; *Madan Mohan* v. *Sashi Bhusan*, (1915) 31 Ind Cas 549 (549): 19 Cal W N 1211; *Virjivandas Madhavdas* v. *Md Ali Khan*, (1880-81) 5 Bom 208 (215).

(7) *Sitaramaya* v. *Ramappaya*, (1917) 39 Ind Cas 160 (162): 5 Mad L W 207 [Suit for recovery of property].

Note 4.

(1) *Bengal and North Western Railway* v. *Sadaram*, 1922 Cal 500 (501): 49 Cal 895: 27 Cal W N 82: 70 Ind Cas 229. See also *Mukhdoon Ally* v. *Ismail*, 1867 Pun Re No 72.

Note 5.

(1) *Damodar Das* v. *Girdhari Lal*, (1905) 27 All 564 (566): 1905 All W N 100: 2 All L J 692; *Khemomal* v. *Firm of Pessumal*, (1919) 53 Ind Cas 32 (32): 13 Sind L R 133.

(2) *Damodar Das* v. *Girdhari Lal*, (1905) 27 All 564 (566): 1905 All W N 100: 2 All L J 692; *Digambar Das* v. *Biswaswar Chowdhury*, (1917) 41 Ind Cas 12 (12) Cal [Though the decision mentions the word 'proved' the Court found as a matter of fact that the necessary allogations were not clearly made in the plaint]; 33 Bom L R 1291.

(3) *Omur Ali* v. *Weylayet Ali*, (1879) 4 Cal L Rep 455 (457); *Ramakrishna Sardar* v. *Sreekanta Mondal*, 1929 Cal 667 (668): 33 Cal W N 687.

(4) *G P Narain Singh* v. *Saheb Roy*, (1873) 19 Suth W R 203 (203).

(5) *Khemomal* v. *Firm of Pessumal*, (1919) 53 Ind Cas 32 (32): 13 Sind L R 133.

(6) *Ram Narain Dut* v. *Annada Prasad Joshi*, (1887) 14 Cal 681 (686).

6. "In respect of the same act or transaction."—The word "same" preceding the words "act or transaction" applies also to the words "series of acts or transactions".[1] O. 1, R. 3, Note 6.

The simplest instance of cases where any right to relief arises out of the same act or transaction occurs in suits in which, the plaintiff challenges for instance, an order or act of a Court or of an executive authority, joining several persons as defendants who claim rights under the said act or order as against the plaintiff, whether jointly, severally or in the alternative.[2] A right to relief cannot be said to arise out of the same act or transaction if the case against each defendant is *entirely distinct and separate* in its subject-matter from that of the other defendants.[3] In a suit against *A*, *B*, *C*, *D* and *E*, the plaintiff alleged that certain goods belonged to him, that *A* obtained the documents of title relating thereto from the plaintiff by fraud and made them over to *B*, that *B* knowing that *A* had no title either to the document or the goods, wrongfully dealt with them and sold the goods to *C* and *D*, that *C* and *D* wrongfully claimed to retain the goods and the documents of title, that *A* pledged one of the documents of title with *E* and that the goods were in the possession of *C*. He claimed recovery of the documents of title and the goods covered thereby, or in the alternative, damages. It was held that the alleged fraud of *A* was the *foundation of the case* on which the rest of it depended, that it concerned all the parties and that therefore there was no misjoinder of parties.[4]

Where a plaintiff alleges a right against a person and sues to enforce it, other persons who claim or seek to exercise the same right in opposition to the plaintiff, may be joined as defendants; because the infringement of the plaintiff's right is the transaction out of which the whole claim arises.[5]

Note 6.

(1) *Umabai* v. *Bhava Bhalvant*, (1909) 3 Ind Cas 165 (168): 34 Bom 358; *Jethanand* v. *Chetumal*, 1926 Sind 66 (68): 90 Ind Cas 970: 19 Sind L R 395.

(2) *Raghunath* v. *Sarosh*, (1898) 23 Bom 266 (270) [Several creditors attaching property in execution of several decrees—Claim suit impleading all—Relief is in respect of same matter; *Durga Charan Sarkar* v. *Jotindra Mohan Tagore*, (1900) 27 Cal 493 (497 to 499), (Do.); *Manikapalli Ramayya* v. *Chinna Rangayya*, (1900) 10 Mad L Jour 234 (235, 236), (Do.); *Haranand* v. *Prosanno Chander*, (1883) 9 Cal 763 (765): 12 Cal L Rep 556 [Execution sale in favour of several purchasers—Suit against for setting aside sale]; *Srimohan Thakur* v. *Macgregor*, (1901) 28 Cal 769 (782, 783); *Gangabai* v. *Bai*, (1898) Bom P J 198; *Dorasami* v. *Muthuswami*, (1904) 27 Mad 94 (97): 13 Mad L Jour 479; *Govindakrishna* v. *Srinivasa Ramacharlu*, 1925 Mad 1237 (1238): 49 Mad L Jour 420: 1925 Mad W N 629: 90 Ind Cas 748; *Gopal Ojha* v. *Ramadhar Singh*, 1925 Pat 228 (232): 82 I C 204; *Shah Zahid Hussain* v. *Shah Zaffar Hussain*, (1909) 2 Ind Cas 3 (4): 6 All L J 456.

(3) *Bhagvati Prasad Gir* v. *Bindeshri Gir*, (1884) 6 All 106 (108): 1883 All W N 229; *Shah Gholam* v. *Mt Wajida Bibi*, (1875) 7 N W P 188; *Shyam Behari* v. *Mahaprasad*, 1930 All 180 (185): 1930 All L J 99: 123 Ind Cas 324; *Lukumsey* v. *Fazulla*, (1880) 5 Bom 177 (179); *Umabai* v. *Bhavu Balwant*, (1909) 3 Ind Cas 165 (169): 34 Bom 358: 11 Bom L R 499; *Ahmedbhai* v. *Dinshaw*, (1911) 12 Ind Cas 813 (822): 13 Bom L R 1061; *Jankibai* v. *Srinivash Ganesh*, (1913) 20 Ind Cas 533 (534): 38 Bom 120; *Ranee Lalun Monee* v. *Sona Monee Dabee*, (1874) 22 Suth W R 334 (335); *Jogemaya Dassi* v. *Girendra Nath*, (1900) 4 Cal W N 590 (592); *Guru Prasad* v. *Narendra Narain*, (1909) 1 Ind Cas 361 (362) Cal; *Chandra Kumar* v. *Rani Sashi Mukhi*, 1924 Cal 511 (511): 71 Ind Cas 324; *Muthappa* v. *Muthupalani*, (1904) 27 Mad 80 (83); *Mahipat Narain* v. *Kerit Singh*, (1924) 81 Ind Cas 648 (648): 1 Pat L R 458; *Naina Mal* v. *Baq Hussain*, 1888 Pun Re No 189; *Mangal* v. *Girlhari*, 1892 Pun Re No 127; *Ganga Rai* v. *Mt Sukeena Begum*, (1873) 5 N W P 72.

(4) *Ramendra Nath* v. *Brajendra Nath*, (1917) 41 Ind Cas 944 (951): 45 Cal 111

(5) *Ramakrishna Raju* v. *Katta Venkatasamy*, (1906) 29 Mad 87 (89); *Krishnajiban* v. *Maniuddin*, 1921 Cal 653 (655): 33 Cal L Jour 369: 63 Ind Cas 241; *Mokund Lall* v. *Chotay Lall*, (1884) 10 Cal 1061 (1068, 1069); *Krishnasami* v. *Sundarappayar*, (1895) 18 Mad 415 (417): 5 Mad L Jour 164; *Indar Kuar* v. *Gur Prasad*, (1889) 11 All 33 (35): 1888 All W N 283; *Mazhar Ali Khan* v. *Sajjad Husain Khan*, (1902) 24 All 358 (360): 1902 All W N 85; *Brij Mohan* v. *Ghurhu Rai*, 1895 All W N 23 (24) 17 All 123; *Dorasami Pillai* v. *Angammal*, (1908) 18 Mad L Jour 265 (266, 267): 3 Mad L Tim 286: 18 Mad L Jour 484; *Chaman Lal* v. *Sikandar Khan*, (1912) 17 Ind Cas 641 (641): 10 All L J 387.

O. 1, R. 3, Notes 6—9.

In a suit for recovery of property by an owner against several persons who are alleged to have unlawfully got into possession of various parcels of land and combined to resist the right and title of the plaintiff, all such persons may be joined in one suit. The cause of the plaintiff is one and entire and cannot be affected by the title under which the defendants profess to hold. The plaintiff is entitled to claim possession of his lands as a whole and not in fragments and all persons who oppose him in the enforcement of that right, are concerned in his cause of action and therefore there cannot be any misjoinder of defendants.[6] But if no connection or conspiracy is alleged to exist between the various persons joined as defendants, or if it is not alleged that they acted in concert or under a common title, it cannot be said that the plaintiff's right to relief arises out of the *same transaction* or series of transactions and the suit will be bad for misjoinder of defendants.[7]

7. "Jointly."—In all cases of a *joint* liability or a *joint* and several liability, all the persons liable may be joined as defendants.[1] Thus where *A* and his *benamidar B* jointly execute a sale deed to *C* containing a joint covenant for quiet possession, and the covenant is broken, *C* can sue *A* and *B* for damages.[2]

8. Joint tort-feasors.—In suits on joint torts each tort-feasor is responsible for the injury sustained by the common act and they can all be sued together.[1] Thus in a suit for damages for assault against *A* and *B* where the act was done simultaneously in pursuance of a conspiracy there is no misjoinder; for, in such a case the assault is a single act or transaction.[2]

9. "Severally."—Where the plaintiff's right to relief against several persons arises out of the same act or transaction and where if separate suits were brought against them any common question of law or fact would arise, such persons may be joined in one suit as defendants though they are *severally* liable. Thus in suits for contribution arising out of the same matter, all persons liable to contribute may be joined and the liability of each may be determined in proportion to his interest and provided for separately.[1] Similarly a suit to set aside a revenue sale for arrears of rent against several persons

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(6) *Lokenath* v. *Keshab Ram*, (1886) 13 Cal 147 (153): 11 Ind Jur 105; *Nundokumar* v. *Banomali*, (1902) 29 Cal 871 (880); *Omur Ali* v. *Weylayet*, (1879) 4 Cal L Rep 455 (458); *Gujadhur Pershed* v. *Saheb Roy*, (1873) 19 Suth W R 203 (203); *Sharoop Chunder* v. *Mothoor Mohun*, (1865) 4 Suth W R 109 (110); *Laxmi Narain* v. *Ram Ratan*, 1924 Nag 55 (56): 19 Nag L R 178: 77 Ind Cas 761.

(7) *Ram Prosad* v. *S. M. Sachi Dassi*, (1902) 6 Cal W N 585 (588); *Dhar* v. *H. Htoon May*, (1919) 52 Ind Cas 927 (928): 12 Bur L Tim 106; *Ramanathan Chetty* v. *Mallaka Anjappan*, (1914) 24 Ind Cas 813 (813): 4 Mad L W 899; *Afzal Shah* v. *Lachmi Narain*, (1917) 42 Ind Cas 856 (857): 40 All 7: 15 All L J 809; *Digambar Das* v. *Bisweswar Chowdhury*, (1917) 41 Ind Cas 12 (12) Cal; *Sudhendu Mohun Roy* v. *Durga Dasi*, (1887) 14 Cal 435 (439).

Note 7.

(1) *Somasundaram* v. *Fischer*, (1895) 19 Mad 60 (61): 5 Mad L Jour 222; *Thiagaraja* v. *G S Pandara Sannadhi*, (1888) 11 Mad 77 (81); *Thakur Baksh* v. *Bhagwan Din*, (1906) 9 Oudh Cas 142 (143); *Shama Sunkur* v. *Sreenath*, (1869) 12 Suth W R 354 (355) [Combining to oppose plaintiff's possession].

(2) *Somasundaram Ayyar* v. *Fischer*, (1896) 19 Mad 60 (61): 5 Mad L Jour 222.

Note 8.

(1) *Brinsmead* v. *Harrison*, (1872) L R 7 C P 547; *Biressbur* v. *Baroda Prosad*, (1911) 11 Ind Cas 504 (506): 15 Cal W N 825; *Jhoonikee* v. *Ajoodhya*, (1873) 19 Suth W R 218 (218); *Harihar Pershad* v. *Bholi Pershad*, (1907) 6 Cal L Jour 383 (390).

(2) *Varaj Lall* v. *Ramdat*, (1902) 26 Bom 259 (264): 3 Bom L R 878; *Rameesur Bhuttacharjee* v. *Shib Narain*, (1870) 14 Suth W R 419 (419).

Note 9.

(1) *Ibn Hussain* v. *Ramdai*, (1890) 12 All 110 (113): 1890 All W N 31; *Tavasi Talavar* v. *Palani Andi Talavar*, (1866-68) 3 Mad H C 187 (188); *Khema Debea* v. *Kumola Kant*, (1868) 10 Beng L R 259 (N): 10 Suth W R 10; *Rajaput Rai* v. *Nawab Muhammad Ali Khan*, (1873) 5 N W P 215; *Hira Chund* v. *Abdal*, (1875-78) 1 All 455 (456).

each of whom had purchased *different separate* items of property is not bad for misjoinder, the proceeding complained of being one, and the ground upon which it is impugned being also the same.[2] **O. 1, R. 3, Note 9.**

Where a Hindu reversionary heir sues after the death of the widow for recovery of possession of immoveable property belonging to the last male owner alleged to have been improperly alienated, there was a conflict of decisions under the old Code as to whether he is entitled to join all the alienees in one suit as defendants.[3]

In *Rup Narain* v. *Gopal Devi*,[4] a case under the old Code, their Lordships of the Privy Council doubted whether in such a case, there would be any misjoinder. Under the present rule which is wider than the corresponding section of the old Code, it is clear that such joinder is permissible.[5] The abovementioned principle is applicable not only to suits for possession but also to suits for mere declaration.[6] The cases above referred to are cases of suits by *reversioners*. But the principle will apply to suits by *junior members* of a Hindu undivided family or by members of a Malabar *tarwad* to set aside alienations, and to suits by heirs or successors-in-interest to set aside alienations by the predecessors-in-interest.[7] In a suit for partition of properties belonging to a joint Hindu family by a junior member against the father, it was held that the vendees and mortgagees and others who had obtained decrees against the father which were alleged to be collusive and fraudulent, were properly joined as parties.[8]

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(2) *Dorasami* v. *Muthusami*, (1904) 27 Mad 94 (98): 13 Mad L Jour 479; *Gouri Prasad* v. *Ram Ratan*, (1886) 13 Cal 159 (161, 162).

(3) *Kachar* v. *Bai Rathore*, (1883) 7 Bom 289 (291) [No]; *Ganeshi* v. *Khairati*, (1894) 16 All 279 (281): 1894 All W N 82 [No]; *Koondun Lal* v. *Rae Himmut Singh*, (1871) 3 N W P 86 [No]; *Kanhaiyalal* v. *Balmukund*, (1900) 13 C P L R 9 (17) [No]; *Sami Chetti* v. *Ammani*, (1873) 7 Mad H C R 260 (262) [Yes]; *Vasudeva* v. *Kuleadi*, (1874) 7 Mad H C 290 (291) [Yes]; *Mahomed* v. *Krishnan*, (1888) 11 Mad 106 (111) [Yes]; *Shoroop Chunder* v. *Mothoor Mohun*, (1865) 4 Suth W R 109 (110) [Yes]; *Ishan Chunder* v. *Rameswar*, (1897) 24 Cal 831 (832) [Yes]; *Hari Ballabh Rai* v. *Gopa Lal Singh*, (1910) 6 Ind Cas 577 (578) Cal [Yes]; *Umabai* v. *Vithal*, (1909) 1 Ind Cas 120 (121): 33 Bom 293: 11 Bom L R 34: 5 Mad L Tim 230 [Yes]; *Banee Krishun* v. *Koondum Lal*, (1870) 2 N W P 221 [Yes]; *Mussammut Rattan Kaur* v. *Badna*, 1899 Pun Re 24 [Yes]; *Kubra Jan* v. *Ram Bali*, (1908) 30 All 560 (562): 5 A L J 647: 1908 All W N 235: 4 Mad L Tim 392 [Yes]; *Provabati Devi* v. *Rameswar*, (1910) 6 Ind Cas 248 (248, 249) Cal [Yes].

(4) *Rup Narain* v. *Gopal Devi*, (1909) 3 Ind Cas 382 (385) P C: 36 Ind App 103: 6 All L J 567: 10 Cal L Jour 58: 13 Cal W N 920: 5 Mad L Tim 423: 11 Bom L R 833: 93 Pun Re 1909: 146 Pun W R 1909: 68 Pun L R 1910: 19 Mad L Jour 548: 36 Cal 780 P C [reversing 1905 Pun Re 1].

(5) *Rameswar* v. *Provabati*, (1914) 25 Ind Cas 84 (85): 20 Cal L Jour 23: 19 Cal W N 313; *Bal Krishna* v. *Hira Lal*, (1914) 24 Ind Cas 95 (96): 12 All L J 509: 36 All 406; *Shanker* v. *Vithaldas*, 1926 Nag 316 (317): 9 Nag L J 17: 98 Ind Cas 819.

(6) *Rup Narain* v. *Gopal Devi*, (1909) 3 Ind Cas 382 (385): 36 Ind App 103: 6 All L J 567: 10 Cal L Jour 58: 13 Cal W N 920: 36 Cal 780: 5 Mad L Tim 423: 11 Bom L R 833: 93 Pun Re 1909: 146 Pun W R 1909: 68 Pun L R 1910: 19 Mad L Jour 548 P C; *Jivas Singh* v. *Garbha Singh*, 1921 Jour 12 (1): 30 Pun L R 1921: 59 Ind Cas 522: 25 Pun W R 1921; *Ralia Ram* v. *Mulk Raj*, (1920) 54 Ind Cas 512 (512): 17 Pun L R 1920: 2 U P L R (L) 29.

(7) *Ralia Ram* v. *Mulk Raj*, (1920) 54 Ind Cas 512 (512): 17 Pun L R 1920: 2 U P L R (L) 29 [Joint Hindu family]; *Abdul* v. *Apaga*, (1889) 12 Mad 234 (235) [Malabar tarwad]; *Byathamma* v. *Arulla*, (1892) 15 Mad 19 (22), (Do.), *Jaudha Kuar* v. *Court of Wards*, 1881 All W N 172 (172): 4 All 159 [Heir]; *Parbati Kunwar* v. *Mahomed Fatima*, (1907) 29 All 267 (271): 4 All L J 121: 1907 All W N 36 [Heir]; *Fazul Hussain* v. *Amir Haider*, (1911) 9 Ind Cas 588 (588): 76 Pun L R 1911: 73 Pun W R 1911, (Do.); *Tufail Mahomed* v. *Hira Singh*, (1911) 10 Ind Cas 48 (48): 167 Pun L R 1911: 120 Pun W R 1911, (Do); *Sona Khushal* v. *Bhanubai Krishna*, (1916) 33 Ind Cas 950 (952): 40 Bom 351: 18 Bom L R 45, (Do); *Lalchand* v. *Manohri*, (1918) 44 Ind Cas 549 (550): 59 Pun Re 1918: 64 Pun W R 1918, (Do.); *Bhimayya* v. *Lakshmi Narayana*, 1928 Mad 820 (820): 110 Ind Cas 672 [Suit by adopted son to set aside alienations of adoptive mother]; *Govindaraja* v. *Alagappa*, 1926 Mad 911 (912): 24 Mad L W 186: 51 Mad L Jour 194: 1926 Mad W N 642: 49 Mad 836: 97 Ind Cas 212 [Suit by trustee to set aside alienations of prior trustee].

(8) *Shanmuka* v. *Arunachalam*, 1922 Mad 332 (333): 45 Mad 194: 30 Mad L Tim 172: 69 Ind Cas 961: 42 Mad L Jour 97: 14 Mad L W 642: 1921 Mad W N 799.

O. 1, R. 3, Notes 10—12.

10. "In the alternative."—A suit by the transferee of a mortgage for sale against the mortgagor in which is also included a claim in the alternative for damages against the transferor, if it should appear that any portion of the debt had been discharged by the mortgagor before the transfer and so was not recoverable from the mortgagor, is not bad for misjoinder. For the right to relief arises out of the same transaction though in the *alternative*.[1] Similarly in suits for rent against tenants, an *alternative* claim against the plaintiff's co-sharers or vendors can be joined, if it is alleged by the tenants, that the co-sharers have received the whole or a portion of it from the tenants.[2] Where the plaintiff purchased certain land from *A* and was subsequently dispossessed by *B* it was held that in a suit against *B* for a declaration of his title, the plaintiff could also join *A* as defendant praying for the refund of purchase money if it be found that *B* is the owner.[3] Where the plaintiff filed a suit for recovery of money against two defendants alleging that one of them was his agent and had lent the other the suit amount and prayed for a decree against the other if the loan was true or, in the alternative, against the agent if he did not advance the loan, it was held that the suit was not bad for misjoinder of defendants.[4] *See also* the undermentioned cases.[4-a] In cases where it is doubtful which of the two defendants is liable to the plaintiff, both of them may be joined in one suit with a claim for alternative relief.[5] *See* R. 7, *infra*.

11. Award of costs in claims of alternative reliefs.—*See* S. 35, Note 9.

12. Ancillary relief.—Where there is one cause of action against some defendants and the relief claimed against the other defendants is only *ancillary* to the relief to be given to the plaintiff and not in respect of a distinct and separate cause of action, the suit is not bad for misjoinder. For example, where *A* and *B* are co-sharers of certain lands in the possession of *C* and *D* and *A* sues *B*, *C* and *D* claiming to eject *C* and *D* from his share, and for partition of his share as against *B*, the claim against *B* is merely *ancillary* to the relief claimed as against *C* and *D* which cannot be properly worked out without a partition

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Note 10.

(1) *Aiyathurai* v. *Meera Raruthan*, (1908) 31 Mad 252 (256, 257): 18 Mad L Jour 238; *Dirg Singh* v. *Manbhar*, (1910) 7 Ind Cas 69 (69) All; *Kowari Basuvireddy* v. *Tallapragadha Nagamma*, (1910) 8 Ind Cas 1087 (1088): 35 Mad 39: 1910 Mad W N 827: 9 Mad L Tim 467: *Mahadeo* v. *Nago*, (1911) 12 Ind Cas 357 (358, 359): 7 Nag L R 130.

(2) *Mouji* v. *Kuverji*, (1907) 31 Bom 516 (522): 9 Bom L R 482; *Madan Mohun* v. *Hollocan*, (1886) 12 Cal 555 (557); *Sham Singh* v. *Kishun Sahai*, (1907) 6 Cal L Jour 190 (196); *Uzir* v. *Haricharan*, (1917) 37 Ind Cas 671 (671) Cal; *Iswar* v. *Girindra*, (1918) 48 Ind Cas 726 (728) Cal; *Binode Lal* v. *Preo Nath*, (1917) 40 Ind Cas 173 (174) Cal; *Yerukola* alias *Penta Jogiah* v. *Mudiya Kamudu*, (1909) 4 Ind Cas 34 (34): 19 Mad L Jour 399: 5 Mad L Tim 282: 6 Mad L Tim 139.

(3) *Serajul Huq* v. *Abdul Rahman*, (1902) 29 Cal 257 (259): 6 Cal W N 300; *Rajdaur* v. *Kali Krishna*, (1882) 8 Cal 963 (965): 11 Cal L Rep 330: 7 Ind Jur 88.

(4) *Meyappa* v. *Pertannan*, (1906) 29 Mad 50 (51): 16 Mad L Jour 39; *Child* v. *Stenning*, (1877) 5 C D 695.

(4-a) *Arunachala* v. *Venkatasami*, (1871-74) 7 Mad H C 123 (127) [Sum of money alleged to have been misappropriated by *A* or *B*—Suit against both with a prayer in the alternative is in form]; *Murugappa* v. *L K S S Firm*, 1926 Mad 135 (2) (136): 90 Ind Cas 721 [Suit against debtor—Liability of his transferee can be tried in the suit]; *Ishwardas* v. *Hiralal*, 1931 Nag 20 (23): 26 Nag L R 359 [Suit against *B* on mortgage—*B* denying plaintiff's title and also discharge by payment to *A*—*A* may be impleaded and claim of alternative relief against *A* is in proper form].

(5) *Buddree Doss* v. *Hoare*, (1882) 8 Cal 170 (173); *Kumarappa* v. *Venkatachalam*, (1909) 4 Ind Cas 312 (313): 7 Mad L Tim 16; *Kondiba Gopal* v. *Mestrejean*, 1928 Bom 91 (94): 30 Bom L R 162: 109 Ind Cas 191.

of *A's* share. For this purpose *B* may be properly joined as a party to the suit.[1] O. 1, R. 3, Notes 12—15.

13. Separate trials.—It has been already said in Note 2 above that a plaintiff is entitled under this rule to join several defendants in respect of several causes of action arising out of the same act or transaction or series of acts or transactions. Though O. 1, R. 2 applies in terms only to the joinder of plaintiffs and there is no corresponding rule in regard to the joinder of defendants it has been held both in England and India that the principle of that rule is applicable to the case of the joinder of defendants also.[1] If the trial of the suit is likely to be embarrassing owing to a variety of defences the Court may order separate trials or make such other order as may be expedient.[2]

14. Appeal.—If in any suit the Court holds that it is bad for misjoinder of defendants and orders the plaintiff to elect to proceed against some only, the order is a judgment within the meaning of Cl. 15 of the Letters Patent and an appeal lies therefrom. For the order is in substance a decision that the suit as framed does not lie and the suit will have to be dismissed if the plaintiff does not comply with the order.[1]

15. Classes of cases illustrating the above principles.—*See* O. 1, R. 10.

Court may give judgment for or against one or more of joint parties.

R. 4. [Ss. 26, 28.] Judgment may be given without any amendment— O. 1, R. 4, Note 1.

(*a*) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(*b*) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

[1877, Ss. 26, 28.]

Synopsis.

1. Scope of the rule.

1. Scope of the rule.—Clause (*a*) of this rule must be read with O. 1, R. 1. Where several persons *in whom any right to relief is alleged to exist,* join together as plaintiffs in a suit, but it is found that only some of them are entitled to relief, a judgment may, under this rule, be given for such relief in

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Note 12.

(1) *Sri Raja Simhadri* v. *Prattipati,* (1906) 29 Mad 29 (32).

Note 13.

(1) *Harendra Nath* v. *Purna Chandra,* 1928 Cal 199 (201, 202): 55 Cal 164: 32 Cal W N 885: 109 Ind Cas 755; *Payne* v. *British Time Recorder Co,* (1921) 2 K B 1 (15). See *Jethanand* v. *Chetumal,* 1926 Sind 66 (68): 90 Ind Cas 970: 19 Sind L R 395.

(2) *Umabai Mangesh Rao* v. *Vithal Vasudeo Shetti,* (1909) 1 Ind Cas 120 (121): 33 Bom 293: 5 Mad L Tim 230: 11 Bom L R 34; *Lal Chand* v. *Manohri,* (1918) 44 Ind Cas 549 (550): 59 Pun Re 1918: 64 Pun W R 1918; *Ramendra Nath Roy* v. *Brojendra Nath Dass,* (1917) 41 Ind Cas 944 (947, 952): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158; *Harendra Nath* v. *Purna Chandra,* 1928 Cal 199 (202): 55 Cal 164: 32 Cal W N 885: 109 Ind Cas 755; *Tufail Mahomed* v. *Hira Singh,* (1911) 10 Ind Cas 48 (48): 167 Pun L R 1911: 120 Pun W R 1911.

Note 14.

(1) *Ramendranath Roy* v. *Brojendra Nath Dass,* (1917) 41 Ind Cas 944 (945, 947): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 58.

O. 1, R. 4, Note 1.

favour of such persons.[1] Thus, where four members of an undivided family sued the widow of a deceased co-parcener for possession of certain properties, but the Court found that only *one* of these was entitled to relief, it was held that judgment was properly given in his favour without any amendment.[2] But where *no right to relief is alleged to exist in one of several plaintiffs* and one plaintiff alone is found, as a matter of fact, to be entitled to relief this rule will not apply, and judgment cannot be given in his favour without amendment. Thus, where *A* and *B* sue *C* on the allegation that *A* alone is entitled to relief and that *B* is added merely as a *pro forma* party, but *B* alone is found to be entitled to relief, judgment cannot be given in his favour without amendment.[3]

Clause (*b*) of this rule must, similarly, be read with O. 1, R. 3. Where several defendants have been impleaded under O. 1, R. 3 but some of them alone are really found to be liable, judgment may, under this rule, be given against them without any amendment, according to their respective liabilities.[4]

An unsuccessful defendant, at whose instance another defendant is added as a party may be made liable to pay the costs of the successful defendant.[5]

O. 1, R. 5, Note 1.

Defendant need not be interested in all the relief claimed.

R. 5. [New.] *It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.*

[R. S. C., O. 16, R. 5.]

Synopsis.

1. Scope of the rule.

1. Scope of the rule.—A suit which is otherwise properly constituted shall not be bad for misjoinder merely because the defendants are not *equally* interested in the relief claimed in the suit.[1] Thus, a suit for accounts against *A* and *B* as agents is not necessarily bad for misjoinder merely because the plaintiff may ask for accounts as against *A* from 1265 to 1283 fasli and as against *B*, from 1281 to 1283.[2] Similarly, a suit is not bad for misjoinder merely because the relief claimed as against some of the defendants is only *ancillary* to the main relief claimed in the suit.[3]

Order 1, Rule 4—Note 1.

(1) *Moolchand* v. *Bhoop Singh*, 1927 Oudh 484 (485): 105 Ind Cas 473: 1 Luck Cas 546.

(2) *Lakshmakka* v. *Nagi Reddi*, (1905) 28 Mad 500 (503).

(3) *Bhogilal* v. *Jethalal*, 1929 Bom 51 (53, 54): 114 Ind Cas 262: 30 Bom L R 1588. But see *Karan Singh* v. *Md Ismail*, (1885) 7 All 860 (862): 1885 All W N 247 [*A* and *B* claiming *joint right* against *C*—*B* having no right at all —*Held A* cannot be given relief without amendment].

(4) *Brij Mohan Pande* v. *Ghurhu Rai*, 1895 All W N 23 (24): 17 All 123; *Janokinath* v. *Ramrunjan*, (1879) 4 Cal 949 (953): 4 Ind Jur 348. See *Shamumal Tenmal* v. *Rijhumal Bhojumal and another*, (1916) 36 Ind Cas 92 (94, 95): 10 Sind L R 29.

(5) *Child* v. *Stenning*, 11 Ch D 82 (82) [Cited in 10 Cal 445 (481)].

Order 1, Rule 5—Note 1.

(1) *Mowji* v. *Kuverji*, (1907) 31 Bom 516 (522): 9 Bom L R 482; *Umabai* v. *Bhan Bulwant*, (1909) 34 Bom 358 (368); *Laxmi Narayan* v. *Ramratna*, 1924 Nag 55 (56): 19 Nag L R 178: 77 Ind Cas 761 [Suit for possession against several defendants asserting titles to different portions of the land is not bad]; *Ram Narain* v. *Ram Kishen*, (1911) 10 Ind Cas 515 (520): 46 Pun Re 1911; *Alagappa Mudaliar* v. *Sivarama Sundara Mudaliar*, (1894) 4 Mad L Jour 288 (292).

(2) *Degamber Mozundur* v. *Kallynath Roy*, (1881) 7 Ind Cas 654 (658): 9 Cal L Rep 265.

(3) *Appa Rao* v. *Prattipati Ramayya*, (1906) 29 Mad 29 (31). See also Note 12 to O 1, R 3 above.

R. 6. [S. 29.] The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundies and promissory notes. **O. 1, R. 6, Notes 1—2.**

Joinder of parties liable on same contract.

[1877. S. 29. R. S. C., O. 16, R. 6.]

Synopsis.

1. Scope of the rule.
2. Joint liability.
3. Several liability.
4. Joint and several liability.
5. Suit against one of several partners.
6. Where decree against one co-contractor precludes suit against other co-contractors.
7. "Any one contract."
8. Suits on bills of exchange, hundies and promissory notes.

"At his option." See Notes 3 and 4.
Parties in partnership suits. See Note 4 and O. 1, R. 10, Note 15.

1. Scope of the rule.—This rule is applicable only to suits on *contracts* including bills of exchange, hundies and promissory notes. The liability on a contract may be a *joint* one or a *joint and several* one or a *several* one. Where *A* becomes liable under a promise and after his death the liability survives to his heirs *B*, *C* and *D*, the liability of the latter is a *joint* and *single* one.[1] Where *A* and *B* *jointly* make a promise to pay a certain amount to *C* each of them also *severally* undertaking to pay that amount, it is a case of a *joint and several liability*. Where *A* and *B*, each for himself, agrees to pay a certain amount to *C* it is the case of *several* liability. This rule deals with cases of several liability and cases of *joint and several* liability, the legal consequences of both kinds of liability, so far as this rule is concerned, being the same.

2. Joint liability.—As has been seen in Note 1 above, a liability is joint if on the death of one of the joint promissors the liability becomes the liability of the surviving promisors and no liability devolves upon the heirs or legal representatives of the deceased promisor; *survivorship* is the distinguishing mark of a joint contract; where therefore there is no *survivorship* and the liability extends beyond the surviving debtors to the estate of a deceased debtor the liability is presumably joint and several.[1] Judged by this test the liability of *A* and *B* under a *joint* promise to pay *C* a certain sum of money is a *joint and several* one inasmuch as under S. 42 of the Indian Contract Act, 1872, it is provided that where two or more persons have made a *joint* promise then unless a contrary intention appears by the contract, all such persons during their joint lives and after the death of any one of them, *his representative*, jointly with the survivor or survivors must fulfil the promise. There has, however, been a conflict of view on the point. It was held in the undermen-

Order 1, Rule 6—Note 1.

(1) *Ahinsa Bibi* v. *Abdul Kader Sahib*, (1902) 25 Mad 26 (32-35); *Surendra Nath Bose* v. *Aghore Nath Bose*, 1921 Cal 534 (535): 25 Cal W N 525: 62 Ind Cas 464 [Representatives of a tenant constitute one body, liable for the whole rent]. But see *Kailash Chandra Mitra* v. *B. K. Chakravarthi*, 1925 Cal 1056 (1058): 29 Cal W N 1000 F B [Which holds a contrary view].

Note 2.

(1) *Krishna Das Roy* v. *Kali Tara Chowdhurani*, (1918) 22 Cal W N 289: 44 Ind Cas 80 (85).

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O. 1, R. 6, Notes 2–6.

tioned cases[2] that a *joint* promise by *A* and *B* creates under S. 43 of the Contract Act, a *joint and several* liability. A contrary view has been expressed in the two cases noted below.[3] It is submitted that the former view seems to be the correct one.

3. Several liability.—The rule provides that the plaintiff may at his option join in one suit all or any of the persons severally liable under a contract. Thus, where, by one contract *each* of two persons *A* and *B* agree to pay a certain sum of money to *C*, *A* and *B* are severally liable under the contract and *C* can, under this rule either sue *A* and *B* jointly or can bring separate and successive suits against them.

4. Joint and several liability.—It has been seen in Note 2 above how a *joint* liability is different from a *joint and several* liability. Where under this rule the plaintiff sues one or some of the persons jointly and severally liable, the latter have no right to insist on the joinder of the other promisors so liable as parties to the suit.[1] But this rule is confined to liability arising out of *contracts*. As will be more fully discussed under R. 10 *infra*, where the liability is a *joint* one but is not *contractual*, it cannot be enforced without joining as defendants all the persons jointly liable.

In England the defendants can insist, even in cases of contracts, on the joinder of the other joint promisors as parties to the suit.[2]

5. Suit against one of several partners.—Section 43 of the Contract Act applies to contracts entered into with firms or partnerships. Hence, by virtue of O. 1, R. 6 a plaintiff in enforcing such a contract is not bound to implead all the members of a firm as defendants, but is entitled to sue, as he chooses, one or more of them, for the performance of the entire contract.[1]

6. Whether decree against one co-contractor precludes suit against other co-contractors.—*A* and *B* *jointly* promise to pay *C* a certain sum of money. *C* sues *A* separately and obtains a decree. He then executes the decree against *A* and the decree is satisfied. He cannot subsequently sue *B* on the same contract; because, having realised what was due to him under the contract, he has no longer any rights under it. But supposing the decree against *A* remains *unsatisfied* or is only *partially satisfied*, can *C* bring a separate suit against *B* for the amount remaining due to him under the contract?

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(2) *Motilal Bechardoss* v. *Ghellabhai Hariram*, (1893) 17 Bom 6 (11): Chitty's S C C R 336; *Ramanjulu Naidu* v. *Aravamudu Ayyangar*, (1910) 5 Ind Cas 735 (736): 33 Mad 317; *Muhammad Askari* v. *Radha Ram Singh*, (1900) 22 All 307 (316, 319): 1900 AP W N 73; *Krishna Das Roy* v. *Kali Tara Chowdurani*, (1918) 44 Ind Cas 80 (86): 22 Cal W N 289. See also *Joy Gobind Lala* v. *Monmotha Nath Banerji*, (1906) 33 Cal 580 (582); *Jogendra Nath Roy* v. *Nagendra Narain Nandi*, (1906-07) 11 Cal W N 1026 (1028); *Rameswar Singh* v. *Jaideb Jha*, (1910) 6 Ind Cas 387 (387): 12 Cal L Jour 591.

(3) *H Coomar Mullick* v. *Rajendrolal Moonshe*, (1878) 3 Cal 353 (359-360); *Shivlal Motilal* v. *Birdichand Juraj*, (1917) 40 Ind Cas 194 (198): 19 Bom L R 370.

Note 4.

(1) *Thomas Beck* v. *Thomas Siddle*, 1892 Pun Re No 11; *Hemendro* v. *Rajendrolall*, (1878) 3 Cal 353 (360): 1 Cal L Rep 488: 2 Ind Jur 758; *Bhagabat* v. *Madhub*, (1896) 23 Cal 553 (555) (N); *Muhammad Askari* v. *Radhe Ram Singh*, (1900) 22 All 307 (315): 1900 All W N 73; *Dick* v. *Dhunji*, (1901) 25 Bom 378 (386): 3 Bom L R 234.

(2) *Norbury Notzio* v. *Griffiths*, (1918) 2 K B 369; *Kendall* v. *Hamilton*, (1879) 4 App Cas 504 (515, 516); *Krishna Das Roy* v. *Kali Tara Chowdurani*, (1918) 44 Ind Cas 80 (85, 86): 22 Cal W N 289.

Note 5.

(1) *Lukmidas* v. *Purushotam Haridas*, (1881-82) 6 Bom 700 (702); *Motilal* v. *Ghellabhai*, (1892) 17 Bom 6 (11): Chitty's S C C R 336; *Narayana* v. *Lakshmana*, (1898) 21 Mad 256 (257); *Baldeo Prasad Kanhaiyalal* v. *Sheikh Abdulla and Sheikh Ramzan*, (1902) 15 C P L R 51 (52); *Jag Lal* v. *Shib Lal*, 1902 Pun Re No 37: 25 Pun L R 1902; *Mohun Lal* v. *Sri Gungaji Cotton Mills Company*, (1900) 4 Cal W N 369 (373).

On this question there is a conflict of decisions. It has been held by the High Courts of Bombay,[1] Calcutta[2] and Madras[3] that such a suit is barred. These decisions are based on the view that the contract gives rise to but one *cause of action* and when once that cause of action is sued on and a judgment is obtained on it, the cause of action merges in the judgment and the plaintiff has no longer any cause of action against the other co-promisor. As regards the argument based on S. 43 of the Contract Act, *viz.*, that the plaintiff can under that section sue, as he chooses, one or more of the joint promisors, it was said that the section merely deprives a defendant of the right of being sued along with his joint promisors but does not operate to convert a *single* cause of action into several causes of action, so as to enable the plaintiff to file separate actions against both. On the other hand, it has been held by the Allahabad High Court[4] that a fresh suit against *B* is not barred under such circumstances, on the ground that S. 43 of the Contract Act makes the joint liability of a co-promisor, *joint and several*, and also on the ground that, inasmuch as the present rule deprives the defendants of their right to insist on their co-promisors being joined as parties, the plaintiff gets a larger right of bringing separate suits against the promisors.

It is submitted that neither of the grounds relied on can be accepted as leading to the conclusion arrived at by the Allahabad High Court. That the liability under a joint promise by *A* and *B* is joint and several does not affect the *singleness of the cause of action*. Nor can the deprivation of certain rights of the *defendants* give the *plaintiff* any additional right. The same observations will apply to the decision in the undermentioned case of the Calcutta High Court in which it was held that when the obligation is *joint and several* an unsatisfied decree against one of the promisors is not a bar to an action against the others.[5]

Suppose *C* sues *both A* and *B* (joint promisors) but *A* consents to a judgment against him. Can *C* thereafter prosecute the suit against *B* alone? It has been held by the Bombay High Court that *C* can do so,[6] on the ground that the doctrine of *King* v. *Hoare* "which laid down that judgment recovered against a joint promisor was a bar for a further action in respect of the same liability against the other joint promisors" ought not to be applied to the prosecution of an action *already instituted*.

7. "**Any one contract.**"—The rule only applies where the defendants are liable on the *same* contract. It does not apply where the defendants are liable on *different* contracts.[1]

Note 6.

(1) *Shivlal* v. *Birdichand*, (1917) 40 Ind Cas 194 (199): 19 Bom L R 370; *Lakshmishankar* v. *Vishnuram*, (1900) 24 Bom 77 (83, 84): 1 Bom L R 534.

(2) *Hemendra* v. *Rajendrolall*, (1877-78) 3 Cal 353 (359, 360): 1 Cal L Rep 488: 2 Ind Jur 758.

(3) *Guruswami* v. *Chinna Mannar*, *Guruswami* v. *Sadasiva*, (1882) 5 Mad 37 (44) [Distinguished in 32 Mad 317]; *Ramanjulu* v. *Aravamudu*, (1910) 33 Mad 317 (321, 322): 5 Ind Cas 735: 1910 Mad W N 35: 7 Mad L Tim 373; *Umamaheswara* v. *Singaperumal*, 8 Mad 376; *Suryanarayana* v. *Gurunada Pillai*, 21 Mad 259 [The proposition was questioned but not rejected in this case].

(4) *Md Askar* v. *Radhera*, (1900) 22 All 307 (315, 316, 317): 1900 All W N 73.

(5) *Dhunput Singh* v. *Sham Soonder Mitter*, (1880) 5 Cal 291 (293, 294): 4 Cal L Rep 501.

(6) *Shivlal Motilal* v. *Birdichand Jivraj*, (1917) 40 Ind Cas 194 (199): 19 Bom L R 370; *Dick* v. *Dhunji*, (1901) 25 Bom 378 (386): 3 Bom L R 234.

Note 7.

(1) *Mangalchand* v. *River Steam Navigation Co, Ltd*, 1928 Cal 490 (490): 108 Ind Cas 591.

O. 1, R. 6, Note 8.

8. Suits on bills of exchange, hundies and promissory notes.—The drawer and the acceptor of a bill of exchange can be joined as co-defendants in a suit brought by the holder of the bill.[1] But suppose *A* draws a bill of exchange payable at sight on *B* and the latter, on presentation, refuses to accept it. In such a case, the holder of the bill has no cause of action against *B* and cannot add *B* as a co-defendant with *A*.[2]

This rule does not say that any party *must* be joined as a co-defendant to a suit on a bill or *hundi*. But this does not obviate the need for joining a person who may, in the circumstances of the case, be a *necessary* party.

Thus, where the endorsee sues the endorser for renewal of a lost cheque, the drawer also must be impleaded as the cheque cannot be renewed without his co-operation.[3]

It must be remembered that the rule is only one of *procedure*. It merely enables the holder of a bill to sue all the parties in one action. It does not in any way affect the liabilities of the parties. Hence, where the holder of a bill of exchange sues the drawer, the acceptor and the endorser, the decree cannot provide that the endorser should be exempt from liability until the plaintiff has exhausted his remedies against the drawer and the acceptor.[4]

O. 1, R. 7, Note 1.

R. 7. [New] *Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.*

When plaintiff in doubt from whom redress is to be sought.

[R. S. C., O. 16, R. 7.]

Synopsis.

1. Scope of the rule.
2. Costs of suit where relief is claimed against defendants in the alternative. See Note 9 to S. 35.

1. Scope of the rule.—This rule enables the plaintiff to bring one suit against a number of persons in the alternative where he is in *doubt* as to which of them is liable to him.[1] The following are instances of cases in which a plaintiff may sue several defendants in the alternative under this rule:—

Note 8.

(1) *Basant Ram* v. *Kolahal*, (1875-78) 1 All 392 (393); *Gopal Dass* v. *Seetha Ram*, (1867) 3 Agra 268 [Endorser alone may be sued]; *Pestonjee* v. *Mirza*, (1878) 3 Cal 541 (541); *Jegan Nath* v. *Ram Das Brij Das*, (1914) 25 Ind Cas 881 (882): 243 Pun L R 1914 [Hundi dishonoured—Suit against endorser—Drawer was added as co-defendant]; *Duncan Fort & Co* v. *N & S W Bank*, 6 App Cas at p 11.

(2) *Sheth Kahandas Narandas* v. *Dahiabhai*, (1878-79) 3 Bom 182 (183).

(3) *Baldeo Prasad* v. *Girish Chunder*, (1878-80) 2 All 754 (755).

(4) *Bank of Bengal* v. *Kartick Chunder Roy*, (1889) 16 Cal 804 (805, 806).

Order 1, Rule 7—Note 1.

(1) *Massey* v. *Heynes*, (1888) 21 Q B D 330 C A: 57 L J Q B 521: 36 W R 884; *Sanderson* v. *Blyth Theatre Co*, (1903) 2 K B 533 (541): 72 L J K B 761: 89 L T 159: 52 W R 33: 19 T L R 660 cited in 10 Mad L W 122: 37 Mad L Jour 125: 1919 Mad W N 625: 26 Mad L Tim 246: 58 Ind Cas 274 (278); *Honduras etc Co* v. *Lefevre and Tucker*, (1877) 2 Ex D 301: 46 L J Ex 391: 36 L T 46: 25 W R 310 (C A) cited in 19 Mad 211 (216), 4 Mad L Jour 288: 29 Mad 50 (51): 16 Mad L Jour 39.

(1) A plaintiff can sue two persons as defendants to recover from either the one or the other, a sum of money by way of rent for a godown when he is in doubt as to which of the two owes the rent.[2] O. 1, R. 7, Notes 1—2.

(2) *A* sues *B* for a sum of money lent to *B* by *C*, *A's* agent. *B* denies the loan but *C* maintains he made the loan. *A*, in such a case, may join *C* as a co-defendant in the suit praying for relief against him in the alternative.[3]

(3) Plaintiff alleged that both the first and second defendants claimed a charge for the use of certain water and prayed that the Court should determine which of the defendants was entitled to the charge, and that the other should be restrained from interfering with the plaintiff, and compelled to refund the charges he had already collected. *Held*, there was no misjoinder.[4]

It should be noted that *ex hypothesi* where a plaintiff sues different persons in the alternative, *all* of them cannot be made liable. Where, therefore, judgment is given against one of the defendants, the plaintiff cannot enforce it against the other.[5]

2. Costs of suit where relief is claimed against defendants in the alternative.—*See* Note 9 to S. 35.

R. 8. [Ss. 30, 32.] (1) Where there are numerous *persons*[3] having the same interest[8] in one suit, one or more of such *persons* may, with the permission of the Court,[10] sue or be sued,[14] or may defend,[15] in such suit, on behalf of *or for the benefit of all persons* so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit[16] to all such *persons* either by personal service or, *where* from the number of *persons* or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct. O. 1, R. 8.

One person may sue or defend on behalf of all in same interest.

(2) Any person on whose behalf *or for whose benefit* a suit is instituted or defended under *sub-rule* (1) may apply to the Court to be made a party[18] to such suit.

[1877, Ss. 30, 32. *Cf.* R. S. C., O. 16, R. 9.]

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(2) *Mowji Monji* v. *Kuverji Nanaji*, (1907) 31 Bom 516 (522, 523): 9 Bom L R 482; See also *Hridoy Nath Shaha* v. *Mohobutnessa Bibi*, (1893) 20 Cal 285 (291); *Child* v. *Stenning*, (1877) 5 Ch D 695: 46 L J Ch 523: 36 L T 426: 25 W R 519 (C A) cited in 8 Cal 170 (172): 29 Mad 50 (51), 12 Cal L Jour 357.

(3) *Meyappa Chetti* v. *Perianna Chetti*, (1906) 29 Mad 50 (51): 16 Mad L Jour 39; *Kondiba Gopal* v. *Mestre Jean*, 1928 Bom 91, 94, 95): 30 Bom L R 162: 109 Ind Cas 191.

(4) *Kumarappa* v. *Venkatachallam*, (1909) 4 Ind Cas 312 (313): 7 Mad L Tim 16.

(5) See *French* v. *Howie*, (1906) 2 K B 674 C A; *Morel Brothers* v. *Westmoreland*, (1904) App Cas 11: 73 L J K B 93: 20 T L R 38: 52 W R 353: 89 L T 702 cited in 50 Ind Cas 59 (64).

O. 1, R. 8, Notes 1—2.

Synopsis.

1. Legislative changes.
2. Scope and object of rule.
3. Numerous persons.
4. Clubs and other associations.
5. Suit to set aside fraudulent transfers.
6. Suit by a member of a community in his own right.
7. Suit to establish or negative a public right.
8. Having the same interest.
9. Representative suit for damages not maintainable.
10. With the permission of the Court.
11. At what stage of suit permission is to be granted.
12. Form of permission.
13. Who may apply for permission.
14. May be sued.
15. "May defend."
16. Notice of the institution of the suit.
17. Title of suit.
18. Addition of parties.
19. Suit in the name of wrong plaintiff.
20. Addition of parties after decree.
21. Decree in a representative suit.
22. Costs in representative suit.
23. Compromise of representative suit.
24. Abatement of suits and appeals.
25. Applicability of rule to arbitration proceedings.

Binding effect of decree in representative suit. See Note 21.
Object of notice. See Note 16, Pt. (7).
Permission to be given to definitely named persons. See Note 12, Pt. (4).
Permission whether should be express. See Note 12, Pt. (1).

1. Legislative changes.—

The first paragraph of this rule corresponds to S. 30 of the Code of 1882 and the second paragraph corresponds to the fourth paragraph of S. 32 of that Code. The alterations effected are not very material.

2. Scope and object of rule.—The general rule is that all persons interested in a suit ought to be joined as parties to it, so that the matters involved may be finally adjudicated upon and fresh litigation over the same matters may be avoided.[1] The present rule forms an exception to this general rule. It provides that where a number of persons are similarly interested in a suit one or more of them can, with the permission of the Court, sue or be sued on behalf of themselves and the others. The rule is founded on convenience and saves the trouble and expense which would otherwise have to be incurred in such cases.[2]

The conditions for the applicability of this rule are:—

(1) The parties must be *numerous.*

(2) They must have the *same interest* in the suit.

(3) The *Court's permission* under the rule must be obtained.

(4) *Notice* must be given to the parties whom it is proposed to represent in the suit.

The rule is taken from O. 16, R. 9 of the Rules of the Supreme Court which runs as follows:—

Order 1, Rule 8—Note 2.

(1) *Maung Tun Wa* v. *Maung Tha Kado*, (1900-1907) 1 L B R 252 (254); *Amrut* v. *Mukund*, (1909) 4 Ind Cas 236 (240): 5 Nag L R 152.

(2) *Hira Lal* v. *Bhairon*, (1883) 5 All 602 (605): 1883 All W N 155; *Sursangji* v. *Partap Sang*, (1904) 28 Bom 209 (213, 214): 5 Bom L R 937; *Srikanti Narayanappa* v. *Indupuram Ramalingam*, (1866-68) 3 Mad H C 226 (229); *Baiju Lal Parbatia* v. *Gulak Lal Pathuk*, (1897) 24 Cal 885 (390); *Ranganswami* v. *Krishnaswami*, 1923 Mad 276 (277): 44 Mad L Jour 116: 17 Mad L W 147: 1923 Mad W N 84: 32 Mad L Tim 133: 71 Ind Cas 463; *Srinivasachariar* v. *Raghavachariar*, (1900) 23 Mad 28 (31, 32): 7 Mad L Jour 281; *Raghuraj Singh* v. *Bishen Tewary*, (1917) 37 Ind Cas 384 (384) Pat; *Gafurali* v. *Mohiddin*, 1932 Bom 65 (68): 33 Bom L R 1575: 135 Ind Cas 806; *Andiappan Ambalam* v. *Subbaya Ambalam*, 1932 Mad 163 (164): 34 Mad L W 919: 136 Ind Cas 315.

"Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested." It will be seen that the chief distinction between the Indian rule and the English rule is that under the latter permission is necessary only for *defending* a suit on behalf of others and not for suing or being sued.[3] O. 1, R. 8, Notes 2—3.

3. Numerous persons.—The first essential for the application of this rule is that *numerous* persons should be interested in the suit. The rule does not fix any limit to the number. In one case, it was held that the rule contemplates the case of parties too numerous to be conveniently made parties to the suit.[1] In another case, a hundred persons were held to be "numerous" within the rule.[2] And in an English case[3] it was held that thirty defendants were "numerous".

It is not necessary that the number should be *capable of ascertainment*. A suit is therefore maintainable on behalf of a fluctuating body, *e.g.*, the inhabitants of a town[4] or village[5]; the members of a defined[5-a] sect[6] or caste[7] or class[8] or the followers of a particular religion, like the Mahomedan community[9] or the Hindu community.[10] In this connection it may be pointed out that a fluctuating body like a village community can own property[11] or even be a promisee under a contract.[12]

But a suit is not maintainable on behalf of the *public in general*.[13] This is not because the number of persons forming the public is not capable

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(3) *Oriental Banking Corporation* v. *G Lall Seal*, (1883) 9 Cal 604 (606, 607): 13 Cal L Rep 142.

Note 3.

(1) *Varanakot* v. *Varanakot*, (1878-80) 2 Mad 328 (332): 5 Ind Jur 243.

(2) *Abdul Ghani* v. *Subramania*, 1929 Mad 44 (45): 27 Mad L W 212: 107 Ind Cas 789.

(3) *Andrews* v. *Salmon*, 1888 W N 102 (Eng).

(4) *Md Shafi* v. *Fatehgarh*, 1927 Lah 196 (197): 100 Ind Cas 49.

(5) *Lal Bahadur* v. *Rameshwar*, 1921 All 206 (207): 43 All 345: 19 A L J 126: 60 Ind Cas 990; *Harishchandra* v. *Pram Nath*, 1921 Cal 405 (406): 26 Cal W N 587: 69 Ind Cas 910; *Kalurkhabir* v. *Jan Mia*, (1902) 29 Cal 100 (103, 104); *Thanakoti* v. *Muniappa*, (1885) 8 Mad 496 (496); *Kalicharan* v. *Ram Kumar*, (1913) 18 Ind Cas 67 (68, 69): 17 Cal W N 73; *Abdul Ghani* v. *Subramania Chettiar*, 1929 Mad 44 (45): 27 Mad L W 212: 107 Ind Cas 789; *Haradhone* v. *Ramdoyal*, (1894) 21 Cal 181 (N).

(5-a) *Manmotho Nath* v. *Harish Chandra*, 33 Cal 905 (912).

(6) *Baldeo* v. *Bir Gir*, (1900) 22 All 269 (269): 1900 A L W N 69 [Sect known as *Niranjini* Akhara]; *Maharaj Bahadur* v. *Paresh*, (1904) 31 Cal 839 (845) [Digambari sect of Jains]; *Srinivasachariar* v. *Raghavachariar*, (1900) 23 Mad 28 (30, 31): 7 Mad L Jour 281 [Thengalai sect at Triplicane]; *Dhunpat Singh* v. *Paresh Nath*, (1894) 21 Cal 180 (182) [Jain Sitambari sect].

(7) *Monmotho Nath* v. *Harishchandra*, (1906) 33 Cal 905 (911, 912, 913): 10 Cal W N 867 [Satchasi community]; *Nagindas* v. *Somnath*, 1932 Bom 122 (125): 34 Bom L R 343: 56 Bom 242: 137 Ind Cas 461 F B.

(8) *Ahmedbhoy Habibhoy* v. *Balkrishna Mukund*, (1895) 19 Bom 391 (398, 399) [Raiyats of a village]; *Kalicharan* v. *Ram Kumar*, (1913) 18 Ind Cas 67 (68-69): 17 Cal W N 73, (Do.).

(9) *Jan Ali* v. *Ram Nath Mundul*, (1882) 8 Cal 32 (41): 9 Cal L Rep 433; *Ramchandar* v. *Ali Muhammad*, (1913) 18 Ind Cas 797 (798): 11 All L J 233: 35 All 197.

(10) *Monmotho Nath* v. *Harishchandra*, (1906) 33 Cal 905 (911): 10 Cal W N 867.

(11) *Venkatasubban* v. *Ayyathurai*, (1920) 54 Ind Cas 202 (205): 37 Mad L Jour 554: 26 Mad L Tim 364; *Sivaraman* v. *Muthaya*, (1888) 12 Mad 241 (248): 16 Ind App 48: 5 Sar 331 P C; *Secretary of State* v. *Haibatra Hari*, (1904) 28 Bom 276 (283, 284): 6 Bom L R 43; *Secretary of State* v. *Mathurabhai*, (1890) 14 Bom 213 (221); *Navroji* v. *Kharshedji*, (1904) 28 Bom 20 (49, 50): 5 Bom L R 745; *Probhat Chandra Sen* v. *Hari Mohan*, (1920) 54 Ind Cas 742 (748): 24 Cal W N 206 [*Dhobi* community of Narinda]; *Buduvaram Narasimhalu Chetty* v. *Noota Ibbundram*, 1923 Mad 434 (434): 44 Mad L Jour 240: 1923 Mad W N 237: 72 Ind Cas 95 [Vysia community of Mogarale].

(12) *Buduvaram Narasmhalu Chetty* v. *Noota Ibbundram*, 1923 Mad 434 (434): 44 Mad L Jour 240: 1923 Mad W N 237: 72 Ind Cas 95; *Idris* v. *Jane Skinner*, 1918 P C 154 (156): 82 Pun Re 1919: 45 Pun W R 1919: 56 Ind Cas 723 P C.

(13) *Adamson* v. *Arumugam*, (1886) 9 Mad 463 (466): 10 Ind Jur 374; *Mohamed Din* v.

O. 1, R. 8, Notes 3—6.

of ascertainment but because of the principle that there can be no private actions for public wrongs.

A suit on behalf of the whole Hindu community is not impeachable on the ground of the number being incapable of ascertainment. The contrary view of the Calcutta High Court in the undermentioned case[14] has been dissented from in later decisions of the same High Court.[15] But such a suit may be open to attack on another ground, namely, that the parties cannot have the "same interest" in such a case. *See* Note 8 below.

4. Clubs and other associations.—Bodies of persons may be registered under the Companies Act and may be authorised under the law to sue and be sued through one of their members or officers. But in the case of unincorporated associations like clubs, etc., the secretary or other officers of the club cannot sue or be sued except by obtaining permission under this rule,[1] even though he or they may have been authorised by a resolution of the association to sue or to defend a suit.[2]

5. Suit to set aside fraudulent transfers.—A suit to set aside a transfer of immoveable property on the ground that it is in fraud of the creditors of the transferor must be brought by or on behalf of all the creditors. Such a suit cannot be brought by some only of the creditors for their benefit alone.[1]

6. Suit by a member of a community in his own right.—This rule is only an enabling provision. It does not debar any member of a community from maintaining a suit in his own right although the act complained of injures other members of the community.[1]

Atiraju Kuer, 1931 Pat 418 (419): 10 Pat 568: 133 Ind Cas 463: 12 Pat L Tim 885.

(14) *Sajedur Raja* v. *Baidyanath*, (1893) 20 Cal 397 (407).

(15) *Monmotho Nath Das* v. *Harishchandra Das*, (1906) 33 Cal 905 (911): 10 Cal W N 867. See also *Probhat Chandra Sen* v. *Hari Mohun Dhupi*, (1920) 54 Ind Cas 742 (748): 24 Cal W N 206.

Note 4.

(1) *Ma Gyi* v. *Pat Lon*, (1917) 38 Ind Cas 572 (573): 9 Bur L Tim 247 [Office of unregistered company]; *Atmanand* v. *Brahm Narain*, (1907) 4 All L J 541 (543): 1907 All W N 229 [Manager of unregistered religious society]; *Hriday Nath* v. *Akhilchandra Roy*, 1929 Cal 445 (447): 49 Cal L Jour 357 [Secretary of Brahma Samaj]; *Muhammadan Association* v. *Bakhshi Ram*, (1884) 6 All 284 (285): 1884 All W N 76: 8 Ind Jur 586 [Secretary of Mahomedan Association of Meerut]; *Michael* v. *Briggs*, (1891) 14 Mad 362 (362) [Secretary of a Club suing a member for a debt due to the Club]; *Mohidin Khan* v. *Balai Khan*, (1910) 7 Ind Cas 868 (869): 1910 Mad W N 500: 8 Mad L Tim 357 [Suit by trustee—Many others interested in suit—O 1, R 8 should be followed]; *Virasami* v. *Arunachala*, (1878) 2 Mad 200 (201): 4 Ind Jur 337 [In a suit brought for the dismissal of a Dharmakarta, all the members of the District Committee should join as parties]; *Ganesha* v. *Mandi Forest Co*, (1899) 21 All 346 (347): 1899 All W N 123 [Suit *against* Secretary]; *North W P Club* v. *Sadullah*, (1898) 20 All 497 (498, 499): 1898 All W N 138, (Do.). See also *Oldfield* v. *Co-operative Stores*, 1925 Sind 244 (245): 18 Sind L R 93: 88 Ind Cas 784 [O 1, R 8 held not applicable]; *Ajodhya Nath* v. *City Magistrate of Lucknow*, 1924 Oudh 128 (129): 26 Oudh Cas 333: 80 Ind Cas 495.

(2) *Atmaram* v. *Narayan*, 1922 Bom 109 (110): 46 Bom 132: 64 Ind Cas 555: 23 Bom L R 972 [Suit to eject tenants from caste property—Plaintiff authorised by resolution of caste]; *Michael* v. *Briggs*, (1891) 14 Mad 362 (368); *Mahomed* v. *Husen*, (1898) 22 Bom 729 (730) [Treasurer misappropriating funds of the association—No one member can sue alone to recover the amount misappropriated even though authorised].

Note 5.

(1) *Chatterput* v. *Maharaj Bahadur*, (1905) 32 Cal 198 (217): 32 Ind App 1: 9 Cal W N 225: 2 All L J 190: 8 Sar 713: 18 Mad L Jour 125: 3 Mad L Tim 344: 7 Cal L Jour 395: 10 Bom L R 262 P C; *Burjorji* v. *Dhunbai*, (1892) 16 Bom 1 (20); *Ishwar* v. *Devar*, (1903) 27 Bom 146 (150): 5 Bom L R 19; *Hakim Lal* v. *Mooshhar Sahu*, (1907) 34 Cal 999 (1006): 11 Cal W N 889: 6 Cal L Jour 410; *Sri Thakurji* v. *Narsingh Narain Singh*, 1921 Pat 53 (53): 6 Pat L Jour 68: 2 Pat L Tim 217: 1921 Pat H C C 47: 63 Ind Cas 788; *Manickavelu* v. *Arbuthnot*, (1882) 4 Mad 404 (408).

Note 6.

(1) *Pokhar Das* v. *Raghu Ram*, 1921 Lah 76 (77): 3 Lah L Jour 384: 62 Ind Cas 888; *Jadu Singh* v. *Sant Singh*, 1927 Pat 221 (222): 8 Pat L Tim 267: 101 Ind Cas 500; *Saklat* v. *Bella*, (1921) 63 Ind Cas 963 (967): 13 Bur L Tim 183; *Gulba* v. *Basanta*, (1910) 32 All 284 (286): 7 All L J 238: 5 Ind Cas 547; *Pursholam* v. *Kala*, (1902) 26 Bom 301 (304): 3 Bom L R 932; *Ramzan Ali* v. *Basharat Ali*, 1901 Pun Re No 105 [Some of many co-sharers may sue trespasser]; *Fatik Chandra Roy* v. *Atlas Bibi*, (1912) 14 Ind Cas 478 (479): 15 Cal L Jour 225 [Co-sharers—Defendant cutting trees—One co-sharer can sue for damage regarding his share];

Illustrations.

O. 1, R. 8, Note 6.

1. Where every member of the community had an *individual* right to perform religious rites on a certain platform and the defendant raised a masonry structure on the platform, *Held* that any member of the community could sue for the removal of the structure.[2]
2. The worshippers at a dharmasala can challenge the alienation of property attached to the *dharmasala*, as persons interested in the preservation of the property.[3]
3. It has been held that individual tax-payers can sue for an injunction restraining a Municipality from misapplying its funds.[4]
4. *A*, a creditor of *B* obtains a decree against *B* and attaches certain property as belonging to *B*. The attachment is set aside at the instance of *C*, who claims to be the transferee of the property from *B*. Then *A* sues for a declaration that the alienation is fraudulent and does not affect his right to attach the property under his decree. The suit is maintainable.[5]
5. Plaintiffs as members of a certain caste claimed for themselves and their fellow caste men, the exclusive right of entry and worship in the sanctuary of a temple. The defendants who belonged to some other caste entered the sanctuary and worshipped there, thus infringing the rights of plaintiffs' caste. *Held* that individual members of the latter caste could sue for the personal injury suffered by them due to the pollution of their sanctuary.[6]
6. Every Mahomedan worshipper in a mosque has an individual right to sue any one who interferes with his right.[7] Hence individual Mahomedan worshippers can sue to set aside an alienation of endowed property,[8] or for declaration that certain property is *wakf* property.[9]

Although, where a number of persons have similar but distinct rights any one of them may sue in his own right, yet, the Court may, on grounds of convenience, require the plaint to be amended and converted into a representative action.[10] Where the suit is not brought in a representative capacity but in an individual capacity the decree in the suit does not bind members of the class who are not actually parties on record.[11] The fact that the suit

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Thackersey Dewaraj v. *Hurbhum*, (1884) 8 Bom 432 (450); *Srinivasachariar* v. *Raghavachariar*, (1900) 23 Mad 28 (32): 7 Mad L Jour 281; *Dasondhay* v. *Muhammad*, (1911) 11 Ind Cas 36 (37): 8 All L J 710: 33 All 660; *Benarsi* v. *Altaf Husain*, (1921) 63 Ind Cas 171 (173) All [Mutwalli of a wakf in respect of a mosque need not obtain the permission of Court to maintain a suit on behalf of the trust]; *Nariman* v. *Municipal Corporation of Bombay*, 1923 Bom 305 (320): 25 Bom L R 689: 47 Bom 809: 83 Ind Cas 856; *Maqbul Singh* v. *Sadhu Ram*, 1926 Lah 502 (502): 95 Ind Cas 247: 7 Lah 451: 8 Lah L Jour 584: 27 Pun L R 695; *Hira Lal* v. *Bhairon*, (1883) 5 All 602 (607): 1883 All W N 155.

(2) *Baiju Lal Parbatia* v. *Bulak Lal Patluk*, (1897) 24 Cal 385 (390).

(3) *Sewa Singh* v. *Budh Singh*, 1892 Pun Re No 66.

(4) *Vaman Tatyaji* v. *Municipality of Sholapur*, (1892) 22 Bom 646 (649, 650, 651).

(5) *Ebrahimbhai* v. *Fulbhai*, (1902) 26 Bom 577 (581, 582): 4 Bom L R 180: 42 Mad 143. See however the recent amendment to S. 53 of Transfer of Property Act.

(6) *Anandrav* v. *Shankar*, (1883) 7 Bom 323 (328): 7 Ind Jur 613.

(7) *Md Alam* v. *Akbar Husain*, (1910) 32 All 631 (634): 7 All L J 797: 6 Ind Cas 835; *Ramachandra* v. *Ali Muhammad*, (1913) 18 Ind Cas 797 (798-799): 11 All L J 233: 35 All 197; *Fazl-Ul-Rahman* v. *Md Yusuf*, (1885) All W N 219 (220); *Kazi Hussan* v. *Sagun Bal Krishna*, (1900) 24 Bom 170 (176): 1 Bom L R 649; *Jawahra* v. *Akbar Husain*, (1885) 7 All 178 (182): 1884 All W N 324 F B; *M Md Fahimul Huq* v. *Jagat Ballav Ghosh*, 1923 Pat 475 (477): 2 Pat 391: 4 Pat L Tim 675: 74 Ind Cas 403; *Sadiq Husain* v. *Khan Bahadur Hakim Mirza*, 1922 Oudh 1 (2): 9 Oudh L J 111: 26 Oudh Cas 82: 66 Ind Cas 90; *Jan Ali* v. *Ram Nath Mundul*, (1882) 8 Cal 32 (41): 9 Cal L Rep 433.

(8) *Md Fahimul Haq* v. *Jagat Ballav*, 1923 Pat 475 (477): 2 Pat 391: 4 Pat L Tim 675: 74 Ind Cas 403; *Zafaryab Ali* v. *Bakhtawar Singh*, (1883) 5 All 497 (500): 1883 All W N 91.

(9) *Ilahi Baksh* v. *The Court of Wards*, 1908 Pun L R 78: 52 Pun W R 1908; *Sadiq Husain* v. *Khan Bahadur Hakim Mirza Nazir Husain Khan*, 1922 Oudh 1 (2): 9 Oudh L J 111: 26 Oudh Cas 82: 66 Ind Cas 90.

(10) *Srinivasachariar* v. *Raghavachariar*, (1900) 23 Mad 28 (32): 7 Mad L Jour 281.

(11) *Srinivasachariar* v. *Raghavachariar*, (1900) 23 Mad 28 (32): 7 Mad L Jour 281.

O. 1, R. 8, Notes 6—8.

is against a defendant in his individual capacity does not preclude him from raising a question of general custom, although the adjudication cannot bind members of the community who are not on the record as parties. If the plaintiff wishes to have the question of common right tried out he should amend his plaint and allege that the suit is brought against the defendant personally and as representing others claiming the same rights.[12]

7. **Suit to establish or negative a public right.**—It has been seen in S. 91, Note 1 that a private person cannot maintain a suit in respect of a *public* right except under the provisions of S. 91, unless he is able to show that he has suffered *special damage*. Where numerous persons, not being the general public (*e.g.*, a particular community) suffer *special injury* in respect of a public right, any one of such persons may, under this rule, bring a representative suit on behalf of all such persons.[1] Where there is no question of a *public* right at all, no special injury need be proved. Thus suits may be brought by village communities to establish their rights in connection with village pathways,[2] village wells[3] or *ghats* or banks of rivers.[4]

A person may sue for a declaration that he is the owner of certain land free from any right of the public to use it as a highway. In such a case the plaintiff may implead any one who formally claims to use the land as a public highway. He need not proceed under O. 1, R. 8 against all persons who may deny his right. But the decree in such a case will only bind the actual defendants.[5]

8. **Having the same interest.**—The persons on whose behalf a suit is brought must have the *same* interest in the suit. The interest need not be a *proprietary* one. Thus the disciples of a *mutt* can sue for setting aside an improper alienation of the *mutt* properties and for restoration thereof to the head of the *mutt*.[1] Similarly the worshippers at a temple can sue for setting aside an alienation of temple property[2] and, where there is no trustee or manager, even for the recovery of the temple property.[3] The expression "same interest" is not confined to *joint* or *concurrent* interest.[4] It applies also to cases where the interest is *similar* though *distinct*.[5] But an interest merely *as a member of the public* is not a sufficient interest for the purposes of

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(12) *Sitab Rai* v. *Dubai Nagesia*, (1907) 6 Cal L Jour 218 (221).

Note 7.

(1) *Andi Moopan* v. *Muthuveerama Reddy*, (1915) 29 Ind Cas 248 (250): 29 Mad L Jour 91: 17 Mad L Tim 453; *Khaji Sayed Yusuf* v. *Ediga Narasimhappa*, (1918) 44 Ind Cas 367 (368): 8 Mad L W 377: 1918 Mad W N 175.

(2) *Kali Charn Naskar* v. *Ram Kumar Sardar*, (1913) 18 Ind Cas 67 (69): 17 Cal W N 73; *Harish Chandra* v. *Pran Nath*, 1921 Cal 405 (406): 26 Cal W N 587: 69 Ind Cas 910.

(3) *Pokhar Das* v. *Raghu Ram*, 1921 Lah 76 (77): 3 Lah L Jour 384: 62 Ind Cas 888.

(4) *Peary Lal* v. *Surendra Nath*, 1925 Cal 1233 (1233): 88 Ind Cas 505.

(5) *Harbans Narain Singh* v. *Bhajoo Nonia*, (1919) 49 Ind Cas 796 (797-798) Pat; *Chuni Lal* v. *Ram Kishen*, (1888) 15 Cal 460 (467): 12 Ind Jur 425.

Note 8.

(1) *Chidambaranatha* v. *Nallasiva*, (1917) 42 Ind Cas 366 (367): 33 Mad L Jour 357: 22 Mad L Tim 218: 6 Mad L W 666: 41 Mad 124.

(2) *Ashraf Ali* v. *Md Nurajjama*, (1919) 49 Ind Cas 355 (355): 23 Cal W N 115; *Sukhdeo* v. *Gopal Misir*, (1916) 36 Ind Cas 976 (977) Pat [Suit for declaration that suit property is trust property is maintainable]; *Veerama Chanani* v. *Soma*, (1920) 58 Ind Cas 585 (1) (585): 1920 Mad W N 393: 38 Mad L Jour 226: 43 Mad 410. See however *Raghubar* v. *Kesho*, (1889) 11 All 18 (26): 1888 All W N 276: 13 Ind Jur 148. Also *Kamaraju* v. *Asanali Sheriff*, (1900) 23 Mad 99 (100).

(3) *Rangaswami* v. *Krishnnaswami*, 1923 Mad 276 (277): 44 Mad L Jour 116: 17 Mad L W 147: 1923 Mad W N 84: 32 Mad L Tim 133: 71 Ind Cas 463.

(4) *Sivagurunatha* v. *Ramaswami*, (1912) 15 Ind Cas 399 (400): 11 Mad L Tim 257: 1912 Mad W N 105; *Jatindra Mohan* v. *Rebati Mohan*, 1932 Cal 275 (282): 55 Cal L Jour 8: 138 Ind Cas 4 [Owners of Taluk and of subordinate tenures having same interest in suit].

(5) *Sivagurunatha* v. *Ramaswami*, (1912) 15 Ind Cas 399 (400): 11 Mad L Tim 257: 1912 Mad W N 105; *Raghuraj* v. *Bishen Tewary*, (1917) 37 Ind Cas 384 (384) Pat.

this rule.[6] As has been observed in *Adamson* v. *Arumugam*[7] the rule "is rather designed to allow one or more persons to represent a *class having special interests* than to allow such persons to sue on behalf of the general public." For examples of cases where several persons were held to have the same interest in the suit *see* the undermentioned cases.[8] It has been held by the High Court of Lahore that the defendants in a partition suit may, in certain circumstances, have the same interest in the suit and that O. 1, R. 8 may apply to such a case.[9]

O. 1, R. 8, Note 8.

Where the parties do not have the same interest in the suit, they must all be on the record.[10] Thus, in a suit for diverting Government water for non-riparian purposes, where each plaintiff has a distinct cause of action and also has to prove damage, a representative suit cannot be brought on behalf of all the riparian owners.[11] Similarly in a suit for contribution all the co-promisors must be before the Court.[12]

The rule does not require that the whole body on whose behalf the proceedings are taken should be of the *same opinion*. The true principle underlying the rule is that the suit should, in form, be constituted into a representative one in order to prevent the defendant from being vexed by similar suits by others. "If a substantial majority of the members of a body are of one opinion an order may be made by the Court giving permission under this rule, though there is a small or negligible minority holding a different opinion." This is the view of the Madras High Court.[13] It has been held by the Bombay High Court that where a community is divided into two clear factions, one faction favouring and the other opposing the suit, it cannot be said that the community has the same interest in the suit and a suit cannot be brought under O. 1, R. 8.[14]

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(6) *Girija Prosunno Roy* v. *Becharam Patra*, (1916) 35 Ind Cas 846 (847) Cal.

(7) (1886) 9 Mad 463 (466): 10 Ind Jur 874; *Mahomed Din* v. *Atirajo*, 1931 Pat 418 (419): 10 Pat 568: 133 Ind Cas 463: 12 Pat L Tim 885.

(8) *Kalidas Jivram* v. *Gor Parjaram Hirji*, (1891) 15 Bom 309 (315) [Suit by a class of priests for declaration of their rights]; *Ganapathi Ayyan* v. *Savithri Ammal*, (1898) 21 Mad 10 (13) [Choultry for feeding Brahmins—Any Brahmin in the locality may sue]; *Geereeballa* v. *Chunder Kunt*, (1885) 11 Cal 213 (218) [A representative suit can be brought on behalf of all the legatees under a will for discovery of testator's date]; *The Oriental Banking Corporation* v. *Gobind*, (1883) 9 Cal 604 (608): 13 Cal L Rep 142 [Person dying, leaving numerous creditors—One can sue on behalf of all]; *Ebrahimbhai* v. *Fulbhai*, (1902) 26 Bom 577 (581, 582): 4 Bom L R 180, (Do.); *Ori Lall* v. *Muhammad Yakub*, (1914) 25 Ind Cas 908 (911): 1 Oudh L J 496: 17 Oudh Cas 354 [Suit on behalf of Suni Muslims of Bilgram against Hindus of Bilgram to establish the former's right to kill cows]; *Bhundal Pande* v. *Pandol Pos*, (1888) 12 Bom 221 (225) [The fishermen of a village can sue to establish their exclusive right of fishery in creek]; *Mayor of York* v. *Pilkington*, 1 Atk 282 [Suit by fishermen to establish a right to fishery]; *Chhotty Lal* v. *Manzur Ahmed*, 1929 All 439 (440): 116 Ind Cas 813 [One co-sharer can sue on behalf of all]; *Sukhdeo Prasad* v. *Gopal Misir*, (1916) 36 Ind Cas 976 (977, 978) Pat [Communal temple—Any member of the community may sue]; *Vaidinatha* v. *Chandrasekhara*, (1905) 15 Mad L Jour 459 [Suit by Kattalaikkars of a temple for their exclusive right of performing certain festival]; *Vaman* v. *Municipality of Sholapur*, (1898) 22 Bom 646 (648) [Suit by a tax-payer to restrain Municipality from misapplying its funds]; *Ittiachan* v. *Velapan*, (1885) 8 Mad 484 (488) [Suit by members of Malabar tarwad]; *Kombi* v. *Lakshmi*, (1882) 5 Mad 201 (206), (Do.).

(9) *Bir Singh* v. *Pirthi Singh*, 1928 Lah 693 (694): 108 Ind Cas 720 [Distinguishing 17 Cal 906 and 16 Bom 608].

(10) *Pahladha Singh* v. *Luchmunbutty*, (1869) 12 Suth W R 256 (259); *Bishen Chand Basawat* v. *Nadir Hossein*, (1888) 15 Cal 329 (340): 15 Ind App 1: 5 Sar 113: 12 Ind Jur 170 P C [Suit for determining *extent* of trusts]; *Hira Lal* v. *Bhairon*, (1883) 5 All 602 (606): 1883 All W N 155.

(11) *Fisher* v. *The Secretary of State for India*, (1909) 32 Mad 141 (155): 5 Mad L Tim 149: 2 Ind Cas 325: 19 Mad L Jour 131.

(12) *Ibu Husain* v. *Ramdai*, (1890) 12 All 110 (114): 1890 All W N 31.

(13) *Hajee Sahib Hameed* v. *Md Khather Pillai Marakayar*, 1925 Mad 985 (985, 986): 86 Ind Cas 1022; *R Narasimham* v. *Seema Javuli Trade Committee*, 1929 Mad 633 (634): 118 Ind Cas 285; *Katha Pillai* v. *Kanakasundaram*, (1918) 45 Ind Cas 423 (424, 425): 24 Mad L Tim 20: 8 Mad L W 160: 1918 Mad W N 794; *Abdul Ghani* v. *Subramania Chettiar*, 1929 Mad 44 (45): 27 Mad L W 212: 107 Ind Cas 789.

(14) *Harkisandas* v. *Chhaganlal*, (1916) 33 Ind Cas 264 (265): 18 Bom L R 1: 40 Bom

O. 1, R. 8, Note 8.

It is not a condition precedent to a suit under O. 1, R. 8 that the consent of the community should be obtained *beforehand* for the suit.[14-a] Nor is it necessary to hold a meeting of the caste or community.[15] But if a meeting *is convened* and the meeting is irregularly held, the consent expressed at such a meeting is vitiated and O. 1, R. 8 will not apply.[16] In such a case, the consent of the various members expressed subsequently cannot help the plaintiff because it cannot be taken to represent the real sense of the community.[17] Where a meeting is properly held and certain persons are duly appointed to sue on behalf of the whole body, the fact that some members of the body subsequently side with the defendants does not take away from the representative character of the suit.[18]

Under this rule, a suit can be brought on behalf of a body against some of its own members.[19]

The rule says that where numerous persons have the same interest in one suit, one or more of *such persons* may sue on behalf of all. Hence, the plaintiff must have himself the same interest as the persons he seeks to represent.[20] Thus, a suit to establish the rights of the sweepers and chamars could be filed only by persons belonging to those two castes and not by outsiders.[21] Where, however, A as representing a body has a certain interest in the suit in common with all the other members of the body and has also a *special right peculiar to himself* in respect of the same matter, the two interests may be combined in the same suit under O. 1, R. 1.[22]

The rule is regulative and not constitutive. It only deals with procedure and does not create any right to sue. It presupposes the existence of the right of suit in the community. Hence, where there is no right to sue at all in the community, the rule does not apply.[23] Thus, where the property of a trust is vested in a trustee it has been held that the trustee alone can sue for recovery of possession of the property and not the worshippers in the temple.[24] Simi-

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158. See also *Tanudin* v. *Pandu*, (1894) 18 Bom 699 (701).

(14-a) *Sivathal Periyava Nadar* v. *Nana Chuna Velumuruga Nadar*, 27 Mad L W 212: 64 Ind Cas 618.

(15) *Abdul Ghani* v. *Subramania*, 1929 Mad 44 (46): 27 Mad L W 212: 107 Ind Cas 789; *Sivathal Periyava Nadar* v. *Nana Chuna Velumuruga Nadar*, 1921 Mad 682 (683, 684): 30 Mad L Tim (H C) 47: 64 Ind Cas 618.

(16) *Harikisandas* v. *Chhaganlal*, (1916) 33 Ind Cas 264 (265): 18 Bom L R 1: 40 Bom 158.

(17) *Harikisandas* v. *Chhaganlal*, (1916) 33 Ind Cas 264 (266): 18 Bom L R 1: 40 Bom 158.

(18) *Puranchandra* v. *Nalini Kanta*, 1928 Cal 741 (742): 48 Cal L Jour 276.

(19) *R Narasimham* v. *Seema Javili Trade Committee*, 1929 Mad 633 (634): 118 Ind Cas 285; *Sivathal Periyava Nadar* v. *Nana Chuna Velumuruga Nadar*, 1921 Mad 682 (683, 684): 30 Mad L Tim H C 47: 64 Ind Cas 618.

(20) *Ragava* v. *Rajaratnam*, (1891) 14 Mad 57 (61); *Maharaj Bahadur Singh* v. *Parash Nath*, (1904) 31 Cal 839 (845); *Kaliba Sahu* v. *Balgia Nachiar*, (1911) 9 Ind Cas 886 (886): (1911) 1 Mad W N 320: 9 Mad L Tim 483; *Sundaram Iyer* v. *Venkateswara Iyer*, (1910) 7 Ind Cas 391 (391): 1910 Mad W N 397: 8 Mad L Tim 248.

(21) *Jugal Kishore* v. *Khuda Bux*, 1927 All 96 (97): 98 Ind Cas 553.

(22) *Katha Pillai* v. *Kanakasundaram*, (1918) 45 Ind Cas 423 (425): 24 Mad L Tim 20: 8 Mad L W 160: 1918 Mad W N 794.

(23) *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya*, (1883) 7 Bom 323 (328): 7 Ind Jur 613; *Srinivasachariar* v. *Raghavachariar*, (1900) 23 Mad 28 (32): 7 Mad L Jour 281; *Krishnamacharlu* v. *Appan Govinda*, (1917) 42 Ind Cas 275 (278, 279) Mad; *Maharaj Bahadur* v. *Gandauri Singh*, (1917) 39 Ind Cas 868 (879, 880): 2 Pat L Jour 323: 2 Pat L W 282; *Hukumchand* v. *Ran Bahadur Singh*, (1919) 53 Ind Cas 833 (847): 1919 Pat H C C 805: 4 Pat L Jour 580; *D'Cruz* v. *D'Silva*, (1909) 1 Ind Cas 995 (997): 32 Mad 131; *A Munisami Chetty* v. *A Murugappa Chetty*, (1910) 5 Ind Cas 515 (516): 7 Mad L Tim 45 [Suit for pure declaration held not maintainable by the worshippers at temple].

(24) *Rangaswami Naidu* v. *Krishnaswami*, 1923 Mad 276 (277): 44 Mad L Jour 116: 17 Mad L W 147: 1923 Mad W N 84: 32 Mad L Tim 133: 71 Ind Cas 463; *Noor Muhammad* v. *Karima Bibi*, (1914) 25 Ind Cas 559 (559): 16 Mad

larly, where a suit is barred under the provisions of any law, it cannot be maintained merely because it is on behalf of numerous persons within O. 1, R. 8. Thus S. 92 (2) forbids suits in relation to public charitable and religious trusts otherwise than under the section, where the relief claimed is covered by the section.[25] Where, however, S. 92 does not cover the case, the suit may be brought under O. 1, R. 8 although it relates to a public trust.[26]

9. Representative suit for damages not maintainable.—No representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff.[1] In such a case the plaintiffs cannot be deemed to have the "same interest" in the suit. Hence, O. 1, R. 8 does not enable a representative action for damages in respect of defamation to be brought on behalf of a number of persons.[2]

10. With the permission of the Court.—As a matter of *procedure*, the Court ought to insist on the permission prescribed by R. 8 being obtained before a matter is allowed to be fought out in a representative capacity.[1] If, in such a case, the plaintiff refuses to amend the plaint after being required to do so, the suit should be dismissed.[2] But an objection on the ground of want of permission cannot be raised for the first time in appeal.[3] At any rate, when objection is taken before the appellate Court, the suit should not be dismissed but should be remanded for the procedure provided by this rule being followed.[4]

Permission under the rule, obtained in the trial Court enures for the appellate Court also and no fresh permission is necessary in respect of the appellate Court.[5]

L Tim 165: 27 Mad L Jour 270; *Dasondhay* v. *Mohammad Abu Nasar*, (1911) 11 Ind Cas 36 (37): 8 All L J 710: 33 All 660; *Maulavi Md Fahimul* v. *Jagat Ballav Ghosh*, 1923 Pat 475 (477): 2 Pat 391: 4 Pat L Tim 675: 74 Ind Cas 403 [The mutwali himself is the offender or if he is unwilling to act, the beneficiary must have the power to recover the property]. See also *Ambalavana Desigar* v. *Bappu Row Jagadap*, (1899) 9 Mad L Jour 93 (97).

(25) *Vadalamudi Sastrulu* v. *Venkataseshayya*, 1928 Mad 614 (620): 110 Ind Cas 894 [Suit for appointment of proper trustee]; *Veeraraghava* v. *Parthasarathy*, 1925 Mad 1070 (1071, 1072): 1925 Mad W N 505; *Sukhdeo Prosad* v. *Gopal Misra*, (1916) 36 Ind Cas 976 (977, 979) Pat. [Suit for removal of trustee]. See also *MacMochi* v. *Lee Chin*, (1905) 9 Cal W N 594 (596).

(26) *Ashraf Ali* v. *Md Nurojama*, (1919) 49 Ind Cas 355 (356): 23 Cal W N 115 Cal; *Madhav Rao* v. *Shri Omkareshvar Ghat*, 1929 Bom 153 (155, 156): 31 Bom L R 192: 119 Ind Cas 775; *Manuti Ram Rao* v. *Sri Gopal*, (1932) 34 Bom L R 415 (419, 421): 1932 Bom 305.

Note 9.

(1) *Jenkins* v. *John Bull Ltd*, (1910) The Times, April 20 [Per Fletcher Moulton, L J].

(2) *Gidney* v. *Anglo-Indian and Domiciled European Association*, 1930 Rang 177 (181): 8 Rang 250.

Note 10.

(1) *Govind Ram* v. *Gokul*, 1929 All 806 (807): 1930 All L J 197; *Sheo Tahal Das* v. *Syed Husain*, 1888 All W N 156 (157); *Sheikh Chedi* v. *Dy. Commissioner, Bahraich*, (1900) 3 Oudh Cas 351 (356); *Sharuddin* v. *Jyaruddin*, (1917) 42 Ind Cas 543 (544) Cal; *Ranganayaki Amma* v. *Jagayya*, 1927 Mad 666 (666): 101 Ind Cas 375; *Lutifunnissa* v. *Nazirun Bibi*, (1885) 11 Cal 33 (36, 37); *Raghava* v. *Rajaratnam*, (1891) 14 Mad 57 (60); *Thanakoti* v. *Muniappa*, (1885) 8 Mad 496 (497); *Harbans Narain Singh* v. *Bhajoo Nonia*, (1919) 49 Ind Cas 796 (797, 798) Pat; *Gobardhan Missir* v. *Shama Kant Lall*, 1928 Pat 205 (208): 7 Pat 197: 9 Pat L Tim 113: 108 Ind Cas 330; *Puramathan* v. *Sankara*, (1900) 23 Mad 82 (84).

(2) *Nityanand* v. *Mohindro Kristo*, (1894) 21 Cal 181 (N); *Geereeballa* v. *Chunder Kant*, (1885) 11 Cal 213 (218); *Oriental Bank Co* v. *Gobind Lal*, (1883) 9 Cal 604 (608): 13 Cal L Rep 142; *Jan Ali* v. *Ramnath Mundul*, (1882) 8 Cal 32 (41): 9 Cal L Rep 433.

(3) *Pokhar Das* v. *Rijhu Ram*, 1921 Lah 76 (77): 3 Lah L Jour 384: 62 Ind Cas 888; *Secretary of State* v. *Mathura Bai*, (1890) 14 Bom 213 (218); *Ranganayyakama* v. *Maddi Jagayya*, 1927 Mad 666 (667) [Objection first raised in second appeal]: 101 Ind Cas 375; *Dilawar Husain* v. *Subhan Khan*, 1931 Oudh 375 (377): 8 Oudh W N 722.

(4) *Hira Lal* v. *Bhairon*, (1883) 5 All 602 (604): 1883 All W N 155 [Per Stuart, C J].

(5) *Ram Dyal* v. *Raju Shah*, (1919) 51 Ind Cas 437 (438): 46 Pun Re 1919 Lah; *Ismail Munshi* v. *Niamet Khan*, 1927 Cal 608 (610): 101 Ind Cas 738.

O. 1, R. 8, Notes 10—14.

The Court should exercise a judicial discretion in granting permission to a person to sue in a representative capacity under the rule.[6]

11. At what stage of suit permission is to be granted.—The proper course is to obtain permission before the suit is instituted. But the permission may be granted even *after* the institution of the suit,[1] and even though it had been refused on a previous occasion.[2]

12. Form of permission.—The permission under the rule need not be *express*. It may be gathered from the proceedings of the Court in which the suit was instituted.[1] The *dictum* of Stuart, C. J. to the contrary in the undermentioned case[2] is not good law. See the undermentioned case[3] where it was held on the language of the Court's order that permission was not given. Permission under the rule must be to definitely named persons.[4]

13. Who may apply for permission.—Where a suit is brought *by* certain persons.

(1) on behalf of themselves and as representing others or

(2) *against* certain persons on behalf of themselves and as representing others,

the application for permission should be made by the plaintiff.[1] But where a suit against a number of persons is sought to be *defended* by one of them, the application should generally be made by the defendant who seeks to defend on behalf of all. The persons to whom permission has been granted under the rule *must act together*. If permission is granted to a certain number of persons and some of them do not join in the suit, the remaining persons alone cannot avail themselves of the permission and sue.[1-a]

14. May be sued.—Where the inhabitants of a village claim a right of way over plaintiff's land the plaintiff with the Court's permission, may sue one or more of them on behalf of all, to negative the right.[1] The consent

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(6) *Bhicoobi* v. *Hariba Raghuji*, (1917) 42 Ind Cas 9 (17): 19 Bom L R 650: 42 Bom 556; *Kali Kanta* v. *Gouri Prosad*, (1890) 17 Cal 906 (910); *Gafuralli* v. *Mohiddin*, 1932 Bom 65 (66): 33 Bom L R 1575: 135 Ind Cas 806 [Permission granted by predecessor cannot be revoked by succeeding Judge in final judgment].

Note 11.

(1) *Baldeo Bharathi* v. *Bir Gir*, (1900) 22 All 269 (270): 1900 All W N 69; *Fernandez* v. *Rodriguez*, (1897) 21 Bom 784 (785, 786) F B; *Chennu* v. *Krishnan*, (1902) 25 Mad 399 (401); *Amed Ali* v. *Abdul Majid*, (1917) 39 Ind Cas 773 (774): 44 Ind Cas 258: 21 Cal W N 1144; *Maung Wa* v. *Maung Cheik*, 1927 Rang 134 (134): 6 Bur L Jour 16: 101 Ind Cas 200; *Nariman* v. *Municipal Corporation, Bombay*, 1923 Bom 305 (320): 25 Bom L R 689: 47 Bom 809: 83 Ind Cas 856; *Andi Moopan* v. *Muthuvirama Reddy*, (1915) 29 Ind Cas 248 (250): 17 Mad L Tim 453: 29 Mad L Jour 91.

(2) *Chennu Menon* v. *Krishnan*, (1902) 25 Mad 399 (401).

Note 12.

(1) *Mukh Lal* v. *Jagadeo Tewari*, (1908) 35 Cal 1021 (1022); *Dasondhay* v. *Muhammad*, (1911) 11 Ind Cas 36 (37): 8 All L J 710: 33 All 660; *Dhunpat* v. *Paresh Nath*, (1894) 21 Cal 180 (188); *Kalu Khobir* v. *Jan Meah*, (1902) 29 Cal 100 (108); *Muhammad* v. *Kunhi Kutti Ali*, 1929 Mad 451 (452): 1928 Mad W N 867: 117 Ind Cas 725; *Krishna* v. *Atul*, 1924 Cal 998 (1001): 39 Cal L Jour 612: 84 Ind Cas 79; *Ismail Munshi* v. *Niamat Khan*, 1927 Cal 608 (611): 101 Ind Cas 738; *Sekhar Ali* v. *Anu Manjhi*, (1910) 6 Ind Cas 46 (47) Cal: 51 Mad 128 F B; *Lal Mohan* v. *Ram Lakhmi*, 1932 Cal 271 (274): 35 Cal W N 1203: 59 Cal 636: 137 Ind Cas 46.

(2) *Hira Lal* v. *Bhairon*, (1883) 5 All 602 (604): 1883 All W N 155. See also *Nityanand* v. *Mohendro Kristo*, (1894) 21 Cal 181 (N 2).

(3) *Raghava* v. *Rajaratnam*, (1891) 14 Mad 57 (60, 61).

(4) *Kali Kanta* v. *Gouri Prosad*, (1890) 17 Cal 906 (911).

Note 13.

(1) *Gian Singh* v. *Managing Committee*, (1932) 33 Pun L R 221 (222) [Court acting under O 1, R 8 without application—Procedure irregular].

(1-a) *Abdul Hakim* v. *Abdul Gani*, 1925 Cal 547 (548, 551): 80 Ind Cas 26.

Note 14.

(1) *Chuni Lal* v. *Ram Kishen*, (1888) 15 Cal 460 (465, 466): 12 Ind Jur 425 F B.

of the defendant on the record is not necessary to enable the Court to permit the plaintiff to sue the defendant as representing the whole community.[2]

O. 1, R. 8, Notes 14—17.

15. "May defend".—This clause comes into operation when the plaintiff has impleaded all the persons interested as defendants, and one of them wishes to defend on behalf of all other defendants. In such a case the Court may permit him to so defend the suit on behalf of all.

16. Notice of the institution of the suit.—The provision as to the issue of notice of the institution of the suit, is a peremptory one.[1] But it is the duty of the *Court* to issue such notice[2] and a suit cannot therefore be dismissed for failure of the party to move the Court to perform the duties imposed on it by the section.[3] The notice may be given whenever, the defect is pointed out. If the defect is noticed by the appellate Court, the suit may be remanded for the notice being given.[4]

We have seen in Note 12 *ante* that the permission under the rule need not be *express* but may be *inferred* from the proceedings. In some of such cases, obviously, notice of the institution of the suit could not have been given. The absence of notice therefore could not affect the *representative character* of the suit, if in point of *substance* it was a representative one. This is the view of the Madras High Court.[5] It has however been held by the High Court of Patna that when notice is not given as required by this rule, the suit is not a representative one and that the decree will bind only the parties actually on the record.[6]

A notice under the rule should specify the names of the persons to whom permission is to be given, so that the persons interested may have an opportunity of knowing who have been selected to represent them.[7] But the non-specification of the names is not necessarily fatal to the suit.[8] At any rate, the decree in the suit will always bind the persons who actually take part in the suit.[9]

17. Title of suit.—Where a suit is brought by or against persons in a representative capacity the fact should be stated not only in the plaint (*See*

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(2) *Ambalam Pakheya Udayan* v. *J M Bathe*, (1912) 13 Ind Cas 599 (602): 1912 Mad W N 152: 24 Mad L Jour 630: 36 Mad 418 Mad; *Ismail Munshi* v. *Niamet Khan*, 1927 Cal 608 (610): 101 Ind Cas 738 [Permission may be granted though defendant on record objects].

Note 16.

(1) *Nariman* v. *Municipal Corporation, Bombay*, 1923 Bom 305 (319): 25 Bom L R 689: 47 Bom 809: 83 Ind Cas 856; *Shyam Lal* v. *Mt Lalli*, 1922 All 16 (17): 44 All 231: 20 All L J 73: 65 Ind Cas 259; *Abdul Hakim* v. *Abdul Ghani*, 1925 Cal 547 (551): 80 Ind Cas 26.

(2) *Mukh Lal* v. *Jagdeo Tewari*, (1908) 35 Cal 1021 (1022); *Abdul Hakim* v. *Abdul Ghani*, 1925 Cal 547 (551): 80 Ind Cas 26.

(3) See the cases cited in foot-note (2) above and also *Shyam Lal* v. *Mt Lalli*, 1922 All 16 (17): 44 All 231: 20 All L J 73: 65 Ind Cas 259.

(4) *Shyam Lal* v. *Mt Lalli*, 1922 All 16 (17): 44 All 231: 20 All L J 73: 65 Ind Cas 259.

(5) *Sonachalam* v. *Kumaravelu*, 1928 Mad 77 (89): 54 Mad L Jour 8: 27 Mad L W 216: 51 Mad 128: 107 Ind Cas 625 F B; *Sonachalam* v. *Kumaravelu*, 1928 Mad 445 (447): 54 Mad L Jour 587: 27 Mad L W 769: 109 Ind Cas 199.

(6) *Gobardhan* v. *Shamakhant Lal*, 1928 Pat 205 (208): 7 Pat 197: 9 Pat L Tim 113: 108 Ind Cas 330.

(7) *Ismail Munshi* v. *Niamat Khan*, 1927 Cal 608 (611): 101 Ind Cas 738; *Kali Kanta* v. *Gouri Prosad*, (1890) 17 Cal 906 (911).

(8) *Ekhar Ali* v. *Anumanjhi*, (1910) 6 Ind Cas 46 (47) Cal.

(9) *Ismail Munshi* v. *Niamat Khan*, 1927 Cal 608 (611): 101 Ind Cas 738.

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O. 1, R. 8, Notes 17—21.

O. 7, R. 4) but also in the title of the suit.[1] *See also* Appendix A forms 1 and 2. But the suit may be a representative one though the cause title may not show it. In India the *substance* and not the form of pleadings should be considered.[2]

18. Addition of parties.—The effect of an order under the rule is that the parties who have obtained permission to sue as representatives have the conduct of the suit on behalf of all those they purport to represent. Sub-rule 2 provides that any person on whose behalf a suit is instituted or defended under sub-Rule 1 may apply to the Court to be added as a party to the suit.[1] Such a person must show that the conduct of the suit is not in proper hands and that his interests will be seriously affected to his prejudice if he is not joined as a party. The reason is that there is considerable delay caused by a fresh party coming in and the costs of other parties are consequently increased.[2] The application must also be made without unnecessary delay.[3]

19. Suit in the name of wrong plaintiff.—Under O. 1, R. 10, sub-Rule 1, where through a *bona fide* mistake, a suit has been instituted in the name of a wrong person as plaintiff, the Court can allow any other person to be substituted as plaintiff. Suppose, *A* describing himself as a creditor of *B* sues on behalf of himself and the other creditors of *B* and it turns out that *A* is not a creditor of *B*. *A* cannot continue the suit, as O. 1, R. 8 presupposes a community of interest between the plaintiff and the other persons he is allowed to represent. But can *C*, who is an admitted creditor of *B* be substituted for *A* under O. 1, R. 10, sub-Rule 1 in such circumstances? It is conceived that he can.[1] There is nothing in O. 1, R. 10 or R. 8 to exclude the application of Rule 10 to cases arising under R. 8.

20. Addition of parties after decree.—Where in a suit under this rule, the plaintiffs on the record neglect to execute the decree in their favour, the Court may add other persons as parties to enable them to execute the decree.[1]

21. Decree in a representative suit.—Where a person sues or is sued on behalf of himself and as representing others, it is called a representative suit. To such a suit Explanation VI of S. 11 applies and a decree passed in such a suit enures to the benefit of, or binds, all the persons so represented in the suit, although they are not *actually* parties on the record.[1] A representative suit is not

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Note 17.

(1) Re *Totenham*, (1896) 1 Ch 628.

(2) *Sonachalam* v. *Kumaravelu*, 1928 Mad 77 (87): 54 Mad L Jour 8: 27 Mad L W 216: 51 Mad 128: 107 Ind Cas 625 F B.

Note 18.

(1) *Dhuncooverbhai* v. *Advocate-General*, (1899) 1 Bom L R 743 (745); *Gafur Alli* v. *Mahiddin*, 1932 Bom 65 (66): 33 Bom L R 1575: 135 Ind Cas 806.

(2) *Vasani Tricanji* v. *Ismailbhai Sheoji*, (1909) 4 Ind Cas 130 (130): 11 Bom L R 1054: 34 Bom 420.

(3) *Conyware* v. *Lewis*, (1883) 48 L J 527.

Note 19.

(1) *Krishna Aiyar* v. *Pachiappa Chetty*, 1924 Mad 883 (884): 47 Mad L Jour 540: 1924 Mad W N 522: 82 Ind Cas 492 [It was, however, held in this case that no *bona fides* was proved and the substitution was therefore refused].

Note 20.

(1) *Swaminatha Mudaliar* v. *Kumarasami Chettiar*, 1923 Mad 472 (473): 44 Mad L Jour 282: 17 Mad L W 422: 32 Mad L Tim 212: 1923 Mad W N 239: 72 Ind Cas 284.

Note 21.

(1) *Srinivasachariar* v. *Raghavachariar*, (1900) 23 Mad 28 (32): 7 Mad L Jour 281; *Subbanna*

confined to suits brought under O. 1, R. 8.[2] It includes cases where, under the *substantive* law certain persons are entitled by virtue of their position to sue on behalf of themselves and others, *e.g.*, the manager of a joint Hindu family[3] and the Karnavan of a Malabar Tarwad.[4]

O. 1, R. 8, Notes 21—22.

A decision in a representative suit under this rule, as in any other case, operates as *res judicata* only when it is given on the *merits*[5] and only so far as the rights litigated are *common* to the person suing or being sued and those whom he represents.[6] Further it can bind the persons represented only with respect to their *property* which the person suing or sued represented, although the parties on *record* may be personally liable. Hence, a decree for injunction which can only be enforced through the personal obedience of the defendant is not binding on the persons who were not parties actually on the record but against whom a representative suit was filed.[7]

If the alleged common right in a representative suit under this rule is negatived, the suit should be dismissed; the Court cannot, in such a suit declare the rights of individuals as distinguished from the rights of the class of persons on whose behalf the suit is brought[8] though it is open to pass a decree in favour of persons forming a smaller number out of a larger class.[9]

Where a suit is not a representative one, Explanation VI to S. 11 does not apply and the decree cannot bind any one who is not a party to it.[10]

22. Costs in representative suit.—Under S. 35 of the Code, the costs of all suits are within the discretion of the Court and the Court can determine by whom or out of what property the costs are to be paid. As a general rule only parties on the record are liable to pay costs. (*See* S. 35

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v. *Bayamma*, 1925 Mad 640 (644): 21 Mad L W 300: 86 Ind Cas 498; *Shankarlal* v. *Dakor Temple Committee*, 1926 Bom 179 (183): 28 Bom L R 309: 94 Ind Cas 47; *Anandrav Bhikajiphadke* v. *Shankar Daji Charya*, (1883) 7 Bom 323 (328): 7 Ind Jur 613; *Ismail Munshi* v. *Niamat Khan*, 1927 Cal 608 (610): 101 Ind Cas 738 [Defendant may be sued in a representative capacity though he does not state in his written statement that he is appearing in a representative capacity]. See also *Khaji Sayyid Yusuf Sahib* v. *Ediga Narasimhappa*, (1918) 44 Ind Cas 367 (368): 1918 Mad W N 175: 8 Mad L W 377: 51 Mad 128 F B.

(2) *Godimella Rangamma* v. *Panchangam Narasimhacharyulu*, (1916) 35 Ind Cas 116 (119, 120): 31 Mad L Jour 26: (1916) 2 Mad W N 258.

(3) *Sheikh Ibrahim* v. *Rama Iyer*, (1911) 10 Ind Cas 874 (878): 21 Mad L Jour 508: (1911) 1 Mad W N 442: 35 Mad 685; *Ramayya* v. *Venkataratnam*, (1894) 17 Mad 122 (126): 4 Mad L Jour 52.

(4) *Vasudevan* v. *Sankaran*, (1897) 20 Mad 129 (139): 7 Mad L Jour 102 F B; *Olayat Govinda* v. *Damodaran*, (1910) 8 Ind Cas 485 (486): 9 Mad L Tim 108; *Varanakot* v. *Varanakot*, (1878-80) 2 Mad 328 (331, 333): 5 Ind Jur 248. The contrary view taken in the following cases does not seem to be good law:—*Moideen Kutti* v. *Krishnan*, (1887) 10 Mad 322 (330): *E Kombi Achen* v. *K Lakshmi Amma*, (1882) 5 Mad 201 (206); *K Vasudevan Nambudri* v. *Narayanan Nambudri*, (1888) 6 Mad 121 (125): 7 Ind Jur 131; *M M Gopalan Nayar* v. *K V Tamburatti*, (1884) 7 Mad 87 (88). Compare also *Ittiachan* v. *Velappan*, (1885) 8 Mad 484 (487); *Sri Devi* v. *Kelu Eradi*, (1887) 10 Mad 79 (84); *Sankaran* v. *Parvathi*, (1889) 12 Mad 434 (437); *Komappan Nambiar* v. *Ukkaran Nambiar*, (1894) 17 Mad 214 (215): 4 Mad L Jour 3.

(5) *Bhikna* v. *Rahmatullah*, (1909) 2 Ind Cas 622 (623) All.

(6) *Mt Khursaidi Begam* v. *Secretary of State*, 1926 Pat 321 (324): 1926 Pat H C C 145: 94 Ind Cas 433: 5 Pat 539: 7 Pat L Tim 679.

(7) *Sahib Thambi* v. *Hamid*, (1911) 12 Ind Cas 1006 (1007): (1911) 2 Mad W N 534: 22 Mad L Jour 109: 10 Mad L Tim 515: 36 Mad 414; *Srinivasa* v. *Arayar Srinivasachariar*, (1906) 33 Mad 483 (484): 1910 Mad W N 479: 20 Mad L Jour 546: 6 Ind Cas 229: 8 Mad L Tim 33; *Sadagopachari* v. *Krishnamachari*, (1889) 12 Mad 356 (365).

(8) *Krishnamacharlu* v. *Appan Govinda Ramanuja*, (1917) 42 Ind Cas 275 (279) Mad.

(9) *Srinivasa Thathachariar* v. *Srinivasa Aiyangar*, (1899) 9 Mad L Jour 355 (361).

(10) *Abdur Rahim* v. *Abu Md Barkat Ali*, 1928 P C 16 (20): 9 Pat L Tim 65: 32 Cal W N 482: 27 Mad L W 339: 55 Ind App 96: 26 All L J 464: 54 Mad L Jour 609: 108 Ind Cas 361: 30 Bom L R 774: 55 Cal 519: 48 Cal L Jour 55: 1928 Mad W N 926 P C; *Maratti Moosa* v. *Nampotan Kandri*, (1910) 8 Ind Cas 129 (130): 8 Mad L Tim 445 [Plaintiff expressly refusing to recognise certain persons as members of the class he professes to represent—Latter are not bound by decree against plaintiff].

O. 1, R. 8, Notes 22–24.

Note 9). This rule applies also to representative suits. Hence, in such suits, as a general rule, costs should be awarded only against parties on the record but not against other persons whom the parties on the record may represent.[1] But this is not an inflexible rule. In exceptional cases, costs may be ordered to be paid even by persons who are not parties on the record but on whose behalf, or for whose benefit, the suit has been brought or defended. The Court may also, in a fit case, direct the costs to be paid out of any property which may belong to the community represented in the action. In any case, great caution is necessary in making an order as to costs in a representative suit.[2] In the undermentioned case[3] the next friend of a minor plaintiff in a representative suit was ordered to pay the costs.

23. Compromise of representative suit.—It was held in the undermentioned case[1] following the English case of *Jenkins* v. *Robertson*[2] that persons instituting a suit on behalf of the public (*c.g.*, a suit under S. 92, C. P. C.) have no right to bind the public by a compromise decree. In a recent case of the Privy Council, however, their Lordships left it open whether the law in India under S. 11, Civil Procedure Code is the same as that stated above.[3] They have, however, indicated that *Jenkins* v. *Roberts* was based on Scotch Law and had been explained in Re *South American and Mexicon Co.*, [(1895) 1 Ch. 37]. But in a representative suit under O. 1, R. 8, the representative is *dominus litis* until judgment and he can therefore discontinue or compromise the suit.[4]

24. Abatement of suits and appeals.—*A* sues on behalf of himself and numerous other persons under O. 1, R. 8. *A* dies pending the suit. Does the suit abate? No.[1] The reason is twofold: *firstly* the persons represented are not the "legal representatives" of the deceased plaintiff within the meaning

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Note 22.

(1) *Sajedur* v. *Baidya Nath*, (1896) 1 Cal W N 65 (67).

(2) *Bhicoobai* v. *Hariba Raghuji*, (1917) 42 Ind Cas 9 (17): 9 Bom L R 650: 42 Bom 556.

(3) *Geereebala* v. *Chunder Kant*, (1885) 11 Cal 213 (219).

Note 23.

(1) *Sundarambal* v. *Yogavana Gurukal*, (1914) 23 Ind Cas 72 (80): 26 Mad L Jour 315: 1914 Mad W N 286: 1 Mad L W 276.

(2) (1908) 2 Ch 652.

(3) *Abdur Rahim* v. *Abu Md Barkat Ali*, 1928 P C 16 (20): 9 Pat L Tim 65: 32 Cal W N 482: 27 Mad L W 339: 55 Ind App 96: 26 All L J 464: 54 Mad L Jour 609: 108 Ind Cas 361: 30 Bom L R 774: 55 Cal 519: 48 Cal L Jour 55: 1928 Mad W N 926 P C.

(4) *Krishnamachariar* v. *Chinnammal*, (1913) 18 Ind Cas 369 (370): 24 Mad L Jour 192: 13 Mad L Tim 151: 1913 Mad W N 194; *Sivagurunatha Chettiar* v. *Ramasami Iyengar*, (1912) 15 Ind Cas 399 (401): 11 Mad L Tim 257: 1912 Mad W N 105.

Note 24.

(1) *Sivagurunatha* v. *Ramasami*, (1912) 15 Ind Cas 399 (401, 402): 11 Mad L Tim 257: 1912 Mad W N 105; *Muhomed* v. *Kunhi Kutti Ali*, 1929 Mad 451 (453): 1928 Mad W N 867: 117 Ind Cas 725; *Kanni Rowther* v. *Naina Mahomed Rowther*, 1931 Mad 590 (591): 33 Mad L W 604: 60 Mad L Jour 659: 132 Ind Cas 289: 54 Mad 770; *Venkatakrishna* v. *Srinivasacharlar*, 1931 Mad 452 (454): 1931 Mad W N 353: 130 Ind Cas 761: 34 Mad L W 214: 54 Mad 527: 61 Mad L Jour 135 [Death of representative *appellant*]; *Balu* v. *Ram Rikh*, 1930 Lah 282 (283): 120 Ind Cas 548; *Venkatanarayana Pillai* v. *Subbammal*, (1915) 29 Ind Cas 298 (300, 301): 17 Mad L Tim 435: 28 Mad L Jour 535: 17 Bom L R 468: 19 Cal W N 641: 2 Mad L W 596: 38 Mad 406: 1915 Mad W N 555: 21 Cal L Jour 515: 42 Ind App 125 P C [Suit by Hindu reversioner]; *Krishnaswami* v. *Seethalakshmi*, (1919) 49 Ind Cas 268 (270, 272): 1918 Mad W N 888: 9 Mad L W 166: 25 Mad L Tim 116, (Do.); *Ram Din* v. *Raj Rani*, (1912) 17 Ind Cas 101 (105): 8 Nag L R 113, (Do.); *Raja Anand Rao* v. *Ramdas Daduram*, 1921 P C 123 (124): 48 Cal 493: 25 Cal W N 794: 13 Mad L W 318: 1921 Mad W N 24: 30 Mad L Tim 194: 17 Nag L R 37: 62 Ind Cas 737: 48 Ind App 12 P C [Suit under S 92 of the Code]; *Parameswaram* v. *Narayanan*, (1916) 34 Ind Cas 384 (385): 3 Mad L W 305: (1916) 1 Mad W N 402: 31 Mad L Jour 279: 40 Mad 110; *Ram Gopal* v. *Har Kishen*, 1925 Lah 598 (598): 7 Lah L Jour 517: 88 Ind Cas 478: 26 Pun L R 732. But see *Kuhda Baksh* v. *Ahmad*, 1930 Lah 18 (19): 120 Ind Cas 794 [Case seems to assume that the suit will abate if the representatives are

O. 1, R. 8, Note 24.

of S. 2 (11) of the Code and O. 22, R. 3 does not apply to such a case;[2] *secondly* the persons represented *are already parties to the suit constructively* though the conduct of the suit is in the hands of a particular person to whom leave has been given, and any one of such persons can continue the suit after the plaintiff's death.[3] The application to continue the suit should be made under O. 1, R. 8, sub-Rule 2[4] or O. 1, R. 10, sub-Rule 2.[5] No period is fixed within which such application should be made, but the High Court of Madras expressed an opinion in the undermentioned case[6] that such an application will be governed by Art. 181 of the Limitation Act. Suppose now that *A* sues *B* on behalf of himself and numerous other persons and a decree is passed in favour of *A*. *B* appeals and, during the pendency of the appeal, one of the persons represented by *A* dies, and his legal representatives are not brought on the record. Does the appeal abate? No.[7] The reason is, that the principle of the abatement of a suit by the death of a party has no application where the deceased was not a party to the suit *eo nomine*. Where the *suit as brought* is not a representative one, there is a difference of opinion in the Lahore High Court as to whether the fact that, in appeal, some respondents are allowed to represent others will not prevent abatement on the death of the persons so represented. One set of cases hold that it will not.[8] The other that it will.[8-a] In the following case[8-b] forty persons instituted a suit against *A*. All the forty persons joined as plaintiffs and the suit was not brought in a representative capacity. A decree was passed in favour of the plaintiffs. *A* appealed from the decree, but obtained permission from the Court that the appeal should be defended by four out of the forty decree-holders in the lower Court. Pending the appeal, some of the decree-holders, other than the four selected to defend

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not brought on record within the prescribed period. This view cannot be accepted as correct].

(2) *Muhammad* v. *Kunhi Kutti Ali*, 1929 Mad 451 (451): 1928 Mad W N 867: 117 Ind Cas 725; *Parameswaram* v. *Narayanan*, (1916) 34 Ind Cas 384 (385): 3 Mad L W 305: (1916) 1 Mad W N 402: 31 Mad L Jour 279: 40 Mad 110; *Venkatanarayana Pillai* v. *Subbammal*, (1915) 29 Ind Cas 298 (300): 17 Mad L Tim 435: 28 Mad L Jour 535: 17 Bom L R 468: 19 Cal W N 641: 2 Mad L W 596: 38 Mad 406: 1915 Mad W N 555: 21 Cal L Jour 515: 42 Ind App 125 P C; *Sivagurunatha Chettiar* v. *Ramaswami Iyengar*, (1912) 15 Ind Cas 399 (401): 11 Mad L Tim 257: 1912 Mad W N 105.

(3) *Parameswaram* v. *Narayanan*, (1916) 34 Ind Cas 384 (385): 3 Mad L W 305: (1916) 1 Mad W N 402: 31 Mad L Jour 279: 40 Mad 110; *Krishnaswami Iyer* v. *Seethalakshmi Ammal*, (1919) 49 Ind Cas 268 (270): 1918 Mad W N 888: 9 Mad L W 166: 25 Mad L Tim 116; *Venkatanarayana Pillai* v. *Subbammal*, (1915) 29 Ind Cas 298 (300): 17 Mad L Tim 435: 28 Mad L Jour 535: 17 Bom L R 468: 19 Cal W N 641: 2 Mad L W 596: 38 Mad 406: 1915 Mad W N 555: 21 Cal L Jour 515: 42 Ind App 125 P C.

(4) *Krishnaswami Iyer* v. *Seethalakshmi Ammal*, (1919) 49 Ind Cas 268 (272): 1918 Mad W N 888: 9 Mad L W 166: 25 Mad L Tim 116.

(5) *Parameswaram* v. *Narayanan*, (1916) 34 Ind Cas 384 (385): 3 Mad L W 305: (1916) 1 Mad W N 402: 31 Mad L Jour 279: 40 Mad 110.

(6) *Krishnaswami Iyer* v. *Seethalakshmi Ammal*, (1919) 49 Ind Cas 268 (270): 1918 Mad W N 888: 9 Mad L W 166: 25 Mad L Tim 116; *Mohamed Kanni* v. *Nainan Mohamed*, 1931 Mad 590 (591): 33 Mad L W 604: 60 Mad L Jour 659: 132 Ind Cas 289: 54 Mad 770.

(7) *Ram Dial* v. *Mohommed Raju Shah*, (1919) 51 Ind Cas 437 (438): 46 Pun Re 1919; *Udmi* v. *Hira*, (1921) 60 Ind Cas 111 (113): 1 Lah 582: 2 Lah L Jour 762; *Khuda Baksh* v. *Ahmed*, 1930 Lah 18 (19): 120 Ind Cas 794.

(8) *Samail* v. *Haji*, 1926 Lah 31 (32): 89 Ind Cas 378; *Rikhi Ram* v. *Durga Dass*, 1926 Lah 216 (216): 91 Ind Cas 558; *Wali Mahamad* v. *Mahtu*, 1925 Lah 124 (125): 5 Lah 429: 6 Lah L Jour 360: 86 Ind Cas 592; *Bhuri* v. *Khanun*, (1919) 50 Ind Cas 422 (423): 20 Pun Re 1919: 121 Pun L R 1919 [Question left open but delay in petition to bring on record legal representatives was excused]; *Md Sher Khan* v. *Ghulam Mahomed*, 1932 Lah 334 (337): 13 Lah 92: 137 Ind Cas 830, (Do.) [Lah 582 foll; 1925 Lah 124 dist].

(8-a) *Afzal-un-Nisa* v. *Fayaz-ud-Din*, 1931 Lah 610 (612): 132 Ind Cas 657 [The fact that there was no order under O 1, R 8 (1) in trial Court makes no difference]; *Mohammad Sher Khan* v. *Gulam Muhammad*, 1932 Lah 334 (337): 13 Lah 92: 137 Ind Cas 830 [1925 Lah 124, Distd.]. See also *Jatindra Mohan* v. *Rebati Mohan*, 1932 Cal 275 (282): 55 Cal L Jour 8: 138 Ind Cas 4.

(8-b) *Samail* v. *Haji*, 1926 Lah 31 (32): 89 Ind Cas 378.

O. 1, R. 8, Notes 24—25.

the appeal, died. *A* failed to bring on record their legal representatives within the period of limitation. *Held*, that the appeal abated under such circumstances, on the ground that all the forty persons being actually on the record as plaintiffs in the lower Court, the suit was not a *representative* suit, and that although some of the respondents may be allowed by the Court to *defend* the appeal on behalf of themselves, and others, the appellant *must* join as parties to the appeal all the persons who were actually plaintiffs on the record in the lower Court and in whose favour a decree had been passed. *A fortiori*, where, in such a case, one of the respondents selected to represent the others dies, and his legal representatives are not brought on the record within the prescribed period of limitation, the appeal abates.[9]

A suit was brought against *B* as a trustee representing a temple and *C* as representing a certain community. Pending the suit *B* died and another trustee was appointed. *Held*, that the new trustee should be brought on the record, so that the idol and the temple properties might be represented in the suit.[10] As to the procedure to be adopted in cases where parties sue or are sued in a representative capacity with the permission of the Court under this rule and one or more of them die pending the suit or appeal see the case noted below.[10-a]

25. Applicability of rule to arbitration proceedings.—O. 1, R. 8 has no application to private arbitration proceedings.[1]

O. 1, R. 9. Note 1.

R. 9. [S. 31.] No suit shall be defeated by reason of the misjoinder *or non-joinder* of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Misjoinder and *non-joinder*.

[1877, S. 31, R. S. C., O. 16, R. 11. *See* S. 92, O. 1, R. 13; O. 2, R. 7.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Misjoinder of parties.
4. Misjoinder of parties and causes of action—Multifariousness.
5. Non-joinder of parties.
6. Non-joinder in mortgage suits. See O. 34, R. 1.
7. Limitation. See O. 1, R. 10.
8. Arbitration proceedings.

1. Legislative changes.—

The corresponding section of the former Code (S. 31) did not contain the expression "non-joinder". Hence there was some doubt whether the section applied to cases of

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(9) *Bagi Ram* v. *Rana*, 1901 Pun L R 160: *Mir Nawab* v. *Hardeo*, (1911) 12 Ind Cas 871 (871): 60 Pun Re 1911: 42 Pun L R 1912: 238 Pun W R 1911.

(10) *Sonachalam Pillay* v. *Kumaravelu Chettiar*, 1927 Mad 1105 (1): 38 Mad L Tim 357: 102 Ind Cas 710.

(10-a) *Venkatakrishna Reddy* v. *Srinivasachariar*, 54 Mad 527 [Per Ramesam, J.].

Note 25.

(1) *Hashmat Hussain* v. *Siddiq Hasan*, 1927 All 128 (130): 98 Ind Cas 998.

non-joinder also or was confined to cases of misjoinder alone. *See* the undermentiond cases.[1] These cases can be only of academic interest under the present Code, as the new rule makes it clear that it applies to cases of non-joinder of parties as well as of mis-joinder.

2. **Scope of the rule.**—This rule provides that no suit shall be defeated *by reason of the misjoinder or non-joinder of parties,* but that the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. There are, however, cases in which the Court cannot, under the substantive law, deal with the rights and interests of the parties *actually* before it in the absence of certain other persons. Thus the Court cannot, in a suit by a co-trustee for possession of the trust-property, grant any relief to the plaintiff in the absence of all the other co-trustees on the record.[1] The reason is that all the co-trustees together represent a *single and indivisible right* which cannot be adjudicated upon and no effective decree passed by the Court in their absence. In such a case, the necessary parties may be added under O. 1, R. 10.[2] Where they are not so added, the suit will be dismissed, not *by reason of the non-joinder of parties* but by reason of the fact that the Court *cannot, under the substantive law, grant any relief to the parties* actually on the record. O. 1, R. 9 does not affect such cases, and cannot be relied upon to dispense with the joinder of such necessary parties.[2-a]

This rule does not apply to cases where there is a misjoinder of *causes of action as well as of parties.*[3]

3. **Misjoinder of parties.**—O. 1, R. 1 deals with the question "who may be joined as *plaintiffs* in a suit". O. 1, R. 3 deals with the question "who may be joined as *defendants* in a suit". If persons are joined as plaintiffs in the same suit in any case not covered by O. 1, R. 1 there is *misjoinder of plaintiffs.* Similarly, if persons are joined as defendants to the same suit in any case not covered by O. 1, R. 3, there is a *misjoinder of defendants.*

A misjoinder of parties is not fatal to a suit.[1] Where there is a misjoinder of parties the Court has power under O. 1, R. 10 (2) to strike out the

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Order 1, Rule 9—Note 1.

(1) *Wedderman* v. *Societe Generale,* 19 Ch D 246 (251) [Applies to non-joinder also]; *Ramayya* v. *Venkataratnam,* (1894) 17 Mad 122: 4 Mad L Jour 52 [Yes]; *Mahabala* v. *Kunhana,* (1898) 21 Mad 378 (382): 8 Mad L Jour 139 [Yes]; *Faizu* v. *Doman,* (1914) 25 Ind Cas 536 (537): 19 Cal L Jour 455 [Does not apply].

Note 2.

(1) See Note 8 to O 1, R 6 and also Note 5, *infra.*

(2) *Sitaramayya* v. *Ramappaya,* (1917) 39 Ind Cas 160 (161, 162): 5 Mad L W 207 [Rules 9 and 10 of O. 1 should be construed together].

(2-a) *Parameswar Deen* v. *Chhab Nath,* 1925 Oudh 606 (607): 87 Ind Cas 904; *Gendan Lal* v. *Babu Ram,* (1912) 13 Ind Cas 197 (200): 9 All L J 86; *Nagindas and Co* v. *Moti Bhai Patel,* 58 M L J 613 [Shares were distinct].

(3) *Mohimachandra* v. *Atul Chandra,* (1897) 24 Cal 540 (543); *Ganesh Lal* v. *Khairati Singh,* (1894) 16 All 279 (282, 283): 1894 All W N 82.

Note 3.

(1) *Jiwan Singh* v. *Garbha Singh,* 1921 Jour 12 (1): 30 Pun L R 1921: 59 Ind Cas 522: 25 Pun W R 1921; *Natesa* v. *Ganapathi,* (1891) 14 Mad 103 (108); *Mg Ye* v. *Mg Aung Lha,* (1911) 12 Ind Cas 206 (207): 4 Bur L Tim 255; *Gur Prosad Singh* v. *Gur Prosad Lal,* (1914) 25 Ind Cas 438 (438): 19 Cal L Jour 316; *Shahab-ud-din* v. *Anjumani Naumania,* (1911) 10 Ind Cas 212 (214): 132 Pun L R 1911: 248 Pun W R 1911; *Nripendranath Roy* v. *Birendra Nath,* (1917) 41 Ind Cas 615 (624): 21 Cal W N 939; *Krishnappa Chetty* v. *Maung Hman,* (1913) 18 Ind Cas 181 (182): 5 Bur L Tim 234; *Alah Baksh* v. *Sadiq Ali,* 1903 Pun Re No 38: 87 Pun L R 1903; *Mt Rattan Kaur* v. *Badna,* 1899 Pun Re No 24; *Sharaf* v. *Pir Baksh,* 1893 Pun Re No 83; *Tani Mahesha* v. *Secretary of State for India in Council,* 1894 Pun Re No 67: *Khayale Singh* v. *Pitam Singh,* (1910) 8 Ind Cas 889 (889) All; *Govinda Kumar Sur* v. *Mohini Mohan Sen,* 1930 Cal 42 (46): 33 Cal W N 769: 57 Cal 349: 125 Ind Cas 726; *Sham Behari Lal* v. *Maha Prasad,* 1930 All 180 (183): 1930 All L Jour 99: 123 Ind Cas 324; *Baru Mal* v. *Radha Krishen,* 1881 Pun Re No 3; *Abdulla* v. *Wahid-un-Nissa,* (1898) 1 Oudh Cas 308 (312); *Behari Lal* v. *Kodu Ram,* (1893) 15 All 380 (381): 1893 All W N 150; *Chakuri Singh* v. *Suraj Kuar,* (1905) 2 All L J 91; *Ramsebak* v. *Ramlall Koondoo,* (1881) 6 Cal 815 (825): 8

O. 1, R. 9, Notes 3—5.

names of the persons improperly joined, and to allow the suit to be proceeded with. There is no misjoinder of plaintiffs where one of the plaintiffs is entitled to all the estate sued for and the name of another person is added as a co-plaintiff merely as a matter of extra caution.[2]

4. Misjoinder of parties and causes of action—Multifariousness.—O. 2, Rr. 3, 4 and 5 deal with joinder of causes of action. Where, in the same suit several causes of action are joined in contravention of these provisions there is a *misjoinder of causes of action*. A misjoinder of causes of action may be coupled with a misjoinder of plaintiffs or of defendants. In such a case there is *multifariousness or a misjoinder of parties and of causes of action*. As has been seen already in Note 2 above, this rule does not apply to such a case.

5. Non-joinder of parties.—The rule applies to non-joinder of parties as well as misjoinder. Hence, the failure to join any parties does not *per se* entail the dismissal of a suit.[1] But there is a distinction between the non-joinder of *necessary* parties and non-joinder of *proper* parties. Necessary parties are those in whose absence the Court cannot pass an effective decree at all. Proper parties are those whose presence is necessary in order to enable the Court to completely and adequately adjudicate on all the matters involved in the suit. (*See* Notes under O. 1, R. 10.) If the non-joinder is only of *proper* (as contrasted with necessary) parties, it can never be, in itself, fatal to the suit.[2] In such a case the Court can, under this rule, deal with the matters in controversy in so far as the parties actually before the Court are concerned,[2-a] or it may order the addition of the parties under

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Cal L Rep 457; *Sreeram Hazra* v. *Gyaram Hatee*, (1869) 11 Suth W R 507; *Janokinath* v. *Ramrunjan*, (1879) 4 Cal 949 (958): 4 Ind Jur 348; *Venkatamuniappa* v. *Godam Chandappa*, (1910) 5 Ind Cas 466 (467): 7 Mad L Tim 364.

(2) *Bachubai* v. *Shamji*, (1885) 9 Bom 536 (548); *Abdulla* v. *Wahid-un-Nissa*, (1898) 1 Oudh Cas 308.

Note 5.

(1) *Chhotey Lal* v. *Manzur Ahmad*, 1929 All 439 (440): 116 Ind Cas 813; *Kedar Nath* v. *Amrit Mandal*, 1925 Pat 568 (575): 1925 P H C C 170: 88 Ind Cas 676; *Parmeshwar* v. *Raj Kishore*, 1925 Pat 59 (61): 3 Pat 829: 5 Pat L Tim 646: 80 Ind Cas 34; *Gur Prosad* v. *Md Taqu*, 1921 Oudh 148 (149): 8 Oudh L J 310: 63 Ind Cas 548; *Nath Lal* v. *Lala*, (1912) 14 Ind Cas 35 (38): 9 All L J 410; *Diwan Shib Nath* v. *Alliance Bank, Simla*, (1914) 25 Ind Cas 480 (485): 110 Pun W R 1914: 215 Pun L R 1914: 3 Pun Re 1915; *Gajendra Singh* v. *Akal Koer*, (1921) 59 Ind Cas 292 (294) Pat; *Balwant* v. *Faizullah*, (1915) 31 Ind Cas 456 (457) [Court of Board of Revenue, U P]; *Veera Reddy* v. *Akka Reddy*, (1915) 28 Ind Cas 487 (487) Mad; *Mt Maryam Bibi* v. *Ram Das*, 1922 All 404 (405): 70 Ind Cas 613; *Gajendra Singh* v. *Akal Koer*, (1921) 59 Ind Cas 292 (296) Pat; *Kaji Mahomed Sheriff* v. *Yusuff Sheriff*, (1910) 5 Ind Cas 455 (456): 7 Mad L Tim 349; *Kamalapati Benerjee* v. *Bejoy Lal*, (1909) 3 Ind Cas 291 (293) Cal; *Mulji Tej Singh* v. *Ramsi Devraj*, (1910) 34 Bom 13 (20, 21): 11 Bom L R 273: 3 Ind Cas 837; *Ruchpaul* v. *Johuree*, (1866) 1 Agra 147; *Hari Bakhsh* v. *Gulab Rai*, (1891) All W N 175 (176); *Hafizunnissa* v. *Wajid*, 1881 All W N 140 (140); *Muhammad Talib* v. *Ghafurulah*, 1882 All W N 67 (67). See *Ruchpaul* v. *Johuree*, (1866) 1 Agra 147; *Manohar Kandhu* v. *Pahlad Kandu*, 1882 All W N 80 (80); *Ramanathan* v. *Arunachalam*, 1921 Mad 557 (558): 44 Mad 43: 60 Ind Cas 316: 39 Mad L Jour 474; *Gur Prosad* v. *Muhammad Taqi*, 1921 Oudh 148 (149): 8 Oudh L J 310: 63 Ind Cas 548; *Haidar Ali* v. *Shafuddin*, 1932 Cal 34 (36): 54 Cal L Jour 113: 134 Ind Cas 1068 [O 1, R 9 applies to mortgage suits also]; *Thayammal* v. *Venkatrama*, (1884) 7 Mad 401 (404): 8 Ind Jur 371 [Reversioner's suit—Non-joinder of reversioner of equal degree—No bar].

(2) *Digambar Mahton* v. *Hansraj Mahton*, 1922 Pat 96 (96): 1 Pat 361: 3 Pat L Tim 238: 67 Ind Cas 156; *Sahijram* v. *Bhambhomal*, 1930 Sind 147 (148): 124 Ind Cas 377; *Ram Dei Misrain* v. *Jurawan Misir*, 1930 All 762 (764): 1930 All L J 857: 128 Ind Cas 8; *Bhura* v. *Matu*, (1921) 60 Ind Cas 6 (7) Lah; *Narsinha* v. *Vaman Venkat Rao*, (1910) 34 Bom 91 (100): 11 Bom L R 1102: 4 Ind Cas 249; *Chokkalingam Chetty* v. *Periyakaruppan Chetty*, (1915) 28 Ind Cas 141 (142): 28 Mad L Jour 197; *Surja Narain* v. *Chandra Bera*, 1924 Cal 1050 (1051): 40 Cal L Jour 74: 84 Ind Cas 467; *Maryam Bibi* v. *Ram Das*, 1922 All 404 (405): 70 Ind Cas 613; *Bhagwat Kuer* v. *Jagdam Sahay*, 1922 Pat 352 (354): 3 Pat L Tim 429: 67 Ind Cas 597; *Jaydeo Singh* v. *Padarath Ahir*, (1898) 25 Cal 285 (289); *Gangaram* v. *Bapu Sahib*, 1922 Bom 354 (355): 24 Bom L R 826: 46 Bom 1022: 84 Ind Cas 508. See *Bindu Bashini* v. *Jahnavi*, (1909) 1 Ind Cas 150 (151): 13 Cal W N 303.

(2-a) *Lakhi Chowduri* v. *Akloo Jha*, (1912) 13 Ind Cas 123 (124): 16 Cal W N 639; *Babu Triloke* v. *Lala Umanand Lal*, 1922 Pat 447 (447): 72 Ind Cas 634; *Bikoo Mahton* v. *Narayan Sahoo*, 1924 Pat 303 (304): 72 Ind Cas 431; *Afzal Khan* v. *Kariman Bibi*, (1913) 20 Ind Cas 658 (659): 11 All L J 619.

O. 1, R. 10, sub-Rule 2. But in the case of *necessary* parties, the Court cannot as has already been seen in Note 2 above, decide the suit at all in their absence.[3] But even in such a case the Court cannot immediately proceed to dismiss the suit without giving an opportunity to the plaintiff to amend the plaint by adding the absent parties.[4] If, however, on being required to add a necessary party, the plaintiff refuses to do so, the suit is liable to be dismissed.[5] *See* Note 2 *ante*. O. 1, R. 9, Notes 5—8.

6. Non-joinder in mortgage suits.—*See* O. 34, R. 1

7. Limitation.—*See* O. 1, R. 10.

8. Arbitration proceedings, mis-joinder and non-joinder in.—Mis-joinder of parties and causes of action in arbitration proceedings is not an objection involving a question of jurisdiction. But it has been held by the Sind Court that if objection is taken on the ground of misjoinder and the arbitrators ignore it, the objection may be made the basis of a charge of misconduct against the arbitrators.[1]

R. 10. [Ss. 27, 32, 33.] (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit,[6] if satisfied that the O. 1, R. 10.

Suit in name of wrong plaintiff.

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(3) *Madho Ram* v. *Jagat Singh*, (1919) 52 Ind Cas 18 (19): 1 U P L R (All) 7; *Amirchand Nagindas & Co* v. *Moti Bhai*, 1930 Mad 714 (718): 58 Mad L Jour 613: 31 Mad L W 757: 130 Ind Cas 453; *Sital Prosad* v. *Asho Singh*, 1923 Pat 651 (653): 1922 Pat H C C 326: 4 Pat L Tim 698: 69 Ind Cas 677: 2 Pat 175; *Ramasray* v. *Sheonandan*, (1916) 35 Ind Cas 868 (870): 1 Pat L Jour 573: 1 Pat L W 35: 1917 Pat H C C 21; *Sanwale Singh* v. *Ganeshi Lal*, (1913) 20 Ind Cas 41 (43): 11 All L J 630: 35 All 441; *Nagorao* v. *Nago*, (1914) 24 Ind Cas 831 (832): 10 Nag L R 72; *Mukkasa Nair* v. *Secretary of State*, (1914) 24 Ind Cas 547 (559): 15 Mad L Tim 247: 1 Mad L W 307: 26 Mad L Jour 385: 1914 Mad W N 521; *Haran Sheikh* v. *Ramesh Chandra*, 1921 Cal 622 (622): 25 Cal W N 249: 62 Ind Cas 425; *Siddik Ahmed* v. *Azizar Rahman*, 1927 Cal 238 (238): 44 Cal L Jour 557: 99 Ind Cas 901; *Thakurdwara Pheru Mal of Amritsar* v. *Ishar Das*, 1928 Lah 375 (376): 9 Lah 588: 30 Pun L R 41: 110 Ind Cas 384; *Mohana Velu* v. *Annamalai*, 1923 Mad 337 (337): 17 Mad L W 241: 44 Mad L Jour 249: 1923 Mad W N 89: 72 Ind Cas 63; *Lutchmanen* v. *Siva Prokasa*, (1899) 26 Cal 349 (354): 3 Cal W N 190; *Narayan* v. *Laving*, (1877-78) 2 Bom 140 (141): 2 Ind Jur 319; *Balkrishna* v. *Moro Krishen*, (1897) 21 Bom 154 (159); *Heiniger* v. *Droz*, (1901) 25 Bom 433 (440): 3 Bom L R 1; *Kalidas* v. *Nathu*, (1883) 7 Bom 217 (220): 7 Ind Jur 428; *Durga Charan* v. *Jotindra Mohan*, (1900) 27 Cal 493 (500); *Pria Nath Das* v. *Ram Taran*, (1903) 30 Cal 811 (821): 30 Ind App 159: 7 Cal W N 601: 8 Sar 497; *Rajendranath* v. *Sheikh Mohomed*, (1882) 8 Cal 42 (50): 8 Ind App 135: 4 Sar 254: 5 Ind Jur 548 P C; *Abdul Rab* v. *Eggar*, (1908) 35 Cal 182 (184): 12 Cal W N 160.

(4) *Umri Mal* v. *Jai Gopal*, (1910) 8 Ind Cas 1047 (1047): 217 Pun L R 1910; *Maung E Maung* v. *Ma Chit May*, 1930 Rang 295 (296): 129 Ind Cas 508; *Imperial Pressing Company* v. *British Crown Assurance Corporation Ltd*, (1913) 21 Ind Cas 836 (838): 41 Cal 581; *Kedar Nath* v. *Tulshi*, (1913) 21 Ind Cas 182 (182) Oudh; *Bansidhar* v. *Raghubir*, (1911) 10 Ind Cas 737 (738): 7 Nag L R 43; *Mahabala* v. *Kunhanna*, (1898) 21 Mad 373 (382): 8 Mad L Jour 139; *Kaji Mahomed* v. *Eusuff Sheriff*, (1910) 5 Ind Cas 455 (456): 7 Mad L Tim 349 [Opportunity given in appeal].

(5) *Bhagwati Prosad* v. *Babulal*, 1921 All 411 (413): 19 All L J 525: 63 Ind Cas 548; *Rattan Chand* v. *Ram Prosad*, 1906 Pun Re No 69: 118 Pun L R 1906; 106 Pun W R 1906; *Badri Das* v. *Jawala Prasad*, 1891 Pun Re No 86 F B; *Pohlu Shah* v. *Ditta Singh*, 1901 Pun Re No 56: 94 Pun L R 1901; *Naba Kumar Hazra* v. *Radashyam*, 1931 P C 229 (231): 35 Cal W N 977: 61 Mad L Jour 294: 1931 All L J 797: 54 Cal L Jour 274: 34 Mad L W 444: 134 Ind Cas 654 P C; *Ram Sarup* v. *Musst Rikhi*, 1905 Pun Re 12: 1905 Pun L R 73: 1905 Pun W R 24; *Sitaramaya* v. *Ramappaya*, (1917) 39 Ind Cas 160 (161, 162): 5 Mad L W 207; *Shib Nath* v. *Alliance Bank*, (1914) 25 Ind Cas 480 (485): 110 Pun W R 1914: 215 Pun L R 1914: 3 Pun Re 1915; *Shanmugha* v. *Subbayya*, 1922 Mad 317 (318, 320): 15 Mad L W 283: 1922 Mad W N 106: 42 Mad L Jour 133: 31 Mad L Tim 266: 70 Ind Cas 645; *Sudhendu Mohan* v. *Durga Dasi*, (1887) 14 Cal 435 (439); *Ramsebuk* v. *Ramlal*, (1881) 6 Cal 815 (823): 8 Cal L Rep 457; *Ambika* v. *Tarini*, (1913) 19 Ind Cas 963 (963, 964): 18 Cal W N 464 [Omission to add within limitation]; *Jagat Narain* v. *Udit Narain*, (1913) 20 Ind Cas 262 (263) Cal. (Do.); *Giris Chandra Kit* v. *Ram Saran*, 1929 Cal 591 (592), (Do.).

Note 8.

(1) *Kewalram* v. *Donald Graham and Company*, (1911) 11 Ind Cas 274 (276) Sind.

O 1, R. 10. suit has been instituted through a *bona fide* mistake,[3] and that it is necessary for the determination of the real matter in dispute[4] so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just. [5]

Court may *strike out* or add parties.

(2) The Court may at any *stage of the proceedings*,[32] either upon or without the application of either party,[12] and on such terms *as may appear to* the Court *to be just*, order that the name of any party improperly joined,[31] whether as plaintiff or defendant, be struck out,[33] and that the name of any person who ought to have been joined,[13] whether as plaintiff or defendant, or whose presence before the Court may be necessary[14] in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit,[30] be added.

(3) No person shall be added as a plaintiff *suing without a next friend* or as the next friend of a plaintiff *under any disability* without his consent.[38]

Where defendant added, plaint to be amended

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons *and of the plaint* shall be served on the new defendant and, *if the Court thinks fit*, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, XV of 1877,[41] section 22, the proceedings as against *any person* added as defendant shall be deemed to have begun only on the service of *the* summons.

[1877, Ss. 27, 32, 33; R. S. C., O. 16, Rr. 2, 11, 39.]

Synopsis.

SUB-RULE (1).

1. Legislative changes.
2. Scope of the sub-Rule.
3. Bona fide mistake.
4. "Necessary for the determination of the real matter in dispute."
5. "Upon such terms as the Court thinks just."
6. At any stage of the suit.
7. Consent . . . . See Note 38, infra.
8. Limitation Act, S. 22 . . . . See Note 41, infra.

SUB-RULES (2) TO (5).

9. Legislative changes.
10. Scope and applicability of sub-Rule (2).
11. Addition of parties.
12. "Either upon or without the application of either party."
13. "Who ought to have been joined."
14. "Whose presence before the Court may be necessary."

15. Partnership suits.
16. Partition suits.
17. Pre-emption suits.
18. Suits for possession by co-owners.
19. Suits by or against joint promisees.
20. Suits for rent.
21. Suits on torts.
22. Mortgage suits. See O. 34, R. 1, infra.
23. Suits on negotiable instruments.
24. Suits for specific performance.
25. Government.
26. Suits by or against Corporations. See O. 29, R. 1.
27. Miscellaneous.
28. Addition introducing new cause of action.
29. Addition altering nature of suit.
30. "Questions involved in the suit."
31. Improper addition of plaintiff or defendant.
32. Parties may be added at any stage of the proceedings.
33. Sriking out name of party improperly joined.
34. Transposition of parties.
35. Transposing of defendant as plaintiff.
36. Transposing of plaintiff as defendant.
37. Misdescription of parties.
38. Consent of added party. Sub-Rule 3.
39. Amendment of plaint. Sub-Rule 4.
40. Suit by or against a dead person.
41. Limitation Act, S. 22.
42. Appeal.
43. Revision.

New party deemed added on service of summons. See Note 41, Pt. (14).
Substitution of plaintiff. See Note 2.
Suit by members of a Hindu family. See Note 18.
"When it is doubtful." See Note 3, Pt. (4).

SUB-RULE (1).

1. Legislative changes.—

(1) The words "with his or their consent" in S. 27 of the old Code corresponding to sub-Rule (1) of this order has been omitted.

(2) The words "at any stage of the suit" are new. *See* Note 6, *infra*.

2. Scope of the sub-rule.—This sub-rule deals with the substitution or addition of plaintiffs after an action is brought. It contemplates cases in which a suit is brought by a plaintiff, who subsequently discovers that he cannot get the full relief he seeks without the joinder of some other person as co-plaintiff, and cases, where it is found that some other person, and not the original plaintiff is entitled to the relief claimed. In the former contingency, a new party has to be *added* and in the latter, a new party has to be *substituted* as plaintiff.[1] To bring a case within this sub-Rule it must be shown that

(1) the action was commenced in the name of the original plaintiff by a *bona fide* mistake, and

(2) the substitution or addition is necessary for the determination of the real matter in dispute.

The words "if the suit is brought in the name of the wrong person as plaintiff" do not exclude altogether persons who may institute the suit

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Order 1, Rule 10—Note 2.

(1) *Charu Chandra* v. *Sarat Chandra*, (1910) 8 Ind Cas 87 (89): 12 Cal L Jour 537; *Ayscough* v. *Bullar*, (1889) 41 Ch D 341 (346) C A: 58 L J Ch 474: 60 L T 471: 37 W R 529 (C A) Cons in 25 Bom 433 (463); *Vadilal* v. *Shah Khushal*, (1903) 27 Bom 157 (161): 4 Bom L R 968; *Abdullah Beg* v. *Abdul Hasan*, (1912) 13 Ind Cas 350 (351) All.

O. 1, R. 10, Notes 2—3.

without any right to do so[2] but the case must fall within the provisions of the sub-rule. Unless, therefore, the two conditions of the sub-rule are satisfied a defendant is entitled to the dismissal of a suit brought by an unauthorised person and the defect cannot be cured by the addition or substitution of persons who might have brought the suit.[3] The right of the plaintiff to be added must be *same as the right in suit;* in other words a substitute can be added only to enforce, *the right pleaded.*[4] A Court has, therefore, no power to import into the case as co-plaintiff a person who has a *different cause of action inconsistent with that of the original plaintiff.*[5] This sub-rule does not apply to applications under O. 22, R. 3,[6] or to cases of non-joinder of *necessary* parties,[7] or to cases in which a suit has been instituted against a wrong person as defendant.[8] It applies to Revenue Courts also.[9] As to its applicability to appeals, *see* S. 107, Note 16, *ante.*

3. **Bona fide mistake.**—The first condition for the applicability of this sub-Rule is, as has been seen already in Note 2 above, that the action was commenced in the name of the original plaintiff by a *bona fide* mistake.[1]

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(2) *Krishna Boi* v. *The Collector and Government Agent, Tanjore,* (1907) 30 Mad 419 (420): 2 Mad L Tim 447; *Maggi* v. *Ma Feik,* (1903) 2 Low Bur Rul 245 (247); *Bhimanagowd* v. *Eswara Gowd,* (1919) 49 Ind Cas 139 (140): 9 Mad L W 79: 25 Mad L Tim 140: (1918) Mad W N 929 [Administration suit—Finding as to "*bona fide* mistake" need not be express]; *P T P Parappan* v. *Unni Chennan,* 1923 Mad 180 (180): 1922 Mad W N 817: 16 Mad L W 826: 69 Ind Cas 413: *Firm of Gerimal Hariram* v. *Firm of Raghunath,* 1921 Sind 59 (60): 16 Sind L R 71: 66 Ind Cas 873; See also *Brohmo Dossee* v. *Hudhoo Soodhun Ghose,* (1874) 22 Suth W R 278 (278) [Plaintiff's alleged acquisition of title from third parties not established —the third parties to be impleaded].

(3) *Rani Raghubans* v. *Hashmat Ali,* (1904) 7 Oudh Cas 78 (81); *Subbaiyar* v. *Kristnaiyer,* (1876-78) 1 Mad 383 (384): 2 Ind Jur 360; *Bhanu Tukaram Shet* v. *Kashinath Pandshet,* (1896) 20 Bom 537 (539); *Gopal Kashi* v. *Ram Bai Saheb Patvardhan,* (1875) 12 Bom H C 17 (22); *Maung Myo* v. *Mi Myit Shu,* (1892-96) Upp Bur Rul Vol II 244; *Dwarkanath Pal* v. *Giris Chunder Bundopadhya,* (1881) 6 Cal 827 (831); See also *Lulcet Pandey* v. *Byjnath Singh,* (1870) 14 Suth W R 285 (285) [Remand to decide if plaintiff has right to sue, correct, whether suit relates to moveable or immoveable]; See also *Davis* v. *Angel,* (1862) 4 De F & J 524 (529) cited in 10 Cal L Jour 263: 3 Ind Cas 178 [Future rights without present right of suit—Suit to be dismissed]; *Arur Singh* v. *Todur Mal,* (1919) 49 Ind Cas 501 (503): 1919 Pun W R 22 (Do.); *Budh Singh* v. *Niradharan,* (1905) 2 Cal L Jour 431 (436, 441) [Contingent heir to a trustee—No right of suit]; *Thuna* v. *Beni Ram,* (1887) 9 All 439 (440, 441): 1887 All W N 75 [Person having sold away his interest —No right of suit]; *Iyappa* v. *Ramalakshmamma,* (1890) 13 Mad 549 (551, 552), (Do.). But see *Kotrabassappaya* v. *Chenvirappa,* (1899) 23 Bom 375 (380). See also *Nagesur Pershad* v. *Bindeshwari,* (1915) 29 Ind Cas 402 (402) Cal [No right on date of decree impeached—No right of suit]; and *Girdharidas* v. *Pawlett,* (1878-80) 2 All 690 (694) [Political Agent of a Raj (Kota State) cannot sue on its behalf]; and *Pitamber Ratansi* v. *Jagjivan Hansraj,* (1889) 13 Bom 131 Notes (136): 13 Ind Jur 267 N [Contract with plaintiff as representative of a caste—Plaintiff ceasing to hold the office—No right of suit]; *Delhi & London Bank* v. *Kulwant Singh,* 1904 Pun Re No 16: 1904 Pun L R 46 [Son of a deceased registered share-holder to get registered as per Articles of the Company—Else no right of suit]: *Daya* v. *Param Sukh,* (1889) 11 All 104 (107, 108) [A relation of defamed person cannot sue for defamation]; *Brahmanna* v. *Ramakrishnama,* (1895) 18 Mad 250 (251, 252): 5 Mad L Jour 89, (Do.). See also *Sukkhan* v. *Biped,* (1907) 34 Cal 48 (50): 4 Cal L Jour 388, (Do.).

(4) *Fakir Muhammad* v. *Agha Khan,* 1930 Sind 73 (74): 120 Ind Cas 517; *Heiniger* v. *Droz,* (1901) 25 Bom 433 (463, 466): 3 Bom L R 1; *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur,* (1887) 14 Cal 400.

(5) *Maung Shwe* v. *Ma Pan,* (1915) 31 Ind Cas 332 (333): 8 L B R 302: 8 Bur L Tim 283.

(6) *Amalaksao* v. *Govind Rao,* (1919) 49 Ind Cas 34 (35): 15 Nag L R 21.

(7) *Relumal* v. *Chellaram,* (1907) 1 Sind L R 191.

(8) *Tulika Basavaraju* v. *Parry & Co,* (1904) 27 Mad 315 (325). See also *Mrs Fox* v. *The Secretary of State for India in Council,* 1908 Pun W R 59.

(9) *Secretary of State* v. *Raghunandan,* 3 U P L R (B R) 60 (2).

Note 3.

(1) *Gopal Das* v. *Budree Das,* (1906) 33 Cal 657 (660): 10 Cal W N 662; *V Krishna Iyer* v. *Pachiappa Chetty,* 1924 Mad 883 (884): 47 Mad L Jour 540: 1924 Mad W N 522: 82 Ind Cas 492; *Ma Gyi* v. *Ma Feik,* (1903) 2 L B R 243 (254); *Behari Lal* v. *Ram Chand,* 1907 Pun Re No 149; *Syed Hussein Ali* v. *Abdur Rahim,* (1903) 7 Cal W N 529 (531) [*Bona fide* mistake—Substitution of executors in place of heirs allowed]; *Shunmukha Chetty* v. *C K Narayanier & others,* (1916) 40 Mad 743 (744): 41 Ind Cas 510. See also *Carter* v. *Misree Lal,* (1870) 2 N W P H C 179.

The mistake may be one of fact or of law.[2] A mistake has been held to be *bona fide* where O. 1, R. 10, Note 3.

(1) It is not *deliberate* but one *honestly* made.[3]

(2) The point is doubtful.[4]

(3) The Court of first instance and the appellate Court take different views on a point on which the plaintiff's right of action depends.[5]

On the other hand, there can be no room for any *bona fide* mistake where it is *persisted in* after objection[6] or where, to *his own knowledge*, the original plaintiff has no right to sue on the date of the plaint.[7]

Illustrations.

1. *A*, the agent of *B*, files a suit in his own name by a *bona fide* mistake. The Court can, under this sub-rule, substitute the name of the principal *B* for that of the original plaintiff *A*.[8]
2. *A*, the administratrix of the estate of *B* sued on a mortgage bond in favour of *B*. She was unaware of the fact that her powers as administratrix had come to an end before the date of suit and was honestly under the impression that she had such powers. *Held*, that the person entitled to sue may be substituted for *A* under this sub-rule.[9]
3. *A* claiming title under a *tamliknama* executed in his favour by *B* sues for possession of certain properties under a *bona fide* mistake that the *tamliknama* covered that property; *held* that on discovery of the mistake, *B*, the real owner could be added as a co-plaintiff under this sub-Rule.[10]
4. *A*, the Official Assignee of Bombay was constituted the attorney of *B*, the Official Assignee of Madras, to institute a suit on the latter's behalf in Bombay. Instead of suing as "*A*, attorney of *B*" he sued as "*A*, Official Assignee of Bombay" owing to a *bona fide* mistake; *held* that the plaint could be amended by substituting "*A*, attorney of *B*" for "*A*, Official Assignee of Bombay".[11]
5. *A* instituted a suit against *B* in respect of certain properties. At the date of the suit he had already been declared to be a trespasser on that property; *held*, that *A* could not be treated as having instituted the suit by a *bona fide*

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(2) *Hugnes* v. *Pump House Hotel Co*, (1902) 2 K B 485 C A: 71 L J K B 803: 87 L T 359: 50 W R 677 (C A) cited in 12 Cal L Jour 537; *Duckett* v. *Gover*, (1877) 6 Ch D 82: 42 L J Ch 407: 25 W R 455 cited in 33 Cal 657; *Gopal Dass* v. *Budree Das*, (1906) 33 Cal 657 (660): 10 Cal W N 662; *Firm of Gerimal* v. *Firm of Raghunath*, 1921 Sind 59 (61): 16 Sind L R 71: 66 Ind Cas 873; *Charu Chunder* v. *Sarat Chundar*, (1910) 8 Ind Cas 87 (89): 12 Cal L Jour 537.

(3) *Nistarini Dassya* v. *Sarat Chandra*, (1915) 29 Ind Cas 680 (681): 22 Cal L Jour 279: 20 Cal W N 49; *Sukhdeo* v. *Yashodabai*, 1932 Nag 20 (20): 27 Nag L R 335: 135 Ind Cas 409; *Promoda Nath* v. *Kinoo Mollah*, (1909) 4 Ind Cas 495 (496): 13 Cal W N 167: 8 Cal L Jour 135 [Mistake of pleader's clerk].

(4) *The Doaba Bank* v. *Hira Lal*, (1920) 2 Lah L Jour 402; *Gusaun Mal* v. *Ram Rakha Mal*, (1919) 50 Ind Cas 128 (129) Lah [In the case of benami transfer, it is possible to have doubts as to the person entitled to sue]; *Ravji* v. *Mahadev*, (1897) 22 Bom 672 (676) [Suit filed by benamidar].

(5) *Hughes* v. *Pump House Hotel Co*, (1902) 2 K B 485 C A: 71 L J K B 803: 87 L T 359: 50 W R 677 (C A) cited in 12 Cal L Jour 537; *P T P Parappan Kidavu* v. *Karuppala Thottala Pojil Edathil, Unnichennah*, 1923 Mad 180 (180): 1922 Mad W N 817: 16 Mad L W 826: 69 Ind Cas 413.

(6) *Syed Ameer Sahib* v. *Venkatarama*, (1893) 16 Mad 296 (299).

(7) See *Muhammad Khalu Khan* v. *Saifulla Khan*, 1887 Pun Re No 91.

(8) *Jamna Das* v. *Damodar Das*, 1927 Bom 424 (426): 29 Bom L R 418: 103 Ind Cas 225; *Subodini* v. *Ganoda Kant Roy*, (1887) 14 Cal 400 (400); *Soobramonion Chetty* v. *Myat Tha U*, (1910) 4 L B R 95 (96, 97).

(9) *Nistarini Dassya* v. *Sarat Chandra*, (1915) 29 Ind Cas 680 (682): 22 Cal L Jour 279: 20 Cal W N 49.

(10) *Abdul Wahid Khan* v. *Sadiq Ali Khan*, (1904) 7 Oudh Cas 193 (197, 198).

(11) *Sardarmal* v. *Aranrayal*, (1897) 21 Bom 205 (210).

O. 1, R. 10, Notes 3—9.

mistake and that the true owner could not be substituted under this sub-Rule.[12]

6. *A* sued *B* for possession of certain lands. *B* contested the suit on the ground that *A* had transferred the whole of his interest in the lands to *C* and that, therefore, he had no title to sue. *A* maintained his right stating that the transfer never became operative. This was found to be false. Thereupon *A* applied for adding *C* as a co-plaintiff; *held*, that the falsity of his plea negatived any *bona fides* on his part, and that the amendment could not be allowed.[13]

4. "Necessary for the determination of the real matter in dispute".—Under this rule it is essential that, in addition to the existence of a *bona fide* mistake, the substitution or addition should be necessary for the determination of the real matter in dispute.[1]

5. "Upon such terms as the Court thinks just".—The terms will be such as the Court thinks just under the particular circumstances of the case. Thus the Court may order the payment of costs up to the time of amendment.[1] In the undermentioned case,[2] where a defendant was added under sub-Rule 2, the Court made the order that the defendant should consent to be bound by all the previous proceedings in the suit and by any order that the Court might make as to the costs of those proceedings.

6. "At any stage of the suit".—The Court may allow the amendment *at any stage* of the suit. Thus it can add a party before the decree is actually drawn up[1] or after the matter has been referred to arbitration,[2] or even in second appeal.[3] Where the appellate Court substitutes a new plaintiff for the wrong one, and remands the case to the original Court there must be a *de novo* trial.[4]

7. Consent.—*See* Note 38, *infra*.

8. Limitation Act, S. 22.—*See* Note 41, *infra*.

SUB-RULES 2 TO 5.

9. Legislative changes.—

1. Under S. 32 of the old Code corresponding to this sub-Rule, the Court could *add* parties *at any time* and even without any *application* therefor. But it could not *strike out* parties *except on the application of a party made on or before the first hearing*. Under this sub-Rule the Court has power to strike out or add parties *at any stage of the proceedings* with or without any application.

2. The first portion of S. 32 of the old Code empowering the Court to transpose a plaintiff as a defendant or a defendant as a plaintiff, has been omitted as

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(12) *Kesho Prosad* v. *Lal Brij Mohan*, (1917) 38 Ind Cas 154 (155, 156): 2 Pat L Jour 199: 1 Pat L W 355.

(13) *Ganendra* v. *Surja Kanta*, (1912) 15 Ind Cas 39 (41): 17 Cal W N 462.

Note 4.

(1) *Heiniger* v. *Droz*, (1900) 25 Bom 433 (464): 3 Bom L R 1; *Abdullah Beg* v. *Abdul Hasan*, (1911) 11 Ind Cas 223 (225) All.

Note 5.

(1) *Vyankatesh Oil Mill* v. *Velmohamad*, 1928 Bom 191 (193): 30 Bom L R 117: 109 Ind Cas 99; *Bhaymani Kunwar* v. *Subh Narain*, 1905 All W N 35 (36).

(2) *Ahmedbhoy* v. *Vulcebhoy*, (1884) 8 Bom 323 (338): 8 Ind Jur 680.

Note 6.

(1) *John Solons* v. *Ram Narain*, (1921) 61 Ind Cas 378 (379) Pat.

(2) *Mitsui Bussan Kaisha Ltd* v. *Hogarth Shipping Co Ltd*, 1926 Cal 722 (725): 43 Cal L Jour 297: 94 Ind Cas 182.

(3) *Seshamma* v. *Chennappa*, (1897) 20 Mad 467 (469).

(4) *Krishna Bai* v. *Collector and Government Agent, Tanjore*, (1911) 9 Ind Cas 254 (254): 21 Mad L Jour 808: 9 Mad L Tim 324.

unnecessary in view of the fact that the power to add or strike out parties includes the power to transpose them as well.[1] O. 1, R. 10, Notes 9—10.

3. Under S. 33 of the old Code corresponding to sub-Rule 4, amended copies of the summons as well as of the plaint had to be served on the *original defendant*. Under sub-Rule 4, such service is necessary only *if the Court thinks fit*.

10. Scope and applicability of sub-Rule (2).—This sub-rule corresponds to the second sentence of O. XVI, R. 11 of the English Rules.[1] The object of the rule is to bring before the Court, at the same time, all the persons, who are parties to disputes relating to one subject-matter, so that the disputes may all be determined at the same time without the delay, inconvenience, and expense of separate actions and trials,[2] and the principle underlying the rule is, that the Court should put itself in the position of being able to effectually and completely adjudicate upon, and settle all the questions involved in the suit.[3]

The sub-Rule gives a wide discretion to the Court to meet every case of defect of parties[4] but is subject to two limitations:—

(1) The Court has no power to join a person as a party if he could not have been originally impleaded under O. 1, Rr. 1 or 3.[5]

(2) The presence of the person added *must be necessary to effectually and completely adjudicate upon* and settle all points involved in the suit.[6]

The discretion also should be exercised in a reasonable manner so as not to cause inconvenience or embarrassment.[7]

Note 9.

(1)) *Harchand Singh* v. *Gurdip Singh*, 1927 Lah 485 (488): 8 Lah 241: 102 Ind Cas 817; *Brojendra Kumar* v. *Gobind Mohan*, (1916) 34 Ind Cas 186 (188): 20 Cal W N 752; *Md Sirajuddin* v. *Ghulam Jailani*, (1921) 59 Ind Cas 233 (236, 238): 12 Mad L W 25: 30 Mad L Tim 31.

Note 10.

(1) *Amrut* v. *Mukand*, (1909) 4 Ind Cas 236 (237): 5 Nag L R 152.

(2) *Montgomery* v. *Foy, Morgan & Co*, (1895) 2 Q B 321 (324): 65 L J Q B 18: 73 L T 12: 43 W R 691: 14 R 575 (C A) cited in 11 Cal L Jour 426 [*Per* Esher, M R]; *Bryne* v. *Brown*, (1889) 22 Q B D 657 (666, 667) [*Per* Lord Esher, M R]; *The W H Randall*, 1928 P 41 C A: 97 L J P 42: 138 L T 459: 17 App M L C 397 C A; *Moteechund* v. *Murull Dhur Doss*, (1871) 15 Suth W R 432 (432, 433); *Md Sirajuddin* v. *Shah Ghulam*, (1921) 59 Ind Cas 233 (236, 238): 12 Mad L W 25: 30 Mad L Tim 31; *Vaidyanada* v. *Sitarama*, (1882) 5 Mad 52 (54): 6 Ind Jur 242.

(3) *Rayani Kesavalu* v. *Samayoddanda*, 1927 Mad W N 301 (302); *Chandri Ayal* v. *Abdul Karim*, 1927 Bom 49 (50, 51): 28 Bom L R 1360: 98 Ind Cas 915: 51 Bom 16.

(4) *Bhola Pershad* v. *Ram Lal*, (1897) 24 Cal 34 (37); *Kalee Pershad* v. *Joy Narain*, (1869) 11 Suth W R 361 (364, 365): 3 Beng L R A C 23; *Nga Tha Ya* v. *Mi Khan Mhaw*, (1870) 5 Beng L R 371: 13 Suth W R 443; *Rayani Kesavalu* v. *Samayoddanda*, 1927 Mad W N 301 (302); *Khader Saheb* v. *Chotibibi*, (1884) 8 Bom 616 (619); *Aitmad Ali Khan* v. *Allahabad Bank*, (1905) 2 All L J 516 (518); *Shib Gopal* v. *Baldeo*, (1879) 2 All 264 (266).

(5) *Ambadass* v. *Pandu*, (1920) 57 Ind Cas 784 (785) Nag; *Chidambaram* v. *Subramaniyam*, 1927 Mad 834 (834): 53 Mad L Jour 269: 1927 Mad W N 903: 105 Ind Cas 114.

(6) *Abdullah Beg* v. *Abdul Hasan*, (1911) 11 Ind Cas 223 (225) All; *Swaminatha Mudaliar* v. *Kumaraswami*, 1923 Mad 472 (473): 44 Mad L Jour 282: 17 Mad L W 422: 32 Mad L Tim 212: 1923 Mad W N 239: 72 Ind Cas 284; *Naraini* v. *Durjan*, (1878-80) 2 All 738 (743); *Gosaien Shiva Ram* v. *Rugho Rai*, (1867) 2 Agra 44; *Debia* v. *The Government*, (1868) 9 Suth W R 158 (161); *Madan Gopal* v. *Sham Sunder*, 1890 Pun Re No 118; *Abdul Gafur* v. *Ali Miah*, 1925 Cal 26 (29): 28 Cal W N 805: 82 Ind Cas 369; *Bheema Raut* v. *Durga Prosad*, (1912) 16 Ind Cas 908 (909): 40 Cal 323: 17 Cal L Jour 183; *Chandri Ayal* v. *Abdul Karim*, 1927 Bom 49 (50): 28 Bom L R 1360: 98 Ind Cas 915: 51 Bom 16.

(7) *Google* v. *Premlall*, (1881) 7 Cal 148 (149); *Kalee Pershad* v. *Joy Narain*, (1869) 11 Suth W R 361 (364, 365): 3 Beng L R A C 23; *Balmukund* v. *Bissendoyal*, (1919) 50 Ind Cas 51 (51): 46 Cal 48 (51) [Third party against whom defendant claimed indemnity added as a defendant—see S 128 (2) (*c*), C P Code—Sufficient safeguard provided against delay and inconvenience to plaintiff].

O. 1, R 10, Notes 10–11.

The sub-Rule does not deal with the deletion of *reliefs*,[8] or with the *substitution* of parties[9] but only with *striking out* or *addition* of parties. It provides for the addition of any person who *ought to have been joined* and of any person whose presence is *necessary to enable the Court to give a complete and effectual adjudication*. The former is called a *necessary party* and the latter, a *proper party*. The distinction between this sub-Rule and O. 1, R. 3 is, that while the latter refers to the action of the plaintiff at the time of the presentation of the plaint in joining, as defendants, parties against whom the right to relief is alleged to exist, the former refers to the action of the Court, *at a stage subsequent to the presentation of the plaint* in adding parties.[10]

The sub-Rule applies also to proceedings under the Land Acquisition Act, 1894[11] and to suits under S. 92 of the Code.[12] It will also cover the case of an application to implead as parties, the legal representatives of a deceased defendant *in their individual capacity*.[13] It has been held not to apply to proceedings under the Divorce Act[14] nor to enable a Court to adjudicate in a suit, a general question which is of interest to a whole community, by adopting the expedient of joining a member of that community to the suit as a co-plaintiff.[15]

11. Addition of parties—General.—As has been observed in Note 10 above, this sub-Rule provides for the addition of only two classes of persons, namely *necessary* parties, *i.e.*, persons who ought to have been joined as parties, and *proper* parties, *i.e.*, persons without whose presence the questions in the suit cannot be completely and effectually adjudicated upon. Where a person is neither a *necessary* nor a *proper* party the Court has no jurisdiction to add him as a party under this sub-Rule.[1]

No person can bring himself or any one else on the record of a suit except with the cognizance or leave of the Court.[2] Further, it is conceived, that an *order* of the Court is necessary before a person is validly added as a party; the mere fact that the decree includes his name would not amount to an order for joinder of parties under O. 1, R. 10, sub-Rule 2.[3]

The question of the joinder of necessary or proper parties is not a matter of *substantive right* but is merely one of *procedure*[4] and does not confer on

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(8) *Gangadhara Rama Rao* v. *Surya Rao*, (1919) 49 Ind Cas 835 (837): 42 Mad 219: 36 Mad L Jour 169: 9 Mad L W 329: 25 Mad L Tim 184.

(9) *Heiniger* v. *Droz*, (1900) 25 Bom 433 (463): 3 Bom L R 1.

(10) *Sailajananda* v. *Umeshananda*, (1899) 4 Cal W N 462 (464).

(11) *Kishenchand* v. *Jagannathprashad*, (1903) 25 All 133 (134): 1902 All W N 215.

(12) *Vaithilingam* v. *Ramalingam*, (1917) 38 Ind Cas 133 (134): 6 Mad L W 9: 1917 Mad W N 550.

(13) *Jagath Guru Chandrasekhara Bharathi Swamigal* v. *Komarasamy Goundan*, (1916) 32 Ind Cas 320 (320) Mad.

(14) *Ramsay* v. *Boyle*, (1903) 30 Cal 489 (497): 7 Cal W N 504.

(15) *Fakir Muhammad* v. *Aga Khan*, 1930 Sind 73 (74): 120 Ind Cas 517.

Note 11.

(1) *McCheane* v. *Gyles*, (1902) 1 Ch 911 (918): 71 L J Ch 446: 86 L T 217: 50 W R 386 cited in 11 Cal L Jour 416; *National Insurance Co* v. *Nissim Abraham*, 1929 Cal 477 (477, 478): 56 Cal 447: 119 Ind Cas 21 [Joining party merely "for watching proceedings" is a mistake].

(2) *Shib Sahai* v. *Jagannath*, 1892 All W N 139 (139).

(3) *Shagun Chand* v. *Data Ram*, 1927 All 465 (466): 25 All L J 369: 101 Ind Cas 868: 49 All 664.

(4) *Mulji* v. *Ransey*, (1909) 3 Ind Cas 837 (841, 842): 34 Bom 13: 11 Bom L R 273.

the persons so joined any *new* rights or rights adverse to those of the others.[5] As has been seen in Note 10 *ante*, the Court has a wide discretion in the matter of the joinder of a necessary or proper party.[6] It will ordinarily be exercised in favour of a person who applies in proper time.[7] Even in the absence of an application the Court should not, as a rule, dismiss a suit for non-joinder of a necessary or proper party but should add him as a party of its own motion or direct the plaintiff to apply for that purpose.[8] The discretion will not, however, be exercised in favour of an applicant who applies to be added as a party, where the application is made at a late stage of the case[9] or where the person sought to be added is only a *proper* party and the plaintiff opposes such application.[10]

O. 1, R. 10, Note 11.

The trial Court cannot add parties after the suit has been carried out of it into the Court of appeal.[11] The Court of appeal has, however, the same powers as that of the original Court in the matter of addition of parties to the suit, or respondents to the appeal.[12] In fact, the appellate Court should see, before deciding the appeal, that all the necessary parties are brought on the record.[13] Where, therefore, it finds it necessary to have certain persons before it, the proper course is not to return the plaint for amendment, but to add them as parties itself and remand the case for trial[14] or to remand the case to the lower Court directing it to add such persons as parties, and then try the case.[15] But the discretionary power should be exercised with caution.[16]

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(5) (1873) 1 N W Ed 44.

(6) *Kale Khan* v. *Seva Ram*, 1889 Pun Re No 156 F B.

(7) *Buddree Doss* v. *Hoare, Miller & Co*, (1881) 8 Cal 170 (173).

(8) *Gur Prasad* v. *Md Taqi*, 1921 Oudh 148 (149): 8 Oudh L J 310: 63 Ind Cas 548; *Ramanatham* v. *Arunachalam*, 1921 Mad 557 (558): 44 Mad 43: 60 Ind Cas 316: 39 Mad L Jour 474; *Kundan Lal* v. *Faqir Chand*, (1905) 27 All 75 (80): 1 All L J 476; *Riasat Ali* v. *Rajeshar Bali*, (1910) 6 Ind Cas 977 (978): 13 Oudh Cas 109; *Maung E Maung* v. *Ma Chit May*, 1930 Rang 295 (296): 129 Ind Cas 508.

(9) *Surendranath* v. *Tripura Pada Bhattacharjee*, 1928 Cal 215 (215): 32 Cal W N 304: 109 Ind Cas 282.

(10) *Vaidylinga* v. *Sadasiva Iyer*, 1926 Mad 836 (837): 1926 Mad W N 575: 95 Ind Cas 214: 51 Mad L Jour 148: 50 Mad 34: 24 Mad L W 738; *Nabakumar Hazra* v. *Radashyam Mahish*, 1931 P C 229 (231): 35 Cal W N 977: 61 Mad L Jour 294: 1931 All L J 797: 54 Cal L Jour 274: 34 Mad L W 444: 134 Ind Cas 654 P C [Prayer for addition of parties before the Privy Council—*De novo* trial involved—Prayer—Refused].

(11) *Ram Nidhee* v. *Ajoodhya Ram Khan*, (1873) 20 Suth W R 123 (125): 11 B L R App 37; *P Singaravelu Pillai* v. *P V Murugesa Pillai*, (1911) 12 Ind Cas 69 (69) Mad [Appeal admitted by Privy Council—High Court cannot add parties].

(12) *Athiyappa* v. *Ayanna*, (1885) 8 Mad 300 (302, 303); *Baluswami Iyer* v. *Lakshmana Iyer*, 1921 Mad 172 (174): 44 Mad 605: 41 Mad L Jour 129: 13 Mad L W 562: 1921 Mad W N 316: 63 Ind Cas 374 F B; *Kunhanna Rai* v. *Manakke*, 1929 Mad 343 (344): 53 Mad L Jour 315: 29 Mad L W 546: 1929 Mad W N 374: 117 Ind Cas 796; *Ananda Gopal Gossain* v. *Nafar Chandra Pal*, (1913) 21 Ind Cas 928 (930): 18 Cal W N 259: 26 Mad L Jour 86 P C; *Sankaralinga Nadan* v. *Nageswara Dorai*, (1908) 12 Cal W N 946 (957): 31 Mad 236: 35 Ind App 176: 8 Cal L Jour 230: 10 Bom L R 781: 18 Mad L Jour 387: 4 Mad L Tim 101 P C [Beneficiaries were joined as co-plaintiffs on appeal]; *Narayanasamy Gurukal* v. *Irulappa*, (1902) 12 Mad L Jour 355 (359), (Do.). See however *Radha Prasad Singh* v. *Rambhajan*, 1883 All W N 201 (201).

(13) *Velammal* v. *Lakshmu Ammal*, (1915) 31 Ind Cas 814 (815) Mad.

(14) *Mammali* v. *Pakki*, (1884) 7 Mad 428 (429); *Pateshri Pratap* v. *Rudranarain*, (1904) 26 All 528 (531): 1904 All W N 119; *Habib* v. *Baldeo*, (1901) 23 All 167 (173): 1901 All W N 39; *Hemangini Debi* v. *Haridas Banerjee*, (1918) 46 Ind Cas 398 (399): 3 Pat L Jour 409: 1918 Pat H C C 276: 5 Pat L W 216; *Thirthasamy* v. *Gopala*, (1890) 13 Mad 32 (33); *Meah Vzir* v. *Savai*, (1916) 32 Ind Cas 791 (793): 43 Cal 938: 20 Cal W N 547; *Chinnan* v. *Ramachandra*, (1892) 15 Mad 54 (56); *Krishnabai* v. *Sonubai*, (1865) 2 Bom H C R 310; *Atony Juas Prabhu* v. *Ramakrishnaiya*, (1915) 31 Ind Cas 263 (263): 2 Mad L W 1034.

(15) *Mihin Lal* v. *Imitaz Ali*, (1896) 18 All 332 (333): 1896 All W N 91; *Maung Chein* v. *Ma Shwe Than*, (1903-04) 2 L B R 277 (278); *Maharana Shri Jasvatsingji* v. *Secretary of State*, (1889) 14 Bom 299 (305) [While remanding the case, the Appellate Court directed the Lower Court to consider question of adding necessary parties]. See also *Tuan Man* v. *Chesom*, 1932 P C 146 (150, 151): 36 Mad L W 135: 136 Ind Cas 632 P C [Appellate Court should not however indicate the order to be passed by the Lower Court]; *Appa Rao* v. *Vithal*, 1931 Bom 408 (409): 33 Bom L R 608: 134 Ind Cas 365.

(16) *Sarada Khanta Das* v. *Gobinda Mohan Das*, (1910) 6 Ind Cas 912 (918, 919): 12 Cal L Jour 91.

O. 1, R. 10, Notes 11—12.

Where a person applies to be added as a party appellant, the test is whether he can urge any of the grounds upon which the validity of the Court's order is called in question by the appellant already on record; if he cannot, he ought not to be added.[17] Nor will the Court's discretion be exercised in favour of a party who has resisted the objection as to non-joinder in the lower Court.[18]

The High Court has, in second appeal, no power to add parties after it has remanded the case to the lower Court.[19] There is a conflict of view as to whether the High Court can, in second appeal, add a person as a party if he was not a party to the appeal before the lower appellate Court. According to the High Court of Allahabad it cannot.[20] According to the High Courts of Calcutta,[21] Madras,[22] and Patna[23] it can. The Allahabad High Court rested its view solely on S. 559 of the Code of 1882 corresponding to O. 41, R. 20 of the Code and did not advert to Ss. 27, 32 and 582 of that Code corresponding to O. 1, R. 10 and S. 107 of the present Code which give ample power to the Court to add parties. It is submitted that the Allahabad view is not correct. There is also a conflict of opinion as to whether a Court of second appeal can add a person who was not a party *to the original suit itself*. The Allahabad,[24] Bombay,[25] and Lahore[26] High Courts hold that it cannot, while the Calcutta High Court holds that it can.[27] It is submitted with respect that the latter view is correct. If, in order to prevent multiplicity of suits, the first Court has power to add new parties to the suit, there is no reason why the powers of the appellate Court, in that respect should be restricted. It has been held by the Lower Burma Chief Court[28] that a Court of second appeal has no power to *substitute* one defendant for another in the plaint or record of the original suit, nor one appellant for another in the record of the first appeal.

12. "Either upon or without the application of either party."—It is not generally the province of the Court to force the plaintiff in a case to implead particular persons as parties.[1] Accordingly the Court, will not, as a

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(17) *Krishna Prosad Singh* v. *Gosta Behari Kundu*, (1907) 5 Cal L Jour 434 (437); *Jafar Ali* v. *Har Govind*, (1917) 41 Ind Cas 65 (67) Cal.

(18) *Badri Das* v. *Jawala Prosad*, 1891 Pun Re No 86 F B; *Obhoy Gobind* v. *Hurychurn*, (1882) 8 Cal 277 (278). See *Bansi Lal* v. *Ramji Lal*, (1898) 20 All 370 (372): 1898 All W N 75 [No objection to addition of defendant in appeal—Grounds—Oral objection in Appellate Court disallowed]; *Naba Kumar Hazra* v. *Radashyam Mahish*, 1931 P C 229 (231): 35 Cal W N 977: 61 Mad L Jour 294: 1931 All L J 797: 54 Cal L Jour 274: 34 Mad L W 444: 134 Ind Cas 654 P C; *Mohanavelu Mudaliar* v. *Annamalai Mudaliar*, 1923 Mad 337 (337): 17 Mad L W 241: 44 Mad L Jour 249: 1923 Mad W N 39: 72 Ind Cas 63.

(19) *Kalenther Ammal* v. *Ma Mi*, 1926 Rang 9 (10): 3 Rang 474: 92 Ind Cas 125.

(20) *Chunni* v. *Lala Ram*, (1894) 16 All 5 (8): 1893 All W N 141; *Pachkauri Raut* v. *Ram Khelawan Chaubey*, (1915) 26 Ind Cas 25 (25): 37 All 57: 12 All L J 1277 [Following 16 All 5].

(21) *Durga Charan* v. *Lakhi Narayan*, (1918) 47 Ind Cas 917 (919) Cal.

(22) *Paya Matathil* v. *Kovamel Amina*, (1896) 19 Mad 151 (152): 5 Mad L Jour 279.

(23) *Padarath Mahton* v. *Hitah Singh*, 1924 Pat 773 (774): 5 Pat L Tim 509: 1924 Pat H C C 249: 82 Ind Cas 600.

(24) *Firm Shiam Lal* v. *Dhanpat Rai*, 1925 All 768 (768): 23 All L J 757: 6 L R A Civ 386: 88 Ind Cas 493: 47 All 853.

(25) *Monjiram* v. *Maneklal*, 1929 Bom 353 (354): 31 Bom L R 672: 53 Bom 598: 119 Ind Cas 654.

(26) *Haliman* v. *Nur Muhammad*, 1923 Lah 490 (491): 73 Ind Cas 136; *Sundar Singh* v. *Gurudevi*, (1915) 31 Ind Cas 27 (28): 169 Pun W R 1915.

(27) *Gyananda Asram* v. *Kristo Chandra Mukerji*, (1904) 8 Cal W N 404 (406). See also *Banbihari Mukerji* v. *Bhejnath Singh*, 1932 Cal 448 (449, 450): 59 Cal 329.

(28) *Chokkalingam Chetty* v. *Maung Aung Baw*, (1900-02) 1 L B R 350 (351).

Note 12.

(1) *Rajandronath Dutt* v. *Sheik Muhammad Lall*, (1859-61) 8 Ind App 135 (141): 8 Cal 42: 4 Sar 254: 5 Ind Jur 548 P C. See *Jottram Ramkrishna* v. *Ramakrishna Mandal*, (1903) 27 Bom 31 (41): 4 Bom L R 754.

O. 1, R 10 Note 12.

rule, act except on the application of the *parties*[2] and unless such application contains definite allegations of fact upon which a liability is imputed to the person sought to be impleaded.[3] In proper cases, however, this sub-rule empowers the Court to act *suo motu*[4] on the application of the person seeking to be made a party[5] or even without it.[6] A Court cannot, however, of its own motion add a receiver as a defendant when the leave of the Court appointing the receiver has not been obtained.[7]

Where a person applies to be made a party, what the Court ought to see is whether the suit cannot be determined owing to his absence, or whether he will be prejudiced by his not being joined as a party.[8] The position of a person who is made a defendant on his own application, is very different from that of a person who is impleaded without any such application, in that the former has to make out a *prima facie* case before the plaintiff can be asked to meet it[9] while, so far as the latter is concerned, he can claim to have his pleas fully heard and determined.[10]

Where a person is added under this sub-Rule, the evidence already on the record cannot be used against him without his consent.[11] Where a person has been made a plaintiff a motion to strike out his name can only be made by himself.[12]

The addition of a party will not shift the burden of proof from the plaintiffs who are bound to prove their own case as against the original defendant.[13]

An application of a person to be added as a co-plaintiff cannot be treated as an application under O. 22, R. 10 of the Code.[14]

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(2) *Bhagmani* v. *Subh Narain*, (1905) 25 All W N 35 (36); *Jagat Narain Singh* v. *Udit Narain Singh*, (1913) 20 Ind Cas 262 (263) Cal; *Bhageto Koer* v. *Abdul Rahman*, (1916) 36 Ind Cas 77 (80) Pat; *Ambika Charan* v. *Tarini Charan*, (1913) 19 Ind Cas 963 (964): 18 Cal W N 464.

(3) *Allahabad Bank* v. *Muhammad Raza Khan*, (1912) 16 Ind Cas 592 (593, 594): 15 Oudh Cas 304.

(4) *Bhag Mani Kunwar* v. *Subh Narayan Rai*, (1905) 25 All W N 35 (36).

(5) *Oriental Bank Corporation* v. *Charriol*, (1886) 12 Cal 642 (652); *Vaidiyyanathien* v. *Sitaramayyan*, (1882) 5 Mad 52 (53): 6 Ind Jur 242; *Khadar Saheb* v. *Choti Bibi*, (1884) 8 Bom 616 (618); *Raoaba* v. *Noorjehan*, (1886) 13 Cal 90 (94); *Athiapa* v. *Ayanna*, (1885) 8 Mad 300 (301).

(6) *Mohindra Bhusan* v. *Shoshee Bhooshan*, (1880) 5 Cal 882 (886).

(7) *Jatindra* v. *Sarfaraj*, (1910) 6 Ind Cas 214 (216): 14 Cal W N 653. See *Asudamal Dwarka Das* v. *Chottram Gopal Das*, (1921) 60 Ind Cas 273 (274): 14 Sind L R 171.

(8) *Ramakrishnaiya* v. *Satyanarayana*, 1929 Mad 291 (293): 116 Ind Cas 137; *Ahmed Hussain* v. *Mt Khodeja*, (1869) 10 Suth W R 368 (369): 8 Beng L R (A C) 28 Note [Intervenors not likely to be affected—Not to be impleaded]; *Konjul Sahoo* v. *Gouroo Buksh Kooer*, (1872) 13 Suth W R 362 (363): 8 Beng L R 184 Note [Intervenors likely to be prejudiced—Rightly impleaded]; *Saligram Singh* v. *Gheeno Singh*, (1871) 16 W R 19 (21), (Do.).

(9) *Ramakrishna* v. *Narain*, (1920) 56 Ind Cas 845 (847, 848) Nag; *Buyrubanath* v. *Mahesh Chunder*, (1870) 13 Suth W R 168 (170): 4 Beng L R A C 162; *Juggodanund* v. *Hamid Rasool*, (1868) 10 Suth W R 52 (52); *Balma Kundu* v. *Adikundu*, (1880) 7 Cal L Rep 560 (562).

(10) *Ram Taruck* v. *Radha Ballab*, (1871) 15 Suth W R 97 (98). See *Madarilal* v. *Pahalwan Singh*, (1915) 28 Ind Cas 440 (441): 2 Oudh L J 161.

(11) *Watson & Co* v. *Hargobind*, (1874) 22 Suth W R 35 (36). See also *Satyabai Dasi* v. *Sudharamu Dasi*, 1931 Cal 580 (580): 58 Cal 801: 35 Cal W N 122: 134 Ind Cas 1279 [A party may, however, be added on condition that he could only intervene at particular stages—And that he could not question orders passed before he applied to Court].

(12) *Duckett* v. *Gover*, 6 Ch D 82: 42 L J Ch 407: 25 W R 455 cited in 33 Cal 657.

(13) *Kanjul Sahoo* v. *Guroo Buksh*, (1870) 13 Suth W R 362 (363): 8 Beng L R 184 Note; *Dayal Chunder Sahay* v. *Nobin Chunder Adhikari*, (1872) 16 Suth W R 235 (237, 238): 8 Beng L R 180.

(14) *Bibijan Bibi* v. *Abdul Jabbar*, (1916) 36 Ind Cas 919 (921) Cal.

O. 1, R. 10, Note 13.

13. "**Who ought to have been joined.**"—A person who *ought* to have been joined as a party is called a *necessary* party. They are persons necessary to the constitution of the suit, *i.e.*, persons *in whose absence no effective decree at all can be passed.*[1] Thus where several persons have a *joint right of action*[2] such as co-trustees,[3] all must join in suing. In a suit to set aside an order for rateable distribution all persons interested in the distribution are necessary parties.[4] A receiver appointed after the institution of the suit is a necessary party.[5] But an Official Assignee is not a necessary party in a suit to recover a money debt from an insolvent.[6] In a suit for a declaration that certain *pottahs* were forgeries, all persons who claim under those *pottahs* must be made parties.[7] Where *A* sued *B* for arrears of rent of a house but did not implead *G* who had already purchased the house and had got his title declared against *A* in a Civil Court, it was held that *G* was a necessary party.[8]

Note 13.

(1) *Kishen Prasad* v. *Har Narain*, (1911) 9 Ind Cas 739 (740): 33 All 272: 38 Ind App 45: 15 Cal W N 321: 8 All L J 256: 9 Mad L Tim 343: 13 Cal L Jour 345: 21 Mad L Jour 378: 13 Bom L R 359: (1911) 2 Mad W N 395 P C; *Ramakrishnayya* v. *Satyanarayana*, 1929 Mad 291 (293): 116 Ind Cas 137; *Ram Taruck* v. *Radha Ballab*, (1871) 15 Suth W R 97 (98); *Aghore Nath* v. *Kamini Debi*, (1910) 6 Ind Cas 554 (558): 11 Cal L Jour 461; *Manajuddin Biswas* v. *Team Mandal*, (1912) 15 Ind Cas 176 (176): 39 Cal 881 [Transferee of property—Sold in execution—Necessary party in setting aside sale]; *Appalacharyalu* v. *Ramachandracharyalu*, 1923 Mad 81 (82): 16 Mad L W 287: 68 Ind Cas 901 [In a suit to enforce registration, even minor executants should be brought on record]; *Peslonji* v. *Ganpat*, 1925 Nag 288 (288, 289): 8 Nag L J 73: 89 Ind Cas 888; *Venu* v. *Kanaran*, 1926 Mad 991 (992): 51 Mad L Jour 282: 1926 Mad W N 763: 97 Ind Cas 551 [If interests of defendants on record inseparable from those of necessary parties not brought on record, the decree will be wholly void]; *Narayan Bharathi* v. *Laxing Bharathi*, (1877) 2 Bom 140 (141): 2 Ind Jur 319; *Jit Bhajat* v. *Sheikh Hussaini*, 1901 All W N 14 (14); *Omrao Begum* v. *The Government of India*, (1883) 9 Cal 704 (710, 711): 10 Ind App 39: 12 Cal L Rep 395: 7 Ind Jur 215: 4 Sar 419 P C; *Lal Chand* v. *Mangta Mal*, (1917) 42 Ind Cas 420 (421): 1917 Pun L R 119: 1917 Pun W R 158 [Parties to marriage, necessary parties in suit for declaration of invalidity of marriage]; *Syed Subhanat Ali* v. *Keshu Tewari*, (1874) 6 N W P H C 208; *Mela Ram* v. *Narain Das*, 1882 Pun Re No 188. But see *Buddree Doss* v. *Hore Miller & Co*, (1882) 8 Cal 170 (172, 173) [Where the words were interpreted to mean "might have been joined" this cannot be accepted as correct in view of the latter rulings]; *Durgacharan* v. *Mohan Tagore*, (1900) 27 Cal 493 (497-499).

(2) *Shanmuga* v. *Subbayya*, 1922 Mad 317 (318, 319): 15 Mad L W 283: 1922 Mad W N 106: 42 Mad L Jour 133: 31 Mad L Tim 266: 70 Ind Cas 645; *Girwar Narain* v. *Makbulunnissa*, (1916) 36 Ind Cas 542 (544): 1 Pat L Jour 168; *Muhammad Hassan* v. *Kazi Nazir Muhammad*, (1917) 38 Ind Cas 13 (13, 14): 1 Pat L Jour 437: 3 Pat L W 31 [All members of Endowment Committee should sue for removal of trustee]; *Ashtamurti Nambudri* v. *Raman Menon*, (1899) 9 Mad L Jour 312 (312) [If co-trustees refuse to join as plaintiffs they should be made defendants].

(3) *Rajendra Nath* v. *Sheik Muhammad*, (1881) 8 Cal 42 (50): 8 Ind App 135: 4 Sar 254: 5 Ind Jur 548 P C; *Puramathan* v. *Sankara Menon*, (1900) 23 Mad 82 (84); *Savitri* v. *Raman*, (1901) 24 Mad 296 (299) [Co-Urulans]. See also O 31, R 2.

(4) *Gouri Prosad* v. *Ram Ratan*, (1886) 13 Cal 159 (162). See however *East India Cigarette Manufacturing Co* v. *Anand Mohan Basak*, (1920) 58 Ind Cas 10 (11): 24 Cal W N 401 [Receiver in insolvency represents all creditors—Latter not necessary parties].

(5) *Jatindra* v. *Sarfarai*, (1910) 6 Ind Cas 214 (216): 14 Cal W N 653; *Baikubehari Roy* v. *Harendranath Mukerji*, (1910) 8 Ind Cas 1 (2): 15 Cal W N 54 [Receiver is necessary party only in suits affecting property in his hands]; *Janaki Koer* v. *Sirendra*, (1909) 2 Ind Cas 958 (958): 10 Cal L Jour 23, (Do.); *Haram Chunder* v. *Pulchand*, 1932 All 382 (383), (Do. Official Receiver); *Chiranji Lal* v. *Munshi*, 1926 Lah 696 (696): 94 Ind Cas 660 [Sale by Receiver of property as belonging to insolvent—Claim by third party dismissed—In appeal Receiver necessary party]; *Abdulla Abdul Gani* v. *B K Chatterjee*, 1932 Rang 11 (12): 9 Rang 565 [After sale certificate is issued to auction-purchaser, Receiver cannot sue for possession]; *Binda Persad* v. *Ramchander*, 1921 All 89 (90): 43 All 452: 19 All L J 277: 60 Ind Cas 821 [Wrongful seizure of property by Official Receiver at the instance of creditor—Suit against creditor for damages by real owner—Receiver not necessary party]; *Lalji Sahai* v. *Abdul Gani*, (1910) 7 Ind Cas 765 (766): 15 Cal W N 253: 12 Cal L Jour 452 [S 53, Provincial Insolvency Act—Appeal—Official Receiver proper party].

(6) *Chandumal* v. *Rance*, (1895) 22 Cal 259 (267); *Jathalal* v. *Gangaram*, (1915) 29 Ind Cas 30 (31): 8 Sind L R 325.

(7) *Dukheena Mohan* v. *Ameeroodin*, (1869) 12 Suth W R 247 (247); *Gopal Ojha* v. *Ramdhar Singh*, 1925 Pat 228 (233): 82 Ind Cas 204 [Persons recorded as in possession are necessary parties in a suit to declare entry in land register incorrect].

(8) *Gopinath* v. *Mumtaz Ali*, 1929 Oudh 148 (148): 6 Oudh W N 118: 116 Ind Cas 58.

But a person who is only *indirectly* or *remotely* interested, is not a necessary party.[9] Thus all persons interested in the right of easement are not necessary parties to the suit where the cause of action on the pleadings is against those persons only who are alleged to have interfered with the plaintiff's right.[10]

A married English woman having an English domicile can sue in India in respect of a mortgage due to her, without joining her husband as a party even though the statutes in England which have freed married women from disability have not been extended to this country.[11]

14. "Whose presence before the Court may be necessary."—A person is a *proper* party if his presence before the Court is necessary to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit.[1] In other words the expression "proper party" means the party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in coming to a decision on the point in

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(9) *Jogendranath Singh* v. *Secretary of State*, (1912) 17 Ind Cas 921 (924): 17 Cal W N 835: 16 Cal L Jour 385; *Babu Bisram Singh* alias *Bishen Singh* v. *Maharani Inderjit*, (1866) 6 Suth W R (C R) 2 (5) [Remote heir—No right to sue in the lifetime of nearer heir]; *Joy Govindas* v. *Gouri Persad Saha*, (1867) 7 Suth W R (C R) 201 (202) [Persons claiming by adverse title—Not necessary parties]; *Ahmed Hussain* v. *Mussamat Khadija*, (1868) 10 Suth W R 368 (369): 3 Beng L R 28 Note; *Koegtar* v. *Prosanno Kumar*, (1877) 2 Cal 472 (473, 474); *Maung Bya* v. *Maung Santhu*, (1911) 10 Ind Cas 779 (779): 4 Bur L Tim 74 [Benamidar for another—Not necessary party]; *Asudamal Dwaraka Das* v. *Choithram*, (1921) 60 Ind Cas 273 (274): 14 Sind L R 171 [Suit against partnership—Receiver appointed in dissolution suit, not necessary party unless Receiver's appointment or possession is in question]; *Gajendra Singh* v. *Akal Koer*, (1921) 59 Ind Cas 292 (295) Pat; *Mahant Ramrup Gir* v. *Lalchand Marwari*, 1922 Pat 248 (248): 3 Pat L Tim 352: 67 Ind Cas 401: 1 Pat 475; *Subbaraya Mudaliar* v. *Kandasami Mudali*, 1923 Mad 58 (59): 16 Mad L W 880: 1922 Mad W N 674: 70 Ind Cas 168: 32 Mad L Tim 124 [After suit sale of properties, decree-holder not a necessary party in a claim suit]; *Bhola Sunar* v. *Madho Persad*, 1928 Nag 65 (2) (66): 105 Ind Cas 799 (799), (Do.); *Pakkiri Mahomed Rowther* v. *Bava Moideen*, 1927 Mad 82 (83): 1926 Mad W N 919: 98 Ind Cas 790 [Compromise with some defendants —They cease to be necessary parties]; *Mahomed Bibi* v. *N P Sulaiman*, 1926 Mad 1110 (1117): 24 Mad L W 425: 98 Ind Cas 838 [Debtors of the estate are not necessary parties to administration suit]; *Upendranath Ghose* v. *Baikuntha Nath Ghose*, 1929 Cal 237 (238): 33 Cal W N 96: 119 Ind Cas 801 [Suit for mutual adjustment of rights of worship—Deity not necessary party]; *Samiruddin* v. *Kadar Moyee Dasi*, (1910) 7 Ind Cas 691 (692) Cal [Non-opposing creditor in Lower Court not necessary party in appeal by insolvent]. See *Mewa Singh* v. *Basant Singh*, 1918 P C 49 (50): 21 Bom L R 232: 28 Cal L Jour 530: 24 Mad L Tim 429: 9 Mad L W 416: 28 Pun L R 1919: 1 Pun W R 1919: 48 Ind Cas 540 P C; *Shaman* v. *Sardha*, 1898 Pun Re No 61 [Childless widow in Kangra District—Alienation—Village community—No right to contest]; *Ram Kannye* v. *Meernomyee*, (1865) 2 Suth W R 49 (50, 51) [Hindu widow—No right to sue during lifetime of sons]; *Jannobee* v. *Dwarakanath*, (1867) 7 Suth W R (C R) 455 (455), (Do.); *Surja Kant* v. *Hemantha Kumari*, (1893) 20 Cal 498 (504): 20 Ind App 25: 17 Ind Jur 169: 6 Sar 279 P C [But in suit by Hindu widow for enhancement of rent in a Zamindari—Son being a minor—Suit held not bad]; *Md Afzul Khan* v. *Karimanbibi*, (1913) 20 Ind Cas 658 (658): 11 All L J 619 [Suit by one of the heirs of deceased Mussalman for her share alone—Other heirs not necessary parties].

(10) *S Narayana Bera* v. *Chandra Bera*, 1924 Cal 1050 (1050, 1051): 40 Cal L Jour 74: 84 Ind Cas 467; *Madan Mohan* v. *Sashi Bhusan*, (1915) 31 Ind Cas 549 (550): 19 Cal W N 1211; *Bhola Nath Mandal* v. *Mohesh Chandra*, 1925 Cal 1138 (1138, 1139): 88 Ind Cas 664; *Bhusan Sahana* v. *Upendra Nath Ghose*, 1926 Cal 1201 (1201): 96 Ind Cas 665 [Confirming 1926 Cal 462]; *Durga Ram Das* v. *Bharat Ram Das*, 1926 Cal 92 (94): 85 Ind Cas 739; *Sabirer Ma* v. *Bihari Mohan Pal*, 1928 Cal 23 (24): 104 Ind Cas 845; *Bikoo Mahtan* v. *Narayan Sahu*, 1924 Pat 303 (304): 72 Ind Cas 431 [Suit by some servient owners alone held not bad]. See, however, *Madan Mohan* v. *Akshoy Kumar Baruri*, (1910) 5 Ind Cas 23 (23): 14 Cal W N 15.

(11) *Hughes* v. *Delhi & London Bank*, (1888) 15 Cal 35 (39).

Note 14.

(1) *Keshavram* v. *Runchod*, (1905) 30 Bom 156 (161): 7 Bom L R 811; *Mrs Fox* v. *The Secretary of State for India in Council*, 1908 Pun W R 59; *Upendra* v. *Sheikh Sobhan*, (1911) 11 Ind Cas 183 (184): 15 Cal L Jour 6; *Narain Kuer* v. *Durjan Kuer*, (1880) 2 All 738 (742); *Ahmed Bhoy* v. *Vuleebhoy*, (1884) 8 Bom 323 (336): 8 Ind Jur 680; *Digambar Nanda* v. *Secretary of State*, (1912) 17 Ind Cas 917 (917): 16 Cal L Jour 381 [Plaintiff suing for declaration that he was not a tenure-holder but a *raijat* —Other persons recorded as *raiyats* of plaintiff were held proper parties]; *Muhammad Said Khan* v. *Indarpati*, 1927 All 315 (315): 100 Ind Cas 679 [Persons having no interest in suit property but appearing on record of rights are proper parties]; *Nathubai Ichharam* v. *Narayanacharya Ramcharya*, 1927 Bom 470 (473): 29 Bom L R 937: 104 Ind Cas 764: 51 Bom 800 [Administration suit—Executor and other partners with deceased—Other partners are neither necessary nor proper parties]. See *Secretary of State* v. *Jadav Chandra*, (1917) 39 Ind Cas 409 (423): 21 Cal W N 452 [B T Act—Suit for declaration of states as tenant—Under-raiyats may be proper parties]; *Bank of Hindustan* v. *Prem Chand*, (1868-69) 5 Bom H C (O C) 83.

O. 1, R. 10, Note 14.

issue.[1-a] It is not necessary that any *relief* should be asked against him,[2] the object of adding him being to avoid needless multiplicity of suits[3] and to protect his interests.[4]

Illustrations.

1. *X* executes a mortgage in favour of *A*, who is a *benamidar* for *B*. *A* institutes a suit against *X* on the mortgage. *B*, the real owner may be added as a party.[5]
2. *A*, one of the relations of a deceased person brings an administrative suit against the other relations. The status of such relations as heirs is not denied. *B* applies to be added as a party alleging that he is an adopted son of the deceased. He can be added as a party in order to avoid multiplicity of suits.[6]
3. *A*, an administrator of the estate of a deceased person sues *B*, one of the heirs of the deceased, for profits, on the ground that he acted as executor *de son tort*. In such a suit the other heirs of the deceased may be added in order to avoid needless litigation.[7]
4. *A*, alleging that he is the adopted son of *B*, deceased, sues *C*, the widow for possession of certain properties of the deceased. In such a suit, the reversioners to the estate of *B*, who dispute such adoption may be added as parties in order to protect their interests.[8]
5. *A*, a legatee under a will, sues *B*, the executor, for a legacy. The estate is not sufficient to pay all the legacies in full. Other legatees under the same will may be added as parties for the protection of the executor, and so that if any rateable abatement is to be made, it may be done in a manner binding on all the legatees.[9]
6. In a suit against the owners of a ship, the plaint was allowed to be amended by adding the ship as a party defendant.[10]
7. *A* institutes an interpleader suit against *B* and *C*. *D* applies to be added as a party alleging that he has a right to the amount in suit. He may be added even though both the plaintiff and the defendants oppose such joinder.[11]

(1-a) *Baikuntha* v. *Sarat Chandra*, 1925 Cal 1257 (1257, 1258): 89 Ind Cas 57. See also *Arur Singh* v. *Musst Lakshmi*, 1898 Pun Re No 75; *Karam Din* v. *Sharaf Din*, 1898 Pun Re No 89 F B; *Nariman* v. *Municipal Corporation of Bombay*, 1923 Bom 305 (319): 25 Bom L R 689: 47 Bom 809: 83 Ind Cas 856.

(2) *Kashi* v. *Sadashiv*, (1897) 21 Bom 229 (233); *Thirthasamy* v. *Gopala*, (1890) 13 Mad 32 (33); *Chidambaram Chettiar* v. *Sri Rangachariar*, (1906) 29 Mad 106 (110): 15 Mad L Jour 475; *Gurulingaswamy* v. *Ramalakshmumma*, (1894) 18 Mad 53 (58): 4 Mad L Jour 237. See *Diwan Shib Nath* v. *The Alliance Bank of Simla*, (1914) 25 Ind Cas 480 (485): 1915 Pun Re No 8: 1914 Pun L R 215: 1914 Pun W R 110.

(3) *Basli Bibi* v. *Hanif-ud-din*, (1910) 6 Ind Cas 570 (571): 12 Cal L Jour 267; *Bhandin* v. *Shaikh Ismail*, (1887) 11 Bom 425 (428); *Hashim Ibrahim* v. *Secretary of State*, 1927 Cal 352 (353): 31 Cal W N 384: 101 Ind Cas 539 [Reference under S 18 of the Land Acquisition Act for determining valuation of *waqf* property —Mutwallis can be added as parties].

(4) See illustrations (4) and (5) below. *Sankaralinga Nadan* v. *Rajeswara Dorai*, (1908) 31 Mad 236 (250): 35 Ind App 176: 12 Cal W N 946: 8 Cal L Jour 230: 10 Bom L R 781: 18 Mad L Jour 387: 4 Mad L Tim 101 P C [Worshippers added as proper parties where trustee did not conduct litigation in the interest of the trust]; *Lakshmi Bai* v. *Santappa*, (1889) 13 Bom 22 (24): *Narayanasamy* v. *Irulappa*, (1902) 12 Mad L Jour 355 (359), (Do.).

(5) *Yellamanchili Pichaiya* v. *Yellamanchili Rattamma*, 1929 Mad 268 (270): 55 Mad L Jour 856: 29 Mad L W 56: 115 Ind Cas 340 [Suit by benamidar—Addition of real owner as party is permissible]; *Bhola Pershad* v. *Ram Lal*, (1897) 24 Cal 34 (37) [Assignee of real owner was added].

(6) *Maung Tin* v. *Maung Po*, 1927 Rang 192 (192): 5 Rang 159: 103 Ind Cas 22.

(7) *H P Robson* v. *Administrator-General, Punjab*, 1929 Lah 753 (759): 30 Pun L R 503. See *Zamindar of Bhadrachalam* v. *Raja Venkatadri Appa Rao*, 1922 Mad 457 (474): 16 Mad L W 369: 1922 Mad W N 532: 43 Mad L Jour 486: 31 Mad L Tim 221: 46 Mad 190: 70 Ind Cas 689 F B.

(8) *Rajaratnam* v. *Halasyasundaram*, 1923 Mad 521 (522): 17 Mad L W 329: 44 Mad L Jour 322: 72 Ind Cas 156 [But if there is no dispute as to the adoption, reversioner cannot be added]. See *Kristo Sunkur* v. *Koylasnath*, (1871) 15 Suth W R (C R) 6 (6).

(9) *Purushotham* v. *Kala Govindji*, (1902) 26 Bom 301 (304): 3 Bom L R 982.

(10) *B & P Steam Navigation Co* v. *Shepherd & Co*, (1888) 12 Bom 237 (238).

(11) *Rabbaba* v. *Noorjahan*, (1886) 13 Cal 90 (93).

But in exercising their powers under this rule, Courts ought to see that they do not load the record with parties who are shown to have no interest in the suit[12] and that the trial of the suit is not embarrassed by the simultaneous investigation of totally unconnected controversies.[13] Thus in a suit by *A* against *B* for damages on the ground that goods sold by *B* to *A* did not correspond to sample, it is not necessary to add the person who sold the same goods to *B* before the latter sold it to *A*.[14] In a suit by *A* against *B* to compel the registration of a document, third parties cannot be added and permitted to plead that the document ought not to be registered.[15] Similarly a person claiming under a title quite distinct from that under which any of the parties to the suit claim, is not a proper party.[16] So also in a suit between parties each contending that he is the judgment-creditor in respect of a particular decree, the judgment-debtor is not a proper party.[17] Where *A* sues *B* for damages for tort, it is not necessary to add all persons injured by the same tort.[18]

Where parties are unnecessarily impleaded at the instance of a person other than the plaintiff, the Court may direct that the costs of the added parties should be paid by the person who moved for their joinder.[19]

15. Partnership suits.—In a suit for *dissolution of partnership* and accounts it is essential that all the partners should be on the record.[1] Where one of the partners is dead, his representatives are necessary parties.[2] Similarly, the receiver of a deceased partner's estate will be a necessary party.[3]

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(12) *Sekh Chand Pramanik* v. *Ramoni Mohun Roy*, (1912) 17 Ind Cas 603 (604): 17 Cal W N 1105; *Shams-ud-din* v. *Allah Dad*, 1925 Lah 65 (66): 6 Lah L Jour 351: 82 Ind Cas 603.

(13) *Thompson* v. *London County Council*, (1898) 1 Q B 840 C A: 47 W R 433: 68 L J Q B 625: 80 L T 512 (C A) cited in 18 Mad L Jour 238; *Kalenath Roy* v. *Issur Chunder*, (1869) 11 Suth W R (C R) 23 (24): 2 Beng L R (F B) 89 F B [Suit for arrears of rent at enhanced rate—Defendants alleged transfer of holding—Not to be added]; *Baboo Rughoo Nath* v. *Byjnath*, (1875) 24 Suth W R (C R) 349 (349, 350) [Rent suit—Real owner alleging plaintiff to be a benamidar—Not to be added].

(14) *Mahomed Badsha* v. *Nicol Fleming*, (1879) 4 Cal 355 (359): 2 Cal L Rep 330.

(15) *Monjiram* v. *Maneklal*, 1929 Bom 353 (354): 31 Bom L R 672: 53 Bom 598: 119 Ind Cas 654.

(16) *Beresford* v. *Ramasubba*, (1890) 13 Mad 197 (202, 206).

(17) *Abdul Gunnee* v. *Pogose*, (1869) 12 Suth W R (C R) 436 (438): 4 Beng L R A C 1.

(18) *Harihar* v. *Bholi*, (1907) 6 Cal L Jour 383 (390, 391).

(19) *Sivaramakrishna* v. *Sankaranarayana*, 1930 Mad 918 (913): 1930 Mad W N 679: 32 Mad L W 438: 59 Mad L Jour 524: 129 Ind Cas 35.

Note 15.

(1) *Ramaswamy* v. *Adappa*, 1925 Mad 347 (347): 78 Ind Cas 168; *Ambika Charan* v. *Tarini Charan*, (1913) 19 Ind Cas 963 (963): 18 Cal W N 464; *Puthenpurayil* v. *Puthenpurayil*, (1916) 33 Ind Cas 564 (564) Mad; *Raman Chetty* v. *Nagarathna Naicker*, (1912) 15 Ind Cas 380 (381): 11 Mad L Tim 246; *Firm of Manghoomal* v. *Firm Aratmal*, 1922 Sind 13 (14): 65 Ind Cas 26: 15 Sind L R 152; *K V Limaya* v. *J K Watve*, 1924 Pat 65 (67): 1923 Pat H C C 276: 76 Ind Cas 950: 2 Pat L Rep (Civ) 132; *Amirchand Nagindas & Co* v. *Raoji Bhai Moti Bhai*, 1930 Mad 714 (716): 58 Mad L Jour 613: 31 Mad L W 757: 130 Ind Cas 453; *Sreenath* v. *Haricharan*, (1908) 7 Cal L Jour 266 (267); *Dularchand* v. *Balramdas*, (1875-78) 1 All 453 (454); *Alagappa Chetty* v. *Vellian Chetty*, (1895) 18 Mad 33 (35, 36): 4 Mad L Jour 283; *Ram Chand* v. *Subhan Baksh*, 1902 Pun Re No 69; *Ramdoyal* v. *Junmenjoy*, (1887) 14 Cal 791 (794); *Ramachandra* v. *Govind*, 1887 Bom Print Judgt 219; *Pandit Bhawani Sahai* v. *Ganesh Das*, 1884 Pun Re No 65; *Pearee Mohan* v. *Chunder Nath*, (1872) 18 Suth W R 408 (410); *Anant Ram* v. *Channu Lal*, (1903) 25 All 378 (383, 384): 1903 All W N 76 [It is not necessary to join all members of the Hindu family if only individual members and strangers compose the partnership]; *Damodardas* v. *Vishendas*, (1910) 7 Ind Cas 584 (587, 588): 4 Sind L Rep 2, (Do.); *P L K Palaniappa Chetty* v. *M A R Arunachallam Chetty*, (1914) 25 Ind Cas 140 141): 7 Bur L Tim 202 [Business agent of firm cannot sue for dissolution—Partner must be substituted as plaintiff].

(2) *Baboo Janaky Das* v. *Bindabandas*, (1841-46) 3 Moo Ind App 175 (197): 1 Sar 263 P C; *Ram Lal* v. *Lakshmi Chand*, (1861) 1 Bom H C R App 51; *Murlidhar* v. *Ram Pratab*, (1896) 1 Cal W N 12; *Ramnarain* v. *Ram Chunder*, (1890) 18 Cal 86 (89, 90); *Harrison* v. *Delhi & London Bank*, (1882) 4 All 437 (450): 1882 All W N 87: 7 Ind Jur 150; *Syed Abdul Hauk* v. *Vaikuntam*, 1927 Mad 491 (493): 52 Mad L Jour 318: 25 Mad L W 388: 38 Mad L Tim 214: 100 Ind Cas 616: 1927 Mad W N 574.

(3) *Tohara Bibi* v. *Zabeda Khatoon*, (1919) 7 Ind Cas 75 (76): 12 Cal L Jour 368.

O. 1, R. 10, Note 15.

But a sub-partner[3-a] or a person who is not in the partnership as a member of the firm but is a member of a superior partnership in which he is on one side and the whole firm as a unit on the other, is not a necessary party to a suit for dissolution of the firm.[4]

In a suit for the *recovery of a debt* due to the partnership all the partners are necessary parties inasmuch as, under S. 45 of the Indian Contract Act the right to claim performance of the contract of loan rests jointly with all the promisees.[5] The said section also provides that on the death of one of the promisees, the right to claim performance rests with the surviving promisees *and the legal representatives of the deceased promisee.* The latter will also be necessary parties therefore to a suit for a debt due to the partnership and this is what the High Court of Calcutta holds.[6] The Allahabad,[7] Bombay[7-a] and Madras[8] High Courts have, however, held a contrary view based on the inconvenience and difficulties that might arise in insisting upon the joinder of the legal representatives of a deceased partner. It is submitted with respect that this latter view is not correct. It is unnecessary to consider this question under the present Code, for the newly introduced provisions of O. 30 provide an exception, as it were, to S. 45 of the Contract Act in that they allow *one* partner alone to sue, provided the suit is *in the name of the firm.*[8-a] It follows that where such a suit is brought, the legal representatives of a deceased partner are not necessary parties.[8-b]

A dormant partner is not a necessary party in an action on a contract entered into with the firm or with one of its members.[9] Where in a suit by the owner of a firm who is also a member of a joint Hindu family, the other members of the family are proved to be partners in the firm, the Court ought to allow the other members to come on record and have the plaint amended accordingly.[10] The same rule will hold good where a suit is brought by the plaintiff as the sole partner and it is found that there are other partners.[11]

(3-a) *Chidambaram* v. *Karuthan Chetty*, (1916) 34 Ind Cas 543 (544) 4 Mad L W 10: 20 Mad L Tim 134: (1916) 2 Mad W N 18.

(4) *Sathappa Chetty* v. *Subramaniyam Chetty*, 1927 P C 70 (71): 4 Oudh W N 491: 101 Ind Cas 17: 31 Cal W N 857: 25 All L J 687: 1927 Mad W N 500: 53 Mad L Jour 245: 26 Mad L W 265: 39 Mad L Tim 232 P C.

(5) *Imamuddin* v. *Liladhar*, (1892) 14 All 524 (527): 1892 All W N 104; *Alagappa Chetty* v. *Vellian Chetty*, (1895) 18 Mad 33 (36): 4 Mad L Jour 283; *Subraya Kani* v. *Ramachandra Pai*, (1910) 6 Ind Cas 438 (438): 7 Mad L Tim 432; *Muthayya Chetty* v. *P S R Somasundaram Chetty*, 1923 Mad 85 (85): 16 Mad L W 527: 68 Ind Cas 927. See *Launkra Mal* v. *Mohan Singh*, 1884 Pun Re No 93 [Suit against firm].

(6) *Ram Narain Nursing Das* v. *R C Janker Lall*, (1890) 18 Cal 86 (90). See also *Muthia Chetty* v. *Maung Tha In*, (1872-92) L B R 651.

(7) *Gobind Prosad* v. *Chander Sekhar*, (1887) 9 All 486 (491): 1887 All W N 133; *Debi Dass* v. *Nirpat*, (1898) 20 All 265 (366): 1898 All W N 73.

(7-a) *Motilal Bechardas* v. *Chellabhai Hari Ram*, (1893) 17 Bom 6 (13, 14): Chitty's S C C R 336.

(8) *Vaidyanathan* v. *Chinnasamy*, (1893) 17 Mad 108 (117).

(8-a) *Sheo Lal Sahu* v. *Sagar Mal*, (1917) 40 Ind Cas 108 (109): 1 Pat L W 650: 1917 Pat H C C 239.

(8-b) *Pulin Behari Roy and others* v. *Mahendra Chandra Ghose and others*, 1921 Cal 722 (724, 725): 34 Cal L Jour 405: 67 Ind Cas 10.

(9) *Guzzu* v. *Venkadaru Venkata Reddi*, (1915) 31 Ind Cas 913 (918): 1915 Mad W N 864.

(10) *Vadilal* v. *Khusal*, (1903) 27 Bom 157 (161): 4 Bom L R 968; *Rattan Chand* v. *Ram Pershad*, 1906 Pun Re No 69: 118 Pun L R 1906: 1906 Pun W R 106. But see *Lutchumanan* v. *Siva*, (1899) 26 Cal 349 (354): 3 Cal W N 190 [Infant members—Not admitted to partnership—Not necessary parties]; *Lalji* v. *Keshowji*, (1912) 17 Ind Cas 193 (194, 195): 37 Bom 340: 14 Bom L R 840 [Infant sons—Born after suit—Represented by father in business—Not necessary parties].

(11) *Vadilal* v. *Khusal*, (1903) 27 Bom 157 (161): 4 Bom L R 968.

16. Partition suits.—All persons interested in the properties are necessary parties to a suit for partition.[1] The reason is that the share to which a person is entitled can be determined only in the presence of all the persons interested in the properties inasmuch as the partition which is made in favour of the plaintiff against his co-sharers gives him a portion of the property and takes away all rights which the others have in it. But the interest of the person, in order to make him a necessary party, must be of the *same degree* as that of the plaintiff. Persons having an inferior degree of interest to that of the plaintiff are not necessary parties.[2] Thus in a suit for partition of the *melwaram* rights in certain properties, the *kudiwaramdars* are not necessary parties.[3] Similarly in a suit for partition by sons against the father, grandsons are not necessary parties.[4] Similarly, mortgagees of the family properties[5] and creditors of the defendants[6] as also alienees of the family properties[7] are not *necessary* parties to a suit for partition. They may all be *proper* parties, however, if their presence is necessary to enable the Court to adjudicate upon and settle all matters in dispute effectually and completely.[8] The High Court of Bombay has, however, held in the undermentioned case that a purchaser or mortgagee of a co-parcener's share in joint property is a *necessary* party to the suit for partition.[9]

O. 1, R. 10, Note 16.

Note 16.

(1) *Chudasama* v. *Partab Sang*, (1904) 28 Bom 209 (213, 214): 5 Bom L R 937; *Moro* v. *Bhikaji*, (1890) Bom Print Judgt 196; *Nathuni Mahton* v. *Manraj Mahton*, (1877-78) 2 Cal 149 (151): 1 Ind Jur 555; *Parbati* v. *Ainuddin*, (1881) 7 Cal 577 (581): 9 Cal L Rep 170: 4 Shom L R 46; *Kali Kanta Surma* v. *G P Surma Bardeuri*, (1890) 17 Cal 906 (910); *Sudaburt Prosad* v. *Lotf Ali Khan*, (1870) 14 Suth W R 339 (345); *Gokul Prosad* v. *Etwaree Mahto*, (1873) 20 Suth W R 138 (138); *Pahaladha Singh* v. *Mt Luchmunbutty*, (1869) 12 Suth W R 256 (259, 260); *Khater* v. *Talewand*, (1903) 6 Oudh Cas 379 (381); *Thakur Baksh* v. *Bhagwan Din*, (1898) 1 Oudh Cas 215 (219); *Torit Bhoosun* v. *Tara Prosonno*, (1879) 4 Cal 756 (757): 4 Cal L Rep 161: 4 Ind Jur 30; *Srinath* v. *Probhat Chandra*, (1910) 6 Ind Cas 244 (245): 11 Cal L Jour 580; *Sadu Bin Raghu* v. *Ram Bin Govind*, (1892) 16 Bom 608 (611); *Pandit Ikbal Narayan* v. *Pandit Suraj Narain*, (1907) 10 Oudh Cas 33 (36); *The Maharaja of Benares* v. *Debi Dayal Noma*, 1881 All W N 36 (36): 3 All 575; *Nalinakshya Ghosal* v. *Raghunath Ghosal*, 1925 Cal 754 (758): 85 Ind Cas 662; *Timmappaya* v. *Lakshminarayana*, (1883) 6 Mad 284 (286); *Lakshmichand* v. *Kachu Bai*, (1911) 11 Ind Cas 559 (560): 35 Bom 393: 13 Bom L R 517; *Sabdur Ali* v. *Sadashiv*, (1919) 51 Ind Cas 223 (225): 43 Bom 575: 21 Bom L R 369; *Pandurang Anandrav* v. *Bhashkar Sadashiv*, (1874) 11 Bom H C R 72; *Mangli Pershad* v. *Ishri Pershad*, (1896) 18 All 476 (477): 1896 All W N 158; *Mahomed Ahamad* v. *Ansar Muhammad*, (1920) 56 Ind Cas 304 (306): 23 Oudh Cas 62: 7 Oudh L J 158; *Mahomed Abjal* v. *Hafizannissa Khatun*, 1926 Cal 741 (742): 91 Ind Cas 567 [Also in appeal]; *Lachman Das* v. *Baghu Ram*, 1927 Lah 189 (189): 100 Ind Cas 17, (Do.).

(2) *Upendra Chandra* v. *Md Faiz Chowdhry*, (1908) 7 Cal L Jour 449 (452): 12 Cal W N 670 [Durputnidar is not a necessary party].

(3) *Ramakrishna Iyer* v. *Krishna Iyer*, (1908) 18 Mad L Jour 85 (87).

(4) *Digambar Mahton* v. *Dhanraj Mahton*, 1922 Pat 96 (96): 1 Pat 361: 3 Pat L Tim 238: 67 Ind Cas 156.

(5) *Basanta Kumar Das* v. *Kusum Kumari Dasi*, (1917) 38 Ind Cas 584 (585): 44 Cal 28; *Mohindrobhoosun* v. *Soshee Bhoosun*, (1880) 5 Cal 882 (886) [No relief claimed against mortgagee and mortgage not attacked in any way—Mortgagee not even a proper party]; *Muhammad Din and others* v. *Muhammad and others*, 1921 Lah 83 (84): 3 Lah L Jour 377: 67 Ind Cas 425.

(6) *Shanmuga Nadan* v. *Arunachallam*, 1922 Mad 332: 45 Mad 194: 42 Mad L Jour 97: 30 Mad L Tim 172: 69 Ind Cas 961: 14 Mad L W 642: 1921 Mad W N 799 [Though their joinder is not improper].

(7) *Sivaramakrishna* v. *Sankaranarayana*, 1930 Mad 913 (913): 1930 Mad W N 679: 32 Mad L W 438: 59 Mad L Jour 524: 129 Ind Cas 235.

(8) See the cases cited in foot-notes (5), (6) and (7) above. *Indu Bhusan Acharya* v. *Sailaya Sundari*, (1910) 7 Ind Cas 382 (384) Cal; *Ramasamy* v. *Vellayappa*, 1931 Mad 357 (359, 361): 60 Mad L Jour 229: 131 Ind Cas 643: 33 Mad L W 734 [Hindu joint family—Suit for partition—Worshippers of temple—Claiming a sum of joint family money in trust for temple—Added after preliminary decree]; *Nandkeshwar Misra* v. *Sudharshan Ram Tewari*, 1923 Pat 162 (162): 68 Ind Cas 804: 1924 Pat H C C 272 [A co-sharer whose interests have been transferred may be a proper party to a suit for partition]; *Jadunath Roy* v. *Murari Mohun Mullick*, 1931 Cal 594 (596): 35 Cal W N 296: 134 Ind Cas 307 [Mortgagee]; *Narakka* v. *Narayana*, (1883) 6 Mad 331 (333, 334): 7 Ind Jur 357. See *Pandit Ikbal Narain* v. *Pandit Suraj Narain*, (1907) 10 Oudh Cas 33 (35, 36) [Persons in possession in collusion with some sharers—Joinder—Not misjoinder]; *Sri Mohan Thakur* v. *MacGregor*, (1901) 28 Cal 769 (783) [Common manager appointed for a period—Suit for partition and accounts—Impleading manager—No misjoinder].

(9) *Sadu Bin* v. *Ram Bin*, (1892) 16 Bom 608 (612).

O. 1, R. 10, Notes 16–18

Persons not claiming any kind of interest in the properties are not to be added as parties in a partition suit.[10]

17. Pre-emption suits.—In a suit for pre-emption in respect of a joint purchase by several co-vendees, all of them[1] or in the case of the death of one of them, his legal representatives[2] are necessary parties. A second vendee is also a necessary party.[3] But the vendor[4] or a mortgagee from the vendee[5] is not a necessary party. Where the suit for pre-emption is against the *benami* vendee, the real purchaser may be added as a proper party, as such addition will not change the character of the suit.[6] Where a purchaser sues for rent accruing due between the date of his purchase and the date of his surrender to the pre-emptor, the latter must be impleaded as a party.[7]

18. Suits for possession by co-owners.—All co-owners are necessary parties to a suit to recover property belonging to them jointly.[1] Thus one member of a joint Hindu family cannot sue for recovery of property belonging to the family without impleading the other members as parties to the suit.[1-a] Where, however, he sues or is sued as a *manager* of the family, it is not necessary to add the other members as parties.[2] Similarly where a bond

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(10) *Sitaramayya* v. *Ramappayya*, (1917) 39 Ind Cas 160 (162): 5 Mad L W 207; *Jadunath Sarkar* v. *Haran Chandra Sarkar*, 1923 Cal 221 (223): 49 Cal 1043: 36 Cal L Jour 217: 70 Ind Cas 687; *Muddun Gopal Lall* v. *Mst Gowurbutty*, (1874) 21 Suth W R 190 (191).

Note 17.

(1) *Habibulla* v. *Achaibar Pandey*, (1882) 4 All 145 (146): 1881 All W N 153: 6 Ind Jur 486. See *Karan Singh* v. *Md Ismail Khan*, (1885) 7 All 860 (862): 1885 All W N 247. See *Badri Singh* v. *Gobardhan*, 1923 All 187 (188): 79 Ind Cas 220 [But if a stranger with no interest is impleaded as co-plaintiff the whole suit is bad—Amendment by striking off stranger not allowed]; *Umar Daraz* v. *Ram Das*, 1925 All 355 (356): 23 All L J 198: 47 All 450: 87 Ind Cas 55, (Do.).

(2) *Ramchand* v. *Rana*, 1889 Pun Re No 149.

(3) *Khettar Chandra* v. *Nabin Kali Devi*, (1913) 20 Ind Cas 424 (425): 35 All 385: 11 All L Jour 527; *Raushan* v. *Makhan*, 1907 Pun Re No 106: 75 Pun L R 1908: 99 Pun W R 1907. See also *Bhagwan Singh* v. *Kharag Singh*, (1967) 4 All L J 756 (759).

(4) *Hiralal* v. *Ramjas*, (1884) 6 All 57 (58): 1883 All W N 206; *Harbans Tiwari* v. *Tota Sahu*, (1909) 3 Ind Cas 735 (736): 32 All 14: 6 Mad L Tim 300: 3 Ind Cas 735: 6 All L J 926; *Ram Sarup* v. *Sital Prosad*, (1904) 26 All 549 (553): 1 All L J 278: 1904 All W N 128; *Loksingh* v. *Balwan Singh*, 1903 All W N 239 (239); *Shiv Charan* v. *Secretary of State*, 1898 Pun Re No 80; *Uddhammal* v. *Ganda Mall*, 1889 Pun Re No 134; *Bindeshuri* v. *Balraj Sahai*, (1907) 10 Oudh Cas 49 (52, 53).

(5) *Deoraj* v. *Govind Pershad*, (1912) 13 Ind Cas 647 (647): 91 Pun L R 1912: 55 Pun W R 1912; *Ram Sahai* v. *Jagadamba Singh*, (1917) 37 Ind Cas 163 (165): 19 Oudh Cas 153: 3 Oudh L J 683.

(6) *Muhammad Ismail* v. *Abdul Gafur*, (1909) 4 Ind Cas 488 (489) All.

(7) *Buldeo Pershad* v. *Mohun*, (1866) 1 Agra R C A 30.

Note 18.

(1) *Kahn Singh* v. *Gobind Doss*, 1866 Pun Re No 39 [Suit for possession—All common owners of land, necessary parties]; *Hookma Singh* v. *Futteh Singh*, 1866 Pun Re No 103, (Do.); *Dalla Singh* v. *Ala Singh*, 1881 Pun Re No 92; *Kasar Singh* v. *Ganga Singh*, 1882 Pun Re No 2 [*Per* Plowden, J]; *Harran Chunder Mookerjee* v. *Nundopopal Muttyloll*, (1874) 22 Suth W R 71 (73): 13 Beng L R 142; *Sheo Tahal Das* v. *Syed Hussain*, 1888 All W N 156 (156); *Jatra Mohun* v. *Aukhil Chandra*, (1897) 24 Cal 334 (337): 1 Cal W N 314; *Sheikh Faizu* v. *Sheik Doman*, (1914) 25 Ind Cas 536 (537): 19 Cal L Jour 455; *Ram Autar* v. *Abul Hasan Khan*, (1915) 28 Ind Cas 307 (309): 2 Oudh L J 131; *Padmanabha Chettiar* v. *Williams*, (1900) 23 Mad 239 (254, 255): 10 Mad L Jour 10. See however *Gangadhra* v. *Khaja Abdul Ajij*, (1909) 2 Ind Cas 77 (79): 14 Cal W N 128: 11 Cal L Jour 34 [*Patni* sale—Suit to set aside by one co-sharer].

(1-a) *Jugal Kishore* v. *Tulasi Ram*, (1886) 8 All 264 (265): 1886 All W N 89; *Rajaram* v. *Lakshman Pershad*, (1870) 4 Beng L R 118: 12 Suth W R 478; *Hari Gopal* v. *Gokul Das*, (1887) 12 Bom 158 (160); *Hari Vasudev* v. *Mahadu*, (1895) 20 Bom 435 (437); *Guru Prasad* v. *Rasmohan*, (1878) 1 Cal L Rep 431 (432, 433); *Gokool Pershad* v. *Etwaree Mahto*, (1873) 20 Suth W R 138 (138); *Naro Hari* v. *Vithabhat*, (1886) 10 Bom 648 (656); *Sadulla Khan* v. *Bhana Mal*, 1882 Pun Re No 58; *Jagat* v. *Udit*, (1913) 20 Ind Cas 262 (263) Cal; *Shiam Chunder* v. *Budhu*, (1914) 24 Ind Cas 252 (253): 12 All L J 794; *Sheo Churn Narain Singh* v. *Chukraree Pershad*, (1871) 15 Suth W R 436 (437); *Kashinath Chimnaji* v. *Chimnaji Sadashiv*, (1906) 30 Bom 477 (486): 8 Bom L R 268.

(2) *Kishen Pershad* v. *Har Narain*, (1911) 9 Ind Cas 739 (741): 33 All 272: 38 Ind App 45: 15 Cal W N 321: 8 All L J 256: 9 Mad L Tim 343: 13 Cal L Jour 345: 21 Mad L Jour 378: 13 Bom L R 359: (1911) 2 Mad W N 395 P C [Reversing 29 All 311]; *Hori Lall* v. *Nimman Kunwar*, (1912) 15 Ind Cas 126 (129, 131, 135): 34 All 549: 9 All L J 819 F B; *Lutchumanen* v. *Sivaprokasa*, (1899) 26 Cal 349

or a contract is entered *into in the name of a member*, such member can sue thereon without adding the other members as parties.[3] O. 1, R. 10, Note 18.

There is an exception to the rule that all the co-owners are necessary parties to a suit for recovery of joint property. One of several co-owners can maintain an action in ejectment against a trespasser without impleading the other co-owners as parties thereto,[4] though it may be desirable to add them as proper parties.[5] The persons in possession of the property are all, however, necessary parties.[6] An action in ejectment against *a tenant, however*, must be brought by all the co-sharers.[6-a]

An assignee *pendente lite* of the property is not a necessary party to a suit for possession inasmuch as he will be bound under S. 52 of the

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(356): 8 Cal W N 190; *Dayabhai Lallubhai* v. *Gopalji Dayabhai*, (1894) 18 Bom 141 (142); *Pratap Narain Singh* v. *Rudra Narayan Singh*, (1904) 26 All 528 (531): 1904 All W N 119 [Confirmed on appeal in 6 Ind Cas 981 P C]; *Gansavant Balsavant* v. *Narayan*, (1883) 7 Bom 467 (471, 472): 8 Ind Jur 90; *Arunachala* v. *Vaithilinga*, (1886) 6 Mad 27 (28): 7 Ind Jur 10; *Subramanyam* v. *Gopala*, (1887) 10 Mad 223 (225) [Karnavan represents Malabar tarwad]; *Byathamma* v. *Avulla*, (1892) 15 Mad 19 (22), (Do.); *Bishambar Nath* v. *Indra Basa*, (1911) 10 Ind Cas 200 (201): 14 Oudh Cas 127; *Sheikh Ibrahim* v. *Rama Iyer*, (1911) 10 Ind Cas 874 (877, 879): 35 Mad 685: 21 Mad L Jour 508: (1911) 1 Mad W N 442; *Ganpath Marvari* v. *Balmakund*, (1912) 13 Ind Cas 206 (208) Cal; *Madanlal* v. *Kishen Singh*, (1912) 15 Ind Cas 138 (139, 140): 34 All 572: 9 All L J 844 F B [Mortgage suit by manager]; *Chajuma* v. *Nathan*, (1912) 15 Ind Cas 876 (877) All, (Do.); *Annamalai Pathan* v. *Muthuvijiya Ragunath*, (1917) 39 Ind Cas 427 (427): 5 Mad L W 120, (Do.); *Subramaniya* v. *Ramakrishna*, 1922 Mad 407 (407): 15 Mad L W 31: 70 Ind Cas 160; *Lalchand Thawkar* v. *Sheogobind Thakur*, 1929 Pat 741 (742): 8 Pat 788: 121 Ind Cas 330: 11 Pat L Tim 237; *Lalji Nensey Ludha* v. *Keshowji Punja*, (1912) 17 Ind Cas 193 (194): 37 Bom 340: 14 Bom L Rep 840; *Ram Kishan* v. *Ganga Ram*, 1931 Lah 559 (560): 32 Pun L R 199: 133 Ind Cas 116: 12 Lah 428 [The contrary view taken in 23 Mad 190 is no longer law in view of the Privy Council decision in 9 Ind Cas 739].

(3) *Hari Vasudev* v. *Mahadu*, (1896) 20 Bom 435 (437); *Kirpal Singh* v. *Sant Singh*, (1912) 13 Ind Cas 305 (308): 1911 Pun Re No 71: 1912 Pun L R 30: 1911 Pun W R 205; *Biru Ram* v. *Miran Baksh*, 1927 Lah 129 (129): 99 Ind Cas 565; *Gangaram Mahadick* v. *Bapusahib*, 1922 Bom 354 (354): 24 Bom L R 826: 46 Bom 1022: 84 Ind Cas 508; *Bungsee Singh* v. *Soodist Lall*, (1881) 7 Cal 739 (746): 10 Cal L Rep 263; *Gopal Das* v. *Badri Nath*, (1905) 27 All 361 (362): 2 All L J 3: 1904 All W N 282; *Adaikkalam Chetty* v. *Marimuthu*, (1899) 22 Mad 326 (327): 9 Mad L Jour 31; *Sohna Shah* v. *Dipa Shah*, 1902 Pun Re No 15; *Durga Parsad* v. *Damodar Das*, (1910) 5 Ind Cas 767 (768): 32 All 183: 7 All L J 161; *Jayabhai* v. *Rustomji*, (1885) 9 Bom 311 (315).

(4) *Currimbhoy & Co* v. *L A Creet*, 1930 Cal 113 (125): 50 Cal L Jour 208: 57 Cal 170: 123 Ind Cas 250; *Ahmed Sahib Shutari* v. *Magnesite Syndicate Ltd*, (1915) 29 Ind Cas 60 (60): 39 Mad 501: 2 Mad L W 460: 17 Mad L Tim 387: 28 Mad L Jour 598; *Tuljaram* v. *Harkisan*, 1929 Bom 244 (245): 31 Bom L R 448: 119 Ind Cas 177; *Ebrahim* v. *Curseiji*, (1887) 11 Bom 644 (648); *Teeluk Rai* v. *Ramjas Rai*, (1873) 5 N W P 182; *Ramzan Ali* v. *Basharat Ali*, 1901 Pun Re No 105; *Dursan Singh* v. *Durbejoy Singh*, (1909) 1 Ind Cas 530 (532, 533, 534): 9 Cal L Jour 623 [Claim suit and for injunction]; *Selambayi* v. *Sangu Pandithan*, (1916) 35 Ind Cas 147 (147): 3 Mad L W 542 [In this case plaintiff was in sole possession]; *Pendekkallu Thimmayya* v. *Siddappa*, 1925 Mad 63 (64): 75 Ind Cas 112; *Budha Singh* v. *Sant Singh*, 1926 Lah 545 (545): 95 Ind Cas 121; *Kuchibhotta Seetaramasastri* v. *Kushibhotta Sivaramayya*, 1926 Mad 809 (809, 810): 24 Mad L W 181: 1926 Mad W N 398: 95 Ind Cas 856; *Raghuraj Singh* v. *Bishen Tewary*, (1917) 37 Ind Cas 384 (384) Pat. But see *Nundun* v. *Lloyd*, (1874) 22 Suth W R 74 (76). See the following cases:—*Harendra Narain Singh* v. *Moran*, (1888) 15 Cal 40 (46): 12 Ind Jur 220; *Moheeb Ali* v. *Ameer Rai*, (1890) 17 Cal 538 (540); *Santee Ram* v. *Bykunt Parya*, (1873) 19 Suth W R 280 (280): 10 Beng L R 397 [Measurement of land]; *Abdul Hussain* v. *Lall Chand*, (1884) 10 Cal 36 (38): 13 Cal L Rep 323, (Do.).

(5) *Tuljaram* v. *Harkisan*, 1929 Bom 244 (244): 31 Bom L R 448: 119 Ind Cas 177.

(6) *Mokshud Mandal* v. *Khedu Moudal*, 1929 Cal 669 (670): 33 Cal W N 742; *Banubi* v. *Narsingh Rao*, (1907) 31 Bom 250 (253): 9 Bom L R 91; *Poonit Singh* v. *Kamal Singh*, 1924 Pat 172 (173): 72 Ind Cas 1038; *Arunadoya Chakarbarty* v. *Muhammad Ali and others*, 1928 Cal 138 (141): 46 Cal L Jour 433: 106 Ind Cas 261; *Satis Chandra* v. *Brojo Gopal*, (1918) 46 Ind Cas 104 (106): 22 Cal W N 807; *Ezra* v. *Gubbay*, (1921) 60 Ind Cas 969 (971): 47 Cal 907.

(6-a) *Gouri Sunkur* v. *Tirthomonee*, (1869) 12 Suth W R 452 (453); *Sree Chand* v. *Nimchand*, (1870) 13 Suth W R 337 (337, 338): 5 Beng L R App 25; *Sobha Ram* v. *Gunga Pershad*, (1870) 2 N W P H C R 260 (261); *Alum Manji* v. *Ashad Ali*, (1871) 16 Suth W R 138 (139, 140); *Hulodhur Sen* v. *Gooroo Doss Roy*, (1873) 20 Suth W R 126 (127); *Dinobundoo* v. *Drobo Moyee*, (1875) 24 Suth W R 110 (111); *Krishna Rao* v. *Govind*, (1875) 12 Bom H C R 85; *Brojo Kishore Singh* v. *Bharut Singh*, (1879) 4 Cal 963 (963); *Attar Singh* v. *Dewa Singh*, 17 Pun Re 1879; *Radha Prosad Wasti* v. *Esuf*, (1881) 7 Cal 414 (417): 9 Cal L Rep 76; *Reasut Hossein* v. *Chorwar Singh*, (1881) 7 Cal 470 (473): 9 Cal L Rep 260; *Dwarka Nath Rai* v. *Kali Chunder Rai*, (1886) 13 Cal 75 (78) [Withdrawal of one of the co-sharer plaintiffs after suit immaterial]; *Ram Baksh* v. *Chanda*, (1909) 2 Ind Cas 306 (307): 6 All L J 541 [Unwilling co-sharers to be made defendants]; *Gopal Ram Mohuri* v. *Dhakeswar Prosad*, (1908) 35 Cal 807 (811): 7 Cal L Jour 483. See *Kanna Pisharody* v. *Narayanan*, (1881) 3 Mad 234 (236). But see *Ebrahim Pir Muhammad* v. *Curseiji Sorabji*, (1887) 11 Bom 644 (648, 649) [Where one of two co-owners conveyed his share to

O. 1, R. 10, Notes 18—19.

Transfer of Property Act by the decree in the suit.[7] But he may be added as a proper party.[7a] Where, however, the assignee is a purchaser at a Court sale he will be a necessary party.[8] The reason is that S. 52 of the Transfer of Property Act does not apply to sales *in invitum*. In an ejectment suit by a landlord against his tenant the Court should not bring on the record the person from whom the plaintiff holds the land nor persons claiming to hold it from a third party nor such third party.[9] Where *A* sues his lessor *B* for possession of land and *C* intervenes claiming it to be his, he can be added as a proper party if he does not claim adversely both to the plaintiff and the defendant.[10] In a suit for ejectment of a sub-tenant's sub-tenant, the sub-tenant is a necessary party.[11] In a suit for possession of attached property under S. 146, Criminal Procedure Code, the government is not a necessary party.[12] Nor is a Hindu reversioner a necessary or proper party to a suit by the adopted son for possession against the widow where the validity of the adoption could not be questioned.[13] Where *B* is made a co-plaintiff with *A* in a suit for possession, on the ground that under an agreement between them, *B* is entitled to share in the property in the event of success in the litigation, and subsequently *A* compromises the suit with the defendant, *B* cannot claim to continue the suit, as he has no present subsisting interest in the property.[14]

19. Suits by or against joint promisees.—All co-promisees are necessary parties to a suit to enforce the promise.[1] The same principle will apply where a sole obligee dies leaving several co-heirs. In such a case, one of them alone cannot maintain a suit without impleading the others as parties.[2] Where several persons are jointly and severally liable for a single liability

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plaintiff subsequent to lease—It was held plaintiff could sue alone for ejectment—Joint tenancy and tenancy in common contrasted].

(7) *Mathewson* v. *Sri Ram Kanai*, (1909) 1 Ind Cas 626 (629, 630): 36 Cal 675: 9 Cal L Jour 523; *Ishaq Ali Khan* v. *Chunni & Co.* (1899) 21 All 149 (151): 1898 All W N 214; *Sheo Narain* v. *Chunni Lal*, (1900) 22 All 243 (245, 247): 1900 All W N 51; *Gulabchand* v. *Dhondi*, (1874) 11 Bom H C 64; *Umamoyi Burmoneea* v. *Tarini Pershad*, (1867) 7 Suth W R 225 (226).

(7-a) *Lakha Ram* v. *Jhindu*, 1887 Pun Re No 29; *Mathewson* v. *Sri Ram Kanai Singh*, (1909) 1 Ind Cas 626 (629, 630): 36 Cal 675: 9 Cal L Jour 523.

(8) *Sadhu Sah* v. *Hamid Husain Khan*, (1902) 5 Oudh Cas 91 (93).

(9) *Sankara Narayanan* v. *Ananthanarayanan*, (1897) 20 Mad 375 (378); *Ganu* v. *Moro*, (1873) 10 Bom H C R 429; *Sekh Chand* v. *Romoni Mohan Roy*, (1912) 17 Ind Cas 603 (604): 17 Cal W N 1105; *Kartick Nath* v. *Chunman Roy*, (1873) 21 Suth W R 51 (51); *Kashi* v. *Sadashiv*, (1897) 21 Bom 229 (233); *Amir Singh* v. *Moazzam*, (1875) 7 N W P H C R 58 [Plaintiff co-sharer in exclusive possession by agreement can sue alone].

(10) *Joy Kishen* v. *Raj Kishen*, (1871) 16 Suth W R 101 (101). See *Maung Po Gaung* v. *Ma Shwe Bwin*, (1907-08) 4 L B R 231: 14 Bur L Rep 30 [Suit for possession by widows—Sons have no right to be made parties—Burmese Law]. See also *Karamat* v. *Yasin*, 1926 Oudh 422 (423): 94 Ind Cas 3 [Suit by a lessee against another for possession—Landlord not necessary, though proper party]; *Pran Kisto Dey* v. *Bissumbhur Sein*, (1869) 11 Suth W R 80 (81): 2 Beng L R (A C) 207, (Do.).

(11) *Fakhrunissa* v. *Imdad Ali*, (1915) 30 Ind Cas 795 (795) Board of Revenue U P.

(12) *Goswami Ranchor* v. *Sri Girdhariji*, (1897) 20 All 120 (121): 1897 All W N 214.

(13) *Mt Sundarbai* v. *Gopal Singh*, 1926 Nag 354 (355): 94 Ind Cas 918.

(14) *Basant Singh* v. *Mahabir Prosad*, (1913) 19 Ind Cas 340 (343): 35 All 273: 40 Ind App 86: 25 Mad L Jour 301: 16 Oudh Cas 136: 15 Bom L R 525: 17 Cal L Jour 566: 11 All L J 469: 1913 Mad W N 481: 17 Cal W N 669: 14 Mad L Tim 64.

Note 19.

(1) *Ramsebuk* v. *Ram Lall*, (1881) 6 Cal 815 (826): 8 Cal L Rep 457; *Subburalli* v. *Sadashiv*, (1919) 51 Ind Cas 223 (223, 225): 43 Bom 575: 21 Bom L R 369; *Kalekhan* v. *Sevaram*, 1889 Pun Re No 156 F B; *Mangammal* v. *Pahlajrai*, 1928 Sind 16 (16): 105 Ind Cas 544; *Sivaramathu* v. *Muhamed Sahul*, 1927 Mad 84 (85): 51 Mad L Jour 648: 98 Ind Cas 549; *Mannava Annapurnamma* v. *Uppala Akkayya*, (1913) 19 Ind Cas 12 (16): 36 Mad 544: 24 Mad L Jour 333: 1913 Mad W N 328: 13 Mad L Tim 268 F B; *Ti Mull* v. *Mobar Reikan*, (1893-1900) L B R 555.

(2) *Kandhiya* v. *Chandar*, (1885) 7 All 313 (315): 1885 All W N 34 F B; *Bedar Bukht* v. *Khurum Bukht*, (1873) 19 Suth W R 315 (320): 2 Suth 823; *Jugadamba* v. *Haranchandra*, (1868) 10 Suth W R 108 (109): 6 Beng L R 526 Note.

all of them are not necessary parties to a suit against some of them only; but they may be added as proper parties in order to prevent multiplicity of suits.[3]

O. 1, R. 10 Notes 19—20.

20. Suits for rent.—It has been already observed in Note 7 to O. 1, R. 1, that where a right to enforce a liability is jointly vested in several persons, all of them are necessary parties to a suit to enforce such liability.[1] In rent suits only those persons who are liable to pay rent should be impleaded as parties.[2] The general principle governing the joinder of necessary parties does not enable persons who are not likely to be affected by the result, to come in and raise altogether new questions which do not properly arise. Therefore a tenant cannot ordinarily insist on impleading a third party in a rent suit, so as to raise questions of title and thus convert a simple rent suit into a complicated title suit: nor can such party be allowed to come in on his own application.[3] Where, however, the third party claims a share of the rent sued for[4] or where the defendant pleads payment to the third party with the owner's consent[5] or where the third party is alleged to be a transferee from the tenant with the landlord's consent,[6] he may be impleaded as a proper party to the suit. Where, during the pendency of a rent suit, a receiver is appointed in respect of the property of the defendants,

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(3) *Lavingstone* v. *Feroz Din*, (1915) 27 Ind Cas 94 (95): 1914 Pun Re No 107: 203 Pun L R 1915; *Murugappa Chettiar* v. *L K S S Firm*, 1926 Mad 135 (136): 90 Ind Cas 721 [Transferee from joint debtor was made a party]; *Bhugabuth Thakur* v. *Madhub Kristo*, (1896) 23 Cal 553 (556) Note; *Robinson* v. *Giesel*, (1894) 2 Q B 685: 64 L J Q B 52: 71 L T 70: 42 W R 609: 9 R 555 (C A) cited in 54 Ind Cas 636: 30 Cal L Jour 417: 24 Cal W N 110. But see *Kendall* v. *Hamilton*, 1879 L R 4 A C 504: (1878) 3 C P D 403: 47 L J R Q B 665: 39 L T 250: 27 W R 121: 48 L J Q B 705 cited in 17 Bom 562: 37 Cal 399 [The rule that all joint debtors should be sued together is not applicable in India where co-promisors are not necessary, but proper parties].

Note 20.

(1) See also the following cases: *Kalidas* v. *Nathu*, (1883) 7 Bom 217 (219): 7 Ind Jur 428; *Pyari Mohan* v. *Nabin Chunder*, (1899) 26 Cal 409 (413): 3 Cal W N 271 F B; *Obhoy Gobind* v. *Hary Churn*, (1882) 8 Cal 277 (278): *Jogendra Chunder* v. *Nabin Chunder*, (1882) 8 Cal 353 (356): 10 Cal L Rep 331; *Haridas Chatterjee* v. *Gahanabai*, (1920) 56 Ind Cas 761 (762) Nag; *Iswar Chunder* v. *Satish Chunder*, (1903) 30 Cal 207 (210): 7 Cal W N 126; *Vavuthu Naicken* v. *Venkatasesha Iyer*, (1914) 24 Ind Cas 806 (807) Mad; *Ponnambala Pillai* v. *Muthu Chettiar*, (1916) 33 Ind Cas 52 (53): 30 Mad L Jour 619: (1916) 1 Mad W N 181 [Suit by two out of five trustees for rent making the others defendants—Held not bad]; *Ram Asary* v. *Sheonandan*, (1916) 35 Ind Cas 868 (870): 1917 Pat H C C 21: 1 Pat L Jour 573: 1 Pat L W 35; *Dwarka Nath* v. *Tara Prosanna*, (1890) 17 Cal 160 (162). But see *Ma Se* v. *U Zun*, 1924 Rang 201 (202): 2 Bur L Jour 266: 83 Ind Cas 329.

(2) *Raghunathdas* v. *Morarji*, (1892) 16 Bom 568 (576).

(3) *Furgusson* v. *The Government*, (1868) 9 Suth W R 158 (161); *Puddolochun* v. *Lall Chand*, (1868) 10 Suth W R 283 (283): 1 Beng L Rep S N 26; *Parvat Chandra* v. *Amulya Chandra*, 1927 Cal 340 (342): 45 Cal L Jour 146: 101 Ind Cas 527; *Isur Chunder Sein* v. *Bipeen Beharee Roy*, (1871) 16 Suth W R 132 (132): 8 Beng L R 188 Note; *Mt Oognee Chowdrani* v. *Shaikh Keramutoolah*, (1872) 17 Suth W R 219 (219); *Choolie Lall* v. *Kokil Singh*, (1873) 19 Suth W R 248 (248); *Gooroo Prosanna* v. *Guggun Chunder*, (1873) 20 Suth W R 383 (384); *Radha Malakar* v. *Srishtee Narain*, (1874) 21 Suth W R 88 (88); *Bykunt Kyburto Doss* v. *Shustee Mohun Paul Chowdhry*, (1874) 22 Suth W R 526 (528); *Kattyanee Debia* v. *Girish Chunder Banerji*, (1875) 23 Suth W R 168 (169); *Amatal Fatima Khanum* v. *Taranath Chand*, (1875) 24 Suth W R 151 (151): 13 Beng L R App 27; *Biressur Panrey* v. *Jagendro Chunder Debi*, (1875) 24 Suth W R 261 (261, 262); *Baboo Raghu Nath Pershad Singh* v. *Byjnath Sahoy*, (1875) 24 Suth W R 349 (349, 350); *Protap Chunder Roy Chowdhry* v. *Jogendro Chunder Ghose*, (1879) 4 Cal L Rep 168 (171); *Lodai Mollah* v. *Kally Dass*, (1882) 8 Cal 238 (245): 10 Cal L Rep 581: 4 Shom L Rep 275; *Sankaran* v. *Ananthanarayanan*, (1897) 20 Mad 375 (378); *Kashi* v. *Sadashiv*, (1897) 21 Bom 229 (233); *Jotirmoy Maulik* v. *Khudi Ram*, (1919) 50 Ind Cas 908 (909) Cal; *Ala Hussain* v. *Ismail*, 1886 Pun Re No 66; *Sri Rameswar Prasad* v. *Nankhu Mod and others*, (1916) 32 Ind Cas 553 (554) Cal. But see contra *Konjul Sahoo* v. *Gooroo Buksh Kooer*, (1870) 13 Suth W R 362 (363): 8 Beng L R 184 Note; *Kanhaya Roy* v. *Shaik Hyder Baksh*, (1876) 25 Suth W R 29 (30); *Radhamonee* v. *Ram Narain Dey*, (1874) 22 Suth W R 440 (442).

(4) *Chowrasee* v. *Bokhooree*, (1875) 24 Suth W R 350 (350); *Kanhye Roy* v. *Shaik Hyder Baksh*, (1876) 25 Suth W R 29 (30); *Ishen Chunder Sen* v. *Onath Nath Deb*, (1872) 18 Suth W R 16 (17) [Suit for rent by Receiver—Discharge of Receiver—Owner properly impleaded]; *Hridoy Nath Shaha* v. *Mohobutnessa Bibi*, (1892) 20 Cal 285 (291); *Tani Mahesha* v. *Secretary of State for India in Council*, 1894 Pun Re No 67 [Joint lessors may sue though lease deed not in name of all].

(5) *Altaf-ul Rahman* v. *Agha Jan*, (1913) 19 Ind Cas 473 (474): 168 Pun L R 1913: 106 Pun W R 1913.

(6) *Bacha Sham* v. *Bal Govind*, 1930 Pat 323 (324): 11 Mad L Tim 243: 125 Ind Cas 119; *Kashi Das* v. *Krishna Gopal*, 1930 Pat 592 (592): 11 Pat L Tim 623: 128 Ind Cas 790.

O. 1, R. 10, Note 20.

he must be impleaded as a necessary party to the suit.[7] It has been held by a Full Bench of the Calcutta High Court that the heirs of a tenant do not take the tenancy as an entire body, but take as tenants-in-common each being liable jointly and severally for the whole rent to the landlord and that therefore a suit against some of the heirs alone for rent without impleading the others is not bad,[8] though of course they may be added as proper parties.[9]

It may here be observed that apart from the question of the joinder of parties one of several joint lessors cannot sue for recovery of *his share* of the rent[10] or for enhancement of his share of the rent,[11] unless a special arrangement to the contrary is proved[12] or unless the other co-sharers are alleged to have been paid off their shares[13] or the other sharers do not contest the

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(7) *Jotindra Nath* v. *Sarfarary Meah*, (1910) 6 Ind Cas 214 (216): 14 Cal W N 653.

(8) *Kailash Chandra* v. *Brojendra K Chakravarthi*, 1925 Cal 1056 (1058, 1059): 29 Cal W N 1000: 42 Cal L Jour 232: 90 Ind Cas 211: 53 Cal 197 F B; *Meajan Mandal* v. *Jogendra Nath De and others*, 1921 Cal 81 (81): 48 Cal 518: 63 Ind Cas 949; *Keshub Chandra Chowdhry* v. *Joyfulnissa Bibi*, 1928 Cal 397 (398): 32 Cal W N 507 [1925 Cal 1056 F B followed]; *Mohendra Nath Bose and others* v. *Abinas Chandra Bose*, 1923 Cal 615 (618): 27 Cal W N 521: 77 Ind Cas 364 [Suit for whole rent against heirs of one co-tenant—Other tenants not necessary parties]. See, however, 35 Cal 182 and 1921 Cal 534 decided before the Full Bench case in 1925 Cal 1056.

(9) *Guru Prosanna Lahiri* v. *Samurriddin Sarkar*, (1918) 44 Ind Cas 465 (466) Cal.

(10) *Ramajoy* v. *Nagur*, (1866) 5 Suth W R Act X, 68 (68); *Indramonee Burmonee* v. *Sooroop Chunder Pal*, (1871) 15 Suth W R 395 (396): 12 Beng L R 291 Note; *Hur Kishore Das* v. *Jugal Kishore Shaha*, (1871) 16 Suth W R 281 (281): 12 Beng L R 293 Note; *Jafir Khan* v. *Firoz Khan*, 1876 Pun Re No 110; *Annoda Churn Roy* v. *Kali Coomar Roy*, (1879) 4 Cal 89 (90): 2 Cal L Rep 464; *Ishwar Chunder Dutt* v. *Ramakrishna Dass*, (1880) 5 Cal 902 (905): 6 Cal L Rep 421: 3 Shom L Rep 132; *Dinna Nath* v. *Mohurrum Mullick*, (1881) 7 Cal Rep 138 (139) [Suit for plaintiff's share alone not maintainable even if co-sharers are made defendants. But if the whole rent due is claimed, co-sharers may be made defendants if they refuse to join as co-plaintiffs]; *Pergash Lall* v. *Balgobind*, (1892) 19 Cal 735 (741), (Do.); *Ram Saran* v. *Nem Narain*, (1902) 6 Cal W N 326 (328); *Paramada Nath Roy* v. *Ramani Kanta Roy*, (1907) 35 Cal 331 (344, 345): 35 Ind App 73: 12 Cal W N 249: 10 Bom L R 66: 7 Cal L Jour 139: 18 Mad L Jour 43: 3 Mad L Tim 151 P C, (Do.); *Makrand* v. *Mithu Lal*, (1910) 8 Ind Cas 742 (743). But see *Chiranjeb Sen* v. *Mahendra Nath Biswas*, 1929 Cal 90 (90): 32 Cal W N 1238: 115 Ind Cas 518 [Where it was held all co-sharers are not necessary parties to a suit for *assessment* of rent]; *Manohar* v. *Manzur*, (1883) 5 All 40 (41): 1882 All W N 143: *Unnoda Pershad* v. *Erskine*, (1874) 12 Beng L R 370: 21 Suth W R 68; *Jadoo Shat* v. *Kadumbinee*, (1881) 7 Cal 150 (152): 8 Cal L Rep 445; *Gopal Chandar* v. *Juggodamba*, (1868) 10 Suth W R 411 (411, 412); *Udaya* v. *Kali*, (1869) 2 Beng L R App 52: 11 Suth W R 393; *Rampad* v. *Ram Das*, (1897) 1 Cal W N S N cexlv [Notwithstanding the fact of one of them having got his name alone registered under the Land Registration Act].

(11) *Bharrut Chunder* v. *Kali Das*, (1880) 5 Cal 574 (577): 5 Cal L Rep 545; *Kali Chandra* v. *Raj Kishore*, (1885) 11 Cal 615 (617, 618); *Muhammad Saidoodeen* v. *Muhammad Hoossain*, (1870) 2 N W P H C 438 [Even if other co-sharers are impleaded as defendants]; *Bhyrub* v. *Gogaram*, (1872) 17 Suth W R 408 (408): 12 Beng L R 290 Note; *Haradhun Gossamee* v. *Ram Newaz Missery*, (1872) 17 Suth W R 414 (414); *Balaji Bikaji Punge* v. *Gopal Bin Raghu Kuli*, (1878) 3 Bom 23 (25); *Shangullah* v. *Jaman Khan*, 1883 Pun Re No 77; *Gopal* v. *Macnaughton*, (1881) 7 Cal 751 (752); *Bindu Bashini Dasi* v. *Peary Mohan Bose*, (1891) 20 Cal 107 (110); *Baidya Nath De Sarkar* v. *Ilim*, (1897) 25 Cal 917 (920): 2 Cal W N 44; *Jatindra Nath Chowdhry* v. *Prosanna Kumar*, (1910) 8 Ind Cas 842 (843): 38 Cal 270: 38 Ind App 1: 8 All L J 1: 15 Cal W N 74: 13 Cal L Jour 51: 13 Bom L R 1: 21 Mad L Jour 92: 9 Mad L Tim 1: (1911) 2 Mad W N 149 P C [Acting together under Bengal Tenancy Act means co-sharers should be *co-plaintiffs* in an action]; *Vagha Jesang* v. *Jagjivan Amrithlal Desai*, 1925 Bom 542 (543): 27 Bom L R 1107: 90 Ind Cas 558. But see *Rashbehari* v. *Sakhi*, (1885) 11 Cal 644 (647, 648) [Enhancement of rent of a specific plot]; *Bheekoo* v. *Oomar Khan*, (1869) 1 N W P 236 [Suit by a co-sharer to obtain a *kabuliyat* at enhanced rent]; *Durga Prosad* v. *Joynarain Hazrah*, (1877) 2 Cal 474 (477): 2 Ind Jur 142.

(12) *Bykunt* v. *Sushee Mohun*, (1874) 22 Suth W R 526 (528); *Ganga Narain* v. *Saroda Mohan*, (1869) 3 Beng L R A C 230: 12 Suth W R 30; *Gani Mohammad* v. *Moran*, (1879) 4 Cal 96 (101): 2 Cal L Rep 370 F B; *Purushothama* v. *Raju*, (1888) 11 Mad 11 (12) [Muchilika expressly in respect of plaintiff's share—Other sharers need not be joined]; *Jugobundhu* v. *Jodu Ghose*, (1888) 15 Cal 47 (51) [Separate receipt for a number of years]; *Birjo Lal Roy* v. *Shama Churn Bhutt*, (1871) 15 Suth W R 20 (21): 6 Beng L R 523; *Sree Misser* v. *Crowdy*, (1871) 15 Suth W R 243 (244); *Dinobundhoo Chowdhry* v. *Dinonath Mookerjee*, (1873) 19 Suth W R 168 (168, 169); *Rakkal Chunder Roy* v. *Mahtab Khan*, (1876) 25 Suth W R 221 (221); *Lootfullock* v. *Gopee*, (1880) 5 Cal 941 (943): 6 Cal L Rep 402; *Bholanath* v. *Belchamber*, (1911) 10 Ind Cas 891 (892): 14 Cal L Jour 373 [Conversely even if there is separate collection of rent, all the co-sharers may maintain action collectively]. See also *Raj Narain* v. *Ekadasi Beg*, (1900) 27 Cal 479 (483): 4 Cal W N 494; *Pramada Nath* v. *Ramini Kanta*, (1908) 35 Cal 331 (334): 35 Ind App 73: 12 Cal W N 249: 10 Bom L R 66: 7 Cal L Jour 139: 18 Mad L Jour 43: 3 Mad L Tim 151 P C; *Girindra Chandra* v. *Sree Nath*, (1908) 7 Cal L Jour 512; *Mohandra Nath Madak* v. *Paresh Chandra Ghosh*, (1917) 40 Ind Cas 506 (508) Cal.

(13) *Doorga Charan* v. *Jampa Dossee*, (1874) 12 Beng L R 289: 21 Suth W R 46 F B; *Jadu*

plaintiff's claim[14] or collude with the defendant.[15] A person who is a necessary party to a suit for rent is also a necessary party to the appeal against the decree in such suit.[16]

21. Suits on torts.—*See also* O. 1, R. 3 under the heading "Joint tort-feasors". All persons jointly injured need not all be impleaded as parties to a suit on tort.[1]

22. Mortgage suits.—*See* O. 34, R. 1, *infra*.

23. Suits on Negotiable Instruments.—A suit on a Negotiable Instrument must be instituted in the name of a person who, on the face of the instrument, is entitled thereto or by a holder deriving title from him.[1] Where the suit is by a *benami*-holder upon a promissory note, the Court may add the real creditor as plaintiff.[2] In a suit on a lost cheque by the endorsee of the cheque against the endorser for a duplicate of the cheque or for refund of money paid, the drawer of the cheque must be made a party.[3] The mere fact that the drawer and acceptor of a bill are partners does not give rise to the presumption, that they are partners in respect of the drawing of the bill. The fact that the acceptor of the bill is not liable, having been joined as a party after lapse of time does not discharge the drawer from his liability where the suit has been instituted against him in time.[4]

24. Suits for specific performance.—The general rule is that a person who is a stranger to the contract is not a proper party to a suit for specific performance of the said contract.[1] Where, however, the promisor defendant acts in concert with another person in order to defeat the plaintiff's rights under the contract, such person may be added as a proper party to the suit.[2] Thus where *A* enters into a contract with *B* for sale of land, and subsequently sells the same land along with his son *C* to *D*, *C* will be a proper party in a suit by *B* against *A* for specific performance of the contract.[3] The transferee

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Doss v. *Sutheriand*, (1879) 4 Cal 556 (559): 3 Cal L Rep 456; *Saleehoomissa* v. *Mohesh*, (1872) 17 Suth W R 452 (453).

(14) *Murlidhar* v. *Ishri Prosad*, (1884) 6 All 576 (577): 1884 All W N 181. See *Sreenath* v. *Jobu*, (1870) 13 Suth W R 126 (127).

(15) *Ganga Narain* v. *Sree Nath*, (1880) 5 Cal 915 (917): 6 Cal L Rep 16; *Durga* v. *Jampee*, (1874) 21 Suth W R 46 (47): 12 Beng L R 289 F B; *Chokkalingam* v. *Peria Karuppan Chetty*, (1915) 28 Ind Cas 141 (142): 28 Mad L Jour 197.

(16) *Jotendra Nath* v. *Jotu Mundar*, 1922 Pat 4 (4): 3 Pat L Tim 456: 66 Ind Cas 780.

Note 21.

(1) *Jagdeo Singh* v. *Padarath*, (1898) 25 Cal 285 (289); *Chundee Chowdhry* v. *MacNaughton*, (1875) 23 Suth W R 386 (386); *Fatik Chandra* v. *Atta Bibi*, (1912) 14 Ind Cas 478 (479): 15 Cal L Jour 225. See *Gopal Kishen* v. *Ryland*, (1868) 9 Suth W R 279 (281) [Wrongful destruction of property—One member of joint family can sue for personal or special damage] See also *Watrap S. Subramaniya Iyer* v. *The United India Life Insurance Co, Ltd*, 1928 Mad 1215 (1219): 55 Mad L Jour 385.

Note 23.

(1) *Subbaraya* v. *Vaithinatha*, (1910) 5 Ind Cas 931 (932): 33 Mad 115: 7 Mad L Tim 185; *Ram Nath Dwarakanath Den Woode* v. *Ramrao Balakrishna Dhotre*, 1922 Bom 281 (283): 46 Bom 358: 64 Ind Cas 966: 23 Bom L R 1135 [Promissory note in favour of manager—The other members of the joint Hindu family are not necessary parties]. See also Note 18, foot-note 3.

(2) *Syed Ashgar Husain* v. *Sajjad Mirza*, (1898) 1 Oudh Cas 10 (13).

(3) *Baldeo Prasad* v. *Girish Chandar Bose*, (1878-80) 2 All 754 (755).

(4) *Jambu Ramaswamy* v. *Sundararaja*, (1903) 26 Mad 239 (242): 12 Mad L Jour 267.

Note 24.

(1) *Ram Krishna* v. *Sree Kanta*, 1929 Cal 667 (668): 33 Cal W N 687; *Luckumsey Ookerda* v. *Fazula Cassumbhoy*, (1880-81) 5 Bom 177 (179); *Ahmedbhai* v. *Dinshaw*, (1911) 12 Ind Cas 813 (822): 13 Bom L R 1061; *Rangayya* v. *Subramaniya*, (1917) 40 Ind Cas 429 (433, 437, 441): 40 Mad 365: 32 Mad L Jour 575: 5 Mad L W 797: 21 Mad L Tim 385 F B; *Narasinga Rao* v. *Rengasamy Thevan*, (1916) 35 Ind Cas 871 (873): 4 Mad L W 397: (1916) 2 Mad W N 191.

(2) *Mukend Lall* v. *Chotay Lall*, (1884) 10 Cal 1061 (1069) [Per Mitter, J.].

(3) *Ram Krishna* v. *Sree Kanta*, 1929 Cal 667 (669): 33 Cal W N 687.

O. 1, R. 10, Notes 24—25.

from the vendor after the contract of sale may also be added as a party.[4] Where *A* on behalf of himself and his minor brother *B* entered into an agreement to sell with *C*, and *C* sued for specific performance of such agreement, it was held that *B* was properly impleaded as a party even though a decree could not be given against him, as his presence was necessary to have the question of the binding character of the agreement decided in the suit.[5] Under a single contract to convey land to several persons it is not open to some of the joint contractors only to enforce specific performance thereof.[6]

25. Government.—*See also* Note 6 to S. 79 *ante*. Where an Act of State or any other act of the Government is questioned or the proprietary right or right to revenue of the Government is likely to be affected, the Government is a necessary party to the suit.[1]

In some cases, the Government may have such an interest in the matter that the joinder, though not necessary, might be proper.[2] Where the Government has no interest of any kind in the suit, it is neither a necessary nor a proper party.[3]

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(4) *Krishnaswamy* v. *Sundarappaiyer*, (1895) 18 Mad 415 (417): 5 Mad L Jour 164; *Ramchandra* v. *Ramchandra*, (1898) 22 Bom 46 (49): *Mayappa* v. *Kolandavelu*, 1926 Mad 597 (599): 92 Ind Cas 715: 1926 Mad W N 459; *Behari Lal* v. *Kundan Lal*, (1875) 7 N W P 103; *Maung Tun Wa* v. *Maung Tha Kado*, (1900-07) 1 L B R 252 (254).

(5) *Alagappa* v. *Sivaramasundara*, (1896) 19 Mad 211 (216). See also *Nur Mahomed* v. *Natwar Lal*, 1923 All 112 (113): 45 All 220: 71 Ind Cas 452 [Suit by son—Father found to be promisee under contract and impleaded as co-plaintiff].

(6) *Safiur Rahman* v. *Maharamunissa*, (1897) 24 Cal 832 (833).

Note 25.

(1) *Nawab Umjad* v. *Mohumdee Begam*, (1868) 10 Suth W R P C 25 (29): 11 Moo Ind App 517 [Act of State]; *Virasamy* v. *Rama Dass*, (1892) 15 Mad 350 (351): 1 Mad L Jour 231 [Suit to compel mutation of name in the Revenue Register]; *Kalabriga Sivamma* v. *Ravikanty Venkataramamurthy*, (1909) 4 Ind Cas 169 (169): 19 Mad L Jour 331, (Do.); *K Parthasarathi Iyengar* v. *Authari Peria Kuppa Naicken*, (1917) 38 Ind Cas 100 (101) Mad [Suit for declaration of mirasdars that the right of fishery leased out by Government to gramattars of the village belonged to them]; *Cannon* v. *Bissonath Adhicari*, (1880) 5 Cal L Rep 154 (156) [Suit for recovery of land thrown up by a navigable river which defendant claimed as holding under a settlement with the Government]; *Krishnolal* v. *Bhyrup Chunder Deb*, (1874) 22 Suth W R 52 (53) [Suit for land settled with another party]; *Muhamed Israil* v. *J P Wise*, (1874) 21 Suth W R 327 (330): 13 Beng L R 118, (Do.); *Brojanath* v. *Durga Prosad*, (1907) 5 Cal L Jour 583 (596): 34 Cal 753: 12 Cal W N 193 [Suit for sub-soil of Digwari tenure]; *Ranu Valad Mali* v. *Ramabai Kom Mahudalli*, (1869) 6 Bom H C A C 265 [Nature of the tenure of Ghatwali land in dispute].

(2) *Kailash Mai* v. *Dwarakanath Majhi*, (1916) 35 Ind Cas 788 (789) Cal [Suit by Ghatwali tenant against Ghatwal]; *Balaram* v. *Magistrate of Igatpuri*, (1882) 6 Bom 672 (673) [Suit for declaration of public road as private property]; *Kashi* v. *Sadashiv Sakharma Shet*, (1897) 21 Bom 229 (233); *Secretary of State* v. *Murugesa Mudaliar*, 1929 Mad 443 (447): 1929 Mad W N 67: 29 Mad L W 753: 118 Ind Cas 780 [Plaintiff suing District Board and its President for declaration that he was duly elected member—Government applying to be made defendant to which both plaintiff and defendant were opposed—Government being proper party should be added]; *Jagarnath Gir* v. *Tirguna Nand*, (1915) 28 Ind Cas 139 (140): 37 All 185: 13 All L J 252 [Suit for declaration of title to mahantship—Court of Ward need not be made a party]; *Gobind Pershad* v. *Kazi Basiruddin*, (1909) 1 Ind Cas 313 (314) Cal [Suit for *declaration of title* to property wrongfully sold under Public Demands Recovery Act as belonging to another—Secretary of State not a necessary party]; *Mst Indar Kuar* v. *Umra Mal*, 1926 Jour 135 (3): 96 Ind Cas 927 [Suit to set aside sale under S 60, Punjab Excise Act as not binding on plaintiff's shares—Government not necessary party]; *Bal Mokoond Lal* v. *Jirjudhan Roy*, (1882) 9 Cal 271 (276, 277): 11 Cal L Rep 466: 5 Shom L Rep 7 [Suit to set aside revenue sale—Government not necessary party—But may be impleaded on its application]. But see Foot-note (3) below. *Balkishan Das* v. *Simpson*, (1898) 25 Cal 833 (843, 844): 25 Ind App 151: 2 Cal W N 513: 7 Sar 368 P C, (Do.).

(3) *Simon* v. *Thuraimuthu Kadamban*, (1910) 6 Ind Cas 419 (419): 1910 Mad W N 443: 8 Mad L Tim 248; *Krishnayya* v. *Bellary Municipal Council*, (1892) 15 Mad 292 (293) [Suit against Municipality for declaration of title to certain structure]; *Bama Soondaree Dabee Chowdharain* v. *Kashi Kishore Roy Chowdhry*, (1874) 22 Suth W R 245 (245) [Suit for partition where public revenue is not affected]; *Ranu Valad Avaji Mali* v. *Ramabai Kom Mahadu Mali*, (1869) 6 Bom H C A C 265 [Suit to redeem mortgage of ghatwali land, where, under the terms of the mortgage deed, the mortgagor gave up in a razinama to Government all claims to the land]; *Kailash Mai* v. *Dwarikanath Majhi*, (1916) 35 Ind Cas 788 (789) Cal [Suit by a tenant of ghatwali land against his landlord]; *Jahnnovi Chowdharani* v. *The Secretary of State for India in Council*, (1903) 7 Cal W N 377 (380) [Action to set aside revenue sale—Government is not a necessary party]; *Irapa* v. *Apa Sahib*, (1892) 16 Bom 649 (651) [Suit for a declaration that plaintiff is *Kadun Naik* of a village]; *Vythilinga* v. *Sadasiva Iyer*, 1926 Mad 836 (839, 840): 1926 Mad W N 575: 95 Ind Cas 214: 51 Mad L Jour 148: 50 Mad 34: 24 Mad L W 738 [Statute sought to be declared as *ultra vires*—Secretary of State not necessary party in all cases]; *Sri*

26. Suits by or against corporations.—*See* O. 29, R. 1.

27. Miscellaneous.—*Suits to obtain registration*—The Registering Officer is not a necessary party.[1]

Official Assignee.—In suits for money against an undischarged insolvent or in suits by his heirs in respect of property acquired by the insolvent after insolvency, the Official Assignee is not a necessary party.[2]

Suits under S. 92 of the Code.—As to whether the alienee from the trustee is a necessary or a proper party. *See* Note 28 to S. 92 and the undermentioned cases.[3]

A *benamidar* represents the real owner and can maintain an action in his own name.[3-a] But, as, has been seen in illustration 1 to note 14 *ante* the real owner may properly be added as a party to the suit.[3-b] Where a document is executed to *A* in the name of *B*, for a fraudulent purpose, *A* may nevertheless enforce the rights under the document by a suit in his own name

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Mahant Prayaga Does v. *Religious Endowment Board*, 1926 Mad 927 (932); *Kanialal* v. *Narayan Singh*, (1919) 50 Ind Cas 299 (300): 1918 Pun W R 177 [Dispute about irrigation rights—Private water-course—No relief against Government—Latter not necessary party].

Note 27.

(1) *Radakishen* v. *Choonee Lal*, (1880) 5 Cal 445 (448): 5 Cal L Rep 172: 5 Ind Jur 312; *Wishwambhar* v. *Prabhakar*, (1884) 8 Bom 269 (271): 8 Ind Jur 578.

(2) In re *Hunt Monnet & Co* v. *Kholagir Mangir*, (1864) 1 Bom H C 251; *Fatima Bibi* v. *Fatima Bibi*, (1892) 16 Bom 452 (454); *Miller* v. *Budh Singh Dudhuria*, (1891) 18 Cal 43 (44); *Chandmul* v. *Ranee Soondery Dossee*, (1895) 22 Cal 259 (262).

(3) *Oseri* v. *Balmukandas*, (1911) 12 Ind Cas 668 (669): 5 Sind L R 103. See also *Advocate-General* v. *Viswanath*, (1855) 1 Bom H C App 9 [Advocate-General is proper plaintiff for suit to administer the funds of a Hindu charity. See S 92]; *Johnson D Po Min* v. *U Ogh*, 1932 Rang 132 (136): 10 Rang 342.

(3-a) *Gurnarain* v. *Sheolal Singh*, (1919) 46 Cal 566: 1918 P C 140: 46 Ind App 1: 17 All L J 66: 23 Cal W N 521: 36 Mad L Jour 68: 9 Mad L W 335: 1 U P L R (P C) 1: 49 Ind Cas 1 P C; *Venkata Suryanarayana* v. *Guluguri Bapiraju*, 1910 7 Ind Cas 60 (63, 64): 8 Mad L Tim 154: 1910 Mad W N 286: 34 Mad 143 [Setting aside execution sale—Held to be action on a contract]. See *Alikjan Bibi* v. *Rambaran Shah*, (1910) 7 Ind Cas 166 (170) Cal; *Gopee Krist Gosain* v. *Gunga Prosad Gosain*, (1854) 6 Moo Ind App 53 (73): 2 Suth 13: 1 Sar 493: 4 Suth W Rep 46 P C; *Abdul Wahid Khan* v. *Nawab Baqar Ali Khan*, (1907) 10 Oudh Cas 263 (267); *Ramanuja Iyengar* v. *Sadagopa Iyengar*, (1905) 28 Mad 205 (207): 15 Mad L Jour 249; *Subbanarayana Vathiyar* v. *Ramasamy Iyer*, (1907) 30 Mad 88 (90): 1 Mad L Tim 377: 16 Mad L Jour 508; *Singa Pillai* v. *Ayyaneri Govinda Reddi*, (1918) 43 Ind Cas 905 (906): 1918 Mad W N 107 [Mortgage suit]; *Parameshwar Dat* v. *Anandan Dat*, (1915) 26 Ind Cas 507 (2) (508): 13 All L J 24: 37 All 113, (Do.); *Nihal Singh* v. *Dular Singh*, (1916) 33 Ind Cas 615 (615): 18 Oudh Cas 363, (Do.); *Hara Gobind Sha* v. *Purna Chandra Saha*, (1909) 1 Ind Cas 522 (523) Cal, (Do.); *Nand Kishore Lal* v. *Ahmad Ata*, (1886) 18 All 69 (73, 77): 1895 All W N 160; *Yad Ram* v. *Umrao Singh*, (1899) 21 All 380 (382, 384, 385): 1899 All W N 130 [Mortgage]; *Bachcha* v. *Gajadhar Lal*, (1906) 28 All 44 (46): 1905 All W N 173: 2 All L J 702; *Dagdu* v. *Balwant Ramchandra Natu*, (1898) 22 Bom 820 (823); *Gopinath* v. *Bhugwat Pershad*, (1884) 10 Cal 697 (705); *Sachitananda Mohapatra* v. *Baloram Gorain*, (1897) 24 Cal 644 (645) [Foreclosure suit]; *Shangara* v. *Krishnan*, (1892) 15 Mad 267 (268): 2 Mad L Jour 93; *Kirtibash Das* v. *Gopal Jeo*, (1913) 20 Ind Cas 499 (500) Cal. See also *Guyan Dhangar* v. *Sheikh Dondar*, (1919) 52 Ind Cas 324 (325) Pat; *Vaitheswara Iyer* v. *Srinivasaraghava Iyengar*, (1919) 50 Ind Cas 309 (310, 311): 36 Mad L Jour 289: 9 Mad L W 362: 42 Mad 348: 25 Mad L Tim 351; *Ramachandra Vithal Bhat* v. *Gajanan Narayan Deshmukh*, (1920) 56 Ind Cas 349 (351, 353): 22 Bom L R 296: 44 Bom 852; *Govinda* v. *Chengalroya*, 1925 Mad 22 (23, 28): 47 Mad L Jour 415: 35 Mad L Tim 29: 1924 Mad W N 733: 47 Mad 896: 83 Ind Cas 74 F B; *Hit Lal Mahton* v. *Jiboo Mahton*, 1924 Pat 458 (458): 3 Pat 81: 5 Pat L Tim 142: 75 Ind Cas 378; *Rangappa Naicken* v. *Rangasamy Naicken*, 1925 Mad 1005 (1007, 1008): 1925 Mad W N 232: 88 Ind Cas 249. The following cases which held that a benamidar was not entitled to sue are no longer law in view of the Privy Council decision in *Gur Narayan's case* referred to above:—*Kali Prosunno* v. *Dino Nath Mullick*, (1873) 19 Suth W R 434 (435): 11 Beng L R 56 [Real owner must be co-paintiff]; *Bibi Tannoonissa* v. *Woojulmonee Dossee*, (1873) 20 Suth W R 72 (72); *Kutha Perumal Rajali* v. *The Secretary of State*, (1907) 30 Mad 245: 17 Mad L Jour 174; *Hari Gobind Adikari* v. *Akhoy Kumar*, (1889) 16 Cal 364 (367); *Issur Chandra* v. *Gopal Chandra*, (1898) 25 Cal 98 (99): 3 Cal W N 20 [Ejectment]; *Baroda Sundari Ghose* v. *Dino Bandu Khan*, (1898) 25 Cal 874 (875, 876): 3 Cal W N 12; *Mohendra Nath* v. *Kali Prosad*, (1903) 30 Cal 265 (272, 273): 7 Cal W N 229; *Atrabannessa Bibi* v. *Safatullah Mia*, (1915) 31 Ind Cas 189 (190): 43 Cal 504: 22 Cal L Jour 259; *Guyan Dhangar* v. *Sheik Gonder*, (1918) 45 Ind Cas 794 (794) Pat; *Surandernath Ghose* v. *Kali Gopal Mozoomdar*, (1917) 42 Ind Cas 431 (436): 26 Cal L Jour 333: 22 Cal W N 367: 45 Cal 920.

(3-b) *Gur Narain* v. *Sheo Lall Singh*, (1919) 49 Ind Cas 1 (5): 46 Cal 566: 46 Ind App 1: 17 All L J 66: 23 Cal W N 521: 36 Mad L Jour 68: 9 Mad L W 335: 1 U P L R 1 P C; *Pichayya* v. *Rattamma*, 1929 Mad 268 (270): 55 Mad L Jour 856: 29 Mad L W 56: 115 Ind Cas 340; *Bhola Prosad* v. *Ram Lall*, (1897) 24 Cal 34 (37) [Assignees from real owner added as co-plaintiffs].

O. 1, R. 10, Notes 27—28.

provided such fraudulent purpose has not been carried out.[3-c] *See also* Note 61 to S. 9 *ante*.

Other Suits.—In a suit by an alleged adopted son against the widow for declaration of title and possession, the mortgagee from the widow may be added as a proper party.[4] Where subsequent to a suit for declaration of the plaintiff's right to attach a house in execution of a decree, the defendant had entered into an agreement of sale with *X* and had also undertaken to defend the suit, *X* can be impleaded as a party on the defendant's failure so to defend the suit.[5] The judgment-debtor is a proper party to a suit by a transferee of a decree for a declaration of the validity of the assignment.[6]

In a suit to set aside a Rent sale the receiver at whose instance the sale is effected is not a necessary party.[7] In a suit by a remote reversioner to set aside a sale by a Hindu widow the nearer reversioners may be impleaded as proper parties.[8] Where one member of joint Hindu family sues for a declaration against other members thereof, the non-joinder of one of such other members is not necessarily fatal to the suit. He may be added under O. 1, R. 10, sub-Cl. 2 if the Court considers his presence necessary.[9] Where the question is whether the plaintiff or defendant is the real purchaser, a third-party claiming adversely to both of them cannot be impleaded in the suit.[10] As to the necessity of impleading all the attaching creditors in a suit for declaration against one of them that the property is not liable to attachment, *see* the undermentioned case.[11]

28. Addition introducing new cause of action.—The Court will not give leave to add a party where the result would be to introduce a *new cause of action* with which the plaintiff has nothing to do.[1] Thus, where *A*, an importer and seller of watches, sues *B* for an injunction restraining him from importing and selling similar watches, the manufacturer cannot be allowed to be added as a party.[2] Similarly where *A*, who purchased goods by sample from *B*, sued *B* for damages on the ground that the goods purchased were not according to sample and *B* applies to implead *C*, his vendor who sold by sample, so that the question between him (*B*) and *C*, may also be decided, it was held that such joinder would introduce a new cause of action and should not be

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(3-c) *Rajagopalachari* v. *Sundaram Chetty*, (1918) 45 Ind Cas 333 (334, 335): 33 Mad L Jour 696; *Dujai* v. *Shyam Lal*, (1916) 33 Ind Cas 954 (955): 14 All L J 30: 38 All 122.

(4) *Rao Lal Singh* v. *Musst Rani Bhagoti*, (1889) 2 C P L R 236 (238).

(5) *Ahmedbhoy Habibhoy* v. *V Cassum Bhoy*, (1884) 8 Bom 323 (335): 8 Ind Jur 680. But a person in whose favour there is nothing more than an agreement to sell executed by the defendant is not a proper party. See *Nand Lall Pal* v. *Naresh Chandra*, (1917) 41 Ind Cas 468 (470, 471): 2 Pat L W 108.

(6) *Bommanapatti Veerappa* v. *Chinta Kunta Srinivasa Rau*, (1903) 26 Mad 264 (265).

(7) *Annamalai Velan* v. *Murugappa Velan*, (1914) 22 Ind Cas 826 (827): 38 Mad 837: 26 Mad L Jour 239: 1 Mad L W 212: 1914 Mad W N 236.

(8) *Gurulingasamy* v. *Ramalakshmamma*, (1895) 18 Mad 53 (58): 4 Mad L Jour 237.

(9) *Hari Baksh* v. *Gulab Rai*, 1891 All W N 175 (176).

(10) *Chidambaram Chettiar* v. *Subramaniyam Chettiar*, 1927 Mad 834 (835): 53 Mad L Jour 269: 1927 Mad W N 903: 105 Ind Cas 114.

(11) *Durga Charan* v. *Jotindra Mohun*, (1900) 27 Cal 493 (498); *Meyappa Chetty* v. *Maung Po Hnyin*, (1911) 12 Ind Cas 866 (867: 4 Bur L Tim 145.

Note 28.

(1) *Naraini Kuar* v. *Durjan Kuar*, (1878-80) 2 All 738 (743); *Kalian Rai* v. *Ram Ratan*, (1896) 18 All 306 (308): 1896 All W N 72; *Raghoo Nath* v. *Byjnath Sahoy*, (1875) 24 Suth W R 349 (349); *Government* v. *Bourie Bhoomiz*, (1865) 2 Suth W R 280 (281); *Joy Kishen* v. *Raj Kishen*, (1871) 16 Suth W R 101 (101).

(2) *Heiniger* v. *Droz*, (1901) 25 Bom 433 (465): 3 Bom L R 1.

allowed.[3] In a suit for a decree in terms of an award to which the defendant consents, a creditor of the defendant who impugns the award as fraudulent should not be added as a party.[4]

29. Addition altering nature of suit.—Parties should not be added so as to convert a suit of one character into a suit of a different character.[1] Thus a simple suit for rent, cannot, by adding parties, be converted into a suit for title.[2] Similarly a suit for plaintiff's share of the estate of a deceased person cannot be converted into an administration suit by addition of all the persons interested in the estate.[3]

30. "Questions involved in the suit."—The expression "questions involved in the suit" does not mean all claims which may possibly be put forward by anybody to the property involved in the suit.[1] It means questions as *between the parties* to the litigation, *i.e.*, questions with regard to the right set up and the relief claimed on one side and denied or withheld on the other,[2] and not to questions which may arise between co-plaintiffs and co-defendants *inter se*.[3] The said words would, in the case of a suit for partition, include not only the questions arising out of the plaint, but of the plaint considered along with the statement of defence.[4]

31. "Improper addition of plaintiff or defendant."—It has been observed already in Note 10 above that sub-Rule 2 of this rule is subject to the limitation that the Court has no power to join a person as a party if he could not have been originally impleaded under O. 1, R. 1 or 3. Nor does this sub-Rule override the effect of O. 2, R. 3. Thus a person claiming under a title quite distinct from that under which the parties to the suit claim, is an improper party, as his joinder as a party will result in a misjoinder of plaintiffs and causes of action.[1]

Where a person whose right to join as a *co-plaintiff* is denied by the plaintiff on the record,[2] or where such person objects to be added as a plain-

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(3) *Md Badsha* v. *Nicol*, (1879) 4 Cal 355 (359): 2 Cal L Rep 330.

(4) *Dungarsi Dipchand* v. *Ujamsi Velsi*, (1898) 22 Bom 727 (728).

Note 29.

(1) *Sankaranarayanan* v. *Ananthanarayanayyan*, (1897) 20 Mad 375 (378); *Hingulal* v. *Baldeo Ram*, (1902) 24 All 553 (555): 1902 All W N 170; *Kashi* v. *Sadashiv*, (1895) 21 Bom 229 (241); *Biddia* v. *Doorga*, (1874) 22 Suth W R 97 (98); *Heiniger* v. *Droz*, (1901) 25 Bom 433 (464): 3 Bom L R 1; *Gooroo Prosonna* v. *Guggun Chunder*, (1873) 20 Suth W R 383 (384); *Biressur* v. *Jogendra Chunder*, (1875) 24 Suth W R 261 (262); *Venkatasuryanarayana* v. *Ramayya*, 1921 Mad 98 (101, 102): 40 Mad L Jour 153: 29 Mad L Tim 114: 13 Mad L W 551: 62 Ind Cas 802: 1921 Mad W N 100 [Guardian *ad litem* of minor partner in a dissolution suit—Minor's liability proving doubtful guardian cannot be converted into defendant in individual capacity]; *Dhanput* v. *Johurmal*, (1910) 7 Ind Cas 161 (162): 13 Cal L Jour 289 [Description of plaintiffs as "executors under the will of the late Mahant Shebait of the idol" amended as "de facto managers and persons interested in the endowment"].

(2) See Note 20 above.

(3) *Oh Ling Tee* v. *Awkinifee*, (1868) 10 Suth W R 86 (87): 1 B L R S N 3 (a).

Note 30.

(1) *Sitaramayya* v. *Ramappayya*, (1917) 39 Ind Cas 160 (162): 5 Mad L W 207.

(2) *Muhammad Ismail* v. *Abdul Gafoor*, (1909) 4 Ind Cas 488 (489) All; *Narain Kuar* v. *Durjan Kuar*, (1880) 2 All 738 (743): *Vythilinga* v. *Sadashiva Iyer*, 1926 Mad 836 (838): 1926 Mad W N 575: 95 Ind Cas 214: 51 Mad L Jour 148: 50 Mad 34: 24 Mad L W 738.

(3) *Har Narain* v. *Kharag*, (1887) 9 All 447 (449): 1887 All W N 89; *Harischandra* v. *Kumma Vithoba*, 1922 Bom 454 (455): 24 Bom L R 1318.

(4) *Amrut* v. *Mukand*, (1909) 4 Ind Cas 236 (240): 5 Nag L R 152.

Note 31.

(1) *Kalian Rai* v. *Ram Ratan*, (1896) 18 All 306 (308): 1896 All W N 72.

(2) *Googlee Sahoo* v. *Prem Lall*, (1881) 7 Cal 148 (149).

O. 1, R. 10, Notes 31—32.

tiff[3] his joinder as co-plaintiff is improper, though he may be made a defendant.[4] A defendant already on record cannot take such objections as are available to the defendant newly added. Such objections are to be taken by the newly added defendant himself.[5]

32. Parties may be added at any stage of the proceedings.—The power to add a party can be exercised at any stage of the suit.[1] Thus a party could be added before the final decree is actually drawn up[2] or after a suit has been re-instated on an application under O. 9, R. 13 of the Code.[3] The Court has, however, no jurisdiction to add a party in the following cases:—

(1) Where a *final* decree has been passed and drawn up in the suit, and the matter, so far as regards that Court, becomes conclusive.[4]

(2) Where an appeal has been filed against the preliminary decree passed by the Court, and the appellate Court thus becomes seized of the matter.[5]

(3) Where the suit has been remanded to the Court under O. 41, R. 25 of the Code.[6]

(4) Where the suit has been terminated by the parties by a lawful compromise.[7]

There is a conflict of view as to whether, after a *preliminary* decree and before a final decree, a Court has power to act under this rule and add a party and thus re-open the proceedings. The High Court of Madras,[8] Bombay,[9] Calcutta[10] and Allahabad[11] hold that it has. So also does the Court of

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(3) *Uma Sundaree* v. *Ramji*, (1881) 7 Cal 242 (244) 9 Cal L Rep 13.

(4) *Pestanji Mancharji* v. *Matchett*, (1870) 7 Bom H C A C 10; *Bulli Mal* v. *Jhabba*, 1925 Lah 504 (505): 7 Lah L Jour 280: 26 Pun L R 699: 92 Ind Cas 569.

(5) *Foolibai* v. *Ram Pratab*, (1893) 17 Bom 466 (468).

Note 32.

(1) *Krishnaji* v. *Motilal*, 1929 Bom 337 (339): 21 Bom L R 476; *Bhagmani* v. *Subh Narain*, 1905 All W N 35 (36).

(2) *Attorney-General* v. *Birmingham Corporation*, (1880) 15 Ch D 423 C A: 43 L T 77: 29 W R 127; *Keith* v. *Butcher*, (1884) 25 Ch D 750: 53 L J Ch 640: 50 L T 203: 32 W R 378 cited in 32 Cal 483; *Krishna Iyer* v. *Subramaniya Iyer*, 1924 Mad 648 (649): 46 Mad L Jour 368: 34 Mad L Tim 114: 1924 Mad W N 364: 84 Ind Cas 122 [Judgment pronounced but not sealed—Party can be added]; *Jotindra Mohan Tagore* v. *Bejoy Chand*, (1905) 32 Cal 483 (492, 493); *Lakshmi Chand* v. *Gulab Chand*, (1911) 11 Ind Cas 559 (560): 35 Bom 493: 13 Bom L R 517.

(3) *Tikam Singh & Co* v. *Thakur Kishore Ramanji*, (1898) 20 All 188 (189): 1898 All W N 12; *Sotish Chunder* v. *Nil Comul*, (1884) 11 Cal 45 (51, 52); *Debendra Narain* v. *Narendra Narain*, (1920) 54 Ind Cas 636 (637, 641): 24 Cal W N 110: 30 Cal L Jour 417.

(4) *Raghunath Das* v. *Sundar Das*, 1914 P C 129 (131): 42 Cal 72: 41 Ind App 251: 13 All L J 154: 16 Bom L R 814: 20 Cal L Jour 555: 18 Cal W N 1058: 27 Mad L Jour 150: 16 Mad L Tim 353: 1 Mad L W 567: 1914 Mad W N 747: 24 Ind Cas 304; *Lingammal* v. *Venkatammal*, (1883) 6 Mad 227 (228): 7 Ind Jur 192; *Goodall* v. *Mussoorie Bank*, (1887) 10 All 97 (105).

(5) *Singaravelu* v. *Murugesa*, (1911) 12 Ind Cas 69 (69) Mad.

(6) *Muhammad Zaki Ali Khan* v. *Muhammad Jafar Ali Khan*, (1899) 2 Oudh Cas 25 (27).

(7) *Sethupathi* v. *Secretary of State*, 1926 Mad 341 (341): 50 Mad L Jour 59: 92 Ind Cas 311.

(8) *Krishna Iyer* v. *Subramaniya Iyer*, 1924 Mad 648 (649): 46 Mad L Jour 368: 34 Mad L Tim 114: 1924 Mad W N 364: 84 Ind Cas 122.

(9) *Lakhmichand* v. *Kachu Bai*, (1911) 11 Ind Cas 559 (559, 560): 35 Bom 393: 13 Bom L R 517; *Vakatchand Lukmi Chand* v. *Advocate-General*, (1871) 8 Bom H C O C 96.

(10) *Jotindra Mohan Tagore* v. *Bejoy Chund Mahatap*, (1905) 32 Cal 483 (492, 493).

(11) *Shagun Chand* v. *Data Ram*, 1927 All 465 (465): 25 All L J 369: 101 Ind Cas 868: 49 All 664 [Per Iqbal Ahmed, J].

the Judicial Commissioner of Sind.[12] The Nagpur[13] and the Oudh[14] Judicial Commissioners' Courts, on the other hand, hold that it has no such power. The latter view seems to proceed upon the view that such addition involves the *setting aside* of the preliminary decree, and that this cannot be done by the Court. Really, however, the proceedings are re-opened only *so far as the added party is concerned* and this is not affected by O. 20, R. 3. It is therefore submitted that the former view is the correct one.

When the suit is re-opened in appeal the *appellate Court* has the same powers of adding a party as the first Court till a final decree is passed by it.[15] The same principle will apply to the Court of second appeal.[16]

Where the suit is a *representative one* such as a suit contemplated by O. 1, R. 8 or by S. 14 of the Religious Endowments Act, the persons represented by the actual party, are really parties to the suit and their being brought on the record *after the decree* in the place of the actual party does not affect the rule that a Court cannot implead a *new party* after decree.[17]

33. Striking out name of party improperly joined.—The impropriety in the joinder of a party lies in the fact that a party is introduced who has no connection with the reliefs claimed in the plaint.[1] In the case of an improper joinder of plaintiffs the Court can ask them to elect one among themselves to proceed with the suit and to amend the plaint by striking off the others.[2] In the case of improper joinder of defendants the proper course is to strike out the names of such defendants and not to dismiss the suit as against them.[3]

Where a defendant is brought on the record, the Court has no power to strike out his name merely because notice could not be served on him owing to the non-discovery of his whereabouts[4] or because he does not resist the plaintiff's claim.[5] Where the plaintiff states that he has no claim against some of the defendants the proper course is to strike out the names of such defendants and not to dismiss the suit as against them.[6]

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(12) *Khiman Mal Tejumal* v. *Lal Chand Ghanomal*, 1926 Sind 26 (26, 27): 89 Ind Cas 609.

(13) *Raghu Nath* v. *Sheo Lall*, (1917) 39 Ind Cas 849 (850): 13 Nag L R 69. See however *Maroti Rao* v. *Mt Thulsi Bai*, 1927 Nag 299 (299): 103 Ind Cas 806.

(14) *Benimadho* v. *Yusuf Hussain*, 1924 Oudh 33 (33, 34): 26 Oudh Cas 317: 10 Oudh L J 232: 72 Ind Cas 1031.

(15) *Habib Baksh* v. *Baldeo Pershad*, (1901) 23 All 167 (172): 1901 All W N 39; *Aitmad Ali* v. *Allahabad Bank*, (1905) 2 All L J 516 (518); *Thina Shunmuga* v. *Mona Chuna Nana Subbayya*, 1922 Mad 317 (319): 15 Mad L W 283: 1922 Mad W N 106: 42 Mad L Jour 133: 31 Mad L Tim 266: 70 Ind Cas 645.

(16) *Venkata Narasimha* v. *Govindarajulu*, (1909) 4 Ind Cas 1132 (1132): 5 Mad L Tim 225 (1); *Jagar Nath* v. *Mt Bibi Amirunnissa*, 1928 Pat 197 (198).

(17) *Swaminatha* v. *Kumarasamy*, 1923 Mad 472 (472): 44 Mad L Jour 282: 17 Mad L W 422: 32 Mad L Tim 212: 1923 Mad W N 239: 72 Ind Cas 284.

Note 33.

(1) *Gangadara Rama Rao* v. *Surya Rao*, (1919) 49 Ind Cas 835 (837): 42 Mad 219: 36 Mad L Jour 169: 9 Mad L W 329: 25 Mad L Tim 184 [Per Seshagiri Iyer, J]; *Malyam Patel Basavana Gowd* v. *Lakka Narayana Reddi*, 1931 Mad 284 (286): 33 Mad L W 681: 133 Ind Cas 507: 61 Mad L Jour 563: 54 Mad 793.

(2) *Aldridge* v. *Barrow*, (1907) 34 Cal 662 (670, 671): 11 Cal W N 680; *Sreeram Huzra* v. *Gyaram Hatee*, (1869) 11 Suth W R 507 (508); *Venkatachala* v. *Kuppusami*, (1888) 11 Mad 42 (43); *Saina Mal* v. *Shah Bag Hussain*, 1888 Pun Re No 189; *Khawas Khan* v. *Rasul Khan*, 1894 Pun Re No 29; *Baru Mal* v. *Radha Kishen*, 1881 Pun Re No 3.

(3) *Abdul Sac* v. *Sundara Mudaliar*, 1930 Mad 817 (820): 1930 Mad W N 779: 32 Mad L W 836: 127 Ind Cas 805: 59 Mad L Jour 932: 54 Mad 81 F B; *Nagur Chand* v. *Durga Doss*, (1869) 11 Suth W R 137 (137); *Prince Victor Narayan* v. *Bhairabendra Narayan*, 1930 Cal 388 (389): 34 Cal W N 53: 125 Ind Cas 851; *Behari Lal* v. *Kodu Ram*, (1893) 15 All 380 (382): 1893 All W N 150. See *Namasivaya* v. *Kadir*, (1894) 17 Mad 168 (176): 4 Mad L Jour 31.

(4) *Abbasi Begam* v. *Imdadi Jan*, (1896) 18 All 53 (54): 1895 All W N 156.

(5) *Gurulingasamy* v. *Ramalakshmamma*, (1895) 18 Mad 53 (58): 4 Mad L Jour 237.

(6) *Vaddadi Sannamma* v. *Koduganti Radhabhayi*, (1918) 43 Ind Cas 935 (938): 22 Mad

O. 1, R. 10, Note 33.

When a party's name is struck out, the suit comes to an end so far as he is concerned.[7] All the evidence produced by him should be removed from the record.[8] If, on the removal of his name the Court finds that it has no jurisdiction to try the case, the plaint should be returned to be presented to the proper Court.[9]

A Court of appeal has a similar power of striking out parties, to that of the first Court.[10] It has also power to direct the first Court to do so.[11] It is not competent for the lower Court, however, to strike out the name of a party added by the appellate Court.[12] Where one judge has ordered a party to be added leaving the issue of misjoinder to be decided later, the *successor* is competent to strike out the name of the party improperly joined.[13] Where the appellate Court finds that a defendant has been improperly added by the lower Court, it should strike out his name and dismiss the *suit* against him with costs both in the lower Court and before itself and not merely to dismiss the *appeal* preferred by such defendant.[13-a]

Where a suit is dismissed against a defendant on the ground that he has been *improperly joined*, it will amount to a striking off his name under this rule even though the striking out was not formally done, and he ceases to be a party to the suit.[14] But where the plaintiff gives up a defendant *properly* made a party, but his name is not formally struck out, he, nevertheless, continues to be a party to the suit.[15]

A party who ought not to have been impleaded and who is not affected by the decree passed, is not competent to figure as an appellant and where he so figures, his name should be struck out.[16]

Where an order impleading a party, is appealed from and the appeal is dismissed, the impropriety of the addition cannot again be questioned at the stage of the appeal from the decree itself.[17]

L Tim 532: 34 Mad L Jour 17: 1918 Mad W N 23: 7 Mad L W 237 F B [The reason being that by dismissal, the defendant would be unreasonably brought under the operation of S 47). But see *Bishan Das* v. *Har Pershad*, 1870 Pun Re No 19 [Case under the Code of 1859].

(7) *Haveli Shah* v. *Sheik Painda*, 1926 P C 88 (91): 1926 Mad W N 592: 96 Ind Cas 887: 31 Cal W N 174 P C.

(8) *Bucha Singh* v. *Mashook Ali*, (1871) 15 Suth W R 572 (573).

(9) *Shridhar* v. *Chima*, (1873) 10 Bom H C 17.

(10) *Bucha Singh* v. *Mirza Mashook*, (1871) 15 Suth W R 572 (573); *Vasudeva* v. *Salubai*, (1886) 10 Bom 227 (229); *Nagar Chand* v. *Durga Dass*, (1869) 11 Suth W R 137 (137); *Mathewson* v. *Sri Ram Kania Singh*, (1909) 1 Ind Cas 626 (630): 36 Cal 675: 9 Cal L Jour 523; *Gudadhur Chatterji* v. *Raj Kristo*, (1870) 13 Suth W R 73 (73) [Second appeal]; *Ganeshilal* v. *Khairati Singh*, (1894) 16 All 279 (281): 1894 All W N 82, (Do.); *Lingammal* v. *Venkatammal*, (1882) 6 Mad 239 (245): 7 Ind Jur 244; *Ramanuja* v. *Devanagah*, (1885) 8 Mad 361 (365): 9 Ind Jur 264; *Nilakanthappa* v. *Magistrate of Sholapur*, (1882) 6 Bom 670 (671), (Do.). But see *Kowal Sahao* v. *Issur Dayal*, (1869) 12 Suth W R 334 (336) [Power of Appellate Court to strike out, doubted where suit had proceeded against intervenors without objection and plaintiff intended that decree should affect them].

(11) *Kristo Sunker* v. *Koylashnath*, (1871) 15 Suth W R 6 (6); *Salima Bibee* v. *Sheikh Md*, (1896) 18 All 131 (141): 1896 All W N 2; *Rajjo Kuar* v. *Debi Dial*, (1896) 18 All 432 (435): 1896 All W N 139; *Sarala Sundari* v. *Sarada Prasad*, (1905) 2 Cal L Jour 602 (609); *Kahna* v. *Dyal Singh*, 1882 Pun Re No 126; *Mubaraz* v. *Dhera*, 1883 Pun Re No 80.

(12) *Radha Balabh Pathak* v. *Bhullo*, 1930 All 303 (303, 304): 126 Ind Cas 225.

(13) *Ramanathan Chetty* v. *Kadiresan Chetty*, (1913) 21 Ind Cas 604 (604): 1913 Mad W N 993: 14 Mad L Tim 511.

(13-a) *Secretary of State* v. *Chatur Bhuj Nanda*, (1918) 48 Ind Cas 963 (964) Cal.

(14) *U Kala* v. *U Ma Hnin*, 1927 Rang 137 (138): 5 Rang 110: 101 Ind Cas 794; *Baij Nath* v. *Uggar Sain*, 1926 Lah 202 (203): 27 Pun L R 194: 93 Ind Cas 921.

(15) *Sannamma* v. *Radhabhayi*, (1918) 43 Ind Cas 935 (938) Mad F B; *Kuthala Mudaliar* v. *Venkata Reddiar*, 1927 Mad 253 (254): 98 Ind Cas 726.

(16) *Nand Lal* v. *Naresh Chandra*, (1917) 41 Ind Cas 468 (471): 2 Pat L W 108.

(17) *Mir Syed Hasa* v. *Taiyaba Begum*, (1915) 26 Ind Cas 547 (552): 1 Oudh L J 591.

O. 1, R. 10, Notes 34—35.

34. Transposition of parties.—The power to add or strike out parties includes, as has been seen in Note 9 above, the power to transpose them as well and to order amendments consequent upon such transposition.[1] This power should be exercised wherever the ends of substantial justice require it and a transfer of parties from one side to the other should always be granted where the refusal to do so would prejudicially affect the applicant by driving him to another suit.[2] Thus in a suit for partnership accounts where the plaintiff wishes to withdraw the suit, but defendants wish to continue the suit, the plaintiff should be transferred as defendant and the defendant as plaintiff and the suit continued.[3] Transpositions of parties are frequent in partnership suits,[4] partition suits[5] and in suits for administration.[6]

Under O. 1, R. 10, sub-Rule 2 and S. 107 of the Code, the appellate Court has the power to transpose a respondent as an appellant in order to further the ends of justice.[7]

It is no valid objection to an application for transposing a party that the pecuniary jurisdiction of the Court would be affected by such transfer; if it is exceeded, the Court can afterwards return the plaint to be presented to the proper Court.[8]

35. Transposing of defendant as plaintiff.—The transposition of a defendant as a co-plaintiff should always be allowed "where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings".[1] *A* sues *B* the mortgagor, and *C*, the subsequent mortgagee for recovery of the amount due on his mortgage. A preliminary decree is passed, and, thereafter, *C* pays off the amount due thereunder before the passing of the final decree and applies to be transposed as a plaintiff. The Court has power to so transpose him and pass a final decree for foreclosure in his favour.[1-a] Similarly where one of two co-trustees sues a third person for recovery of the trust property and impleads the other trustee as a defendant and pending suit the plaintiff dies, the other trustee

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Note 34.

(1) *Pitambar* v. *Tulsee*, (1867) 7 Suth W R 39 (40); *Municipal Council, Kumbakonam* v. *Veeraperumal*, (1915) 28 Ind Cas 45 (48, 49): 28 Mad L Jour 147: 1915 Mad W N 143.

(2) *Bhupendra Narayan* v. *Rajeswar Pershad*, 1931 P C 162 (165): 1931 All L J 566: 35 Cal W N 870: 132 Ind Cas 610: 34 Mad L W 1: 58 Ind App 228: 1931 Mad W N 865: 33 Bom L R 1273: 54 Cal L Jour 137: 61 Mad L Jour 632: 59 Cal 80 P C; *Nirode Chandra* v. *Profulla Chandra*, 1925 Cal 421 (422): 40 Cal L Jour 585: 85 Ind Cas 168.

(3) *Debi Chand* v. *Parbhu Lal*, 1926 All 582 (583): 24 All L J 694: 96 Ind Cas 67; *Eduljee* v. *Vullebhoy*, (1883) 7 Bom 167 (169): 7 Ind Jur 372.

(4) *Eduljee* v. *Vullebhoy*, (1883) 7 Bom 167 (169): 7 Ind Jur 372; *Brojendra Kumar* v. *Gobinda Mohan*, (1916) 34 Ind Cas 186 (188): 20 Cal 752.

(5) *S Ramamurthy* v. *Surampali Reddi*, (1921) 60 Ind Cas 144 (144): 12 Mad L W 563; *Vishnu Narhar* v. *Shriram*, 1921 Bom 455 (456): 45 Bom 983: 23 Bom L R 391: 61 Ind Cas 398; *Khatija Bi* v. *Babu Sahib*, (1912) 14 Ind Cas 544: 11 Mad L Tim 409.

(6) *Bhimana Goud* v. *Easwara Goud*, (1919) 49 Ind Cas 139 (140): 9 Mad L W 79: 25 Mad L Tim 140: 1918 Mad W N 929.

(7) *Surjya Kanta* v. *Tarak Nath*, 1927 Cal 37 (37, 38); *Gopi Nath* v. *Rup Ram*, 1930 All 786 (787): 1930 All L J 926.

(8) *Rajkishore* v. *Mt Alam Ara*, 1926 Pat 28 (29): 90 Ind Cas 82.

Note 35.

(1) *Bhupendra Narain* v. *Rajeswar Prasad*, 1931 P C 162 (165): 1931 All L J 566: 35 Cal W N 870: 132 Ind Cas 610: 34 Mad L W 1: 58 Ind App 228: 1931 Mad W N 865: 33 Bom L R 1273: 54 Cal L Jour 137: 61 Mad L Jour 632: 59 Cal 80 P C.

(1-a) *Balaji* v. *Ballab Das*, 1928 Nag 145 (146): 11 Nag L J 89: 24 Nag L R 119: 109 Ind Cas 251. See also *Sankar Rao* v. *Ganpat Rao*, 1925 Nag 15 (16): 80 Ind Cas 283. See also *Ramachandra* v. *Dhadhai Singh*, (1914) 25 Ind Cas 440 (441): 19 Cal L Jour 327 [Mortgagees defendants can if anything was due to them transpose themselves to the category of plaintiffs].

O. 1, R. 10, Notes 35—36.

defendant can be transposed as a plaintiff and the suit proceeded with.[2] So also where, *A*, alleging that he was appointed trustee by *C*, a deceased person, sues *B* for moneys due by *B* to *C*, and makes *C's* widow *D* also a defendant to the suit and it is found that *A* was not the trustee for that amount it being *C's* absolute property, the proper course is to transpose *D* as a plaintiff and proceed with the suit.[2-a]

But a transposition of a defendant as a plaintiff cannot be allowed where it deprives another defendant of a valuable right acquired by virtue of the statute of limitations. Thus, where *A* sues *B* and *C* on a promissory note executed by *B* to *C*, on the ground that *C* was really a *benamidar* for *A*, and finding that such a suit is not maintainable by *A* under the Negotiable Instruments Act, *C* applies to be transposed as a plaintiff, the application should not be allowed if, at the time of doing so an independent suit by *C* against *B* would be barred by limitation. The reason is that *B* will lose thereby a valuable statutory right acquired by lapse of time.[3] Similarly a transposition of a defendant as a plaintiff should not be granted if it results in changing the *character of the suit*.[4] Nor can a transposition be made where it would deprive the plaintiff already on record of his power to sue and ask for a determination of the claim advanced by him. Thus where *A* claims to have the sole right to a certain sum of money due from a defendant *B* and makes a third person *C*, who claims as against himself (*A*), a party to the suit, *C* cannot be transposed as a plaintiff in the place of *A*, as, to do so, would be to deprive *A* of his right to have his claim determined.[5]

36. Transposing of plaintiff as defendant.—Under O. 1, R. 10, one of the plaintiffs can be transposed as a defendant, if his original joinder was improper.[1] The Court has also, apart from O. 1, R. 10, inherent power to transpose one of the plaintiffs as a defendant.[2] If the transposition is made at the instance of a co-plaintiff, the Court can make such co-plaintiff give security for the costs of the original defendants incurred up to the date of transposition.[2-a] But as regards future costs of the original defendants, the Courts cannot, merely because of the transposition of one of the plaintiffs as a defendant, order such co-plaintiff to furnish security for their future costs.[2-b] But it would seem, that if apart from the transposition, there are special circumstances, such as the plaintiff suing in

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(2) *Saminatha* v. *Rajagopala*, 1921 Mad 124 (124): 13 Mad L W 148: 40 Mad L Jour 208: 1921 Mad W N 108: 62 Ind Cas 360. See also *Periakaruppan* v. *Velayutham*, (1906) 29 Mad 302 (303) [Co-payee under a pro-note—Originally defendant—Transposed as plaintiff].

(2-a) *Moolchand Gupta* v. *Bhoop Singh*, 1927 Oudh 484 (485): 95 Ind Cas 435.

(3) *Ramdas Sahu* v. *Chhota Lal Mandar*, 1928 Pat 24 (24): 104 Ind Cas 526: 9 Mad L Tim 238.

(4) *Jagabandhu* v. *Haris*, 1922 Cal 459 (460, 461): 36 Cal L Jour 92: 76 Ind Cas 915. See also *John Boisogomoti* v. *Manmatha Nath*, 1931 Cal 76 (78): 5 Cal L Jour 357: 129 Ind Cas 860: 58 Cal 561 [Where the suit is bound to fail for want of title in original plaintiff and the defendant seeking transposition can file separate suit].

(5) *Jarao Kunwar* v. *Bhagwan Kunwar*, 1921 All 184 (185): 19 All L J 833: 63 Ind Cas 778.

Note 36.

(1) *Padma Lohan* v. *Kali Kamal*, 1925 Cal 328 (328): 82 Ind Cas 649.

(2) *Bhairabendra Narain* v. *Udai Narain*, 1924 Cal 251 (252).

(2-a) In re *Mathews Oater* v. *Mooney*, (1905) 2 Ch 460: 74 L J Ch 656: 93 L T 158: 54 W R 75; *Bhairabendra Narain* v. *Udai Narain*, 1924 Cal 251 (254, 255, 256): 50 Cal 853: 79 Ind Cas 298.

(2-b) *Bhairabendra Narain* v. *Udai Narain*, 1924 Cal 251 (254).

the capacity of a "puppet" for another, the Courts may order security for future costs as well.[3]

37. Misdescription of parties.—Where the person who intends to sue or who is intended to be sued is clear, but is *described* wrongly, it is a case of misdescription of parties which can be corrected by the Court at any time.[1] Similarly where relief is originally claimed by or against a party (such as an idol, a minor, or a corporation) who has to be represented by some person, the *proper* representation of that party is a question of the *description* of the party, and not one of addition of new parties.[1-a] But where one person sues or is sued, and *another* person is sought to be substituted in his place, the case is not one of misdescription of parties, and the amendment can be allowed only if there is no question of limitation.[1-b]

Illustrations.

1. *A* sues "the agent, East India Railway Co.", relief being asked for *against the Company* and not against the agent personally. The title is sought to be amended into "East India Railway Co.", by striking out the word "agent". Here the plaintiff's claim as originally made was clearly against the Company, though the title of the suit was worded as if the suit was against the agent also. The case is, therefore, one of misdescription and can

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(3) *Bhairabendra Narain* v. *Udai Narain*, 1924 Cal 251 (254): 50 Cal 853: 79 Ind Cas 298.

Note 37.

(1) *Narayana Sastrigal* v. *Mangalathammal*, (1914) 23 Ind Cas 764 (764): 1 Mad L W 336; *Md Yusuf* v. *Himalaya Bank*, (1895) 18 All 198 (202, 203): 1896 All W N 28; *Devaraya Reddiar* v. *Liptons Ltd*, 1928 Mad 367 (367): 110 Ind Cas 438; *Dipchand* v. *Parmanand*, 1924 Sind 144 (145): 78 Ind Cas 905: 19 Sind L R 262 [Defendant described as manager of a firm, by mistake—Amendment describing defendant individually allowed]; *Karachi Municipality* v. *Narain Das*, 1931 Sind 63 (63): 24 Sind L R 478: 131 Ind Cas 718; *Kusum Kumari* v. *Surendra Krishna*, (1917) 42 Ind Cas 455 (456) Cal [Amendment may be made in appeal]; *Bakaram* v. *Ramchandra*, 1923 Nag 96 (97): 71 Ind Cas 39 [Correction of misdescription only—No limitation].

(1-a) *Jodhi Rai* v. *Basdeo Prosad*, (1911) 11 Ind Cas 47 (48): 33 All 735: 8 All L J 817 [Manager of idol—Amended into idol by manager—19 All 386 overruled]; *Narain Chandra* v. *Dulal Chandra*, 1927 Cal 477 (477, 478): 100 Ind Cas 469 [Plaintiff wrongfully described as minor and represented by next friend]; *Wali Mohomed* v. *Ishak Ali*, 1931 All 507 (512): 1931 All L J 777: 134 Ind Cas 26, (Do.); *Taqui Jan* v. *Obaidulla*, (1894) 21 Cal 866 (868), (Do.); *Bhulai* v. *Sheo Balak*, (1902) 5 Oudh Cas 355, (Do.); *Gajraj Singh* v. *Raghubar*, (1904) 7 Oudh Cas 234 (236), (Do.); *Moorlee Dhur* v. *Nathonee Mahtoon*, (1876) 25 Suth W R 184 (185); *Shanmuga* v. *Narayana Iyer*, (1917) 41 Ind Cas 510 (510): 40 Mad 743 [Suit by minor without next friend—Latter added subsequently]; *Mt Durga Devi* v. *Gur Narain*, 1924 Lah 157 (158): 69 Ind Cas 401, (Do.); *Peary Mohan* v. *Narendra Nath*, (1905) 32 Cal 582 (600): 9 Cal W N 421 [Relief claimed against debutter estate—None of the defendants impleaded as representing estate—Subsequent description of one of defendants as shebait of estate is no addition of new party]; *Dattu* v. *Bhan Singh*, 1926 Nag 40 (43, 44): 88 Ind Cas 235 [Appeal filed by next friend of minor who was really major on the date of appeal]; *Kaurmani Singha* v. *Wasif Ali*, (1915) 28 Ind Cas 818 (819): 19 Cal W N 1193 [Plaintiff suing in representative capacity but the fact not mentioned in the cause of title—Amendment so as to mention it, does not amount to addition or substitution of new plaintiffs]; *Juggannath* v. *Hogg*, (1869) 12 Suth W R 117 (118) [Suit by Receiver in his own name by mistake—Amendment allowed]; *Kanda Ponnappa* v. *Venkatesesha Iyer*, (1919) 50 Ind Cas 353 (354): 9 Mad L W 377: 1919 Mad W N 435; *Dayamoyi* v. *Sanker Nath*, 1926 Cal 417 (419): 42 Cal L Jour 30: 87 Ind Cas 159 [Omission to describe plaintiff as shebait in cause title—Misdescription—Amendment lies]; *Bidhu Sekhar* v. *Kuloda Pershad*, (1919) 50 Ind Cas 525 (526): 46 Cal 877, (Do.). But see *Sami Chettiar* v. *Sesha Iyer*, 1928 Mad 1057 (1059): 113 Ind Cas 663 [Final decree passed with wrong guardian—Held the suit guardian cannot be substituted]. For suits by or against an idol, see the following cases also:—*Pramatha Nath* v. *Pradhyumna Kumar*, 1925 P C 139 (140): 23 All L J 537: 41 Cal L Jour 551: 49 Mad L Jour 30: 52 Ind App 245: 1925 Mad W N 431: 2 Oudh W N 557: 27 Bom L R 1064: 22 Mad L W 492: 52 Cal 809: 87 Ind Cas 305: 30 Cal W N 25: 3 Pat L Rep 315; *Darshan Lal* v. *Shibji Maharaj*, 1923 All 120 (121, 122): 20 All L J 977: 71 Ind Cas 420: 45 All 215: 4 L R A (Civ) 50; *Sheo Ramji* v. *Sri Ridh Nath*, 1923 All 160 (160): 21 All L J 148: 71 Ind Cas 480: 45 All 319: 4 L R A (Civ) 128; *Nabin Chandra Sarma* v. *Sheikh Amir*, (1911) 9 Ind Cas 132 (133) Cal; *Sidhu Sahu* v. *Gopi Charan Das*, (1913) 18 Ind Cas 969 (970): 17 Cal L Jour 233; *Dina Bandu Nandi* v. *Chamireddi Miji*, (1916) 34 Ind Cas 548 (549) Cal; *Pestonji Nusserwanji* v. *Nemchund Maneckchand*, (1907) 9 Bom L R 1301 (1304); *Sewa Singh* v. *Budh Singh*, 1892 Pun Re No 66; *Thakur Raghunathji* v. *Shah Lal*, 1897 All W N 75 (75): 19 All 330.

(1-b) *Alagappa Chetty* v. *Vellian Chetty*, (1895) 18 Mad 33 (37): 4 Mad L Jour 283 [Suit by one partner—Other partners were not added on the ground that there was no misdescription]; *Narayana Sastrigal* v. *Mangalathammal*, (1914) 23 Ind Cas 764 (764): 1 Mad L W 336.

O. 1, R. 10, Note 37.

be corrected by the Court at any time.[1-c] But where the agent is sued *personally*, the amendment of the title as above mentioned will really amount to a substitution of a *new party* which will not be allowed after the period of limitation.[2]

2 A suit is wrongly filed in the name of the Chairman, District Board, Dacca, instead of the District Board, Dacca. The case is one of misdescription and can be corrected by striking off the word "Chairman".[3] Similarly where *A* sues the Municipal Committee of Gorakhpur through its *Secretary* instead of through its President as he ought to have done, and the relief claimed is against the Committee, the misdescription can be corrected at any time.[4]

3. *A* brought a suit against "Shivlal Ramprasad, a firm doing business as merchants at Ahmadabad". It was found subsequently that Shivlal Ramprasad was a joint Hindu family and that the provisions of O. 30, would not apply. The title of the plaint was sought to be amended by substituting the names of the members of the family for the firm's name "Shivlal Ramprasad". It was held that the amendment was only a correction of misdescription and did not amount to an addition of any new parties.[5]

4. A suit was instituted for damages by "H. Hogarth & Sons", it being alleged that they were the owners of the vessel "Baron Jedburgh". The real name of the plaintiff was, however, "Hogarth Shipping Co., Ltd.", and was not described as such owing to a *bona fide* mistake. *Held*, that the description could be corrected at any stage.[6]

The principle of the rule applies to miscellaneous applications also. Thus where an application was made by "The Official Assignee of Bombay" instead of by the "Official Assignee of Bombay as an attorney of the Official Assignee of Madras" it was held that the misdescription could be corrected by the Court.[7]

(1-c) *Nanakchand* v. *E I Ry*, 1925 Lah 441 (442): 6 Lah 252: 7 Lah L Jour 410: 89 Ind Cas 279: 26 Pun L R 437; *Bulakdas* v. *Agent, B N Ry Co*, 1925 Nag 155 (156): 82 Ind Cas 177; *Rameshwar* v. *Agent, B N W Ry*, 1928 Notes 9d: 112 Ind Cas 323: 9 Pat L Tim 542. See also *Saraspur Manfacturing Co* v. *B B & C I Ry Co*, 1923 Bom 452 (453): 47 Bom 785: 73 Ind Cas 1027: 25 Bom L R 513. See also *Muthukrishna* v. *Rajam Iyengar*, (1916) 33 Ind Cas 357 (358): 30 Mad L Jour 57 [Suit by *A*—Amendment into suit by *A* on behalf of a Company]; *Muhammad Yusuf* v. *The Himalaya Bank, Ltd*, (1896) 18 All 198 (202, 203): 1896 All W N 28 [Official liquidator on behalf of a company—17 All 292 overruled]. See also *Mussoorie Bank* v. *Barlow*, (1887) 9 All 188 (190, 191): 1887 All W N 17; *Pragi Lal* v. *Maxwell*, (1885) 7 All 284 (287): 1885 All W N 40; *Carter* v. *Misri Lal*, (1870) 2 N W P H C 179 [Suit by recognised agent of official assignee—Amended into suit by official assignee].

(2) *India General S N & R Co* v. *Lal Mohan*, (1915) 31 Ind Cas 35 (36): 43 Cal 441: 22 Cal L Jour 241; *East Indian Ry Co* v. *Ram Lakhan Ram*, 1925 Pat 37 (38): 3 Pat 230: 1924 Pat H C C 9: 78 Ind Cas 312: 6 Pat L Tim 415; *Agent, B N Ry* v. *Behari Lal*, 1925 Cal 716 (718, 719): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426; *Ram Bihari Lall* v. *E I Ry*, (1921) 64 Ind Cas 125 (126): 1921 Pat 485: 2 Pat L Tim 679; *Mandardhar Aitch* v. *Secretary of State*, (1901) 6 Cal W N 218 (221) [Suit against "an Executive Engineer"—Addition of the Secretary of State as a party subsequently is an addition of a new party]. See *Nubeen Chunder Paul* v. *Mr Cecil Stephenson*, (1871) 15 Suth W R 534 (536); *Traffic Superintendent, E B, E I and O and R Railways* v. *Hafiz Abdul Rahman*, (1901) 4 Oudh Cas 133 (138) [State Railway as defendant—Secretary of State cannot be substituted in the absence of due notice].

(3) *Anukul Chandra* v. *Chairman of the Dacca District Board*, 1928 Cal 485 (487): 32 Cal W N 396: 113 Ind Cas 24. See also *Shamshuddin Khan* v. *Agha Siyid Fateh Shah*, 1924 Oudh 309 (310): 75 Ind Cas 936: 84 Ind Cas 532.

(4) *Manni* v. *Crooke*, (1880) 2 All 296 (298). See *Syed Ameer Sahib* v. *Venkatarama*, (1893) 16 Mad 296 (298).

(5) *Ram Prasad* v. *Shrinivas*, 1925 Bom 527 (527): 27 Bom L R 1122: 90 Ind Cas 685; *Kasturchand* v. *Sagarmal*, (1893) 17 Bom 413 (416) [Suit by a firm by its "manager"—On objection by defendants a partner was joined as co-plaintiff on the ground of misdescription]; *Vyankatesh Oil Mill Co* v. *Vel Muhammad*, 1928 Bom 191 (193): 30 Bom L R 117: 109 Ind Cas 99 [Suit in Firm's name—Court deciding that suit as framed not maintainable—Amendment to insert partners must be treated as one of substitution]; *Narasimham* v. *Seemai Javili Trade Committee*, 1929 Mad 633 (634): 118 Ind Cas 285 [Plaintiff suing on behalf of Trading Committee—Amended as plaintiff suing on behalf of "members" of the Committee]; *Neogi Ghose & Co* v. *Sardar Nehal Singh*, 1931 Cal 770 (771): 35 Cal W N 432: 134 Ind Cas 1200 [*Sole proprietor* of firm suing in name of firm and verifying as a partner—Defect amended]. See *Amar Singh* v. *Maghar Singh*, 1902 Pun L R 103.

(6) *Mitsui Bussan Ltd* v. *Hogarth Shipping Co*, 1926 Cal 722 (725): 43 Cal L Jour 297: 94 Ind Cas 182; *Hogarth Shipping Co, Ltd* v. *Mitsui*, 1925 Cal 922 (923): 41 Cal L Jour 511: 88 Ind Cas 1029 [Affirmed in 1926 Cal 722].

(7) *Sardar Mal* v. *Aranrayal*, (1896) 21 Bom 205 (210).

O. 1, R. 10, Notes 37—40.

Where a party is wrongly described and the Court orders amendment giving a correct description, and inspite of it the amendment is not carried out, the Court can strike out the name of such party.[8]

38. Consent of added party, sub-Rule 3.—No person can be added as a *plaintiff* without his consent expressly given.[1] But a person can be made a *defendant* against the plaintiff's consent[2] even though he may thereby be in a position to counter-claim against the plaintiff.[3]

Persons who are made parties to a suit in the appellate stage cannot be made liable for costs, simply because they encouraged the plaintiff to bring the suit.[4]

39. Amendment of Plaint, sub-Rule 4.—The amendment referred to in this sub-Rule is such amendment as is necessitated by the addition of a defendant and not such an amendment as would add to or alter the nature of the suit as originally brought.[1] A case of misdescription is also one for amendment of the plaint.[2] Where the amendment as per the order of the Court is not made, the proper course is to reject the plaint.[3] But if the parties proceed with the trial without the amendment, if they are not prejudiced, the trial is not bad.[4] In such a case, the petition may be treated as a part of the plaint.

40. Suit by or against a dead person.—A suit instituted in the name of a sole plaintiff[1] or against a *sole* defendant[2] who is dead at the time of the institution of the suit is a nullity and the plaint cannot be amended by bringing his legal representatives on the record. Where, however, there are *several* plaintiffs or several defendants and *one* of them dies, the suit cannot

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(8) *Lachminarain* v. *Salig Ram*, 1924 Oudh 428 (429): 11 Oudh L J 154: 83 Ind Cas 833.

Note 38.

(1) *Ram Narain* v. *Ram Kishen*, (1911) 10 Ind Cas 515 (520): 1911 Pun Re No 46: 179 Pun L R 1911: 108 Pun W R 1911; *Nathi Lal* v. *Lala*, (1912) 14 Ind Cas 35 (37): 9 All L J 410; *Fricker* v. *Van Grutton*, (1896) 2 Ch 649 C A: 65 L J Ch 823: 75 L T 117: 45 W R 53 C A cited in 9 Cal L Jour 331; *Uma Sundari* v. *Ramji*, (1881) 7 Cal 242 (244): 9 Cal L Rep 13; *Jagadamba Dasi* v. *Haran Chandra*, (1868) 6 Beng L R 526 (N): 10 Suth W R 108; *Beharee Lall Das* v. *Radha Nath Das*, (1874) 22 Suth W R 229 (230). Under S 73 of the Code of 1859 it was held that persons can be made co-plaintiffs against their will. See *Tara Chunder* v. *Ameer Mundul*, (1874) 22 Suth W R 394 (395); *Sheoraj Kuar* v. *Hari Krishnan*, (1900) 3 Oudh Cas 347 (348, 350).

(2) *Riasat Ali* v. *Rajeshar Bali*, (1910) 6 Ind Cas 977 (978): 13 Oudh Cas 109; *Secretary of State* v. *Murugesa Mudaliar*, 1929 Mad 443 (447): 1929 Mad W N 67: 29 Mad L W 753: 118 Ind Cas 780.

(3) *Secretary of State* v. *Murugesa Mudaliar*, 1929 Mad 443 (445, 446): 1929 Mad W N 67: 29 Mad L W 753: 118 Ind Cas 780.

(4) *Robert Watson* v. *Har Gobind*, (1874) 22 Suth W R 35 (35 and 36).

Note 39.

(1) *Hingu Lal* v. *Baldeo Ram*, (1902) 24 All 553 (555): 1902 All W N 170.

(2) *Sardar Mal* v. *Aranvayal Sabapathy*, (1897) 21 Bom 205 (210); *Maharaja of Vizianagram* v. *Lakshmi Challaya*, (1873) 18 Suth W R 301 (303): 12 Beng L R 443 P C.

(3) *Thakur Das* v. *The President, Municipal Committee of Simla*, 1890 Pun Re No 36; *Sudhendu Mohun Roy* v. *Durga Dasi*, (1897) 14 Cal 435 (439).

(4) *Nilambur Thacharakkavil Kovillagath Manavikkaran* v. *Manjeri Putten Kavilagam Karnavan*, (1914) 25 Ind Cas 607 (607): 1 Mad L W 775; *Gaj Kumar Chand* v. *Lakshman Ram*, (1911) 10 Ind Cas 503 (505): 14 Cal L Jour 627. See *Kedarnauth Doss* v. *Protab Chunder Doss*, (1881) 6 Cal 626 (628): 8 Cal L Rep 238.

Note 40.

(1) *Mt Bhoondu* v. *Motichand*, 1923 Lah 652 (652): 79 Ind Cas 284 [Suit on behalf of minor who was dead]; *Makram Ali Molla* v. *Abdul Hamid*, 1927 Cal 880 (881): 104 Ind Cas 623 [One of two co-mortgagors dead—Other mortgagor including the deceased mortgagor as a co-plaintiff—Defect can be remedied by amendment to add L Rs of the deceased]; *Surajmal* v. *Raghunath*, 1929 Nag 261 (262): 117 Ind Cas 257 [*Appeal* in name of dead person].

(2) *Veerappa* v. *Tindal*, (1908) 31 Mad 86 (88): 3 Mad L Tim 12: 17 Mad L Jour 551; *Arunachalam Chettiar*, In re, (1915) 30 Ind Cas 679 (679): 2 Mad L W 828; *Rasa Goundan* v. *Pichamuthu*, (1917) 42 Ind Cas 539 (539) Mad; *Nau Nehalsingh* v. *D C Onao*, (1918) 47 Ind Cas 894 (895): 5 Oudh L J 546; *Ram Pratab* v. *Gauri Shankar*, 1924 Bom 109 (111, 112): 25 Bom L R 7: 85 Ind Cas 464; *Moharanee Sunro Moyee* v. *Bykunt Chunder Mustofee*, (1876) 25 Suth W R 17 (17); *Mohun Chunder* v. *Azeem*, (1869) 12 Suth W R 45 (46): 3 Beng L R A C 233.

O. 1, R. 10, Notes 40—41.

be said to be void *ab initio*.[3] The proper procedure in such a case is to strike out the dead person's name and proceed with the suit.[4] If the deceased person was a necessary party, the plaint can be amended by adding his legal representatives as parties.[5]

An appeal against a person who was dead at the date of the presentation of the appeal is incompetent, but as the Court is only acting in a *proceeding in a suit*, it has full power to allow amendment of the appeal by adding the legal representatives of the deceased respondent as parties.[6]

41. Limitation Act, S. 22.—S. 22 of Limitation Act (XV of 1877, now Act IX of 1908) provides that where a *new* plaintiff or defendant is added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.[1] If on the date of his addition, the suit is barred against him, it will have to be dismissed as against him.[1-a] But does the addition of a party after the period of limitation, affect the suit against other defendants who are already on the record? The answer to this depends upon the question whether the added party is a *necessary* party or is only a *proper party* or whether he was already *constructively a party* to the suit though not actually so. If he was a *necessary* party, *i.e.*, if the suit will not be properly constituted one, unless he is made a party, his addition after the period of limitation will entail the dismissal of the whole suit, inasmuch as the suit becomes a properly constituted one, only when he is made a party, and inasmuch, as at that time, the suit is barred against all.[2] Where the

(3) *Makram Ali* v. *Abdul Hamid*, 1927 Cal 880 (881): 104 Ind Cas 623.

(4) *Pala Mal* v. *Fauja Singh*, 1926 Lah 153 (154): 89 Ind Cas 661. See also *Jotindra* v. *Narendra*, 1928 Cal 152 (153): 105 Ind Cas 284 [Plaintiff in doubt if defendant alive or dead—Plaint both against defendant and his heirs defendant subsequently learnt to be dead—His name struck off].

(5) *Roopchand* v. *Sardar Khan*, 1928 Lah 359 (360): 9 Lah 526: 29 Pun L R 626: 110 Ind Cas 281; *Makram Ali* v. *Abdul Hamid*, 1927 Cal 880 (881): 104 Ind Cas 623.

(6) *Gopalakrishnayya* v. *Lakshmana Rao*, 1925 Mad 1210 (1210): 49 Mad L Jour 590: 49 Mad 18: 23 Mad L W 418 F B [Overruling 1924 Mad 56]; *Chatur Prosad* v. *Baijnath Prosad*, 1930 All 131 (131, 132): 123 Ind Cas 824.

Note 41.

(1) *Chokalingam* v. *Seethai Ache*, 1927 P C 252 (255): 27 Mad L W 1: 1928 Mad W N 20: 4 Oudh W N 1231: 54 Mad L Jour 88: 47 Cal L Jour 136: 32 Cal W N 281: 30 Bom L R 220: 107 Ind Cas 237: 6 Rang 29: 26 All L J 371 P C; *Currimbhoy* v. *L A Creet*, 1930 Cal 113 (127): 50 Cal L Jour 208: 57 Cal 170: 123 Ind Cas 250; *Fisher* v. *Pearse*, (1885) 9 Bom 1 (9); *Rajkishore Dosse* v. *Budden Chunder*, (1866) 6 Suth W R 298 (299); *Subbaraya Iyer* v. *Vaithinatha Iyer*, (1910) 5 Ind Cas 931 (931, 932): 33 Mad 115: 7 Mad L Tim 185; *Guruvappa Chetty* v. *Srinivasa Rao*, (1910) 6 Ind Cas 680 (681): 7 Mad L Tim 306 [Subsequently added party may raise question of limitation]; *Sher Singh* v. *Sunder Singh*, 1930 Lah 747 (748): 126 Ind Cas 78: 11 Lah 688; *Venkatasubbamma* v. *Pulipulla Reddy*, 1925 Mad 917 (918): 85 Ind Cas 961.

(1-a) *Harakchand* v. *Deonath*, (1898) 25 Cal 409 (412) [Assignee of the interest of plaintiff, substituted for original plaintiff, after limitation—Suit is barred]; *Abdul Rahman* v. *Amir Ali*, (1907) 34 Cal 612 (615, 617): 11 Cal W N 521: 5 Cal L Jour 486: 2 Mad L Tim 312. (Do.); *Chellaram* v. *Baden Insurance Co*, (1909) 4 Ind Cas 1160 (1163): 3 Sind L R 191; *Northern Bank of India* v. *Ramesh Chander*, 1932 Lah 314 (315): 33 Pun L R 253: 137 Ind Cas 89 [Suit against wrong Legal Representative—Right—Legal Representative impleaded after time-barred—No question of *bona fides* arises].

(2) *Guruvayya* v. *Dattatraya*, (1904) 28 Bom 11 (17): 5 Bom L R 618; *Devi Dayal* v. *Narain Singh*, 1928 Lah 33 (34): 100 Ind Cas 859; *Ramchand* v. *Subhan Baksh*, 1902 Pun Re No 69; *Imamuddin* v. *Liladhar*, (1892) 14 All 524 (528): 1892 All W N 104; *Khan Muhammad Shah* v. *Muhammad Jan*, 1882 Pun Re No 104 [Pre-emption suit—All representatives of deceased vendee not joined—Additon after limitation—Whole suit is barred]; *Ramasami* v. *Pavadai Chetti*, (1914) 23 Ind Cas 813 (813) Mad [Suit instituted by insolvent after adjudication—Receiver seeking to be made a plaintiff after the period of limitation—Suit barred—Hence not made a party]; *Afiuddin Ahamed* v. *Khoda Bux*, (1919) 50 Ind Cas 5 (6) Cal [Application to set aside execution sale—One auction purchaser impleaded after limitation—Whole application is barred]; *Genden Lal* v. *Baburam*, (1912) 13 Ind Cas 197 (199, 200): 9 All L J 86 [Necessary parties not impleaded in mortgage suit till after limitation—Defect fatal to suit]; *Sidhesuri* v. *Dharamjit*, (1914) 22 Ind Cas 570 (571): 41 Cal 727: 19 Cal L Jour 437; *Pappi Amma* v. *Kunhu* alias *Kuttimalu Amma*, 1925 Mad 761 (761): 21 Mad L W 432: 87 Ind Cas 198 [Karnavan necessary party in a suit on Teer-deed]; *Bhagelukoer* v. *Abdul Rahiman*, (1916) 36 Ind Cas 77 (79) (Pat); *Giris Chandra Kit* v. *Ram Saran Majamdar*, 1929 Cal 591 (592); *Fakirunnissa* v. *Imdad Ali*, (1915) 80 Ind Cas 795 (796) B R U P; *Ganesh Singh* v. *Mundi*, (1899) 21 All 346 (348): 1899 All W N 123.

party added is only a *proper* party but not a necessary one, the suit as against the other defendants will not be barred.[3] Where the added party is already constructively a party to the suit, as in the case of representative suits, it is really not a case of adding or substituting *new* parties, and S. 22 does not apply to such a case.[4] O. 1, R. 10, Note 41.

Illustrations.

1. *A*, one of the two heirs of a deceased Khoja Mahomedan institutes a suit to recover a debt due to the estate of the deceased. Here the suit is not a properly constituted one without adding the other heir as a party, and if the other heir is added after the period of limitation, the whole suit will be barred.[5]

2. *A*, *B*, *C* and *D* are partners carrying on business in partnership. *A* sues *B* for partnership accounts without impleading *C* and *D* as parties. In this case also the suit is not a properly constituted one without impleading *C* and *D* as parties, and if they are added after the period of limitation, the whole suit will become barred.[6] The same principle will apply to one of several joint promisees suing without impleading the other joint promisees as parties.[7]

3. *A*, the landlord sues *C*, a sub-tenant of *B*, who is himself a sub-tenant of *A*, for ejectment without impleading *B* as a party; *B* is made a party after the period of limitation. The whole suit must be dismissed as barred.[8]

4. *A*, the *manager* of a joint Hindu family sues *B* for rent due in respect of family property. After the period of limitation *C*, a member of the family is added as a co-plaintiff for the purpose of protecting *A's* interest and of removing any possible objection by the defendant. Here *C* is only a *proper* but not a necessary party and his addition after the period of limitation will not

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(3) *Shivu Bai* v. *Shiddheswar*, 1921 Bom 152 (154): 45 Bom 1009: 23 Bom L R 405: 61 Ind Cas 590; *Guruvayya* v. *Anant*, (1904) 28 Bom 11 (18): 5 Bom L R 618; *Annamalai* v. *Murugappa*, (1914) 22 Ind Cas 826 (828): 38 Mad 837: 26 Mad L Jour 239: 1 Mad L W 212: 1914 Mad W N 236; *Pateshripratap* v. *Rudra Narain*, (1904) 26 All 528 (535): 1904 All W N 119: 1 All L J 543 [Affirmed on appeal to P C 32 All 241]; *Mathuson* v. *Ram Kanai*, (1909) 1 Ind Cas 626 (629, 630): 36 Cal 675: 9 Cal L Jour 528; *Shasaheb* v. *Sadasiv*, (1919) 51 Ind Cas 223 (225): 43 Bom 575: 21 Bom L R 369; *Gehimal Nyalmal* v. *Karmoomal*, (1916) 35 Ind Cas 551 (552, 554): 10 Sind L R 38; *Hazarimal* v. *Bhavani Ram*, (1908) 30 All 538 (540): 5 All L J 554: 1908 All W N 246: 4 Mad L Tim 447; *Md Ishaq* v. *Sheik Akramul*, (1907) 6 Cal L Jour 558 (565, 570): 12 Cal W N 84 [Addition of *pro forma* defendants]; *Sohna* v. *Khalak Singh*, (1891) 13 All 78 (85): 1891 All W N 1; *Oriental Bank* v. *Charriol* (1886) 12 Cal 642 (650); *Thakurmani Singh* v. *Dai Rani Koeri*, (1906) 33 Cal 1079 (1093) [Purchaser of *small portion* of mortgaged property added after limitation—Suit not barred wholly]; *Imam Ali* v. *Baij Nath Ram Sahu*, (1906) 33 Cal 613 (620): 3 Cal L Jour 576: 10 Cal W N 551, (Do.); *Arunachala* v. *Orr*, (1915) 29 Ind Cas 634 (637 638): 40 Mad 722: 32 Mad L Jour 407 [Where a suit is properly instituted and an assignment is made pending suit by the plaintiffs, and the assignee is allowed to continue the suit—S 22 does not apply]; *Fateh Muhamad* v. *Said Ahmed*, 1907 Pun Re No 8: 8 Pun L R 1908: 153 Pun W R 1906 [Assignee of vendee *pendente lite* added after limitation in a pre-emption suit]; *Virchand Vajekaran Shet* v. *Kondu Kasam Atar*, (1915) 31 Ind Cas 180 (181): 39 Bom 729: 17 Bom L R 685; *Jaimal Singh* v. *Gurmukh Singh*, (1910) 5 Ind Cas 898 (899, 900): 1910 Pun Re No. 20: 28 Pun W R 1910: 206 Pun L R 1910; *Behari Lal* v. *Girdhari Lal*, 1897 All W N 36 (37); *Coorla Mills* v. *Vallabhadas*, 1925 Bom 547 (548, 560): 27 Bom L R 1168: 94 Ind Cas 575 [*Del credre* agent suing—Principal not a necessary, but only a proper party—Addition after limitation—S 22 does not apply]; *Ravji* v. *Mahadev*, (1898) 22 Bom 672 (679) [Benamidar suing—Real owner added]; *Thekkian Rangacharlu* v. *Muthukaruppan Kothan*, (1912) 16 Ind Cas 420 (421): 1913 Mad W N 134 [Suit for possession—Some persons in possession impleaded after limitation—Suit dismissed against them]; *Obhoy Charun* v. *Kritartha Moyi*, (1881) 7 Cal 284 (287), (Do.); *Bala Roy* v. *Jang Bahadur*, (1910) 8 Ind Cas 890 (890); *Krishnaji* v. *Vittu*, (1894) 18 Bom 505 (506).

(4) See illustration (4) in the Notes.

(5) *Fatmabai* v. *Pirbhai Virhi*, (1897) 21 Bom 580 (583): Chitty's S C C R 527.

(6) *Ramdoyal* v. *Junmenjoy Coondoo*, (1887) 14 Cal 791 (794); *Ambika Charan* v. *Tarinichandra*, (1913) 19 Ind Cas 963 (964): 18 Cal W N 464.

(7) *Seshan* v. *Veera Raghava*, (1909) 4 Ind Cas 38 (41, 42): 32 Mad 284: 19 Mad L Jour 372: 5 Mad L Tim 351 [One member of a joint family for joint debt]; *Kalidas Kevaldas* v. *Nathu Bagwan*, (1883) 7 Bom 217 (219): 7 Ind Jur 428, (Do.); *Mohun Mal* v. *Kripa Mal*, 1906 Pun Re No 79: 124 Pun W R 1906, (Do.); *Gopalasamy* v. *Periasamy Thevar*, (1896) 6 Mad L Jour 27 (29), (Do.); *Dalluram* v. *Nibahumal*, 1886 Pun Re No 8; *Ramsebuk* v. *Ramlall Koondoo*, (1881) 6 Cal 815 (826): 8 Cal L Rep 152.

(8) *Fakirunnissa Bibi* v. *Imdad Ali*, (1915) 30 Ind Cas 795 (796) U P B R.

O. 1, R. 10, Note 41.

affect the suit by *A*, who in his own right as manager of the family was entitled to institute the suit.[9] The same result may also be arrived at on the principle that the manager *represents* the other members, that the latter are *constructively parties* to the suit and that therefore their subsequent addition is not an addition of any *new* parties within S. 22 of the Limitation Act.[10]

5. *A*, as executrix of *B's* will files a suit for recovery of possession of lands belonging to the deceased *B*. *C* and *D*, the beneficiaries under the will are substituted for *A* after the period of limitation. The suit is not barred by S. 22 of the Limitation Act. The reason is that an executor, trustee or administrator represents the persons beneficially interested and the addition of *C* and *D* in the above case is not the addition of any *new* party.[11]

The mere fact that the Court, of *its own motion* orders the name of any person to be added as a party does not render the provisions of S. 22 of the Limitation Act inapplicable.[12]

Section 22 does not apply to a case of *transposition* of parties, as the Explanation to that section itself shows:[13]

> Under sub-Clause 5 of this rule, a person will be deemed to have been made a party, and proceedings begin against him, only on the *service of summons* on him.[14]

Applying this sub-Clause, some cases[15] have held that the suit as against such a person will be barred unless the service is within the period of limitation. But as the sub-Clause is expressly made subject to S. 22 of the Indian Limitation Act the suit as against a newly added defendant must be deemed to have been instituted when he is made a party so far as regards the

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(9) *Kishen Pershad* v. *Har Narain Singh*, (1911) 9 Ind Cas 739 (741): 33 All 272: 38 Ind App 45: 15 Cal W N 321: 8 All L J 256: 9 Mad L Tim 343: 13 Cal L Jour 345: 21 Mad L Jour 378: 13 Bom L R 359: (1911) 2 Mad W N 395; *Bhola Roy* v. *Jung Bahadur*, (1914) 22 Ind Cas 798 (799): 19 Cal L Jour 5 [Observations in 14 Cal 400 as to applicability of S 22 of the Limitation Act to substitutions under S 27 of the old Code, doubted]; *Thakurmani* v. *Dai Rani*, (1906) 33 Cal 1079 (1093).

(10) *Chetan Singh* v. *Sartaj Singh*, 1924 All 908 (908): 46 All 709: 22 All L J 702: 5 L R A (Civ) 480: 79 Ind Cas 1001; *Nathu Lal* v. *Lala*, (1912) 14 Ind Cas 35 (38): 9 All L J 410. See also *Rajam Aiyangar* v. *Muthukrishna*, (1914) 25 Ind Cas 945 (946): 16 Mad L Tim 251 [Suit by plaintiff in private capacity —Amendment as manager of a company does not amount to *addition of party*—No limitation].

(11) *Janahabi* v. *Brojomahini*, (1903) 7 Cal W N 817 (820); *Mohunt Pudmalall* v. *Lukhmi Rani*, (1908) 12 Cal W N 8 (11). See also *Nistraini Dassya* v. *Sarat Chandra*, (1915) 29 Ind Cas 680 (682): 22 Cal L Jour 279: 20 Cal W N 49 [Widow suing as administratrix for benefit of her sons].

(12) *Immamuddin* v. *Liladhar*, (1892) 14 All 524 (528): 1892 All W N 104; *Damodar* v. *Nain Sukh*, (1906) 8 Bom L R 942 (946); *Ralliram Shewaram* v. *Budhuram*, 1925 Sind 181 (183): 17 Sind L Rep 324: 79 Ind Cas 914; *Ram Kinker Biswas* v. *Kil Chandra*, (1908) 35 Cal 519 (523): 11 Cal W N 350: 5 Cal L Jour 242: 2 Mad L Tim 137 F B [Overruling 24 Cal 640 and 27 Cal 540]; *Sher Singh* v. *Sundar Singh*, 1930 Lah 747 (748): 126 Ind Cas 78: 11 Lah 688.

(13) *Ponnammal* v. *Pichai Thevan*, 1927 Mad 204 (204): 52 Mad L Jour 33: 24 Mad L W 826: 99 Ind Cas 687; *Nagendrabala* v. *Tarapada*, (1908) 35 Cal 1065 (1068): 13 Cal W N 186: 8 Cal L Jour 286: 5 Mad L Tim 91: 4 Ind Cas 369 [*Pro forma* defendant made plaintiff]; *Husainara* v. *Rahmannessa*, (1910) 8 Ind Cas 837 (841): 38 Cal 342: 13 Cal L Jour 3; *Dwarakanath* v. *Manmohan*, (1915) 30 Ind Cas 34 (35): 19 Cal W N 1269: 21 Cal L Jour 611; *Subodini* v. *Ganoda Kant*, (1887) 14 Cal 400 (401); *Moolchand* v. *Bhoop Singh*, 1927 Oudh 484 (485): 1 Luck Cas 546: 105 Ind Cas 473; *Harsingha* v. *Vaman*, (1909) 4 Ind Cas 249 (251): 34 Bom 91: 11 Bom L R 1102. But see *Srirangachariar* v. *Ramaswami Aiyangar*, (1895) 18 Mad 189 (192): 4 Mad L Jour 106 [Which was a case under the old Limitation Act].

(14) *Fakhrunnissa Bibi* v. *Imdad Ali*, (1915) 30 Ind Cas 795 (796) (B R U P); *E I Ry Co Ltd* v. *Ram Lakhan Ram*, 1925 Pat 37 (37): 3 Pat 230: 1924 Pat H C C 9: 78 Ind Cas 312: 6 Pat L Tim 415; *Raghunath Das* v. *Sunder Das Khetri*, 1914 P C 129 (131): 42 Cal 72: 41 Ind App 251: 13 All L J 154: 18 Bom L R 814: 20 Cal L Jour 555: 18 Cal W N 1058: 27 Mad L Jour 150: 16 Mad L Tim 353: 1 Mad L W 567: 1914 Mad W N 747: 24 Ind Cas 304 P C.

(15) *Fakhrunnissa* v. *Imdad Ali*, (1915) 30 Ind Cas 795 (796) (B R U P); *East India Ry Co* v. *Ram Lakhan Ram*, 1925 Pat 37 (37): 3 Pat 230: 1924 Pat H C C 9: 78 Ind Cas 312: 6 Pat L Tim 415; *Subodini* v. *Cumar Ganoda Kant Roy*, 14 Cal 400 (401) (Obiter).

question of limitation.[16] A person is made a party on the date of the *order* of the Court making him a party and not on the date of the *application* to make him a party.[17] Where, however, the lower Court has refused the application and the appellate Court has ordered the addition of the party, the date of the application has been held to be the date of addition.[18] **O. 1, R. 10, Notes 41—42.**

A party once discharged and subsequently re-instated again is a party only from the date of reinstatement.[19]

42. Appeal.—An order under O. 1, R. 10 is not an appealable order and no appeal lies therefrom.[1-a] Thus an order adding[1] or refusing to add a party[2] or an order striking out the name of a party as having been improperly or unnecessarily joined[3] is not appealable. But if in *substance* the order amounts to a "decree" within the meaning of S. 2 (2) it will be appealable as a decree. Thus where the defendant's name is struck out on the ground that the plaintiff has no *cause of action* against him, and the suit is dismissed as against him, the order, in substance, determines the rights of the plaintiff to bring the suit against the defendant and amounts to a decree and, is, therefore appealable as such.[4] Similarly, in a suit under S. 92 of the Code an order refusing to join persons as parties, finally adjudicates or concludes the matter as against those persons inasmuch as such suit operates *in rem*. It is, therefore, appealable as a decree.[5] Similarly, in a partition suit, where the name of one of the defendants is struck out leaving undecided the defendant's claim to a share in the partition, the order amounts to a decree and is appealable.[6]

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(16) *Muhammadbhai* v. *Ismail Haji Halimbhai*, (1911) 12 Ind Cas 586 (587): 13 Bom L R 1014.

(17) *Ammaya Pillai* v. *Narayana Chetti*, 1925 Mad 487 (488): 21 Mad L W 125: 86 Ind Cas 187. But see *Hassanand* v. *Nandiram*, 1930 Sind 259 (260): 128 Ind Cas 675: 32 Cr L Jour 174: 25 Sind L R 107.

(18) *Ramakrishna Moreshwar* v. *Ramabhai*, (1893) 17 Bom 29 (32); *South Indian Industrials Ltd* v. *Mothey Narasinga Rao*, 1927 Mad 468 (469): 52 Mad L Jour 199: 25 Mad L W 477: 38 Mad L Tim 126: 100 Ind Cas 680: 50 Mad 372; *Rahim Baksh* v. *Brijbhukhan Saran*, (1904) 1 All L J 188 (190). See also *Subbaraya* v. *Vaithiyanatha*, (1910) 5 Ind Cas 931 (931): 33 Mad 115: 7 Mad L Tim 185.

(19) *Haveli Shah* v. *Shaikh Painda*, 1926 P C 88 (91): 1926 Mad W N 592: 96 Ind Cas 887: 31 Cal W N 174 P C.

Note 42.

(1-a) *Abdul Haque* v. *Yahya Khan*, (1918) 47 Ind Cas 725 (725) Pat; *Equitable Trust* v. *Hafiz Md Halim & Co.*, 1928 All 120 (123): 25 All L J 985: 108 Ind Cas 699; *Lachmi Narain* v. *Salig Ram*, 1924 Oudh 428 (429): 11 Oudh L Jour 154: 83 Ind Cas 833. The following cases under the old Code are not of much importance in view of the changes in the new Code:—*Abirunnissa* v. *Komurunnissa*, (1886) 13 Cal 100 (101); *Har Narain* v. *Kharag*, (1887) 9 All 447 (451): 1887 All W N 89; *Ridhnath Sahoy* v. *Goppee Sahoo*, (1870) 14 Suth W R 90 (91, 92); *Googlee Sahoo* v. *Premlall Sahoo*, (1881) 7 Cal 148 (149); *Rupram* v. *Jagannath Seth*, (1899) 12 C P L R 41; *Karman* v. *Misri Lal*, (1879) 2 All 904 (904); *Lakshmana* v. *Paramasiva*, (1889) 12 Mad 489 (489); *Fateh Ali* v. *Nizam Din*, 1907 Pun Re No. 71: 37 Pun L R 1908: 170 Pun W R 1907.

(1) *Bibijam Bibi* v. *Abdul Jabbar*, (1916) 36 Ind Cas 919 (920) Cal. But see *Maharana Shir Fatesingh* v. *The Amod Municipality*, 1896 Bom P J 129 (129) [A case under old Code which was appealable under S 588 (2) of that Code]. And *Achambit Bai* v. *Hansraj Rai*, 1896 All W N 101 (101) [Under S. 588 (2) of old Code order impleading a person was appealable—Subsequent order of transposition was also appealable]. And *Abhiram Dass* v. *Gopal Dass*, (1890) 17 Cal 48 (51) [Order admitting a person as a caveator under Probate and Administration Act—Appealable under S. 588 (2) of the old Code].

(2) *Khethramoni* v. *Shyama Churn*, (1894) 21 Cal 539 (541).

(3) *Rathnachalam Iyer* v. *Sivachidambaram*, 1923 Mad 690 (691, 692): 45 Mad L Jour 703: 18 Mad L W 198: 1923 Mad W N 403: 76 Ind Cas 207 [Unnecessary joindor]; *Shanmuka Nadan* v. *Arunachallam*, 1922 Mad 332 (332): 45 Mad 194: 42 Mad L Jour 97: 30 Mad L Tim 172: 69 Ind Cas 961: 14 Mad L W 642: 1921 Mad W N 799 [Improper joinder].

(4) *G. Rama Rao* v. *Surya Rao*, (1919) 49 Ind Cas 835 (836, 837): 42 Mad 219: 36 Mad L Jour 169: 9 Mad L W 329: 25 Mad L Tim 184; *Shair Ali* v. *Jag Mohan Ram*, 1931 All 333 (336): 53 All 466: 1931 All L J 181: 131 Ind Cas 548.

(5) *C E Dooply* v. *M E Moolla*, 1927 Rang 180 (180): 5 Rang 263: 103 Ind Cas 261.

(6) *Ramji Pandey* v. *Alaf Khan*, 1925 Pat 121 (122): 3 Pat 859: 85 Ind Cas 90: 6 Pat L Tim 581.

O. 1, R. 10. Notes 42—43.

But the mere fact that the order under this rule is drafted in the form of a decree, will not make it really a decree, so as to confer a right of appeal.[7]

See also Notes 6 and 7 to S. 2, sub-S. 2.

43. Revision.—An order passed in the exercise of the Court's discretion under this Rule is not ordinarily revisable under S. 115 of the Code[1] even if it is erroneous.[2] But where the order amounts to a failure to exercise jurisdiction, as where the Court considers it has *no power* to act under this rule,[3] or where it *fails to consider* whether the application should be granted or not[4] a revision will lie. Similarly where the order is such that the Court will be deemed to have acted illegally or with material irregularity in the exercise of jurisdiction as where a necessary party is improperly refused to be added[5] or where a party is improperly added causing a misjoinder of parties[6] or resulting in a continuation of litigation[7] or where the application for joinder is refused on the ground that the applicant has no *locus standi*, or that the plaintiff objects to such joinder[8] or where the order is manifestly unjust,[9] a revision will lie under S. 115.

The High Court can also interfere with orders passed under this rule in the exercise of its powers of superintendence under S. 107 of the Government of India Act, 1915, where they amount to a denial of fair trial[10] or where irreparable injury or manifest injustice is likely to result thereby.[11]

As to whether an order under this rule is a "case" within the meaning of S. 115 of the Code, *see* the Notes to that section and the undermentioned cases.[12]

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(7) *Shankar Rao* v. *Raghunath Rao*, 1926 Nag 75 (75): 89 Ind Cas 331.

Note 43.

(1) *Jai Krishna* v. *New Mofussil Co.*, 1926 Nag 393 (396): 95 Ind Cas 171; *Ratnachalam* v. *Sivachidambaram*, 1923 Mad 690 (693): 45 Mad L Jour 703: 18 Mad L W 198: 1923 Mad W N 403: 76 Ind Cas 207; *Rayani Kesavalu* v. *Samayoddanda*, 1927 Mad W N 301; *Bhikambar Das* v. *Thakuri*, (1912) 14 Ind Cas 263 (264) All; *Gobinda Ram* v. *Jiban Chandra*, (1921) 64 Ind Cas 563 (564) Cal; *Kali Rai* v. *Tulsi Rai*, 1926 Pat 207 (208): 4 Pat 723: 93 Ind Cas 932: 7 Pat L Tim 499; *Jaipragash Singh* v. *Harshankar Pershad*, 1882 All W N 53 (53) [Case under Code of 1877]; *Ghunrani* v. *Raj Kumar*, 1882 All W N 55 (55): 4 All 330, (Do): *Harnarain Singh* v. *Bhaktawar Singh*, 1885 All W N 259 (259).

(2) *Rabbaba* v. *Noorjahan*, (1886) 13 Cal 90 (93); *Manik Rao* v. *Hem Raj*, (1928) 111 Ind Cas 141 Nag: 1928 Notes 54 (c).

(3) *Brojendra Kumar* v. *Gobinda Mohan*, (1916) 34 Ind Cas 186 (188): 20 Cal W N 752.

(4) *Sadhu Shah* v. *Hamid Hussain Khan*, (1902) 5 Oudh Cas 91 (92, 93); *Riasat Ali* v. *Rajeshar Bali*, (1910) 6 Ind Cas 977 (978, 979): 13 Oudh Cas 109.

(5) *Fraser* v. *Krishnaswamy Iyer*, 1923 Mad 144 (147): 1922 Mad W N 745: 43 Mad L Jour 211: 16 Mad L W 322: 31 Mad L Tim 290: 71 Ind Cas 293: 47 Mad 47; *Promotha Nath* v. *Rakhal Das*, (1910) 6 Ind Cas 546 (549): 11 Cal L Jour 420.

(6) *Muruppa Chettiar* v. *L K S S Firm*, 1926 Mad 135 (136): 90 Ind Cas 721; *Kuldip Mahton* v. *Mt Patia*, 1928 Pat 281 (282): 9 Pat L Tim 437: 107 Ind Cas 539; *Ambadas* v. *Pandu*, (1920) 57 Ind Cas 784 (784) Nag [Rival claimant—Joinder]. See also *Satyadeva Sahay* v. *Mt Jhamel Kuer*, 1926 Pat 519 (520): 7 Pat L Tim 602: 97 Ind Cas 612.

(7) *Amolak Sao* v. *Gobind Rao*, (1919) 49 Ind Cas 34 (35): 15 Nag L R 21.

(8) *Golap Khan* v. *Bhola Nath*, (1910) 7 Ind Cas 481 (482): 12 Cal L Jour 545; *Khettramoni Dasi* v. *Shyamachurn Kunde*, (1894) 21 Cal 539 (542).

(9) *Allahabad Bank* v. *Md Raza Khan*, (1912) 16 Ind Cas 592 (594): 15 Oudh Cas 304; *Sitaramayya* v. *Ramappayya*, (1917) 39 Ind Cas 160 (161, 162): 5 Mad L W 207.

(10) *Abdul Haque* v. *Md Yahya*, (1918) 47 Ind Cas 725 (725) Pat; *Kali Rai* v. *Thulsi Rai*, 1926 Pat 207 (208): 4 Pat 723: 93 Ind Cas 932: 7 Pat L Tim 499.

(11) *Jugal Krishna* v. *Phul Kumari*, (1918) 44 Ind Cas 564 (566) Cal; *Basli Bibi* v. *Hanifuddin*, (1910) 6 Ind Cas 570 (573): 12 Cal L Jour 267; *Dwaraka Nath* v. *Kisori Lal*, (1910) 6 Ind Cas 549 (551, 552): 14 Cal W N 708: 11 Cal L Jour 426; *Bavajee* v. *Annapurnamma*, 1929 Mad 403 (403): 115 Ind Cas 812 [Section under which High Court interfered not clear]; *Charu Chandra* v. *Sarat Chandra*, (1910) 8 Ind Cas 87 (90): 12 Cal L Jour 537, (Do.).

(12) *Equitabe Trust & Co.* v. *H Md Halim & Co.*, 1928 All 97 (97, 98): 25 All L Jour 991:

R. 11. [S. 32] The Court may give the conduct of the suit to such *person* as it deems proper. **O. 1, R. 11, Note 1.**

Conduct of suit.

[1877, S. 32, R. S. C., O. 16, R. 39.]

Synopsis.

1. Scope of the rule.

1. Scope of the Rule.—The word "person" means a party to the suit, and the Court has no power to give the conduct of the suit to a stranger.[1]

Under the English Law, the Court has as much power to give the conduct of the defence to one of the defendants as the conduct of the suit to one of the plaintiffs.[2] The substitution of the word "person" for the word "plaintiff" in S. 32 of the last Code, would seem to make it clear that the law is the same under the present rule.

Under this rule, read with O. 1, R. 10, the Court has power to transpose a defendant as plaintiff and give him the conduct of the suit.[3]

R. 12. [S. 35.] (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding. **O. 1, R. 12, Note 1.**

Appearance of one **of several plaintiffs or defendants** *for others.*

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

[1877—35. 1859—115.]

Synopsis.

1. Scope.

1. Scope.—"The authorisation" under R. 12 need not be by a general power of attorney. A special power of attorney is enough.[1]

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108 Ind Cas 735: 50 All 276 [Not a "case"]; *Gopinath* v. *Mumtazali*, 1929 Oudh 148 (148): 6 Oudh W N 116: 116 Ind Cas 58 [Is a case].

Order 1, Rule 11—Note 1.

(1) *Tarapada Ghose* v. *Srimati Bhagala Sundari Basu*, 1928 Cal 143 (146): 106 Ind Cas 854: 46 Cal L Jour 530.

(2) *Tarapada Ghose* v. *Srimati Baagala Sundari Basu*, 1928 Cal 143 (144): 106 Ind Cas 854: 46 Cal L Jour 530; *Peek* v. *Ray*, (1894) 8 Ch. 282 Ref: 1928 Cal 143 (144).

(3) *Saminatha Pillai* v. *Rajagopala Mudaliar*, 1921 Mad 124 (124): 18 Mad L W 148: 40 Mad L Jour 208: 1921 Mad W N 108: 62 Ind Cas 360; *Muhammad Sirajuddin* v. *Ghulam Jailani*, (1921) 59 Ind Cas 233 (236, 237, 238): 12 Mad L W 25.

Order 1, Rule 12—Note 1.

(1) *Ambaram* v. *Himat Singh*, (1864-66) 2 Bom H C 103.

O. 1, R 13, Notes 1—2.

R. 13. [S. 34.] All objections *on the ground of non-joinder* or misjoinder *of parties* shall be taken at the earliest possible opportunity and, in all cases *where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen*, and any such objection not so taken shall be deemed to have been waived.

Objections as to non joinder or misjoinder.

[1877—34. *See* O. 1, R. 9, O. 2, R. 7, and S. 99.]

Synopsis.

1. Scope of the rule.
2. Objection not taken at the earliest opportunity cannot be taken later on.
3. "Unless the ground of objection has subsequently arisen."

1. Scope of the Rule.—The Rule provides that all objections on the ground of misjoinder or non-joinder not taken at the earliest opportunity shall be deemed to have been waived. It is based on the principle that a technical objection, which, if taken at an earliest stage of the proceedings, might have been cured, and which has not been so taken, should not be allowed to be raised at a later stage, so as to defeat the rights of the parties.[1]

The rule applies to non-joinder or misjoinder of parties to *appeals*, as well as to *suits*.[2] It also applies to references to arbitration.[2-4] But it does not apply to any objection on the ground of want of cause of action or right of suit in the plaintiff, which is disclosed only after evidence is taken.[3] The reason is that such an objection is not one on the ground of *misjoinder* or *non-joinder*.

The rule, although it limits the right of a defendant to object, does not in any way affect the Courts' power under O. 1, R. 10 to add or strike out parties; nor does it limit the right of the plaintiff to add parties.[4]

2. Objection not taken at the earliest opportunity cannot be taken later on.—It follows from what has been stated in Note 1 that objections as to misjoinder and non-joinder of parties not raised in the lower Court should not be allowed to be raised for the first time in the appellate Court.[1a] But where the objection is taken at the proper time, the Court is bound to adjudi-

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Order 1, Rule 13—Note 1.

(1) *Dhurm Das* v. *Mt Shama Soondri*, (1841-46) 3 Moo Ind App 229 (242): 6 W R P C 43: 1 Sar 271: 1 Suth 147 P C; *Phoolbas Koonwur* v. *Lalla Jogeshur*, (1876) 1 Cal 226 (244, 245): 3 Ind App 7: 25 Suth W R 285: 3 Sar 573: 3 Suth 236 P C.

(2) *Puthu Kuti Kurup* v. *Sankara Varma Raja*, 1921 Mad 243 (245): 44 Mad 344: 40 Mad L Jour 282: 1921 Mad W N 229: 14 Mad L W 69: 62 Ind Cas 386.

(2-a) *Ananda Prosad* v. *Jogesh Chundra*, (1914) 23 Ind Cas 862 (863) Cal.

(3) *Heiniger* v. *Droz*, (1900) 25 Bom 433 (467): 3 Bom L R 1.

(4) *Md Jafar Khan* v. *Mazharul Hasan*, (1906) 3 All L J 474 (475): 1906 All W N 199; *Modhe* v. *Dongre*, (1881) 5 Bom 609 (612).

Note 2.

(1) *Hari Saran* v. *Bhubaneswari*, (1887) 16 Cal 40 (56): 15 Ind App 195: 5 Sar 198: 12 Ind Jur 373 P C; *Sadulla Khan* v. *Bhana Mal*, (1882) Pun Re No. 58; *Jit Singh* v. *Imam Baksh*, 1883 Pun Re No. 151; *Bari Lal* v. *Lallu*, 1882 All W N 118 (113): 4 All 478: 7 Ind Jur 211; *Jagannadha* v. *Lakshminarayana*, 1930 Mad 683 (685): 58 Mad L Jour 688: 31 Mad L W 817: 125 Ind Cas 549; *Haricharan* v. *District Judge of Dacca*, (1910) 6 Ind Cas 327 (331): 11 Cal L Jour 513: 11 Cr. L Jour 320; *Mt Kaula Devi* v. *Chajju*, (1909) 2 Ind Cas 848 (849) All; *Daryao Shah* v. *Tiram Shah*, (1906)

cate upon it.[2] Where an objection is taken at the earliest opportunity but is not decided upon and subsequently, at the conclusion of the trial, the objection is found to be a valid one, effect should be given to it.[3] Where, however, the objection raised in the lower Court is not pressed, it cannot be allowed to be re-opened in the appellate Court.[4] O. 1, R. 13, Note 2.

Where the defendant opposes the plaintiffs' application for joinder of certain parties and the Court rejects the application, the defendant cannot subsequently raise the plea of *non-joinder with respect* to such parties.[5] Where a suit was first heard *ex parte* and, on the defendant's application, the suit was ordered to be re-heard, and he was allowed to put in a plea of non-joinder it was held that the objection was taken in proper time.[6]

The present rule applies to the non-joinder of necessary as well as proper parties.[7] But in an old Allahabad case it was held to be not applicable to *mortgage* suits in which the necessary parties under S. 85 of the Transfer of Property Act had not been joined.[8] This can only be of academic interest now, as the joinder of parties is no longer a matter of substantive law as it was before the present Code, but only of procedure.

Under S. 22 of the Limitation Act, where additional parties are joined in a suit, the suit, as regards them should be deemed to be instituted when they were so added. If such parties are necessary plaintiffs and at the time of their joinder the suit is barred as regards them, the entire suit should be

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2 Nag L R 45 (46-47); *Dursun Singh* v. *Durbejoy*, (1909) 1 Ind Cas 530 (531, 533, 534): 9 Cal L Jour 623; *Aiyavu Muppan* v. *Vellaya Nadan*, (1910) 6 Ind Cas 15 (16): 34 Mad 55: 1910 Mad W N 229: 6 Ind Cas 15: 8 Mad L Tim 6; *Sivasankaram Pillai* v. *Perumal Naicken*, (1909) 4 Ind Cas 106 (106): 7 Mad L Tim 78; *Muhammad* v. *Abdul Gafoor*, (1909) 4 Ind Cas 488 (489) All; *Ram Baksh* v. *Chanda*, (1909) 2 Ind Cas 306 (307): 6 All L J 541: 5 Mad L Tim 392; *Hridoy Nath* v. *Akshoy Lal*, (1919) 52 Ind Cas 463 (464) Cal; *Sahib Ram* v. *Munshi Lal*, 1881 Pun Re No. 64; *Uma Sundari Dasi* v. *Ramji Haldar*, (1881) 7 Cal 242 (244): 9 Cal L R 13; *Raj Narain Bose* v. *Universal Life Assurance Co., Ltd.*, (1881) 7 Cal 594 (603); *Boydonath* v. *Girish Chunder*, (1877-78) 3 Cal 26 (29): 2 Ind Jur 218; *J. Anderson* v. *The Delhi Cotton Mills Co.*, 1903 Pun Re No. 69: 155 Pun L R 1903; *Obhoy Gobind* v. *Hury Churn*, (1882) 8 Cal 277 (278); *Purushotham* v. *Kala*, (1902) 26 Bom 301 (304): 3 Bom L R 932; *Fakirapa* v. *Rudrappa*, (1891) 16 Bom 119 (122); *Moidin Kutty* v. *Krishnan*, (1887) 10 Mad 322 (329); *Magaluri Garudiah* v. *Narayana*, (1881) 3 Mad 359 (363): 6 Ind Jur 24; *Jogesh Chandra* v. *Hyder Ali*, 1927 Cal 237 (238): 44 Cal L Jour 293: 99 Ind Cas 177; *Kedar Nath* v. *Tulshi*, (1913) 21 Ind Cas 182 (183) Oudh; *Raghava Iyer* v. *Murugesa Mudali*, (1912) 17 Ind Cas 97 (99) Mad; *Pratab Bahadur* v. *Naurang Singh*, (1912) 15 Ind Cas 744 (745) Oudh; *Lakhi Chowdhury* v. *Akloo Jha*, (1912) 13 Ind Cas 123 (124): 16 Cal W N 639; *Ahmedbhoy* v. *Sir Dinshaw M Petit*, (1911) 12 Ind Cas 813 (827, 828): 13 Bom L R 1061; *Paramasiva* v. *Krishna*, (1891) 14 Mad 498 (500): 1 Mad L Jour 752; *Ram Pher* v. *Ajudhia Singh*, 1925 Oudh 369 (370): 12 Oudh L Jour 66: 87 Ind Cas 17: 2 Oudh W N 144; *Krishna Ram* v. *Rakmini Sewak Singh*, (1887) 9 All 221 (224): 1887 All W N 31; *Singa Reddi* v. *Madava Rau*, (1897) 20 Mad 360 (362); *Nümoni De* v. *Surendera Nath*, (1918) 46 Ind Cas 648 (650) Cal; *Tulsha* v. *Gopal Rai*, (1884) 6 All 632 (633): 1884 All W N 208: 9 Ind Jur 155; *Tiluk Chand* v. *Muddon Mohun*, (1869) 12 Suth W R 504 (504): 15 Beng L R 143 Notes; *Lall Muhammad* v. *Peer Nazur*, (1872) 18 Suth W R 112 (113); *Lutchmeedur* v. *Rughoobur*, (1875) 24 Suth W R 286 (286); *Hiralal* v. *Ramjas*, (1884) 6 All 57 (58, 59): 1883 All W N 206; *Sita Ram* v. *Kashi*, (1906) 9 Oudh Cas 233 (234); *Kulaikada* v. *Viswanatha*, (1915) 28 Mad 229 (231): 15 Mad L Jour 212.

(2) *Sudhendu* v. *Durga Dasi*, (1887) 14 Cal 435 (438); *Richards* v. *Butcher*, (1890) 62 L T (N S) 867: 6 T L R 363 [Cited in 25 Bom 433 (444)].

(3) *Ramsebuk* v. *Ramlall*, (1881) 6 Cal 815 (823): 8 Cal L Rep 457.

(4) *Kuppusamy* v. *Narasimha*, (1917) 38 Ind Cas 715 (717): 21 Mad L Tim 382: 1917 Mad W N 333: 5 Mad L W 360.

(5) *Sri Kanta* v. *Jag Sah*, 1925 Pat 57 (58): 3 Pat 818: 84 Ind Cas 293: 6 Pat L Tim 237; *Jag Sha* v. *Srikanta Prosad*, 1924 Pat 168 (169): 72 Ind Cas 401.

(6) *Narsingh* v. *Chela Ram*, (1900) Pun L R 2. See also *Sri Raja Sobhanadri Appa Rao* v. *Parthasarathi Appa Rao*, (1932) 137 Ind Cas 274 (277): 1932 Mad 583: 62 Mad L Jour 154: 35 Mad L W 279: 1932 Mad W N 494 [Additional written statement filed with Court's permission by a minor after majority—Objection to misjoinder allowed].

(7) *Kasiyana Kavundan* v. *Thimma Naicken*, (1917) 41 Ind Cas 527 (529, 530) Mad; *Patesari* v. *Rudra*, (1904) 26 All 528 (535): 1904 All W N 119; *Kale Khan* v. *Seva Ram*, (1889) Pun Re No. 156 F B.

(8) *Ghulam Kadir* v. *Mustak Khan*, (1896) 18 All 109 (110): 1896 All W N 7.

O. 1, R. 13, Notes 2—3.

held to be barred.[9] But the rule in O. 1, R. 13 applies even in such cases. Hence a defendant who has not raised the objection as to the non-joinder at the earliest opportunity, cannot take advantage of the bar of limitation when the parties are added after the expiry of limitation.[10]

An objection on the ground of non-joinder cannot be taken by a defendant who is found to have no interest in the subject-matter of the suit.[11]

3. "**Unless the ground of objection has subsequently arisen.**"—These words did not occur in the old section. But even under the old section it was held that where the ground of objection came into existence after the settlement of issues, there was no bar to raising the objection after such settlement. Thus, where a co-parcener who was a necessary party to a suit for partition, was born after the settlement of issues and the plaintiff did not make him a party, the defendant was held entitled to object though issues had already been settled.[1]

It has been held by the High Court of Madras that an objection as to non-joinder of parties cannot be allowed to be raised after settlement of issues merely by reason of the fact that the ground of objection was *not known* to the defendant at or before the settlement of issues.[2] The High Court of Allahabad has, on the other hand, held that a defendant cannot be deemed to have waived the objection under this rule when he had no opportunity of taking the objection or when he was ignorant of the facts on which the objection depended.[3]

ORDER II.

FRAME OF SUIT.

O. 2, R. 1. **R. 1.** [S. 42.] Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Frame of **Suit.**

[1877—42. *See* O. 20, R. 12.]

Synopsis.

1. Scope of Order 2.
2. Scope of rule 1.
3. Subjects in dispute.
4. "As far as practicable."

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(9) *Kalidoss* v. *Nathu*, (1883) 7 Bom 217 (220): 7 Ind Jur 428; *Guruvayya* v. *Dattatraya*, (1904) 28 Bom 11 (19): 5 Bom L R 618.

(10) *Debi Saran* v. *Mahabir Singh*, (1910) 7 Ind Cas 102 (102) All; *Imdad Ahmed* v. *Pateshri Pratab*, (1910) 6 Ind Cas 981 (982): 32 All 241: 37 Ind App 60: 14 Cal W N 842: 12 Bom L R 419: 7 Mad L Tim 414: 1910 Mad W N 118 P C [The Privy Council simply affirmed the decision of the High Court without referring to the point]; *Hazari Ali* v. *Bhavani Ram*, (1908) 30 All 538 (540): 4 Mad L Tim 447: 5 All L J 554: 1908 All W N 246; *Shirekuli Timapa* v. *Ajjibai Narashiv*, (1891) 15 Bom 297 (299).

(11) *Chhotelal* v. *Badri Singh*, (1914) 22 Ind Cas 129 (131) Oudh.

Note 3.

(1) *Modhe* v. *Dongre*, (1880-81) 5 Bom 609 (613).

(2) *Kollichina Venkataramayya* v. *Gudavalli Subbarayudu*, (1914) 25 Ind Cas 122 (122, 123) Mad.

(3) *Immamuddin* v. *Liladhar*, (1892) 14 All 524 (526): 1892 All W N 104.

O. 2, R. 1. Notes 1—3.

1. Scope of the Order.—The provisions of this order dealing with the *frame* of suits should be so construed as not to conflict with the provisions contained in O. 1, which deal with the joinder of parties to suits, on the well-known principle that a statute should be construed as a whole.[1]

2. Scope of the Rule.—The object of this Rule is, that all matters in dispute between the parties and relating to the same transaction should as far as possible be disposed of in the same suit.[1] The penalty for non-compliance with the rule is provided partly by S. 11, Explanation 4, and partly by O. 2, R. 2.[2]

Section 11, Explanation IV provides that any matter which might and ought to have been made a ground of attack or of defence in a former suit will be deemed to have been a matter directly and substantially in issue in such suit and will not be allowed to be re-opened in a subsequent suit between the same parties although it was not *actually* adjudicated upon in the former suit. O. 2, R. 2, provides that every suit should include the *whole of the claim* which the plaintiff is entitled to make in respect of the same cause of action, and that if he omits to include any portion of such claim he shall not be entitled to sue again in respect of it.

This rule has reference mainly, if not exclusively, to correct joinder of causes of action, adequate inclusion of reliefs claimed and so forth, rather than joinder of parties.[3]

3. Subjects in dispute.—The expression "subjects in dispute" has nowhere been defined in the Code and the decisions bearing on the question are not always reconcilable. But an examination of these decisions leads on the whole to the view, that the phrase "Subjects in dispute" refers to the right claimed by one party against the other with reference to a particular legal relation or transaction between the parties. In other words as put in 26 Mad. 760 at page 767 the phrase "means the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other, and demands the judgment of the Court upon." Applying this construction, the present rule requires the plaintiff to bring forward his *whole case* as to the particular legal relation or transaction on which his suit is based but does not require him to raise in the same suit matters pertaining to a *different* legal relation or transaction, although such matters may have a bearing on the right claimed by the plaintiff.

Thus where *A* sues *B* to recover certain property on the ground that he had acquired a title to the property by adverse possession and he fails to prove his claim, he cannot sue again to recover the same property on the ground of his *general title*.[1] The reason is that where a plaintiff sues as

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Order 2, Rule 1—Note 1.

(1) *Mahadeo* v. *Nago*, (1911) 12 Ind Cas 357 (358): 7 Nag L R 130.

Note 2.

(1) *Saral Chand* v. *Mohan Bibi*, (1898) 25 Cal 371 (390): 2 Cal W N 201; *Surja Prasad* v. *Golab Chand*, (1900) 27 Cal 724 (761): 4 Cal W N 701; *Shankar* v. *Puttu*, 1932 Bom 175 (176): 34 Bom L R 125.

(2) *Ramaswami Ayyar* v. *Vydianatha Ayyar*, (1902) 26 Mad 760 (766, 767): 13 Mad L Jour 448; *Anant* v. *Mahableswarbhat*, 1931 Bom 114 (116): 32 Bom L R 1473: 129 Ind Cas 737.

(3) *Shib Nath* v. *Alliance Bank*, (1914) 25 Ind Cas 480 (485): 1915 Pun Re No. 3: 1914 Pun L R 215: 1914 Pun W R 110.

Note 3.

(1) *Woomatara Debea* v. *Unopoorna Dossee*, (1873) 11 Beng L R 158: 18 Suth W R 163 (164, 165) P C.

O. 2, R. 1, Note 3.

owner he should bring before the Court in the same suit all the grounds of attack available to him with reference to his claim for ownership.[2]

But suppose *X* sues *Y* to recover certain lands on the ground that *Y* held them as lessee under *X* and that the lease had expired. *X* fails to prove the lease and sues again for the recovery of the same lands on the strength of his general title. The second suit is *not* barred because the legal relationship between the parties in the second suit is different from that in the first.[3] Similarly, a person suing to redeem a specific mortgage of a certain property, is not debarred, upon his failure to prove the mortgage from suing to redeem another specific mortgage on the same property, because the *transactions* between the parties on which the suits are based, are different.[4]

The following are some more examples of cases bearing on this branch of the subject:—

(1) As a general rule, a suit for partition should embrace the whole partible property belonging to the parties.[5] (But this rule is subject to various exceptions.[6])

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(2) *Masilamani* v. *Thiruvengadam*, (1908) 31 Mad 385 (395, 396) [In first suit claim through A and in second suit claim through B]; *Ramiah* v. *Lakshmi Narayan*, 1926 Mad 234 (235): 49 Mad L Jour 701: 23 Mad L W 13: 91 Ind Cas 660: 1926 Mad W N 126 [In first suit claim as heir of A. In second suit claim as heir of B]; *Naganada Iyer* v. *Krishnamurthi Iyer*, (1910) 6 Ind Cas 233 (238): 34 Mad 97: 20 Mad L Jour 535: 8 Mad L Tim 60: 1910 Mad W N 213; *Govinda Menokki* v. *Govinda Kurup*, (1919) 52 Ind Cas 735 (736): 10 Mad L W 170: 1919 Mad W N 677; *Muhammad Rowther* v. *Abdul Rahiman Rowther*, 1923 Mad 257 (259): 1922 Mad W N 845: 17 Mad L W 188: 32 Mad L Tim 82: 72 Ind Cas 207: 46 Mad 135 [First suit based on right by purchase. Second suit based on right by inheritance]; *Guddappa* v. *Tirkappa*, (1901) 25 Bom 189 (193, 197): 2 Bom L R 872 [First suit based on survivorship, second suit on heirship].

(3) *Zamorin of Calicut* v. *Narayanan Mussad*, (1899) 22 Mad 323 (325); *Kutti Ali* v. *Chindan*, (1900) 23 Mad 629 (632); *Girdar Manordas* v. *Dayabhai Kalabhai*, (1884) 8 Bom 174 (181).

(4) *Ramaswami Ayyar* v. *Vythinatha Ayyar*, (1902) 26 Mad 760 (763): 13 Mad L Jour 448; *Riayatullah Khan* v. *Nazir Khan*, (1884) 6 All 616 (617): 1884 All W N 185 [Plaintiff's title to two houses resting on same title deed. Defendant ousting plaintiff from the two houses on different occasions—Plaintiff entitled to sue separately in respect of the two houses].

(5) *Radha Charan* v. *Krupa*, (1880) 5 Cal 474 (476): 4 Cal L R 428; *Parbati Charan Deb* v. *Ainudeen*, (1881) 7 Cal 577 (581): 9 Cal L Rep 170: 4 Shom L R 46; *Visnu Morcswar* v. *Gangadhar Ganesh*, (1922) Bom 9 (1) (9): 24 Bom L R 302: 46 Bom 823: 69 Ind Cas 399; *Rajendra Kumar* v. *Brojendro Kumar*, 1923 Cal 501 (502, 504): 37 Cal L Jour 191: 77 Ind Cas 790; *Sundaresa* v. *Krishnamurthi*, (1916) 35 Ind Cas 677 (678): 31 Mad L Jour 317: (1916) 2 Mad W N 156: 4 Mad L W 238; *Ranku* v. *Hukmi*, (1916) 35 Ind Cas 545 (547): 1917 Pun L R 2: 1916 Pun W R 156; *Mukundalal Chakrabarty* v. *Jogesh Chandra*, (1916) 35 Ind Cas 870 (871): 20 Cal W N 1276: 1 Pat L Jour 393; *Mahamad Fazlur Rahiman* v. *Md Fayzlur Rahman*, (1911) 10 Ind Cas 854 (855): 15 Cal W N 677; *Domanlal* v. *Prokash Lal*, (1913) 18 Ind Cas 866 (866) Cal; *Nga Po Chein* v. *Mi Pwa Thein*, (1909) 4 Ind Cas 812 (814) (U B): U B R 1907-09 C L V Pro C P 21; *Shivmurtappa* v. *Virappa*, (1897) 24 Bom 128 (130, 133, 134): 1 Bom L R 620; *Satyakumar Banarjee* v. *Satya Kirpal Banarjee*, (1909) 3 Ind Cas 247 (250): 10 Cal L Jour 503; *Jogendranath* v. *Jogabandu*, (1887) 14 Cal 122 (123); *Koer Hasmat* v. *Sunderdas*, (1885) 11 Cal 396 (399): 10 Ind Jur 26; *Haridas* v. *Prannath*, (1886) 12 Cal 566 (569); *Trimbak* v. *Narayana*, (1874) 11 Bom H C R 69; *Nanabhai* v. *Nathabhai*, (1870) 7 Bom H C R (A C) 46; *Ruttun Monee* v. *Brojo Mohan*, (1874) 22 Suth W R 333 (333); *Lalljeet* v. *Rajcoomar*, (1876) 25 Suth W R 353 (355); *Venkata Narasimma Naidu* v. *Bashyakarlu Naidu*, (1902) 25 Mad 367 (379): 29 Ind App 76: 6 Cal W N 641: 4 Bom L R 543: 8 Sar 258 P C; *Subba Rao* v. *Rama Rao*, (1866-68) 3 Mad H C R 376 (377) [Unless different portions of it lie in different jurisdictions]; *Hari Narayan* v. *Ganapathy Rau*, (1883) 7 Bom 272 (277, 278); *Amir Chand* v. *Lakshmi Chand*, (1920) 58 Ind Cas 275 (276): 18 All L J 869: 2 U P L (A) 290 [Portion of property omitted—Suit not to be dismissed forthwith but opportunity for amendment to be given]; *Ram Lochun* v. *Raghoobur*, (1871) 15 Suth W R 111 (112); *Gulab Chand* v. *Ram Nath*, 1922 Bom 119 (120): 46 Bom 327: 64 Ind Cas 995: 23 Bom L R 1171.

(6) *Parvati* v. *Thirumalai*, (1887) 10 Mad 334 (338) [See for instance the following cases]; *Sris Chandra* v. *Maihima Chandra*, (1916) 33 Ind Cas 17 (18): 23 Cal L Jour 231; *Jogendra Nath* v. *Baldeo*, (1908) 35 Cal 961, (968) 12 Cal W N 127: 6 Cal L Jour 785; *Pakkiri Kanni* v. *Mahammad Mangoor*, 1924 Mad 124 (124): 46 Mad 844: 45 Mad L Jour 821: 18 Mad L W 345: 33 Mad L Tim 44: 1923 Mad W N 565: 75 Ind Cas 334; *Basavana* v. *Dodda Lingappa*, 1923 Mad 584 (584): 44 Mad L Jour 652: 17 Mad L W 740: 1923 Mad W N 294: 72 Ind Cas 430: *Kali Charan* v. *Kiranbala*, (1919) 51 Ind Cas 948 (948): 29 Cal L Jour 494; *Subba Row* v. *Anantha Narayan*, (1912) 14 Ind Cas 524 (528): 23 Mad L Jour 64: 11 Mad L Tim 393; *Mansa Ram* v. *Ganesh*, (1912) 16 Ind Cas 383 (384): 17 Cal W N 521; *Amritrav* v. *Govind*, (1913) 21 Ind Cas 590 (591): 9 Nag L R 145; *Hem Chandra Choudhri* v. *Hemanta Kumari Debi*, (1914) 23 Ind Cas 442 (444): 19 Cal W N 356; *Ram Taran* v. *Haricharan*, (1914)

(2) As a general rule, a partner cannot sue merely for his share of the profits of the firm, but must sue for taking the whole accounts of the firm.[7] O. 2, R. 1 Note 3,

For exceptions to the general rule, *see* the case noted below.[8]

(3) Every suit for pre-emption must include the whole of the property subject to the plaintiff's right of pre-emption.[9]

(4) In a suit for declaration of the right to maintenance, the plaint must be so framed as to enable ascertainment of the actual extent of right, *i.e.*, of the amount of maintenance.[10]

(5) A suit to enforce, or to redeem, a mortgage partially, is, as a rule, not maintainable.[11-12]

(6) Although in a suit on the mortgage, full accounts should be taken between the mortgagor and the mortgagee, the mortgagor is not entitled to claim an account, of an entirely independent transaction.[13] Where in proceedings under S. 145 of the Criminal Procedure Code, the property is placed in the possession of a receiver, and a civil suit is brought for the determination of the rights of the rival claimants, the right of the successful claimant to obtain possession from the receiver is not a "subject in dispute" in the suit, and hence, the suit need not include a prayer for possession.[14]

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22 Ind Cas 30 (31): 18 Cal L Jour 556; *Rewan Pershad* v. *Radha Beeby*, (1867) 4 Moo I A 137 (168): 7 Suth W R 35; *Kailash Chandra* v. *Nityanand*, (1909) 11 Cal L Jour 384: 3 Ind Cas 21 (21); *Harikrishna* v. *Lakshmi*, (1911) 34 Mad 402: 5 Ind Cas 491 (493): 20 Mad L Jour 323: 7 Mad L Tim 155: 1910 Mad W N 555; *Uma Sundari* v. *Benodelal*, (1907) 34 Cal 1026 (1028); *Punchanun* v. *Shibchunder*, (1887) 14 Cal 835 (838); *Barahi* v. *Debkamani*, (1896) 20 Cal 682 (686); *Narayanan* v. *Pandurang*, (1875) 12 Bom H C R 148; *Balakrishna* v. *Harishankar*, (1871) 8 Bom H C 64; *Radha Kanta* v. *Biprodas*, (1905) 1 Cal L Jour 40 (42); *Habibur Rasul* v. *Asita Mohan*, (1908) 12 Cal W N 640 (641) [Case of co-owners]. See *Appavier* v. *Rama Subbian*, (1867) 11 Moo Ind App 75: 8 Suth W R 1 P C (2): 2 Sar 218: 1 Suth 657; *Abdul Karim* v. *Badrudeen*, (1905) 28 Mad 216 (222); *Ramasami* v. *Alagirasami*, (1904) 27 Mad 361 (367): 14 Mad L Jour 14; *Pattaravy* v. *Audimula*, (1869-70) 5 Mad H C R 419 (422); *Balaram* v. *Ramachandra*, (1898) 22 Bom 922 (927); *Purshottam* v. *Atmaram*, (1899) 23 Bom 597 (599): 1 Bom L R 76; *Ramachandra* v. *Damodar*, (1896) 20 Bom 467 (468, 469); *Ramacharan* v. *Ajudhia*, (1906) 28 All 50 (51): 1905 All W N 174; *Ram Mohan* v. *Mulchand*, (1906) 28 All 39 (41): 2 All L J 700: 1905 All W N 169; *Ramacharya* v. *Anantha-charya*, (1894) 18 Bom 389 (392); *Subramania* v. *Padmanabh*, (1896) 19 Mad 267 (268); *Krishtiaya* v. *Narasimham*, (1900) 23 Mad 608 (611): 10 Mad L Jour 141; *Muthusami* v. *Nallakulantha*, (1895) 18 Mad 418 (419) [Assumed]; *Lachmi Narain* v. *Jankidas*, (1901) 23 All 216 (218): 1901 All W N 50; *Kandasami* v. *Doraisami*, (1878-80) 2 Mad 317 (324): 5 Ind Jur 352; *Chinna* v. *Surya*, (1882) 5 Mad 196 (197): 6 Ind Jur 410.

(7) *Doyaram* v. *Sookhanum*, (1871) 16 Suth W R 141 (142); *Kalee Churn* v. *Ram Lal*, (1874) 21 Suth W R 300 (301); *Kassammal* v. *Gopi*, (1887) 9 All 120 (121): 1886 All W N 316; *Soonder Bibee* v. *Khilloo*, (1869) 2 N W P 90; *Keshava* v. *Rayapa*, (1875) 12 Bom H C 165; *Chunder Sikur* v. *Ram Buksh*, (1878) 1 Cal L Rep. 545.

(8) *Subbaraydu* v. *Adinarayanadu*, (1895) 18 Mad 134 (135); *Guda* v. *Joyram*, (1899) 26 Cal 262 (265-266); *Durga Prosunno* v. *Ragu Nath*, (1899) 26 Cal 254 (262): 3 Cal W N 299; *Karri Venkata Reddi* v. *Kollu Narasayya*, (1909) 1 Ind Cas 384 (385): 32 Mad 76: 4 Mad L Tim 456: 19 Mad L Jour 10; *Azim Khan* v. *Muhammad Riazuddin*, 1901 Pun Re No. 110; *Dayal Jairaz* v. *Khatav*, (1875) 12 Bom H C 97.

(9) *Durga Prasad* v. *Munshi Lal*, (1886) 6 All 423 (424, 425): 1884 All W N 146.

(10) *Moolchand Kishindas* v. *Thakurbai*, 1926 Sind 18 (19): 96 Ind Cas 997. See also *Hari Charan Bhunya* v. *Sm Kamal Kumari Dasi*, 1931 Cal 670 (671): 35 Cal W N 307: 132 Ind Cas 684 [Will—Maintenance out of income—Suit—Need not be framed as on a charge].

(11 & 12) *Baslingava* v. *Chinva*, 1929 Bom 60 (63): 30 Bom L R 1604: 114 Ind Cas 369; *Huthsanan* v. *Parmeshwaran*, (1899) 22 Mad 209 (211, 212).

(13) *Gangaya* v. *Ardeshar*, 1930 Cal 85 (85, 86): 124 Ind Cas 520.

(14) *T. Devarajulu Naidu* v. *Kondammal*, 1925 Mad 427 (428): 20 Mad L W 754: 80 Ind Cas 929. See also *Sadasiva Pillai* v. *Kalappa Mudaliar*, (1900) 24 Mad 39 (42) [Suit for possession —Title not denied—No declaration need be asked].

O. 2. R. 1, Note 4.

4. "As far as practicable."—If the plaintiff would be embarrassed in his suit, as for instance, where the evidence in support of one ground of his claim is destructive of the other ground, he is not bound to bring into the same suit, both the grounds of his claim.[1]

O. 2, R. 2.

R. 2. [S. 43.] (1) Every suit shall include the whole of the claim[4] which the plaintiff is entitled to make in respect of the cause of action[7]; but a plaintiff may relinquish[12] any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Suit to include the whole claim.

(2) *Where* a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, [10] he shall not afterwards sue [27] in respect of the portion so omitted or relinquished.

Relinquishment of part of claim.

(3) A person entitled to more than one *relief* in respect of the same cause of action may sue for all[13] or any of such reliefs; but if he omits, except with the leave of the Court,[20] to sue for *all* such *reliefs*,[14] he shall not afterwards sue [27] for any relief so omitted.

Omission to sue for one of several reliefs.

Explanation.—For the purposes of this *rule* an obligation and a collateral security[8] for its performance *and successive claims arising under the same obligation*[9] shall be deemed *respectively to* constitute but one cause of action.

Illustration.

A lets a house to *B* at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. *A* sues *B* in 1908 only for the rent due for 1906. *A* shall not afterwards sue *B* for the rent due for 1905 or 1907.

[1877—43, 1859—7.]

Synopsis.

1. Legislative changes.
2. Scope and Object of the Rule.
3. Distinction between this rule and explanation IV to S. 11.
4. Suit to include the whole of the claim in respect of the cause of action.
5. Plaintiff must have been aware of the claim.
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7. "Same cause of action."
8. Obligation and collateral security.
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13. Suit to include all reliefs in respect of the same cause of action.
14. Omission to sue for all reliefs.

Note 4.

(1) *Masilamani* v. *Thiruvengadam*, (1908) 31 Mad 385 (396).

15. Suits for possession and rent.
16. Suits for specific performance and possession.
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28. Set off.
29. Plea in defence not barred.
30. Insolvency proceedings. Not suits.
31. Execution proceedings.
32. Proceedings under Para. 20 of Sch. II of the Code.
33. Application to sue in forma pauperis.
34. Exceptions to the rule as to the splitting up of claims. See note 14, ante.
35. Amendment of plaint.
36. Revenue and Village Courts.

Addition of claims. See Note 6, Pts. (6) and (3).

Advocate-General and trustees. See Note 21, Pt. (11).

Burden of proof. See Note 27, Pt. (6).

Burmese Buddhist Law—Suits for partition or divorce. See Note 26, Pt. (27).

"Cause of action"—Meaning of. See Note 7, Pts. (1), (1-a) and (2).

Claims not available previously. See Note 10, Pts. (52) and (53).

Conversion and trespass. See Note 19, Pt. (6).

Declaration and injunction. See Note 26, Pt. (10).

Declaration or possession. See Note 26, Pts. (2) and (15) and Note 19, Pt. (4).

Default clause—Waiver. See Note 10, Pts. (32) to (36).

Different interests in same properties. See Note 26, F.-N. (28).

Dispossession of several properties by several acts. See Note 26, Pt. (6).

Distinct and different titles. See Note 21, Pts. (9), (12), (13) and (14). See also Note 10, Pts. (15) and (16).

Dower and share, or different classes of dowers. See Note 26, F.-N. (28).

Effect of withdrawal of suits. See Note 10, Pt. (5).

Ejectment suits and title suits. See Note 26, Pt. (17) and F.-N. (28).

Exceptions to the rule as to omission of reliefs. See Note 14, Pts. (2) to (7).

Formal possession and subsequent acts. See Note 26, F.-N. (28).

Heirship of different persons. See Note 26, F.-N. (28).

Instalment bonds. See Note 9, Pt. (1).

Joint debtors. See Note 21, Pt. (10).

Legacy or gift and share of inheritance. See Note 26, F.-N. (28).

Malabar tarward. See Note 26, F.-N. (28).

Mistake in description. See Note 26, F.-N. (28).

Mortgage and lease—Suit for rent alone —Effect. See Note 10, Pts. (48) and (48-a).

Mortgagor's transferees. See Note 26, F.-N. (28).

Omission by ignorance, of facts. See Note 10, Pt. (56).

Omission by oversight or mistake or accident. See Note 5, Pt. (2).

Partnership suits. See Note 26, F.-N. (28); Note 19, F.-N. (11).

Plots under water, on date of first suit. See Note 10, F.-N. (14).

Possession and damages. See Note 26, F.-N. (28).

Possession of land and damages for crops. See Note 26, F.-N. (28).

Promissory notes and original causes of action. See Note 26, Pts. (24) and (25).

Properties held by family and strangers —Partition suits in re. See Note 10, Pt. (57) and Note 21, Pts. (16) and (17).

Redemption suits. See Note 26, F.-N. (28) and also Note 10, Pt. (26).

Reliefs not available previously. See Note 14, Pt. (2).

Removal of obstruction, and damages. See Note 26, F.-N. (28).

Restitution proceedings. See Note 31, Pt. (2).

Reversioners' suits before and after the widow's death. See Note 21, Pt. (5). See also Note 26, Pts. (8) and (14).

Sale of goods—Part delivery—Damages. See Note 10, Pt. (10).

O. 2, R. 2, Notes 1—2.

Same transaction but different causes of action. See Note 23, Pt. (2).
Separate alienations of same person. See Note 21, Pt. (5); Note 26, Pt. (13) and Note 26, F.-N. (28).
Separate contracts in same deed. See Note 26, F.-N. (28) also Note 21, F.-N. (18).
Simultaneous suits. See Note 27, Pts. (1) to (3).
Specific performance and injunction. See Note 16, Pt. (4).
Specific performance and refund. See Note 26, Pt. (3).
Subsequent excess collections. See Note 26, F.-N. (28).
Suit by co-parcener for declaration of non-binding nature of mortgage in respect of some alone of the hypotheca. See Note 10, Pt. (18).
Suit by reversioner for some of several properties alienated. See Note 10, Pt. (17).
Suit on compromises of previous suits. See Note 26, Pt. (5).
Suits on no cause of action and right cause of action. See Note 26, Pt. (20).
Suits on subsequent cause of action. See Note 26, F.-N. (28).
Two or more bonds for a single debt. See Note 26, Pt. (25).
Wrongful seizure and detention. See Note 19, Pt. (9).
Void decrees and unexecutable decrees. See S. 47.

1. Legislative changes.—

The present rule differs from the corresponding section of the Code of 1882, *viz.*, S. 43 in the following respects:—

(1) The word "relief" in paragraph 3 has been substituted for the word "remedy" in the old section.

(2) The words "obtained before the first hearing" which occurred in the old section have been omitted.

(3) The expression "successive claims arising under the same obligation" have been added into the explanation.

(4) The illustration has been redrafted so as to cover a case of rent due for a period subsequent to that for which the suit was instituted.

2. Scope and object of Rule.—O. 2, R. 2 is based on the principle that the defendant should not be *twice vexed* for one and the same cause.[1] The rule is directed against two evils, the splitting of claims and the splitting of remedies.[2] It provides that if a plaintiff omits any portion of the claim which he is entitled to make or any of the remedies which he is entitled to claim in respect of the cause of action for his suit, he shall not thereafter sue for the portion of the claim or for the remedy so omitted.[2-a] It follows from this, that the rule does not preclude a second suit based on a distinct and *separate cause of action* (*See* Note 23 below).

The rule has reference to the *subject-matter* of the claim and *not to the persons* against whom it may be made.[3] Hence an objection on the ground of *non-joinder* of *parties* is not within the rule. (*See* note 21 below.) It is not open to parties by agreement between themselves to over-ride the rule laid

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Order 2, Rule 2—Note 2.

(1) *Mandal & Co* v. *Fazul Ellahie*, (1915) 26 Ind Cas 209 (209): 41 Cal 825; *Naba Kumar Hazra* v. *Radhashyam Mahis*, 1931 P C 229 (230): 35 Cal W N 977: 61 Mad L Jour 294: 1931 All L J 797: 54 Cal L Jour 274: 34 Mad L W 444: 134 Ind Cas 654; *Balmakund* v. *Sangari*, (1897) 19 All 379 (383): 1897 All W N 94; *Mohamad Hussain* v. *Dhaneshar Rai*, (1911) 10 Ind Cas 336 (337): 8 All L J 599; *Andi* v. *Thatha*, (1887) 10 Mad 347 (351) [Suit which is virtually for same relief though in a different form is barred].

(2) *Govind Hari Dev* v. *Parashram Mahadev Joshi*, 25 Bom 161 (167): 2 Bom L R 864; *Mandal & Co.* v. *Fazul Ellahie*, (1915) 26 Ind Cas 209 Cal.

(2-a) *Gobind Krishan* v. *Sirajunnissa*, (1910) 6 Ind Cas 226 (227): 7 All L J 627; *Harnam Singh* v. *Bhola Singh*, (1920) 56 Ind Cas 966 (967): 1921 Lah 309: 4 Lah L Jour 502; *Soonder* v. *Khilloo Mull*, (1870) 2 N W P H C R 90 [Disobedience of rule does not cause dismissal of present suit but only bars a second suit for the omitted portion].

(3) *Nobin Chandra Roy* v. *Magantara Dassya*, (1884) 10 Cal 924 (927).

down by the Legislature, as regards the splitting of causes of action.[4] The rule being penal in its nature should be construed strictly.[5] O. 2, R. 2 Notes 2—5.

3. **Distinction between this rule and Explanation IV to S. 11.**—*See* Note 2 to S. 11 *ante*.

4. **Suit to include the whole of the claim in respect of the cause of action.**—Sub-Rule 1 provides that every suit *shall* include the whole of the *claim* which the plaintiff is entitled to make in respect of the cause of action, on which the suit is based. But under the sub-Rule 3 where the plaintiff is entitled to several *reliefs*, he *may* sue for one or more of such reliefs, and reserve his right, with the leave of the Court, to sue later on for the other reliefs. *A* is entitled to recover from *B* Rs. 15,505 personally, as well as from out of *B's* properties on which the amount is charged. *A* sues for Rs. 4,000 only out of the claim for Rs. 15,505, and subsequently sues for the balance. The subsequent suit is barred inasmuch as the *whole claim* namely for the recovery for Rs. 15,505 cannot be split up.[1] Suppose now that *A* sues for the recovery of the whole of Rs. 15,505 *personally* from *B*, and later on brings a fresh suit for *sale of the properties charged*. This he can do, inasmuch as, in this case, there is no splitting of claim, but only of remedies, which a mortgagee is entitled to do.

5. **Plaintiff must have been aware of the claim.**—In order that the bar contained in O. 2, R. 2, may apply, the plaintiff must have been *aware*, at the time of his first suit, of his right to the portion omitted by him or of the facts which would have entitled him to sue for it.[1] If he was so aware of his right, the fact that omission to include any portion of his claim in his former suit was *accidental* or due to mere *oversight* will not exempt him from the bar.[2]

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(4) *Chhabil Das* v. *Massu*, (1913) 19 Ind Cas 981 (2) (983): 4 Pun Re No. 1914: 207 Pun W R 1913: 145 Pun W R 1913: 243 Pun L R 1913; See also *Kundan Mal* v. *Sardar Allah Dad Khan*, (1910) 5 Ind Cas 821: 19 Pun Re 1910: 36 Pun W R 1910: 167 Pun L R 1910.

(5) *Pramada Dasi* v. *Lakhi Narayan Mitter*, (1885) 12 Cal 60 (63); *Anderson Wright & Co.* v. *Kalagarla*, (1885) 12 Cal 339 (345): *Mandal & Co.* v. *Fazul Ellahie*, (1915) 26 Ind Cas 209 (209): 41 Cal 825.

Note 4.

(1) *Govind Hari Dev* v. *Parashram Mahadev Joshi*, (1901) 25 Bom 161 (165, 166, 167): 2 Bom L R 864. See also *Keshavram* v. *Ranchhod*, (1906) 30 Bom 156 (163): 7 Bom L R 811 [Mortgagee holding two mortgages over the same property—Suit in respect of one mortgage—And subsequent suit in respect of the other barred]; *Raja Bahadar Shiv Lal* v. *Rajee Vappa Pampanna*, (1909) 1 Ind Cas 319 (320): 11 Bom L R 46; *Jannardan Kishore* v. *Sib Prasad Ram*, (1916) 36 Ind Cas 179 (181, 182): 43 Cal 95: 20 Cal W N 475; *Pestonji Bezonji* v. *Abdul Rahiman, etc.*, (1881) 5 Bom 463 (465) [Leave asked at the first hearing for reserving remedies under the mortgage, the plaintiff then taking only a money decree—Leave granted].

Note 5.

(1) *Sankaran* v. *Parvathi*, (1896) 19 Mad 145 (148); *Subramanian* v. *Lakshminarasamma*, 1927 Mad 213 (214): 38 Mad L Tim 82: 98 Ind Cas 538; *Pakkeerayya* v. *Suryanarayana*, 1927 Mad 791 (792): 103 Ind Cas 74: 39 Mad L Tim 217; *Vasudevan* v. *Arunachala Iyer*, 1926 Jour 170 (2): 1926 Mad W N 94: 23 Mad L W 415: 93 Ind Cas 1; *Lachman Singh* v. *Sanwal Singh*, (1875-78) 1 All 543 (544); *Batul* v. *Munnilal*, (1910) 32 All 625 (627): 7 All L J 738: 7 Ind Cas 289; *Ambu* v. *Kettilamma*, (1891) 14 Mad 23 (24, 25): 1 Mad L Jour 28; *Amanat* v. *Imdad*, (1888) 15 Cal 800 (808): 15 Ind App 106: 5 Sar 214: 12 Ind Jur 255: R & J 103; *Uttam Chand Manghirmal* v. *Salamatrai Khubchand*, 1931 Sind 27 (27): 130 Ind Cas 552; *Gorachand* v. *Basanta*, (1911) 12 Ind Cas 684 (685): 15 Cal L Jour 258; *Mariathodi* v. *Appu*, (1892) 15 Mad 296 (297); *Venkata* v. *Krishnasami*, (1883) 6 Mad 344 (350): 7 Ind Jur 358; *Babu Nihal Singh* v. *Mst Najuban*, 1923 All 230 (231): 65 Ind Cas 585; *Binya Bai* v. *Ganpat*, (1915) 47 Ind Cas 881 (881) Nag; *Dasarathi Naidu* v. *Palala Kumaramull*, (1918) 45 Ind Cas 969 (972): 7 Mad L W 557: 1918 Mad W N 427: 24 Mad L Tim 311; *Aishan* v. *Muhammad Din*, (1917) 37 Ind Cas 119 (122): 94 Pun Re No. 1916; *Ram Khelawan* v. *Jaskaran*, (1919) 49 Ind Cas 54 (54): 21 Oudh Cas 307: 1 U P L R (Oudh) 19; *Mt Tajan* v. *Imam Bux*, 1869 Pun Re No. 10; *Romesh Chandra Saha* v. *Kala Ganji*, (1919) 50 Ind Cas 331 (332) Cal; *Kabir Khan* v. *Bhag Bhari*, (1897) Pun Re No. 17; *Manickbai* v. *Virchand*, (1907) 9 Bom L R 1020 (1025); *Batul Kuar* v. *Munni Lal*, (1910) 7 Ind Cas 289 (290): 32 All 625: 7 All L J 738.

(2) *Buzloor Ruheem* v. *Shumsoonnissa*, (1867) 11 Moo I A 551 (605); *Pratap Chandra* v.

O. 2, R. 2, Notes 6—7.

6. **Court must have jurisdiction to try the claim.**—The bar of O. 2, R. 2 does not apply unless the Court which tried the former suit had *jurisdiction* to try the claim omitted by the Plaintiff.[1] Thus, where the former suit was in a Revenue Court, and the later suit was in a Civil Court in respect of a claim not triable by the Revenue Court, the later suit is not barred under this rule.[2] Similarly, where the addition of the claim would offend the provisions of O. 2, R. 4 or 5, it may be omitted, and subsequently sued on.[3] So also, where the sanction of the Government[4] or a certificate under the Pension's Act[5] was a necessary condition to the entertainment of the suit and such condition was wanting in the former case, a subsequent suit is not barred.

But the fact that the addition of a relief would have deprived the Court of jurisdiction to try the *suit* as distinguished from the *particular claim* omitted, does not affect the applicability of the rule.[6]

7. **"Same cause of action."**—For a full discussion as to the meaning of the expression "Cause of action", *see* S. 20 *ante*, Notes 14 to 31.[1]

The "Cause of action" in this rule means the cause of action for which the suit was brought.[1-a] A rough test although not a conclusive one, as to whether the cause of action in a subsequent suit is the same as that in the former suit, is to see whether the same evidence will sustain both suits[1-b] and regard should be had to the allegations in the two suits and not the facts

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Secretary of State, 1922 Cal 101 (103): 35 Cal L Jour 304: 67 Ind Cas 375: 49 Cal 1026; *Janardan* v. *Sib Prosad*, (1916) 36 Ind Cas 179 (181): 43 Cal 95: 20 Cal W N 475; *Muluk Fuqeer Buksh* v. *Lala Manohar Doss*, (1870) 2 N W P H C 29; *Upendra Narain* v. *Janki Nath*, (1918) 47 Ind Cas 129 (131): 45 Cal 305: 22 Cal W N 611; *Syed Abdulla* v. *Hurkishen Singh*, (1905) 2 Cal L Jour 490 (492); *Soonder* v. *Khiloo Mull*, (1870) 2 N W P H C 90; *Bulwant Singh* v. *Chittan Singh*, (1872) 3 N W P H C 27: *Ramujugar Pande* v. *Bhagirathi*, (1915) 27 Ind Cas 808 (810) All [Wrong description of *extent* of suit property and acquiescence in decree. Further suit barred]. But see *Ram Harakh* v. *Ram Lal*, (1916) 33 Ind Cas 124 (126): 38 All 217: 14 All L J 257. (Per Walsh, J.)—"Omits to sue" means "intentionally omits to sue". This view is not correct].

Note 6.

(1) *Chunni Lal* v. *Banspat*, (1887) 9 All 23 (25): 1886 All W N 279; *Imami Begam* v. *Govind Prasad*, (1882) 4 All 318 (320): 1882 All W N 46; *Hakim* v. *Nadim Gul*, 1898 Pun Re No. 30; *Narasinga Rau* v. *Venkata Narayana*, (1893) 16 Mad 481 (486); *Grish Chander Mukerjee* v. *Rameswuree Dabee*, (1874) 22 Suth W R 308 (309); *Bungsee Singh* v. *Soodist Lall*, (1881) 7 Cal 739 (747): 10 Cal L Rep 263. But see *Sharfuddin* v. *Niammat Ali*, (1912) 15 Ind Cas 296 (296) Oudh [Agreement to pay money and transfer share in house. Suit for money in Small Cause Court and separate suit in ordinary Court for house—Separate suit barred]; *Shera* v. *Sahiba*, 1867 Pun Re No 53 [Assault—Compensation for actual pecuniary loss and for injury to feelings—Small Cause Court has jurisdiction only in respect of the former and the claim cannot be split by bringing separate suits].

(2) *Chunni Lal* v. *Banspat*, (1887) 9 All 23 (25): 1886 All W N 279; *Imam Begam* v. *Govind Prasad*, (1882) 4 All 318 (320): 1882 All W N 46; *Hakim* v. *Nadim Gul*, (1898) Pun Re No. 30; *Banda Hasan* v. *Abadi Begah*, 4 All 180 (181).

(3) *Hingu Lal* v. *Baldeo*, (1902) 24 All 553 (555): 1902 All W N 170.

(4) *Pattarary Mudaly* v. *Adimula Mudali*, (1869-70) 5 Mad H C 419 (422).

(5) *Jaggo Bai* v. *Utsava Lal*, 1929 P C 166 (169): 1929 All L J 716: 33 Cal W N 809: 30 Mad L W 60: 56 Ind App 267: 31 Bom L R 891: 57 Mad L Jour 160: 50 Cal L Tim 52: 6 Oudh W N 589: 10 Pat L Tim 527: 117 Ind Cas 498: 51 All 439: 1929 Mad W N 762 P C; *Md Rustam Ali Khan* v. *Nawab Muhammad Azmat Ali Khan*, 1882 Pun Re No 64.

(6) *Maung On Gaig* v. *Ma On Sin*, (1916) 33 Ind Cas 135 (136): 9 Bur L Tim 93; *Rama Rao* v. *Venkayamma*, 1931 Mad 705 (706, 707): 34 Mad L W 277: 1931 Mad W N 893: 134 Ind Cas 803.

Note 7.

(1) See also *Sheo Prasad* v. *Lalit Kuar*, (1896) 18 All 403 (405): 1896 All W N 132; *Harjeebun* v. *Bhugwan*, (1871) 16 Suth W R O C 16 (19, 20, 22, 25, 27): 7 Beng L R 102; *Dan Dial* v. *Munna Lal*, (1914) 24 Ind Cas 978 (979, 980): 12 All L J 955: 36 All 564.

(1-a) *Pittapur Raja* v. *Surya Ram*, (1885) 8 Mad 520 (524): 12 Ind App 116: 9 Ind Jur 274: 4 Sar 638 P C.

(1-b) *Purshottam* v. *Atmaram*, (1899) 23 Bom 597 (602): 1 Bom L R 76; *Md Umar* v. *Ammatul*, 1923 All 311 (312): 21 All L J 267: 71 Ind Cas 965: 45 All 376: 4 L R A (Civ) 169; *Sonu Khushal Khadake* v. *Bahinibai Krishna*, (1916) 33 Ind Cas 950 (951, 952): 40 Bom 351: 18 Bom L R 45; *Maung Po* v. *Ma Lon*, (1911) 11 Ind Cas 497 (498): 38 Cal 629: 38 Ind App 140: 15 Cal W N 766: 14 Cal L Jour 15: 8 All L J 739: 13 Bom L R 464: (1911) 2 Mad W N 397: 4 Bur L Tim 153: 6 L B R

found by the Court in the former suit.[2] The question is, however, one of *substance* rather than of *form*[3] and the causes in the two suits may be the same though the facts alleged may not be exactly identical in the two cases.[4] It is not open to the plaintiff to split up the parts really constituting the same cause of action and file different suits in respect of them.[5] O. 2, R. 2, Notes 7—9.

8. Obligation and Collateral Security.—Under the explanation to O. 2, R. 2, an obligation and a collateral security for its performance constitute but one cause of action.[1] Except for the explanation the two would constitute distinct causes of action[2] as they are under the English Law.[3]

9. Successive claims arising under the same obligation.—Under the explanation to the rule, successive claims arising under the same obligation constitute a single cause of action. Thus in the case of suits on instalment bonds the plaintiff should claim the amount of all the instalments in arrears at the same time. Otherwise he will be barred from suing for the instalments omitted to be so claimed.[1] So also where rent for several successive years is in arrears, but the plaintiff sues only for the rent of some years, and omits to sue for the rents due and in arrears for the years previous to or subsequent to the year of his suit, he cannot subsequently sue for such omitted rents.[2] The

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18: 10 Mad L Tim 479 P C; *Sheo Ratan Singh* v. *Babu Ram Singh*, 1925 Oudh 524 (525): 28 Oudh Cas 82: 85 Ind Cas 391: 1 Oudh W N 749; *Mohammad Asghar* v. *Amjad Ali*, (1905) 8 Oudh Cas 389 (393). But see *Murti* v. *Bhola Ram*, (1893) 16 All 165 (173): 1894 All W N 65 [Test not accepted by Edge, C J]; *Soora Sundaree Dabea* v. *Golam Ali*, (1873) 19 Cal W N 141.

(2) *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty*, (1882) 8 Cal 819 (823, 824): 10 Cal L Rep 537; *Suliman Sahib* v. *Bontala Haman Sahib*, (1913) 20 Ind Cas 418 (419): 38 Mad 247: 1913 Mad W N 554: 25 Mad L Jour 125; *Ketki* v. *Dinabandhu*, (1909) 3 Ind Cas 395 (396): 10 Cal L Jour 83; *Maung Ba Thaung* v. *Ma Shin Min*, (1917) 37 Ind Cas 15 (19): 9 L B R 37: 10 Bur L Tim 189; *Muhammad Ali* v. *Mir Haidar*, (1915) 28 Ind Cas 301 (302): 82 Pun L R 1915: 223 Pun W R 1915; *Naganada* v. *Krishnamurthi*, (1910) 6 Ind Cas 233 (236): 34 Mad 97: 20 Mad L Jour 535: 8 Mad L Tim 60: 1910 Mad W N 213 [Issues in former suit can also be consulted]; *Yeshvadabai* v. *Janardhan*, 1924 Bom 141 (142): 25 Bom L R 1172: 81 Ind Cas 776 [Plaint allegations to be looked into]; *Ackjoo* v. *Ramchunder*, (1875) 23 Suth W R 400 (400-401), (Do.). But see *Gokul Misir* v. *Bandee Ali Beg*, (1910) 8 Ind Cas 9 (12) All.

(3) *Duncan Brothers* v. *Jeetmul Sreedharee Lall*, (1892) 19 Cal 372 (376, 380) F B.

(4) *Jahathamba Ammal* v. *Ramasami Ayengar*, (1914) 25 Ind Cas 579 (580) Mad. See also *Shankar Baksh* v. *Daya Shankar*, (1888) 15 Cal 422 (431): 15 Ind App 66: 5 Sar 107: 12 Ind Jur 132: R & J 100 P C [Suit for redemption—Prior suit in under-proprietory right—Subsequent suit in superior proprietory right—Difference only a mode of relief—Same cause of action].

(5) *Sheikh Muhammad Ibrahim* v. *Asmatullah*, 1925 Oudh 53 (54): 81 Ind Cas 562. See however *Udaram* v. *Gondu*, 1925 Nag 366 (368): 87 Ind Cas 35.

Note 8.

(1) *Gumani* v. *Ram Padarath Lal*, (1878-80) 2 All 838 (839).

(2) *Swaminathan* v. *Palaniappa*, (1914) 26 Ind Cas 228 (230, 231): 41 Ind App 142: 18 Cal W N 617.

(3) *Kishen Narayan* v. *Palmal*, 1922 P C 412 (413): 4 Lah 32: 50 Ind App 115: 72 Ind Cas 187: 27 Cal W N 802: 38 Cal L Jour 126: 18 Mad L W 341: 6 Pun W R 1923: 4 L R P C 46: 25 Bom L R 220: 44 Mad L Jour 123: 32 Mad L Tim 41 P C.

Note 9.

(1) *Mackintosh* v. *Gill*, (1874) 12 Beng L R 37: 20 Suth W R 358 (361); *Narayan* v. *Nimba*, (1906) 8 Bom L R 547 (549). See also *Appaswami* v. *Ramaswamy*, (1886) 9 Mad 279 (280, 281) [Defendant agreeing to pay part of the debt immediately and part after a fixed time—Suit brought after the time fixed should be for the whole debt]. See also *Hussaina* v. *Sahib Nur*, (1910) 7 Ind Cas 505 (521): 213 Pun L R 1910: 86 Pun W R 1910.

(2) *Taruck Chunder Mukerjee* v. *Panchu Mohini Debya*, (1881) 6 Cal 791 (793): 8 Cal L Rep 297 [Omission of rent for subsequent period]; *Syed Abdulla* v. *Hurkishen Singh*, (1905) 2 Cal L Jour 490 (492) [Omission of rent for previous year]; *Assanullah* v. *Tirthabashini*, (1895) 22 Cal 680 (691); *Girdhari Lal* v. *Khare Prasad*, 1925 All 795 (796): 6 L R (All) Civ 371: 88 Ind Cas 530 [Omission of rent for later years]; *Mahomedbhai* v. *Adamji*, 1922 Bom 152 (153): 23 Bom L R 1086: 64 Ind Cas 919: 46 Bom 229; *Alagu* v. *Abdoolah*, (1885) 8 Mad 147 (148): *Shunmugam Pillai* v. *Syed Gulam Ghose*, (1904) 27 Mad 116 (117, 118) [Though there was a separate muchilika for each fasli]; *Balaji Sitaram Naik* v. *Bhikaji Sopare Prabhu*, (1884) 8 Bom 164 (167) [Omission of rent for later years]; *Raja Eswara Dass* v. *Venkatroyer*, (1898) 21 Mad 236 (237) [Omission of rent for earlier year]; *Adhirani Narain* v. *Raghu Mahapatro*, (1885) 12 Cal 50 (51) [Omission of rent for later year]; *Ramanujulu Naidu* v. *Aramudu Iyengar*, (1910) 5 Ind Cas 735 (736): 1910

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O. 2, R. 2, Notes 9—10.

same rule holds good in the case of suits for royalty,[3] profits,[4] annuity,[5] etc.

But where a lessee undertakes to pay a portion of the rent reserved, to the lessor's superior landlord, and fails to do so with the result that the lessor has to pay the superior landlord, the lessor may sue separately for that portion of the rent treating it as damages for breach of covenant by the lessee.[6] The reason is that in such a case the causes of action for the two suits are *different*. For other instances where the lessor can bring several suits *see* the following cases.[7]

But though the rule bars a *fresh suit* in respect of one of several successive claims arising under the same obligation, not included in the former suit, it does not prevent the plaintiff from taking any other remedy which he may have for its recovery. Thus, where rent was due for the years 1905, 1906 and 1907 and the former suit was for the rent of 1905 only, the plaintiff cannot sue for the rents of the years 1906 and 1907 but can distrain for the rent due for those years, under the rent laws.[8]

10. Omission to sue in respect of a portion of a claim.—The penalty for the omission to sue for the whole claim is that the plaintiff shall not afterwards sue for the portion so omitted.[1] The plaintiff cannot avoid the bar by expressly stating in his plaint in the previous suit that he *reserves* his right to sue for the omitted portion of the claim.[2] Nor can he avoid it by obtaining the *leave of the Court* to sue in respect of the portion of the claim omitted, inasmuch as the only leave that can be granted by the Court, is to sue for one of several *reliefs* under sub-Rule 3 of section.[3]

The rule refers to the cases where a suit has been filed and the plaintiff has omitted therein to sue for a portion of the claim.[4] It has no application

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Mad W N 35: 7 Mad L Tim 373: 33 Mad 317 [Though prior suit was dismissed]; *Amirtao Meheo* v. *Baliram*, (1895) 8 C P L R 9 (10) [Though the suits may relate to different fields in the same holding]; *Taruck Chunder* v. *Panchu*, (1881) 6 Cal 791 (793): 8 Cal L Rep 297 [Omission of rent for later years]; *Atul Krishna Ghose* v. *Nripendro Narain Ghose*, (1905) 1 Cal L Jour 114 (115) [Deposit of rent in Court—Suit by landlord for balance should include claim upto the date of *suit* and not merely upto the date of deposit]; *Syed Abdullah* v. *Hurkishen Singh*, (1905) 2 Cal L Jour 490 (491-492) [Though the claim for one year be taken to have been extinguished by satisfaction and subsequently revived by cancellation of such satisfaction].

(3) *Janardhan Kishore Lal Sing* v. *Sib Prasad Ram*, (1916) 36 Ind Cas 179 (181): 43 Cal 95: 20 Cal W N 475.

(4) *Muhammad Malik Khan* v. *Nirhai Bibi*, (1885) 7 All 761 (763): 1885 All W N 218: *Chandu Singh* v. *Mahtab Singh*, 1883 All W N 142 (142).

(5) *Abdul Karim Khan* v. *Muhammad Jan*, 1922 All 379 (381): 20 All L J 590: 68 Ind Cas 970: 44 All 663.

(6) *Banku Behari* v. *Gopal Chunder*, (1911) 10 Ind Cas 406 (410): 14 Cal L Jour 589.

(7) *Ganga Prasad* v. *Dig Bijai Singh*, (1913) 18 Ind Cas 288 (289) All [Realisation of rent for a certain year suspended by order of Collector —Separate suit after removal of suspension maintainable]; *Chidambaram Pillai* v. *Duraiswami Chetty*, (1919) 52 Ind Cas 325 (326): 10 Mad L W 31: 26 Mad L Tim 114 [Plaintiff purchasing property and afterwards getting by separate assignment right to arrears of rent upto date of purchase—Separate suits for rent accrued after, and before purchase, maintainable].

(8) *Raja Eswara Doss* v. *Venkatroyer*, (1898) 21 Mad 236 (237).

Note 10.

(1) *Hari Nath Das* v. *Syed Hossain Ali*, (1905) 2 Cal L Jour 480 (484): 10 Cal W N 8. See also *Anant Subrao Nadgir* v. *Gurnathbhat Shindgi*, 1931 Bom 114 (116, 117, 118): 32 Bom L R 1473: 129 Ind Cas 737; *Vyasrav Balaji* v. *Subhaji Narayan*, (1868) 5 Bom H C R A C 173 (176); *Fatmabai* v. *Framroz*, 1923 Bom 145 (145, 146): 24 Bom L R 1281: 70 Ind Cas 103.

(2) *Taran Krishna Bhowmik* v. *Samiruddin*, (1916) 34 Ind Cas 51 (53) Cal; *Makeud Ali* v. *Nargis Dye*, (1893) 20 Cal 322 (323, 324, 325); *Satyabadi* v. *Harabati* (1906) 33 Cal 223 (233); *Soondar Bibi* v. *Khillo Mall*, (1870) 2 N W P H C R 90.

(3) *A Raja Bahadur Shivlal* v. *Rajeevappa Pampanna*, (1909) 1 Ind Cas 319 (320): 11 Bom L R 46; *B Janardhan Kishore* v. *Sib Prasad Ram*, (1916) 36 Ind Cas 179 (181, 182): 43 Cal 95: 20 Cal W N 475.

(4) *Upendra Narain Roy* v. *Janki Nath Roy*, (1918) 47 Ind Cas 129 (130): 45 Cal 305: 22 Cal W N 611.

where no suit is filed at all as where the plaint has been returned for presentation to the proper Court, or where the suit is filed and is *withdrawn* under O. 23, R. 1.[5] O. 2, R. 2, Note 10.

As to the meaning of the words "he shall not afterwards sue" *see* Note 27 below.

Suits for breaches of contract.—Where the plaintiff in a suit for damages for breach of contract omits to claim a portion of the damages due to him, he cannot subsequently sue for such portion[6] although the omitted portion may relate to a different stipulation in the contract.[7] But where the covenants although contained in the same contract create *distinct obligations*, the breach of each of them will give rise to a distinct cause of action.[8] A person enters into a contract of service with another for, say a year, but before the expiry of the year, wrongfully dismisses the servant. In such a case the servant's suit for damages for breach of contract should include the payment due to him for the whole year. It is not open to him to split his claim into twelve monthly instalments and sue for each of them separately.[9] Similarly where the defendant commits breach of a contract of sale of goods by refusing to accept a portion of the goods contracted to be purchased by him, and also by refusing to pay for the goods accepted, there is only one cause of action. The plaintiff cannot split it up and sue separately for the price of the goods accepted by the defendant, and for damages for the non-acceptance of the other goods.[10]

A contrary view, however, was taken by *Garth, C. J.*, in the undermentioned case.[10-a] According to the learned Chief Justice a claim for the price of goods sold is essentially a claim for *debt* and is therefore a cause of action of a different nature from a claim for compensation for not accepting

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(5) *Subba Rao* v. *Rama Rao*, (1916) 32 Ind Cas 899 (900): 40 Mad 291: 3 Mad L W 192: 19 Mad L Tim 134: (1916) 1 Mad W N 188: 30 Mad L Jour 341; *Venkata Shetti* v. *Ranga Nayak*, (1887) 10 Mad 160 (164); *Ilahi Baksh* v. *Imam Baksh*, (1875-78) 1 All 324 (325): 1 Ind Jur 561; *Behari Lal* v. *Baran Mal*, (1895) 17 All 53 (55): 1894 All W N 201; *Mulchand* v. *Bhikhari Das*, (1885) 7 All 624 (626): 1885 All W N 129; *Ma Po* v. *A Bux*, 1925 Rang 118 (2) (119): 3 Bur L Jour 189: 84 Ind Cas 483; *Buta* v. *Bishen Das*, (1911) 9 Ind Cas 956 (957): 37 Pun L R 1911: 176 Pun W R 1911; *Gulam Muhammad Khan* v. *Nur Khan*, (1917) 41 Ind Cas 897 (900): 65 Pun Re 1917: 105 Pun W R 1917; *Hare Nath Das* v. *Syed Hossain Ali*, (1905) 10 Cal W N 8: 2 Cal L Jour 480 (484) [Where the suit is withdrawn without leave to sue again, fresh suit is barred]; *Naiz Ahmad* v. *Abdul Hamid*, (1908) 30 All 279 (281): 5 All L J 278: 1908 All W N 131 [Withdrawal of suit without leave—Second suit barred].

(6) *Sheo Shunkar Sahoy* v. *Hriday Narain*, (1883) 9 Cal 143 (146): 12 Cal L Rep 34; *Tukaram Koshti* v. *Lalsa Prannath*, (1907) 3 Nag L R 80 (80) [Eviction by person with paramount title—Suit for damages for breach of covenant for quiet enjoyment—Only one such suit lies].

(7) *Raja Bahadur Shivlal* v. *Rajeevappa Pampanna*, (1909) 1 Ind Cas 319 (320): 11 Bom L R 46; *Shwe Hman* v. *Ma F Mya*, (1920) 56 Ind Cas 653 (655): 10 L B R 111: 12 Bur L Tim 251; *Narain Das* v. *Mangha Ram*, (1914) 23 Ind Cas 845 (847): 183 Pun L R 1914: 129 Pun W R 1914. But see *Kedar Nath* v. *Suraj Narain*, 1908 All W N 199 (200).

(8) *Narain Das* v. *Mangha Ram*, (1914) 23 Ind Cas 845 (847): 183 Pun L R 1914: 129 Pun W R 1914 [Covenants secured in a different manner]; *Mahendra Nath Bose* v. *Abenas Chandra Bhose*, 1923 Cal 615 (619): 27 Cal W N 521: 77 Ind Cas 364 [Breach of covenant to pay rent to landlord and also to pay certain cesses to the Government—Landlord being compelled to pay the cesses—Landlord has distinct causes of action in respect of the rent and the cesses]; *Raibhan* v. *Raoji*, (1920) 58 Ind Cas 18 (19): 16 Nag L R 136; *Yeshvant* v. *Vithal*, (1897) 21 Bom 267 (271) [Independant covenant for payment of interest in mortgage deed]; *Mandal & Co* v. *Fazul Ellahi*, (1915) 26 Ind Cas 209 (210): 41 Cal 825.

(9) *T C Fenwick* v. *Hursookh Rai*, 1868 Pun Re No 36; *Simpson* v. *Clegharn*, (1880) 6 Cal L Rep 91 (92). But see *R D Goodall* v. *J W Alexander*, 1882 Pun Re No 70 [Lease for a season wrongfully terminated before expiry of period—Lessor can at his option sue for rent as it fell due or for damages at once].

(10) *Duncan Brothers & Co* v. *Jeetmull Sreedharee Lal*, (1892) 19 Cal 372 (376, 380) F B [Approving of the view taken by Wilson, J in 12 Cal 339].

(10-a) *Anderson Wright & Co* v. *Kalagarla Surjinarain*, (1886) 12 Cal 339 (341, 342).

O. 2, R. 2, Note 10.

goods which is essentially a claim for *damages*. But *Wilson, J.*, who sat with him in that case held that there was only one cause of action in such circumstances and his view was approved of in the case cited in foot-note (10) above.

Prima facie each separate order and delivery of goods constitute a separate cause of action.[11] But if all the goods were to be delivered under *a single contract* then it would be a case of successive claims arising under the same obligation within the Explanation to O. 2, R. 2 and there would be only one cause of action.[12] But where the parties expressly provide in the indent that each monthly shipment should be treated as a separate contract, there would be a separate cause of action in respect of each monthly shipment.[13]

Suits relating to different properties.—Where the facts complained of are the same, there is only one cause of action though the reliefs sought may relate to different properties or different portions of a property.[14]

This is so even though the plaintiff[15] or the defendant[16] may claim the properties under different titles. Thus a suit by a reversioner on the death of a Hindu Widow, to recover properties improperly alienated by her must include all the items alienated by the widow.[17] Similarly a suit by a co-parcener attacking the mortgage of certain co-parcenary properties is a bar to a similar suit in respect of another property included in the same mortgage.[18]

Suit for Rent.—A suit for rent must include the whole amount due to the plaintiff as rent.[19] Thus, though there may be separate muchilikas for each

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(11) *Augustus Bros* v. *Fernandez*, (1915) 31 Ind Cas 59 (60): 29 Mad L Jour 474: 18 Mad L Tim 377: 2 Mad L W 890: 1915 Mad W N 765; *K E A K Ahmed Sahib & Co* v. *M K Pakir Mahommed Rowther*, 1924 Rang 145 (146): 2 Bur L Jour 169: 1 Rang 694: 79 Ind Cas 755: *K E A K A Sahib & Co* v. *K M Adamsa*, 1924 Rang 249 (252): 2 Rang 66: 81 Ind Cas 465.

(12) *K E A K A Sahib & Co* v. *K M Adamsa*, 1924 Rang 249 (252): 2 Rang 66: 81 Ind Cas 465; *K E A K Ahmed Sahib & Co* v. *Pakir Muhamed Rowther*, 1924 Rang 145 146: 1 Rang 694: 2 Bur L Jour 169: 79 Ind Cas 755.

(13) *Valkart* v. *Subju*, (1896) 19 Mad 304 (306); *Mandal & Co* v. *Fazul Ellahie*, (1915) 26 Ind Cas 209 (210): 41 Cal 825.

(14) *Sooraj Pershad* v. *Saheb Lal*, (1865) 3 Suth W R 25 (27); *Ganga Din* v. *Mahmud Ali*, 1887 All W N 108 (108); *Madda Singh* v. *Bakan Singh*, 1881 Pun Re No 9; *Kali Kumar Chucker Butty* v. *Aslam*, (1916) 33 Ind Cas 139 (140): 20 Cal W N 163; *Hem Singh* v. *Mt Pray Kuar*, 1926 Oudh 365 (366); *Maula Baksh* v. *Jiri*, 1923 Lah 556 (557): 85 Ind Cas 202; *Maung Kauk Sit* v. *Muthuveerappa Chetti*, (1911) 9 Ind Cas 460 (1) 460: 4 Bur L Tim 16; *Sher Singh* v. *Gobind Sahai*, (1909) 4 Ind Cas 410 (413): 30 Pun W R 1909; *Jagathamba Ammal* v. *Ramaswami Ayyangar*, (1914) 25 Ind Cas 579 (581) Mad; *Sharfuddin* v. *Niamat Ali*, (1912) 15 Ind Cas 296 (296) (Oudh) [Different items of property]; *Bhudmal* v. *Zunkari*, 1922 Nag 246 (247): 18 Nag L R 136: 65 Ind Cas 338 [Different items of property]; *Buzloor Ruheem* v. *Shumsoonnissa*, (1866-67) 11 Moo I A 551 (605): Marsh 286: 2 Suth 59: 2 Sar 259: 2 Hay 190: 8 Suth W R P C 3 P C [Defendant misappropriating jewels and Government paper]; *Nadar Khan* v. *Elahi Baksh*, 1877 Pun Re No 90 [Though portion of land was, in date of first suit, under water] *Manguthu* v. *Jowala Mal*, 1908 Pun W R 58 [Suit by heir for property inherited should include the whole property forming the inheritance]. See also *Anant* v. *Mahableshwarbhat*, 1931 Bom 114 (116, 117, 118): 32 Bom L R 1473: 129 Ind Cas 737; *Jasmir Singh* v. *Rahmatullah*, 1896 Pun Re No 7 [Pre-emption].

(15) *Sharkat-un-Nisa* v. *Shib Sahai*, (1882) 4 All 171 (173): 1881 All W N 174; *Shankar Baksh* v. *Daya Shankar*, (1888) 15 Cal 422 (431): 15 Ind App 66: 5 Sar 107: 12 Ind Jur 132: R & J 100 P C; *Denobundho Chowdry* v. *Kristomonee Dossee*, (1876) 2 Cal 152 (172, 173, 174, 177, 183) F B. But see *Becharji* v. *Pujaji*, (1890) 14 Bom 31 (55, 56).

(16) *Ram Soondar Shaha* v. *Delanney*, (1872) 20 Suth W R 103 (103); *Murti* v. *Bhola Ram*, (1894) 16 All 165 (171): 1894 All W N 65 [Overruling 1886 All W N 113); *Mahi* v. *Usman*, 1885 Pun Re No 15.

(17) *Darbar Lal* v. *Gobind Saran*, 1924 All 902 (904): 46 All 822: 22 All L J 753: 5 L R A Civ 556: 80 Ind Cas 31. See also *Anant* v. *Mahableshwarbhat*, 1931 Bom 114 (116): 32 Bom L R 1473: 129 Ind Cas 737 [Suit by adopted son to set aside alienations by widow—Adoptive mother].

(18) *Abhaidat Singh* v. *Ragho Indar Partab Sahi*, 1926 Oudh 77 (79): 3 Oudh W N 40: 91 Ind Cas 976: 13 Oudh L J 37: 1 Luck 1.

(19) *Meer Muhammad Soaduck Goleston* v. *Mr A J Forbes*, (1866) 5 Suth W R Act X 90 (91) [First suit for rent payable in Co's rupees —Second suit for recovering difference in value barred].

O. 2, R. 2, Note 10.

fasli, and the rent for a particular *fasli*, is thus payable under the particular muchilika, yet, non-payment of rent by the tenant at a particular time, is but one cause of action as far as the landlord is concerned.[19-a]

Suit for Damages for Tort.—A claim to damages arising out of assault cannot be split up into two suits, one for actual pecuniary loss and another for general damages as for injury to feelings.[20]

Suit for demurrage.—A plaintiff in a suit for demurrage, who omits to claim a portion of the relief, cannot subsequently sue in respect of it.[21]

Suit for accounts.—Where the plaintiff in a suit for accounts omits some items, he cannot sue again in respect of the items so omitted.[22] In the undermentioned case[23] accounts were stated between the parties, and the sum so found due, was made payable in instalments, under a promissory note, executed in respect of such sum. The promissory note being insufficiently stamped, was inadmissable in evidence, and hence the payee sued on the original cause of action. But in so suing, he sued only for such of the instalments as were due on the date of the suit, and obtained a decree. He subsequently sued for the remaining instalments. This subsequent suit was held by *Spankie, J.*, to be barred by S. 43 (O. 2, R. 2), while Oldfield, J., held it was not so barred.

Several transactions may give rise to one cause of action, if they form one *continuous course of dealing or form parts of one transaction.* Thus even where there are different contracts, yet if they form part of one transaction a breach of all of such contracts is only one cause of action.[24] This is because the expression "cause of action" might include claims upon several contracts provided, they form part of a continuous course of dealing. And, rent due to a landlord under different muchilikas for different faslis, would be but one cause of action for arrears of rent due, as far as the landlord is concerned.[24-a] When a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided.[25]

Suits on mortgages.—A mortgagor suing for redemption and failing to claim recovery of a portion of the property cannot sue again for it.[26] A

(19-a) *Shanmugam Pillai* v. *Syed Gulam Ghose*, (1903) 27 Mad 116.

(20) *Ruttun Chund Paree* v. *Mussumat Goojnee*, 1868 Pun Re No 58. See also *Arhat Misir* v. *Baldeo Ahir*, (1910) 5 Ind Cas 124 (125) All [Insult caused to a person owing to assault is not a separate cause of action from assault]. See also *Rajah Nil Monee Singh* v. *Issur Chunder Gossal*, (1868) 9 Suth W R 121 (122) [Occurrence of further damage does not create fresh cause of action]. See *D Weston* v. *Peary Mohun Das*, (1914) 23 Ind Cas 25 (64): 40 Cal 898: 18 Cal W N 185.

(21) *Munghroo Manjhee* v. *Gyaram Nandee*, (1870) 14 Suth W R 253 (253).

(22) *Monohur Dass* v. *Babu Seetul Prasad*, (1875) 23 Suth W R 418 (418); *Ganesh Chandra* v. *Ram Kumar*, (1869) 3 Beng L R A C 265: 12 Suth W R 79 (80); *Taran Krishna* v. *Samiruddin*, (1916) 34 Ind Cas 51 (53) Cal. See also *Shoshi* v. *Guru*, (1881) 7 Cal 89 (90): 8 Cal L Rep 285 [Suit for accounts alone risky—Must be also for sums found due].

(23) *Benarsi Das* v. *Bhikari Das*, (1881) 3 All 717 (721, 722): 1881 All W N 47.

(24) *Mandal* v. *Fazul Ellahie*, (1915) 26 Ind Cas 209 (210): 41 Cal 825.

(24-a) *Shunmugam Pillai* v. *Syed Gulam Ghouse*, (1904) 27 Mad 116 (117, 118).

(25) *Kedar Nath* v. *Dinabandhu* (1915) 31 Ind Cas 626 (630): 42 Cal 1043: 19 Cal W N 724.

(26) *Kathiravattath Nair* v. *Manavikrama*, (1898) 21 Mad 153 (156, 157): 8 Mad L Jour 92; *Parambath* v. *Puthengettil*, (1905) 28 Mad

O. 2, R. 2, Note 10.

puisne mortgagee who pays off a prior mortgage, must include in the suit on his mortgage any further claim he may have by reason of such payment.[27] As to the question whether a person holding successive mortgages on the same property, is bound under this rule to sue in respect of all the mortgages, *see* Note 40 to S. 11 *ante*. A mortgagee holding a separate *money* bond against the mortgagor, is not bound to enforce the money bond, along with the mortgage.[28]

First suit for interest on a mortgage, and second suit for the principal. —Where there is a *single* obligation to pay the interest and the principal under a mortgage, a suit for interest alone when the principal also *has become* due, will bar a subsequent suit for the principal.[29] But where there is an independent obligation to pay interest, a prior suit for interest on the basis of such obligation is no bar to a later suit on the mortgage although at the time of the prior suit, the principle sum had become due.[30] Where, however, at the time of the prior suit, the principal sum had not become due, a subsequent suit for the principal will not be barred.[31] *See also* Note 18 below.

Mortgage bonds providing that on default in paying interest or instalments of principal at the stipulated time, the whole amount should become payable at once. Default occurring—Maintainability of separate suits for unpaid interest or instalments, and for balance of mortgage money—

(1) A mortgage bond provides that on default in paying the interest at the stipulated time, the mortgagee should be entitled to claim the mortgage money at once without waiting for the expiry of the term fixed for the redemption of the mortgage.

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406 (407, 408). But see *Brahannayaki* v. *Krishna*, (1886) 9 Mad 92 (95) [Purchaser of equity of redemption of portion of mortgaged property who obtains possession of that portion on payment of mortgage debt is not prohibited by S 43 from instituting a subsequent suit to recover possession of the remaining portion of the mortgaged property from the mortgagee under a later purchase of the remaining portion of the equity of redemption]; *Bhan Dasi Khade* v. *Pattu Matu Sable*, 1923 Bom 63 (64): 24 Bom L R 1157: 73 Ind Cas 862.

(27) *Hara Narain* v. *Shama Sundari Dasi*, (1910) 6 Ind Cas 159 (162): 37 Cal 589: 11 Cal L Jour 551; *Md Husein* v. *Dhaneswar*, (1911) 10 Ind Cas 336 (337): 8 All L J 599. See also *Bhura* v. *Ghure*, (1911) 10 Ind Cas 925 (926): 8 All L J 352 (355).

(28) *Rajagopalachariar* v. *Thiagaraya Mudali*, 1925 Mad 991 (992): 86 Ind Cas 481.

(29) *Mg Pan Gaing* v. *Mg Mo*, 1929 Rang 96 (2) (96): 117 Ind Cas 61; *Mian Sing* v. *Shamdas*, 1889 Pun Re No 70; *Hikmatulla* v. *Imam Ali*, (1890) 12 All 203 (207): 1890 All W N 87; *Kishen Narain* v. *Pala Mal*, (1918) 47 Ind Cas 937 (938): 102 Pun L R 1918: 88 Pun Re 1918: 167 Pun W R 1918; *Muhammad Zakaria* v. *Muhammad Hafiz*, (1917) 41 Ind Cas 233 (234, 235): 39 All 506: 15 All L J 557; *Bela Singh* v. *Ganda Singh*, 1926 Lah 661 (662): 97 Ind Cas 285; *Md Hafiz* v. *Mirza Md Zakariya*, 1922 P C 23 (25, 26): 42 Mad L Jour 248: 20 All L J 17: 26 Cal W N 297: 15 Mad L W 377: 65 Ind Cas 79: 44 All 121: 1922 Mad W N 89: 24 Bom L R 341: 3 Pat L Tim 279: 30 Mad L Tim 224: 1 Pun W R 1922: 35 Cal L Jour 126: 49 Ind App 9 P C; *Kishan Narain* v. *Pala Mal*, 1922 P C 412 (414): 4 Lah 32: 50 Ind App 115: 72 Ind Cas 187: 27 Cal W N 802: 38 Cal L Jour 126: 18 Mad L W 941: 6 Pun W R 1923: 4 L R P C 46: 25 Bom L R 220: 44 Mad L Jour 123: 32 Mad L Tim 41 P C; *Chaudhri Kundan Mal and others* v. *Sardar Allah Dad Khan and others*, (1910) 5 Ind Cas 821 (823): 19 Pun Re 1910: 36 Pun W R 1910: 167 Pun L R 1910. See also *Lee Bu* v. *V R M M Mutukaruppan Chetty*, (1893-1900) L B R 618 [Suit for interest will not lie if the suit for principal is barred]; *Shue Hman* v. *Ma E Mya*, (1920) 56 Ind Cas 653 (654): 10 L B R 111: 12 Bur L Tim 251.

(30) *Swami Rao* v. *Official Assignee of Madras*, 1925 Mad 1120 (1122): 49 Mad L Jour 474: 22 Mad L W 17: 48 Mad 703: 91 Ind Cas 403; *Lalta Prasad* v. *Puran Lal*, 1930 All 286 (287): 51 All 974: 1929 All L J 1045: 119 Ind Cas 90; *Mathara Das* v. *Nihal Singh*, (1928) 110 Ind Cas 206: 1928 Notes 64 (b); *Yashwant* v. *Vithal*, (1897) 21 Bom 267 (271); *Kishan Narain* v. *Pala Mal*, 1922 P C 412 (414): 4 Lah 32: 50 Ind App 115: 72 Ind Cas 187: 27 Cal W N 802: 38 Cal L Jour 126: 18 Mad L W 341: 6 Pun W R 1923: 4 L R P C 46: 25 Bom L R 220: 44 Mad L Jour 123: 32 Mad L Tim 41 P C; *Ram Bhaj* v. *Devia*, 1881 Pun Re No 123; *Sultan Singh* v. *Joti Sarup*, 1928 Lah 269 (270): 109 Ind Cas 613; *Budha Shah* v. *Suleman*, (1917) 41 Ind Cas 576 (577): 71 Pun W R 1917.

(31) *Maung Kyin Pein* v. *Ma Pwa Me*, 1922 Upp Bur 1 (2): 64 Ind Cas 953: 4 U B R 62; *Ram Chandra Sahai* v. *Rama Lal*, (1928) 107 Ind Cas 591: 1928 Notes 32 (d): 26 All L J 57; *Sivasubramania Pillai* v. *Nagappa Pillai*, 1927 Mad 580 (581, 582): 52 Mad L Jour 636: 38 Mad L Tim 211: 25 Mad L W 615: 102 Ind Cas 187.

The mortgagor next defaults in paying interest according to stipulation but the mortgagee thereafter sues only for the arrears of interest. Can he sue again for the principal money? **O. 2, R. 2, Note 10.**

(2) A mortgage bond provides that the mortgage money should be paid in certain instalments but that if there is a default with regard to any instalment, the whole of the unpaid amount would be claimable at once. Default occurs, but the mortgagee sues only for the unpaid instalments. Can he sue again for the balance?

The question in both the above cases is the same, *viz.*, whether the mortgagee has in such a case the option of waiving the benefit of the default clause. On this question there is a conflict of judicial opinion. It has been held by the High Court of Madras[32] and the Judicial Commissioner's Court, Nagpur,[33] that in such a case the mortgagee has an option of waiving the privilege accorded to him by the default clause and that a suit by him for the interest or instalments in arrears, as the case may be, does not bar a subsequent suit for the mortgage money.

But a contrary view was taken in Bombay,[34] Lahore[35] and Oudh.[36]

In this connection we have to note two decisions of the Judicial Committee.[37] In these two cases it was held that a second suit for the principal after the first suit for interest alone was barred under O. 2, R. 2. But these two cases were distinguished in the Madras cases cited above[38] on the ground that in both of them the first suit for interest was instituted after the *expiry of the mortgage term.*

An opinion has been expressed by Ramesam, J., that in cases where terms such as " when you require ", " when required ", " if you choose ", etc., are used, the mortgagee may be held to have an option of the kind discussed above.[39] It was also held in the undermentioned case[40] that the use of the

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(32) ***Sivasubramania Pillai*** **v.** ***Nagappa Pillai,*** 1927 Mad 580 (581, 582): 52 Mad L Jour 636: 38 Mad L Tim 211: 25 Mad L W 615: 102 Ind Cas 187; ***Rego*** **v.** ***Philip Tauro,*** 1929 Mad 371 (374, 375, 377): 29 Mad L W 400: 56 Mad L Jour 580: 1929 Mad W N 208: 120 Ind Cas 853; ***Narayya*** **v.** ***Sarayya,*** 1932 Mad 245 (247): 1931 Mad W N 1246: 35 Mad L W 424: 138 Ind Cas 340; ***Badri*** **v.** ***Sami,*** (1895) 18 Mad 257 (261); ***Badi Bibi Sahibal*** **v.** ***Sami Pillai,*** (1892) 2 Mad L Jour 235. But see ***Mukyaprana Bhatta*** **v.** ***Kelu Nambiyar,*** 1928 Mad 705 (707, 708): 112 Ind Cas 270: 1929 Mad W N 204.

(33) ***Kesheo Rao*** **v.** ***Suklia,*** 1924 Nag 61 (62): 19 Nag L R 170: 76 Ind Cas 122.

(34) ***Srinivas*** **v.** ***Chanbasapa Gowda,*** 1923 Bom 201 (2) (202): 25 Bom L R 203: 72 Ind Cas 290. But see ***Shri Shallapa Hadlapa*** **v.** ***Balapa Lokanna,*** (1883) 7 Bom 446 (447, 448).

(35) ***Brij Lal*** **v.** ***Ram Rattan,*** (1912) 17 Ind Cas 581 (582, 583): 268 Pun W R 1912; ***Kundan Mal*** **v.** ***Allah Dad,*** (1910) 5 Ind Cas 821 (823): 19 Pun Re 1910: 86 Pun W R 1910: 167 Pun L R 1910. See ***Hari Chand*** **v.** ***Mela Ram,*** (1932) 138 Ind Cas 270 (271, 272) Lah.

(36) ***Musammat Nando*** **v.** ***Ram Balak,*** 1930 Oudh 41 (42): 6 Oudh W N 960: 5 Luck 431: 127 Ind Cas 246.

(37) ***Md Hafiz*** **v.** ***Mirza Md Zakariya,*** 1922 P C 23: 42 Mad L Jour 248: 20 All L J 17: 26 Cal W N 297: 15 Mad L W 377: 65 Ind Cas 79: 44 All 121: 1922 Mad W N 89: 24 Bom L R 341: 3 Pat L Tim 279: 30 Mad L Tim 224: 1 Pun W R 1922: 35 Cal L Jour 126: 49 Ind App 9 P C; ***Kishan Narain*** **v.** ***Pal Mal,*** 1922 P C 412: 4 Lah 32: 50 Ind App 115: 72 Ind Cas 187: 27 Cal W N 802: 38 Cal L Jour 126: 18 Mad L W 341: 6 Pun W R 1923: 4 L R P C 46: 25 Bom L R 220: 44 Mad L Jour 123: 32 Mad L Tim 41 P C.

(38) *Sivasubramania Pillai* v. *Nagappa Pillai,* 1927 Mad 580: 52 Mad L Jour 636: 38 Mad L Tim 211: 25 Mad L W 615: 102 Ind Cas 187; *Rego* v. *Phillip Tauro,* 1929 Mad 371 (372): 29 Mad L W 400: 56 Mad L Jour 580: 1929 Mad W N 208: 120 Ind Cas 853.

(39) *Mukyaprana Bhatta* v. *Kelu Nambiar,* 1928 Mad 705 (707, 708): 112 Ind Cas 270: 1929 Mad W N 204; *Rego* v. *Phillip Tauro,* 1929 Mad 371: 29 Mad L W 400: 56 Mad L Jour 580: 1929 Mad W N 208: 120 Ind Cas 853.

(40) *Sivasubramaniya Pillai* v. *Nagappa Pillai,*

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expression "when required by you", clearly made a *demand* necessary for the cause of action to arise to sue for the entire amount. But it was also held in that case that apart from this consideration, the mortgagee has an *option* to sue for the principal or interest alone in such a case. This view was adopted by Venkatasubba Rao, J., in a later case[41] who also held that the absence of such words in the mortgage bond did not affect the question. But if the prior suit was based on an obligation *independent* of that upon which the later suit is based, then the later suit will not be barred. This would be the case where, apart from the mortgage, there is an independent *personal* obligation to pay the debt[42] or the interest thereon[43] and the prior suit for interest is based on such *personal* obligation and the later suit on the mortgage.[44] In such a case, though there may be a default clause in the mortgage deed providing that on the default being made in payment of interest the whole mortgage amount should become due and though the default may have occurred at the time of the prior suit, the prior suit on the *personal* obligation will not bar the later suit on the mortgage.

The conflict above referred to has now been set at rest by the Privy Council in *Lasa Din* v. *Mt. Gulab Kunwar*, 63 M. L. J. 187. Referring to clauses in mortgage deeds providing for the mortgage amount becoming payable on default in payment of instalments, their Lordships say:—"There can be no doubt that as pointed out by Lord Blanesburgh (in 48 All. 457), a proviso of this nature is inserted in a mortgage deed 'exclusively for the benefit of the mortgagees' and that it purports to give them *an option either to enforce their security at once, or if the security is ample to stand by their investment for the full term of the mortgage.*" Thus the Madras view is upheld and the money will "become due" on default only if the "mortgagee exercised the option reserved to him".

If the default clause provides that on default in payment of interest at the due time, the mortgagee should be entitled to *sell* the properties for principle and interest, out of Court, and default occurs, but the mortgagee sues for interest alone, a subsequent suit for the principle is not barred. The reason is that the default did not entitle the mortgagee to sue for the mortgage money but only to have the properties *sold* out of Court.[45]

First suit for interest under a mortgage, second suit for possession.— A mortgage deed provides that on default in the payment of interest on the due date, the mortgagee should be entitled to take possession of the mortgaged property. Default occurring, the mortgagee sues only for interest. On fresh default occurring he sues for possession. Is the suit maintainable?

1927 Mad 580 (581, 582): 52 Mad L Jour 636: 38 Mad L Tim 211: 25 Mad L W 615: 102 Ind Cas 187.

(41) *Rego* v. *Phillip Tauro*, 1929 Mad 371 (377): 29 Mad L W 400: 56 Mad L Jour 580: 1929 Mad W N 208: 120 Ind Cas 853.

(42) *Sultan Singh* v. *Joti Sarup*, 1928 Lah 269 (270): 109 Ind Cas 613.

(43) *Ram Bhaj* v. *Devia*, 1881 Pun Re No 123.

(44) *Buddha Shah* v. *Suleman*, (1917) 41 Ind Cas 576 (577): 71 Pun W R 1917.

(45) *Joseph* v. *Joseph*, 1929 Rang 71 (72): 6 Rang 771: 115 Ind Cas 671.

O. 2, R. 2, Note 10.

The answer to this question seems to depend on whether on the first default the mortgagee was entitled to sue both for interest and possession or whether he was entitled to sue either for interest or possession. In the former case the plaintiff is bound to claim both the reliefs on pain of his second suit for possession being barred.[46] In the latter case the second suit will not be barred.[47]

Lease to mortgagor by mortgagee with possession. First suit for rent, second suit for principal.—*A* mortgages his land with possession to *B* and as part of *the same transaction B* leases the land to *A*. In such a case, the lease forms in reality only an arrangement for the payment of interest. Hence, where after the principal money has become due, the mortgagee sues for rent alone, he cannot sue again for the principal.[48] But separate suits will lie where the lease and the mortgage constitute *distinct and separate transactions.*[48-a]

Partition suits.—A suit for partition of joint property must include the whole of the properties jointly held by the parties.[49] Where the suit does not comply with this rule, the penalty is not the dismissal of the suit but the bar of a fresh suit for the partition of the omitted items.[50] For instances of cases where such a subsequent suit has been entertained; *see* the following cases.[51] The following are the exceptions to the rule that such a suit would be barred.

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(46) *Malik Karim Baksh* v. *Jattu Ram*, (1910) 8 Ind Cas 224 (225): 191 Pun W R 1910: 31 Pun L R 1910; *Brij Lal* v. *Ram Rattan*, (1912) 17 Ind Cas 581 (582): 268 Pun W R 1912; *Chhabil Das* v. *Massu*, (1914) 19 Ind Cas 981 (983, 984): 1914 Pun Re No 4: 207 Pun W R 1913: 145 Pun W R 1913: 243 Pun L R 1913; *Hari Chand* v. *Mela Ram*, (1932) 138 Ind Cas 270 (271, 272) Lah; *Nathu Mal* v. *Tiloka*, (1916) 32 Ind Cas 719 (719): 42 Pun W R 1916 [The above rule does not apply as, where the property was in the possession of a third party, the plaintiff could not have sued for possession at the time of his former suit]. But see *Raman* v. *Wazira*, 1886 Pun Re No 79 [Where it was held that the second suit was not barred].

(47) *Parameshri Das* v. *Fakeria*, (1920) 59 Ind Cas 71 (74): 1 Lah 457: 2 Lah L Jour 466: 56 Pun W R 1920 F B; *Ram Saran Das* v. *Mula*, 1923 Lah 648 (648): 4 Lah 346: 5 Lah L Jour 513: 78 Ind Cas 103. But see contra *Brij Lal* v. *Ram Rattan*, (1912) 17 Ind Cas 581 (582): 268 Pun W R 1912 [This is superseded by 59 Ind Cas 71 (74) Lah].

(48) *Natha Singh* v. *Chuni Lal*, (1918) 47 Ind Cas 364 (365): 69 Pun Re 1918: 112 Pun W R 1918: 117 Pun L R 1918; *Diwan Chand* v. *Ralia Ram*, 1926 Lah 559 (560, 561): 8 Lah L Jour 381: 27 Pun L R 620: 97 Ind Cas 396; *Rala Ram* v. *Diwan Chand*, 1921 Lah 225 (1) (225): 3 Lah L Jour 390: 41 Pun L R 1921: 63 Ind Cas 928. See also *Altaf Ali* v. *Lalta Prasad*, (1897) 19 All 496 (498, 499): 1897 All W N 128 [Relationship not of landlord and tenant but mortgagor and mortgagee—Suit for arrears due upon the lease therefore lies in Civil Court].

(48-a) *Nanu* v. *Raman*, (1893) 16 Mad 335 (338): 3 Mad L Jour 141; *Md Hussain* v. *Abdul Ghafur*, 1922 Lah 111 (111): 3 Lah 1: 65 Ind Cas 102: 8 Pun W R 1922; *Ralia Ram* v. *Amir Chand*, 1923 Lah 203 (204): 4 Lah 52: 5 Lah L Jour 259: 74 Ind Cas 122; *Gurdial Singh* v. *Diwan Chand*, 1928 Lah 732 (733): 112 Ind Cas 15; *Pindi Das* v. *Lal Chand*, (1916) 36 Ind Cas 209 (210): 102 Pun L R 1916: 177 Pun W R 1916; *Buddha Shah* v. *Suleman*, (1917) 41 Ind Cas 576 (577): 71 Pun W R 1917; *Bhagwan Das* v. *Jalal Din*, 1924 Lah 190 (190): 69 Ind Cas 54; *Krishna Kurup* v. *Mammad*, 1932 Mad 466 (468, 469): 1932 Mad W N 337: 35 Mad L W 631: 137 Ind Cas 651.

(49) *Beni Madhab* v. *Gobinda Chandra*, (1918) 46 Ind Cas 165 (166): 22 Cal W N 669; *Haridas Sanyal* v. *Pran Nath*, (1886) 12 Cal 566 (569).

(50) *Ukha* v. *Daga*, (1883) 7 Bom 182 (184); *Sethurama Sahib* v. *Chotta Raja Sahib*, (1917) 40 Ind Cas 820 (824): 1917 Mad W N 327 [Cause of action for partition suit is one and the same as regards all partible properties]; *Subramaniam* v. *Lakshminarasimma*, 1927 Mad 213 (214): 38 Mad L Tim 82: 98 Ind Cas 538; *Sheoambar Singh* v. *Kalka Baksh Singh*, (1911) 9 Ind Cas 424 (425) Oudh; *Choe Singh* v. *Buhadoor Singh*, (1886) 1 Agra Rep (A C) 55.

(51) *Kakajibin Ranoji Et Al* v. *Bapuji Bin Madhavrav*, (1871) 8 Bom H C A C 205 [Suit for partition of portion dismissed on the ground of non-maintainability of such suit—Second suit for partition of entire property not barred]; *Mansaram Chakravarti* v. *Ganesh Chakravarti*, (1912) 16 Ind Cas 383 (383): 17 Cal W N 521 [The perpetual recurrence of the cause of action for partition is one of the incidents of joint property]; *Sasi Mohan* v. *Hari Nath*, 1928 Cal 459 (461): 47 Cal L Jour 436: 32 Cal W N 1023: 110 Ind Cas 60; *Maung Ba Tu* v. *Ma Thet Su*, 1928 Rang 73 (75): 5 Rang 785: 106 Ind Cas 809 [On the ground that if joint possession continues after first decree, there is a fresh cause of action]; *Gulab Shah* v. *Haveli Shah*, (1915) 31 Ind Cas 463 (464): 87 Pun Re 1915: 181 Pun W R 1915 [As long as joint ownership continues joint owners may demand partition]. See also *Joyendra* v. *Baldeo*, (1908) 35 Cal 961 (967, 968): 12 Cal W N 127: 6 Cal L Jour 735 [Omission by mistake or consent of co-owners—Fresh suit not barred].

O. 2, R. 2, Note 10.

(1) Where at the time of the previous suit the omitted portion was *not available* for partition at that time,[52] as for instance where it was in possession of a usufructuary mortgagee.[53]

(2) Where the omitted properties were in a different district.[54] The better view seems to be that even in such cases the bar of O. 2, R. 2, applies, as, under the present Code, there is no objection to the plaintiff bringing a single suit in such case.[55]

(3) Where the omission in the previous suit was due to *ignorance* of existence of the omitted items.[56]

A suit for partition of property held jointly by a Hindu family does not bar a suit for partition of property held by the family jointly with strangers, as the causes of action for the two suits are distinct.[57]

Where the alienee of a share of joint family property sues for partition, he must sue for general partition. Thus where the plaintiff acquired the shares of two out of five members of a joint family by two separate sale-deeds, it was held that his cause of action on both the sale-deeds was one (*i.e.*) the right to sue the co-parceners for partition, and he cannot maintain two actions one on each sale-deed.[58] But in 14 I. C. 524 it was held that an alienee's suit for partial partition is not liable to be dismissed solely for that reason but that the defendant co-parceners can claim that there be a general partition. Further, the defendant can, always in such a suit, insist that the suit must be for general partition.[59]

For example of suits for partition based on distinct causes of action *see* the following cases.[60]

The rule against a suit for partial partition is not applicable to *tenants-in-common*, as in their case there is a separate cause of action in respect of

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(52) *Kristayya* v. *Narasimham*, (1900) 23 Mad 608 (612): 10 Mad L Tim 141.

(53) *The Collector of Ratnagiri* v. *Vyankatrav Narayan Surve*, (1871) 8 Bom H C (A C) 1; *Narayan* v. *Pandurang*, (1875) 12 Bom H C 148.

(54) *Ram Harakh* v. *Ram Lal*, (1916) 33 Ind Cas 124 (126): 38 All 217: 14 All L J 257; *Subba Rau* v. *Rama Rau*, (1867) 3 Mad H C R 376 (377); *Bhai Nihal Singh* v. *Sowaya Singh*, 1884 Pun Re No 162; *V Subba Rao* v. *Anantha Narayana Aiyar*, (1913) 14 Ind Cas 524.

(55) *Maung Tu* v. *Ma Daw*, (1897-1901) U B R Vol II, p 222; *Niaz Ahmed* v. *Abdul Hamid*, (1908) 30 All 279 (281): 5 All L J 278: 1908 All W N 131; *Basavana Gowd* v. *Doddalingappa*, 1923 Mad 584 (584, 585): 44 Mad L Jour 652: 17 Mad L W 740: 1923 Mad W N 294: 72 Ind Cas 430; *Anup Shah* v. *Jaswant Shah*, 1891 Pun Re No 10.

(56) *Subramaniam* v. *Lakshminarasimma*, 1927 Mad 213 (215): 38 Mad L Tim 82: 98 Ind Cas 538.

(57) *Purushottam* v. *Atmaram*, (1899) 23 Bom 597 (598, 601): 1 Bom L R 76; *Debi Sahai* v. *Gouri Shanker Sahay*, (1912) 15 Ind Cas 214 (217): 15 Oudh Cas 81; *Sonba* v. *Babya*, 1924 Nag 89 (91): 20 Nag L R 28: 78 Ind Cas 376 [Suit against stranger purchaser]; *Shamsuddin* v. *Chatomal*, 1931 Sind 143 (144): 134 Ind Cas 895 [Second suit for partition of property in the hands of uncle claiming adversely].

(58) *Manonmani Ammal* v. *Vythilinga Naicker*, (1913) 21 Ind Cas 402 (403, 404): 25 Mad L Jour 481: 1913 Mad W N 881: 14 Mad L Tim 341; *Shivmurteppa* v. *Virappa*, (1899) 24 Bom 129. But see *Subba Row* v. *Ananthanarayana Iyer*, (1912) 14 Ind Cas 524 (528, 532): 23 Mad L Jour 64: 11 Mad L Tim 393 [Principle applicable is that in regard to tenants-in-common].

(59) *Shivmurteppa* v. *Virappa*, (1899) 24 Bom 128 (130, 134): 1 Bom L R 620.

(60) *Shadi* v. *Gainda*, 1890 Pun Re No 127 [Absent brother's share set apart at partition in previous suit—Second suit for dividing that share as the absent one did not return not barred]; *Shiam Sunder Singh* v. *Jagannath Singh*, 1930 All 371 (372): 122 Ind Cas 403 [Suit to enforce partition as directed by a will no bar to suit for partition of inherited properties]; *Khan Bahadur* v. *Ali Akbar*, (1913) 20 Ind Cas 22 (23): 255 Pun L R 1913: 163 Pun W R 1913 [Previous suit based on proceedings in Revenue Court for partition of agricultural land is no bar to suit for partition of *abadi* land]; *Sant Lal* v. *Rameshwar Dayal*, (1917) 42 Ind Cas 413 (414): 4 Oudh L J 520 [Two suits by a member of a Hindu joint family, one in respect of the property covered by an award dividing the main portion of the family property, and the other in respect of the property that was still joint, are separately maintainable].

each item of the properties.[61]

O. 2, R. 2, Notes 10—12.

For other instances *see* the following cases.[62]

See also Notes 19 and 26 below.

11. Minor.—Suppose the next friend of a minor suing on behalf of the minor omits to include in the suit a portion of the claim which he was entitled to make in respect of the same cause of action. Can the minor sue again in respect of it on attaining majority? He cannot[1] unless the omission in the previous suit was due to the gross negligence,[2] fraud,[3] glaring laches, caused by physical incapacity[4] on the part of the next friend or the acts of the next friend were unreasonable or improper in the conduct of the suit,[5] or the minor's interests were not properly safeguarded.[6]

12. Intentional Relinquishment.—Sub-Rule 1 of this Rule provides that a plaintiff may relinquish any portion of his claim in order to bring his suit within the jurisdiction of a particular Court. That means that in bringing the suit, he can, *in his plaint*, relinquish any portion of his claim in order to bring it within the jurisdiction of a particular Court; if the suit is once instituted in a Court having no jurisdiction to grant the relief prayed for, the only order that the Court can pass is to *return the plaint* under the provisions of O. 7, R. 10, and not to allow the amendment of the plaint by relinquishment of reliefs, inasmuch as to allow such amendment will be to deal with a suit over which the Court has no jurisdiction.[1]

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(61) *Kuppusami Ayyar* v. *Subramania Ayyar*, (1897) 7 Mad L Jour 73 (75); *Ittappan* v. *Manavikrama*, (1898) 21 Mad 153 (157, 158): 8 Mad L Jour 92; *Pakkiri Kanni* v. *Haji Muhammad*, 1924 Mad 124 (124): 46 Mad 844: 45 Mad L Jour 321: 18 Mad L W 345: 33 Mad L Tim 44: 1923 Mad W N 565: 75 Ind Cas 334; *Muhammad Yousuf Hussain* v. *Wilayet Hussain*, 1929 Oudh 1 (5): 5 Oudh W N 1001: 113 Ind Cas 785; *Syed Habibur Rasul* v. *Ashita Mohan*, (1908) 12 Cal W N 640 (641); *Mansaram Chakravarthi* v. *Ganesh Chakravarthi*, (1912) 16 Ind Cas 383 (384): 17 Cal W N 521; *Gulab Shah* v. *Haveli Shah*, (1915) 31 Ind Cas 463 (463): 87 Pun Re 1915: 181 Pun W R 1915.

(62) *Appasami* v. *Ramasami*, (1886) 9 Mad 279 (280): 10 Ind Jur 219 [Settlement of accounts—Sum found due by defendant—Defendant giving as to a portion, an order on his agent to pay, and as to the balance promising to pay within a month—Cause of action same]; *Govind* v. *Parashuram*, (1901) 25 Bom 161 (166): 2 Bom L R 864 [Settlement of accounts—Debtor promising to pay portion of the sum by a certain day, and on default to execute mortgage of certain properties for whole amount—Default made—Suit for the portion of the sum promised—Suit for sale of the properties barred]; *Kauleshar Rai* v. *Khudi Rai*, 1881 All W N 72 (72) [Award directing payment of money and delivery of title deeds—Separate suits not maintainable in respect of the two items]; *Samarapuri* v. *Shunmuga*, (1882) 5 Mad 47 (50, 51) [There can be only one suit for partnership accounts]; *Kizhekke Manjambarath* v. *Kanna Kurup*, (1918) 47 Ind Cas 595 (596): 8 Mad L W 152 [There can be only one suit for redemption suit against all co-mortgagees]; *Shankar Baksh* v. *Daya Shankar*, (1888) 15 Cal 422 (431): 15 Ind App 66: 5 Sar 107: 12 Ind Jur 132: R & J 100 [Reliefs may be different though causes of action same]; *Kaneez Fatima Begum* v. *Ram Nandan Dhar Dube*, 1923 All 381: 21 All L J 269: 45 All 384: 73 Ind Cas 977: L R 4 All (Civ) 181 [Mahomedan widow suing only for portion of dower debt is barred from suing for balance].

Note 11.

(1) *Buta* v. *Faiz Bakhsh*, 1893 Pun Re No 76; *Kylash Chunder* v. *Gooroo Churn*, (1865) 3 Suth W R 43; *Gopal Rao* v. *Narasinga Rao*, (1900) 22 Mad 309 (310).

(2) *Lallasheo Churn Lal* v. *Ramnandan Dobey*, (1895) 22 Cal 8 (13, 14).

(3) *Abdul Gafur* v. *Sona Bibi*, (1912) 14 Ind Cas 95 (97) Cal.

(4) *Jawala Singh* v. *Jaimal Singh*, (1909) 1 Ind Cas 400 (402): 25 Pun L R 1909: 14 Pun W R 1909.

(5) *Gopal* v. *Narasinga*, (1899) 22 Mad 309 (310).

(6) *Vyankat Awachit* v. *Onkar*, 1921 Bom 434 (434): 45 Bom 805: 23 Bom L R 250: 61 Ind Cas 276.

Note 12.

(1) *Govindaswami* v. *Kalia Perumal*, 1921 Mad 696 (698, 700): 16 Mad L W 155: 1922 Mad W N 83: 66 Ind Cas 837 [Per Sadasivaier, J Contra Coutts-Trotter, J]; *Sheikh Nur Khan* v. *Shaikh Rahim*, (1920) 54 Ind Cas 655 (656, 657) Nag. But see *P Moolchand* v. *Po Thein*, (1919) 51 Ind Cas 376 (377): 9 L B R 275: 12 Bur L Tim 155 [It is submitted that the view is not correct and is opposed to principle]. See also the following cases in which the plaintiff was held entitled to relinquish at any stage. But the cases were not cases of relinquishment for the purpose of bringing the case *within the jurisdiction of any Court*:—*Mahammad Shamgaya* v. *Omandu Pillai*, 1924 Mad 224 (224): 18 Mad L W 649: 1923 Mad W N 779: 76 Ind Cas 76.

O. 2, R. 2, Notes 12—14.

Where the plaintiff intentionally relinquishes any portion of his claim, he cannot subsequently bring a fresh suit in respect of it.[2]

13. Suit to include all reliefs in respect of the same cause of action.—Sub-Rule 3 provides that where a plaintiff is entitled to more than one relief in respect of the same cause of action, he may sue for all the reliefs or he may sue for one or more of them reserving, with the leave of the Court, his right to sue for the rest.

As to the effect of the omission to sue for all the reliefs, *see* Note 14 below.

14. Omission to sue for all reliefs.—If a plaintiff omits, without the leave of the Court, to sue for any of the reliefs which he is entitled to claim in respect of the cause of action, he shall not *afterwards* sue for the reliefs so omitted by him.[1] There are, however, exceptions to this rule.

(1) Where the right to relief in respect of which a further suit is brought, *did not exist* at the date of the former suit.[2]

(2) By virtue of the special provisions of O. 34, R. 14, where a mortgagee has asked for and obtained only a *personal* decree against the mortgagor for the mortgage amount, he may, notwithstanding O. 2, R. 2 subsequently institute a *suit for sale* in enforcement of the mortgage.[3]

(3) Under the special provisions of the Dekhan Agriculturists' Relief Act, 1879, S. 15-D, the mortgagor can sue his mortgagee first, for an *account* and subsequently for *redemption*.[4] But

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(2) *Karam Chand* v. *Jullunder Bank, Ltd*, 1927 Lah 543 (543): 9 Lah L Jour 293: 102 Ind Cas 705: 29 Pun L R 64; *Shib Shanker Lal* v. *Soni Ram*, (1909) 3 Ind Cas 725 (729): 32 All 33: 6 All L J 931: 6 Mad L Tim 348; *Hori Lal* v. *Dwaraka Prasad*, (1913) 20 Ind Cas 173 (174) All [No subsequent order of the Court can revive the right].

Note 14.

(1) *Sheo Pher Singh* v. *Bhola Singh*, (1911) 11 Ind Cas 87 (88) All; *Abdul Hakim Khan* v. *Karan Singh*, (1915) 30 Ind Cas 951 (953): 37 All 646: 13 All L J 929; *Thakurji Maharaj* v. *Risal*, 1930 All 527 (529): 124 Ind Cas 177; *Mangan Lal* v. *G I P Ry Co*, 1924 All 849 (850): 22 All L J 745: 5 L R (All) Civ 580: 83 Ind Cas 969; *Venkatasubba Rao* v. *Vigneswaradu*, 1928 Mad 840 (842): 1928 Mad W N 336: 28 Mad L W 82: 56 Mad L Jour 52: 110 Ind Cas 554; *Naba Kumar Hazra* v. *Radhashyam Mahis*, 1931 P C 229 (230): 35 Cal W N 977: 61 Mad L Jour 294: 1931 All L J 797: 54 Cal L Jour 274: 34 Mad L W 444: 134 Ind Cas 654 P C [Suit for declaration of invalidity of sale—Subsequent suit for rent and profits barred]; *Rama Rao* v. *Venkayamma*, 1931 Mad 705 (706, 707): 34 Mad L W 277: 1931 Mad W N 893: 134 Ind Cas 803 [Though first Court had no jurisdiction to grant the omitted relief]. See also *Saroj Bandhu Bhadhuri* v. *Manik Sheikh*, 1925 Cal 305 (306): 80 Ind Cas 917.

(2) *Piari* v. *Khiali Ram*, (1881) 3 All 857 (858, 859): 1881 All W N 100; *Nawab Syed Mahomed Zaki Ali Khan* v. *N S M Jafar Ali Khan*, (1889) 2 Oudh Cas 17 (23); *Govindasami Naidu* v. *Uchappa Goundan*, 1922 Mad 413 (415): 1922 Mad W N 477: 70 Ind Cas 579; *Firm of Brijlal Jagan Nath* v. *Firm of Allah Ditta*, 1925 Sind 242 (243): 86 Ind Cas 393; *Kazim Husain* v. *Ali Raza Khan*, 1927 Oudh 498 (499): 4 Oudh W N 947; *Nund Lal Bose* v. *Meer Aboo Mahommad*, (1879) 5 Cal 597 (602): 5 Cal L Rep 45; *Raja Bahadur Shiva Lal* v. *Rajee Vappa*, (1909) 1 Ind Cas 319 (319): 11 Bom L R 46; *Puhalwan Singh* v. *Maharaja Mohesour Buksh Singh*, (1871) 16 Suth W R 5 (9): 2 Suth 442 (660): 9 Beng L R P C 150: 2 Sar 683 P C; *Raja Nilmani Singh* v. *Annanda Prasad Mookerjee*, (1868) 1 Beng L R 97: 10 W R 41 (46) F B; *Thottathil Ahmmad* v. *Muthedath Avuthraman*, (1898) 8 Mad L Jour 273 (276); *Lallu* v. *Bajrangi Lal*, 1925 Oudh 303 (304): 84 Ind Cas 263: 28 Oudh Cas 2; *Ganga Ram* v. *Kanhaiya Lal*, (1905) 27 All 254 (257): 1 All L J 649: 1904 All W N 236 [Suit dismissed as premature—Second suit after accrual of cause of action, not barred]; *Ahmad Khan* v. *Mehr Khan*, 1893 Pun Re No 35 [First suit dismissed as premature—Second suit after accrual of cause of action not barred].

(3) *Indar Pal Singh* v. *Mewah Lal*, (1914) 23 Ind Cas 429 (429): 36 All 264: 12 All L J 374; *Kareri* v. *Ananthayya*, (1887) 10 Mad 129 (130, 131): 11 Ind Jur 138; *Ramayya* v. *Venkataratnam*, (1894) 17 Mad 122 (129): 4 Mad L Jour 52; *Bhola Nath* v. *Muhammad Sadiq*, (1904) 26 All 223 (224, 225): 1904 All W N 2; *Bungsee Singh* v. *Sudist Lall*, (1881) 7 Cal 739 (747): 10 Cal L Rep 263; *Rajkishore* v. *Bhadoo*, (1881) 7 Cal 78 (81). See also *Bahadur Shah* v. *Ram Singh*, (1910) 6 Ind Cas 655 (656): 32 Pun Re 1910: 57 Pun L R 1910: 50 Pun W R 1910.

(4) *Laluchand* v. *Girjappa*, (1896) 20 Bom 469 (473, 474) [For case prior to the amendment of the Act in 1882]. See *Hari* v. *Lakshman*, (1880-81) 5 Bom 614 (616); *Bhau Balaji* v. *Hari Nilakanthrav*, (1883) 7 Bom 377 (379).

where the account taken in the first was confined to only one *transaction*, and not from the earliest transactions upto the date of the suit, the provisions of O. 2, R. 2, will apply.[5] O. 2, R. 2, Notes 14—16.

15. Suits for possession and rent.—Where, under a contract of lease, *A*, the lessee, is bound to pay the rent at the stated periods, and on default, to deliver up possession to the lessor *B*, and on such default occurring, *B* sues *A* for possession first and then brings a subsequent suit for rent, is the latter suit barred? The answer to this depends upon the question whether the two suits are treated as being based on the *same*, or on *different* causes of action. It has been held by the High Court of Bombay that there is *one* cause of action for both the suits and that therefore the second is barred.[1] The High Court of Allahabad,[2] Lahore[3] and Madras[4] have, on other hand held that the causes of action for the two suits are *different* and the second suit is therefore not barred.

16. Suits for specific performance and possession.—Where *A* sues *B* for specific performance of an agreement to sell, and subsequently on the basis of the *same agreement*, sues for possession, the suit is barred under this rule inasmuch as the reliefs in both flow from the same cause of action.[1] But where the subsequent suit is based on the *conveyance obtained in pursuance of the decree in the first suit*, the cause of action is different, and the suit is not barred.[2] Where *A* first sues for possession and later on for specific performance, both being based on the same *agreement*. The latter suit is barred.[3]

When *A* first agreed to sell his property to *B*, and then agreed to sell the same to *C* and therefore *B* sued *A* for an injunction restraining *A* from executing a sale to *C* and, on that suit, being dismissed, again sued *A* for specific performance of his agreement, it was held that the suit is not barred.[4]

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(5) *Daluchand Balaram* v. *Appi Khema*, 1921 Bom 282 (283, 284): 45 Bom 55: 59 Ind Cas 347: 22 Bom L R 1093.

Note 15.

(1) *Kasinath Ramachandra* v. *Nathoo Keshav*, (1914) 25 Ind Cas 73 (73, 74): 38 Bom 444: 16 Bom L R 454. See also *Ram Dayal* v. *Nisar Husain Khan*, 1926 Jour 153 (4): 13 Oudh L J 170: 91 Ind Cas 1031.

(2 *Nandan Singh* v. *Ganga Prasad*, (1913) 20 Ind Cas 892 (893, 894): 35 All 512: 11 All L J 786: See contra *Mewa Kaur* v. *Banarsi Prasad*, (1895) 17 All 533: 1895 All W N 121.

(3) *Khushi Ram* v. *Abdul Gafur*, 1922 Lah 118 (119): 4 Lah L Jour 17: 63 Ind Cas 978.

(4) *Subraya* v. *Ratnavelu*, (1909) 32 Mad 330 (332): 5 Mad L Tim 105: 2 Ind Cas 313 [The contrary view expressed in 6 Mad 159 cannot be accepted as correct].

Note 16.

(1) *Sundara Ramamujam Naidu* v. *Sivalingam Pillai*, 1924 Mad 360 (361, 363): 45 Mad L Jour 431: 18 Mad L W 333: 77 Ind Cas 542: 1923 Mad W N 726; 47 Mad 150; *Nathu Valad Pandu* v. *Budhu Valad Bhika*, (1894) 18 Bom 537 (542); *Deonandan Prasad Singh* v. *Janki Singh*, (1920) 56 Ind Cas 322 (323): 5 Pat L Jour 314: 1 Pat L Tim 325: 1920 Pat H C C 266: 2 U P L R (Pat) 108 [Even possession can be asked on the basis of the agreement to sell]. See also *Fateh Chand* v. *Narsingh Das*, (1912) 16 Ind Cas 988 (991): 22 Cal L Jour 383 [Suit for specific performance—Possession also may be asked]; *Ranjit Sinha* v. *Kalidasi Debi*, (1910) 5 Ind Cas 205 (206): 37 Cal 57: 14 Cal W N 527, (Do.).

(2) *Sundara Ramanujam* v. *Sivalingam*, 1924 Mad 360 (363): 47 Mad 150: 45 Mad L Jour 431: 18 Mad L W 333: 77 Ind Cas 542: 1923 Mad W N 726; *Pandu* v. *Sital Prasad*, (1918) 48 Ind Cas 188 (189, 190): 14 Nag L R 176; *Krishnammal* v. *Manandiar*, (1914) 22 Ind Cas 912 (913): 38 Mad 698: 15 Mad L Tim 103: 1914 Mad W N 200: 1 Mad L W 147 [Dissenting from 22 Mad 24 which was followed by the same Judges in 12 Mad L Jour 71]; *Maung Myo* v *Paw Shun*, 1926 Rang 197 (198): 5 Bur L Jour 113: 98 Ind Cas 160; *Sheodin* v. *Mt Godhi Bai*, (1904) 4 Nag L R 14 (18); *Krishnaji* v. *Sangappa*, 1925 Bom 181 (182): 27 Bom L R 42: 86 Ind Cas 137.

(3) *Rangayya Goundan* v. *Nanjappa Rao*, (1901) 24 Mad 491 (503): 6 Cal W N 17: 3 Bom L R 799: 8 Sar 117: 28 Ind App 221 P C.

(4) *Sardari Mal* v. *Hirde Nath*, 1925 Lah 459 (460): 7 Lah L Jour 236: 87 Ind Cas 994: 6 Lah 384: 26 Pun L R 280: 26 Pun L R 558.

O. 2, R. 2, Notes 17—18.

17. Partition Suits.—A partition suit should as has been seen in Note 10, *ante*, include the entire divisible property of the parties. Similarly, a plaintiff who omits to ask for any relief which he could have claimed in a suit for partition cannot bring a separate suit for such relief. Thus matters such as a charge of negligence against the manager[1] should be dealt with when accounts are taken in the partition suit and not by separate suit.[2]

But a suit for damages for use and occupation during the period the partition suit was pending is based on a different cause of action[3] as also a suit on a promissory-note executed by one member of a joint Hindu family in favour of another.[4]

18. Mortgage suits.—For a full discussion see Note 10 above.

In a suit for redemption, all claims between mortgagor and mortgagee should be settled, and a separate suit for excess profits received by the mortgagee cannot be brought even though such profits may accrue after the institution of the suit.[1] But a separate suit is maintainable for the mesne profits accruing after the date of payment under the preliminary decree.[2] There is, however, one case in which it has been held that the plaintiff is bound to claim mesne profits upto to *delivery of possession*[3] while, on the other hand, there is a decision to the effect that a separate suit lies for mesne profits accruing after the *decree*.[4]

Where a usufructuary mortgagee being deprived of possession, sues for possession alone, and fails to pray in the alternative for the return of the mortgage money, under Transfer of Property Act, S. 68 he cannot, on his suit for possession being dismissed sue for the mortgage money.[5]

Note 17.

(1) *Gulab Chand* v. *Ramnath*, 1922 Bom 119 (120): 46 Bom 327: 64 Ind Cas 995: 23 Boom L R 1171.

(2) *Vishnu* v. *Gangadhar*, 1922 Bom 9 (1) (9): 24 Bom L R 302: 46 Bom 823: 69 Ind Cas 399; *Alisaheb Baba Diwakar* v. *Mohidin Sadik Patil*, (1911) 12 Ind Cas 375 (378): 13 Bom L R 874. See also *Jai Kishen Das* v. *Pashori Lal*, (1932) 137 Ind Cas 775 (776) [Suit for partition—Subsequent suit for mesne profits due before former suit barred, but not for subsequent mesne profits].

(3) *Kristo Das Roy* v. *Behari Lal Sikdar*, (1920) 57 Ind Cas 900 (902) Cal.

(4) *Anantanrayana Iyer* v. *Savitri Ammal*, (1912) 13 Ind Cas 458 (462): 36 Mad 151: 1912 Mad W N 59: 11 Mad L Tim 63: 22 Mad L Jour 231.

Note 18.

(1) *Baloji Tamaji Pottar* v. *Tamangouda Ghnanyam Gauda*, (1869) 6 Bom H C (A C) 97; *Kashi Prasad* v. *Bajrang*, (1908) 30 All 36 (38): 4 All L J 763: 1907 All W N 281; *Sakari Dutt* v. *Ainuddy*, (1910) 6 Ind Cas 336 (337): 14 Cal W N 1001: 12 Cal L Jour 620; *Umrai* v. *Gulzari Lal*, (1909) 2 Ind Cas 834 (2) (835) 12 Oudh Cas 152; *Satyabadi* v. *Harabati*, (1907) 34 Cal Cas 152; *Satyabadi* v. *Harabati*, (1907) 34 Cal 223 (233): 5 Cal L Jour 192; *Ram Din* v. *Bhup Singh*, (1908) 30 All 225 (227): 5 All L J 192: 1908 All W N 96; *Rukhminibai* v. *Venkatesh*, (1907) 31 Bom 527 (533, 534): 9 Bom L R 958 [Deposit of mortgage money in Court preceding suit. Suit to include claim for subsequent mesne profits]; *Zaki-ul-din* v. *Chunni Lal*, 1927 Nag 302 (303): 10 Nag L Jour 142: 103 Ind Cas 290 [Deposit in Court before suit. Suit to include claim for subsequent mesne profits]; *Ma Nyo* v. *Maung, Hla Bu*, 1925 Rang 13 (14): 2 Rang 382: 84 Ind Cas 395 [Deposit in Court before suit—Claim for subsequent mesne profits should be included]; *Ameenam Mal* v. *Meenkshi*, (1921) 60 Ind Cas 226 (229, 230): 12 Mad L W 173 [Suit to enforce mortgage dismissed because a mortgage was found satisfied. Mortgagor cannot sue for excess amount realised by mortgagee]; *Narasinga Patro* v. *Bhagavan Sabuto*, (1914) 24 Ind Cas 688 (689): 1914 Mad W N 499 [Mortgagee cannot sue separate for value of crops standing on the land at the time of delivery of possession to the mortgagor].

(2) *Tarachand* v. *Brojo Gopal*, (1920) 58 Ind Cas 180 (181): 1 Pat L Tim 614: 5 Pat L Jour 595; *Sudha Nya* v. *Sushilabala*, 1926 Cal 178 (178): 85 Ind Cas 547; *Vaiappa Thevan* v. *Subbiah*, (1918) 44 Ind Cas 251 (252): 7 Mad L W 269: 1918 Mad W N 207: 23 Mad L Tim 158; *Ram Karan* v. *Achal Singh*, (1916) 35 Ind Cas 799 (800): 19 Oudh Cas 161: 3 Oudh L Jour 271.

(3) *Girwar Singh* v. *Ram Piari Kuer*, 1924 All 909 (910): 78 Ind Cas 326: 5 L R (All) Civ 223.

(4) *Sakari Datta* v. *Ainuddi*, (1910) 6 Ind Cas 336 (337): 14 All W N 1001: 12 Cal L Jour 620.

(5) *Harnam Singh* v. *Bhola Singh*, (1920) 56 Ind Cas 966 (967): 1921 Lah 309: 4 Lah L Jour 502; *Ram Autar Pande* v. *Shanker Dayal*,

But where the two suits are based on distinct causes of action, the second suit will not be barred although the claim to relief may arise out of the same mortgage.[6]

19. Other examples.—

(1) A suit for specific performance of a contract bars a subsequent suit for damages for failure to perform the contract.[1]

(2) A suit for a personal decree for maintenance bars a subsequent suit for declaring it a charge on property.[2]

(3) A suit for exclusive possession being dismissed, a second suit for joint possession is barred.[3]

(4) The dismissal of a suit for possession bars a suit for declaration of title.[4]

(5) Where there is an agreement to pay a debt partly in cash and partly by executing a mortgage, a single suit must be brought for *both* the reliefs.[5]

(6) A suit for damages for dismantling a building bars a subsequent suit for possession of the land where the allegation in the previous suit was that the defendant had not only deprived plaintiff of the possession of the land but also had wrongfully appropriated the materials of the building on demolishing it.[6]

(7) A suit for mesne profits bars a suit for possession on the same cause of action.[7]

(8) A suit for an injunction bars a subsequent suit for damages on the same cause of action.[8]

(9) A suit for the recovery of the value of property wrongfully taken bars a subsequent suit for damages for the wrongful act.[9]

1926 Pat 87 (88, 89): 1925 P H C C 338: 90 Ind Cas 622: 7 Pat L Tim 150; *Udairaj Singh* v. *Ram Udit*, 1924 Oudh 147 (149): 10 Oudh L Jour 376: 77 Ind Cas 340; *Gahi Mal* v. *Shera*, 1881 Pun Re No. 90; *Sheo Ratan Singh* v. *Ram Singh*, 1925 Oudh 524 (525): 28 Oudh Cas 82: 85 Ind Cas 391: 1 Oudh W N 749.

(6) *Naipal* v. *Bans Gopal Singh*, 1927 All 713 (719): 25 All L J 791: 103 Ind Cas 289 [Mortgagee bound to pay rent, but committing breach—Mortgagor paying the same—He can recover the same in the redemption suit or by a separate suit, under S. 69 of the Contract Act]; *Veerana* v. *Muthukumara*, (1904) 27 Mad 102 (105): 13 Mad L Jour 439 [Usufructuary mortgagee may sue for possession after the dismissal of a suit for sale as on a simple mortgage]; *Bikhomal* v. *Rajalmal*, (1913) 19 Ind Cas 393 (394): 6 Sind L R 140 [Suit for a declaration that a mortgage has been satisfied and for recovery of surplus money paid to the mortgagee which is dismissed as premature as the mortgage was not found to be satisfied does not bar a suit for redemption]. But see contra *Barkhurdar* v. *Chatta Mal*, (1918) 48 Ind Cas 798 (799): 119 Pun Re No. 1918.

Note 19.

(1) *Shib Kristo* v. *Abdool Sobhan*, (1871) 15 Suth W R 408 (410).

(2) *Rangamma* v. *Vohalayya*, (1888) 11 Mad 127 (129); *Bhagirathi* v. *Anantha*, (1893) 17 Mad 268 (270); *Saminatha* v. *Rangathammal*, (1889) 12 Mad 285 (286).

(3) *Dhanpat Ram* v. *Balbhaddar Nath*, (1903) All W N 97 (98); *Sheo Pher Singh* v. *Bhola Singh*, (1911) 11 Ind Cas 87 (88) All.

(4) *Pratab Narain Singh* v. *Musammat Sarju Dei*, (1902) 5 Oudh Cas 173 (175); *Badri Bisal* v. *Mussammat Lalta Koer*, (1907) 10 Oudh Cas 44 (48); *Muhammad Asghar* v. *Amjad Ali*, (1905) 8 Oudh Cas 389 (393).

(5) *Govind Hari* v. *Parashram*, (1901) 25 Bom 161 (166): 2 Bom L R 864.

(6) *Khardha Co., Ltd.* v. *Durga Charan Chandra*, (1920) 58 Ind Cas 636 (638): 46 Cal 640.

(7) *Pallah* v. *Kesar Singh*, 1882 Pun Re No. 138.

(8) *Chajju Sing* v. *Nihal Singh*, (1888) Pun Re No. 190.

(9) *Shaikh Punju* v. *Shaikh Oodoy*, (1872) 18 Suth W R 337 (338); *Mohubut Mundul* v.

O. 2, R. 2, Notes 19—21.

(10) A suit by a lessee against his lessor for loss of income caused by his eviction before the expiry of the lease bars a suit for damages for breach of the covenant for quiet enjoyment.[10]

(11) For other cases *see* the following cases.[11]

See also Note 10, *ante* and Note 26, *infra*.

20. Leave of Court.—Under sub-Rule 3, where a plaintiff is entitled to more than one relief in respect of the same cause of action but omits to ask for some of them, he shall not, *except where the omission has been with the permission of the Court*, sue again for them.[1] The leave need not be *express* but may be inferred from the circumstances of the case.[2] The competence of the Court to grant leave is not affected by the value of the relief sought to be omitted.[3] But as has been seen in Note 10 *ante* its power is confined to reliefs only and does not extend to allowing a splitting up of *claims*.[4]

Under the Code of 1882 the leave had to be obtained *before the first hearing*. The said words having been omitted in this Code, it would seem that the leave may be granted at any stage of the suit.

21. Identity of the parties necessary for the application of the section.—In order that R. 2 may apply, the two suits must be between the same parties[1] or between persons claiming through the same parties.[2] Thus

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Shoorendro Nath Rai, (1865) 4 Suth W R (S C C Ref) 20 (21).

(10) *Labatheen* v. *Thurai Raja*, (1892) 2 Mad L Jour 190 (196).

(11) *Bawa Sant Ram* v. *Chanda Singh*, 1886 Pun Re No. 47 [Occupancy tenant mortgaging holding with possession. Suit by landlord for cancellation of mortgage bars suit for possession]; *Amalur Venkayya Naidu* v. *Visa Laxminarayan Saya*, (1920) 58 Ind Cas 969 (975, 977) Mad [Claims arising out of same partnership—Only one suit lies]; *Andi* v. *Thatha*, (1887) 10 Mad 347 (350); *Maksud Ali* v. *Nargis Dye*, (1893) 20 C 322 (325) [Suit for possession of land—Second suit for possession of trees on land—Defendants wrongful acts same in both the cases—Second suit barred]; *Maya* v. *Mantoria*, 1881 All W N 93; *Ram Lal* v. *Mir Jehangir Ali*, (1910) 5 Ind Cas 126 (All) (127) [Suit for damages for dispossession bars suit for possession]; *Banarsi Das* v. *Municipal Committee, Delhi*, 1907 Pun L R 28: 5 Pun W R 1907 [First suit for a declaratory decree to build a drain on a piece of land. Second suit for damages caused by the defendant's refusal to allow the plaintiff to build the drain barred]; *Ranganyya Goundan* v. *Nanjappa Rao*, (1901) 24 Mad 491 (503): 28 Ind App 221: 6 Cal W N 17: 3 Bom L R 799: 8 Sar 117; *Musammut Kusam Dei* v. *Har Dutt*, 1924 Oudh 129 (132): 26 Oudh Cas 98: 74 Ind Cas 459 [Co-sharer obtaining declaration that certain gift will not affect his rights. Further, suit that the gift should not affect the choice by the partition Court of the plot to be allotted to plaintiff barred]; *Lalla Lachman* v. *Ramsaru Pandyan*, (1873) 20 Suth W R 144 (146).

Note 20.

(1) *Hare Krishna* v. *Umesh Chandra*, 1921 Pat 193 (195): 6 Pat L Jour 373: 1921 Pat H C C 209: 2 Pat L Tim 528: 62 Ind Cas 962: 3 U P L R Pat 57 [Leave of Court exempts the plaintiff from the bar].

(2) *Hare Krishna Sen* v. *Umesh Chandra Dutt*, 1921 Pat 193 (195, 196): 6 Pat L Jour 373: 1921 Pat H C C 209: 2 Pat L Tim 528: 8 U P L R (Pat) 57: 62 Ind Cas 962; *Maung Ko Lay* v. *Moung Nyo*, 1927 Rang 237 (238): 6 Bur L Jour 85: 104 Ind Cas 370.

(3) *Muhammad Faiyaz* v. *Kallu Singh*, (1910) 8 Ind Cas 689 (690): 33 All 244: 7 All L J 1201; *Maung On Gaing* v. *Ma On Sin*, (1916) 33 Ind Cas 135 (136): 9 Bur L Tim 93.

(4) *Janardan Kishore Lal Singh Dao* v. *Sib Prasad Ram*, (1916) 36 Ind Cas 179 (181, 182): 43 Cal 95: 20 Cal W N 475.

Note 21.

(1) *Gobind Krishna* v. *Sirajunnissa*, (1910) 6 Ind Cas 226 (227): 7 All L J 627; *Ramaswamy Mudaliar* v. *Alagathai Anni*, 1929 Mad 96 (103): 1928 Mad W N 654: 116 Ind Cas 116; *Gopalaswami* v. *Govindaswamy*, (1912) 17 Ind Cas 434 (436): 1912 Mad W N 1071; *Nobin Chandra Roy* v. *Magantara*, (1884) 10 Cal 924 (927) [Rule refers to subject-matter of claim and not to the persons against whom it may be made]; *Maharaja of Vizianagaram* v. *Sri Rajah Setrucharla Somasekhara Raj*, (1903) 26 Mad 686 (692): 13 Mad L Jour 83 F B [Omission to join a person as party is no bar to separate suit against him]; *Budhu Chaudhuri* v. *Hardei*, (1912) 15 Ind Cas 833 (835) Oudh. But see *Kizhakke Manjambrath Arulla* v. *Kanna Kurup*, (1918) 47 Ind Cas 595 (596): 8 Mad L W 152 [Suit for redemption against some co-mortgagees bars a suit for redemption against the other co-mortgagees].

(2) *Gobind Krishna* v. *Sirajunnissa*, (1910) 6 Ind Cas 226 (228): 7 All L J 627; *Soorju Prasad* v. *Saheb Lal*, (1865) 3 Suth W R 25 (26).

where the plaintiff[3] or the defendant[4] in the subsequent suit is different from the plaintiff or the defendant in the previous suit, the rule does not apply. The same principle holds good even in cases where same persons sue or are sued in different capacities in the two suits. *See* illustrations 5, 8, 10 and 13 below. O. 2, R. 2, Note 21.

Illustrations.

1. A Hindu widow alienates different portions of her husband's estate to different persons. A reversioner suing for possession after her death can sue the different alienees separately.[5]

2. Where a mortgage is executed by the manager of a joint Hindu family, a prior suit by the mortgagee against the manager does not bar a subsequent suit against the other members of the family.[6]

3. When a decree is obtained and its execution is resisted, suit against the person resisting execution is not barred under this rule.[6-a]

4 A suit for money does not bar a subsequent suit against others for enforcement of charge or lien in respect of that debt.[6-b]

5. A prior mortgagee sues on the mortgage without making the puisne mortgagee a party to the suit. A subsequent suit for the sale, by the mortgagee

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(3) *Dhani Ram Shaha* v. *Bhagirath Shaha*, (1895) 22 Cal 692 (706, 707); *Raja Kesav Venkattappiah* v. *Nayam Venkat Ranga Row*, (1910) 6 Ind Cas 603 (604): 1910 Mad W N 270: 7 Mad L Tim 244; *Kristo Das Roy* v. *Behari Lal Sikdar*, (1920) 57 Ind Cas 900 Cal: 10 L B R 159: 13 Bur L Tim 18 [Plaintiff in second suit was one of the *defendants* in prior suit. He'd R. 2 did not apply].

(4) *Musst Bindo* v. *Ramachandra*, (1919) 50 Ind Cas 905 (906, 907): 41 All 583: 17 All L J 658; *Baroo Sircar* v. *Massim Mundal*, (1874) 21 Suth W R (Gap) 206 (207); *Mohunt Jamoona Doss* v. *Baboo Pookhur Singh*, (1874) 22 Suth W R 133 (134); *Dampanaboyina Gangi* v. *Addulla Ramaswami*, (1902) 25 Mad 736 (740): 12 Mad L Jour 103; *Purun Sookh* v. *Soobhan*, (1876) 2 Agra 323; *Debi Prasana Rai* v. *Mangal Singh*, (1901) All W N 115 (115); *Ramachandra Vithal Bhat* v. *Gajanan Narain Deshmurli*, (1920) 56 Ind Cas 349 (352); 44 Bom 352: 22 Bom L R 296; *Narain Bhagwan Gandhi* v. *Sham Rao Laxman*, (1903) 27 Bom 379 (385, 386, 389): 5 Bom L R 233; *Kashi Bai* v. *Sheo Ram Kupchand*, (1918) 47 Ind Cas 896 (896) Nag; *Subramanian Chetty* v. *Mg Po Thet*, (1912) 14 Ind Cas 801 (802): 5 Bur L Tim 33; *Sonu Khushal Khadake* v. *Bahinibai Krishna*, (1916) 33 Ind Cas 950 (952): 40 Bom 351: 18 Bom L R 45; *Maharajah Sir Rameshwar Singh* v. *Srimati Janeshwari Babooshir and Ekradeshwar Singh*, (1913) 21 Ind Cas 397 (400): 18 Cal W N 129: 19 Cal L Jour 19; *Sheikh Muhammad Ibrahim* v. *Asmatullah*, 1925 Oudh 53 (54): 81 Ind Cas 562: *Jairam* v. *Janki Bai*, 1930 Nag 119 (120): 122 Ind Cas 697: 12 Nag L J 156; *Mt Kusam Dei* v. *Har Datt*, 1924 Oudh 129 (131): 26 Oudh Cas 98: 74 Ind Cas 459: *Indar* v. *Musammat Rao*, (1911) 11 Ind Cas 35 (36): 4 Pun Re No. 1912: 201 Pun L R 1912: 160 Pun W R 1911; *Wazir Muhammad* v. *Amanat Khan*, (1883) All W N 172 (172); *Bindo Bibi* v. *Ramachandra*, (1919) 50 Ind Cas 905 (907): 41 All 583: 17 All L Jour 658 [First suit against A—Second suit against A and others not barred]; *Rahmubhoy* v. *Turner*, (1890) 14 Bom 408 (415, 416) [Nominal defendant in former suit—Later suit against him as real defendant—Not barred]. But see contra *Jumoona Dassee* v. *Bamasoonderee*, (1865) 2 Suth W R 148 (149) [This is bad law]; *Madud Ali Khan* v. *Saleem Ahmad Khan*, (1872) 4 N W P 142 [This view is not good law].

(5) *Sheo Ratan* v. *Ghisiawan*, (1906) 9 Oudh Cas 326 (329); *Rao Kurun Singh* v. *Nawab Mahomed Fysy Ali Khan*, (1870-72) 14 M I A 187 (197): 10 Beng L R P C 1: 2 Suth P C J 474. But see *Maula Baksh* v. *Mt Jiwi*, 1923 Lah 556 (557): 85 Ind Cas 202 [The alienees were held to be in joint possession of the whole land].

(6) *Muhammad Askari* v. *Radhe Ram*, (1900) 22 All 307 (317): 1900 All W N 73.

(6-a) *Raman* v. *Sridharan*, (1893) 16 Mad 449 (450) [First suit against executant of a bond, second suit against other person resisting execution of decree not barred]; *Lalla Teeluckdaree Lall* v. *The Court of Wards*, (1869) 11 Suth W R 149: 2 Beng L R A C 230 [Decree against A—Suit against B who resists execution of that decree, not barred]; *Bhup Singh* v. *Bulab Rai*, (1886) All W N 269 (267-272) [Mortgagee obtaining decree against mortgagor—Execution of decree resisted by another—Suit against latter not barred]; *Krishtodass* v. *Ramkant*, (1881) 6 Cal 142 (146, 147): 7 Cal L Rep 396 [Suit by mortgagee against mortgagor—Third person resisting execution of decree—Suit against him not barred].

(6-b) *Mussammat Chand Kour* v. *Mussammat Fajjo*, (1880) Pun Re No 113 [First suit for money against mortgagor—Second suit to enforce lien against subsequent purchaser not barred]; *Mussammat Makhni* v. *Adjudhia Pershad*, (1882) Pun Re No. 142 [Money decree against mortgagor is no bar to suit to enforce lien against third parties]; *Behraichi Chaudhuri* v. *Surju Naik*, (1882) 4 All 257 (258): 1882 All W N 7 [Mortgagee obtaining mortgage decree against mortgagor—Purchaser of property resisting execution—Suit for declaration of lien against purchaser not barred]. In re *Hurry Mohun Paramanick*, (1871) 15 Suth W R 486 (486): 14 Beng L R 418 Note [Mortgagee obtaining money decree—Mortgaged property in the hands of different alienees—Mortgagee may sue the alienees separately for declaration of his lien].

O. 2, R. 2, Note 21.

against the puisne mortgagee is not barred.[7] The decision in 32 All. 119 is open to the same criticism as has been made about 22 All. 307 in illustration (2) above. *See* 35 M. L. J. 1 (P. C.), where the effect of S. 89, Transfer of Property Act is considered. Similarly a suit by the puisne mortgagee for sale without impleading the prior mortgagee does not bar a suit for redemption of the prior mortgage.[7-a]

6. A suit for redemption against a mortgagee is no bar to suit for contribution against a co-mortgagor.[8]

7. A suit for accounts and profits against a co-sharer does not bar a suit for profits against the same person as lambardar.[9]

8. In the case of joint promissors separate suits are maintainable against each of them, because under the Indian Contract Act, joint promissors are jointly and severally liable.[10]

9. Where certain trustees had failed to ask for a certain relief in a suit brought by them, the Advocate-General is debarred from suing for that relief subsequently.[11]

10. A suit against J. M. and against "Picture Palace", Nos. 84 and 85 by managing proprietor J. M. are against different defendants.[12]

11. A suit for profits by plaintiff in respect of his own share is no bar to a suit by him as the assignee of the profits due to another co-sharer.[13]

12. A suit against a mother in her personal capacity on a mortgage executed by her on behalf of her son is no bar to a suit against the son on the basis of the mortgage.[14]

13. A suit for specific performance of a contract of sale against *A* is no bar to a suit for possession against *A* and *B* in whose favour *A* had executed a conveyance.[15]

14. A suit for partition of properties held jointly by the plaintiff's family is no bar to suit for partition of properties held by the family jointly with strangers.[16]

For other instances, *see* the following cases.[17]

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(7) *Shamdei* v. *Baljit Singh*, (1910) 5 Ind Cas 451 (452): 32 All 119: 7 All L J 29.

(7-a) *Balmakund* v. *Sangari*, (1897) 19 All 379 (380, 381, 383, 384): 1897 All W N 94. But see *Choudhry Gunga Singh* v. *Lachmi Narain*, (1907) 10 Oudh Cas 145 (149); *Jhamman* v. *Dwarka Prasad*, 1897 All W N 100 (100).

(8) *Sabir Hussain* v. *Rirsat Ghaus*, (1929) All 696 (697): 1929 All L J 1162.

(9) *Chunno Lal* v. *Parbhu Dial*, (1910) 6 Ind Cas 809 (809): 7 All L J 596; *Sheobarin* v. *Bhagwan Sahai*, (1919) 50 Ind Cas 953 (954): 41 All 286: 17 All L J 313 [Suit for profits against lambardar does not bar suit against him as trespasser for mesne profits of *other* lands].

(10) *Ramanjulu* v. *Aravamudu*, (1910) 33 Mad 317 (322): 1910 Mad W N 35: 5 Ind Cas 735: 7 Mad L Tim 373; *Nobinchandra* v. *Maganlara*, (1884) 10 Cal 924 (927, 928); *Dhanput Singh* v. *Sham Sunder*, (1880) 5 Cal 291 (294): 4 Cal L Rep 591.

(11) *Advocate-General of Bombay* v. *Punjabi*, (1894) 18 Bom 551 (568).

(12) *Standard Electric and Motor Works* v. *Picture Palace*, 1924 Rang 161 (2) (162): 1 Rang 682: 2 Bur L Jour 218: 76 Ind Cas 791.

(13) *Md Abdul Aziz* v. *Refi-un-nissa Bibi*, (1912) 17 Ind Cas 833 (833): 10 All L J 469.

(14) *Venkataramanachari* v. *Thirunarayanachari*, (1915) 27 Ind Cas 930 (932): 2 Mad L W 212; *Mt Bhagawan Sevi* v. *Mehr Baksh*, (1883) Pun Re No. 41.

(15) *Abdul Majid* v. *Boida Nath Dhur*, (1902) 6 Cal W N 314 (318).

(16) See Note 10 *supra*, foot-note 57.

(17) *Mohunt Jumoona Doss* v. *Baboo Pookhur Singh*, (1874) 22 Suth W R 133 (134) [Different contracts with different persons though at same time give rise to different causes of action]; *Baroo Sircar* v. *Massim Mundul*, (1874) 21 Suth W R 206 (207), (Do.) *Rameswar Singh* v. *Janeswari*, (1913) 21 Ind Cas 397 (400): 18 Cal W N 129: 19 Cal L Jour 19 [First decree against E as legal representative of J. Second suit against J's widow as his legal representative not barred]; *Gangi* v. *Ramaswami*, (1902) 25 Mad 736 (740): 12 Mad L Jour 103 [Suit for inheritance—Different portions of the estate in the hands of different defendants—Separate suits lie]; *Subhadra Dassya* v. *Chandra Kumar Nag*, (1903-04) 8 Cal W N 54 (55) [First suit to annul incumbrances against some co-sharer under tenure holders—Second suit against other co-sharers not barred]; *Debi Prasanna* v. *Mangal Singh*, 1901 All W N 115 (115): 22 All 334 [Paintiff claiming by succession—Estate in hands of different persons—Separate suits lie]; *Kusem Dei* v. *Har Datt*, 1924 Oudh 129 (131): 26 Oudh Case 98: 74 Ind Cas 459 [Suit against Hindu widow for possession—

22. The previous decision must have been on the merits to operate as a bar.—O. 2, R. 2 will not operate as a bar where the decision in the previous suit has not been on the merits. Thus, where the judge in the previous suit has refused to adjudicate on a certain matter a fresh suit in respect of it is not barred.[1]

Similarly, where a previous suit has been dismissed on the ground of technical defect, the bar of O. 2, R. 2 does not apply.[2] As has been seen already in Note 10 *ante* where a plaint has been returned for representation to the proper Court or where the suit is withdrawn with leave to sue again under O. 23, R. 1 the fresh suit may include reliefs omitted in the prior plaint.

23.—Rule does not apply to different causes of action.—The rule does not require that the plaintiff should unite in the same suit *all the causes of action* he may have against the defendant. So, it does not operate as a bar when the subsequent suit is based on a cause of action different from that on which the first suit was based,[1] although such cause of action may arise

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Separate suit lies for setting aside gift in favour of daughter]; *Jiwan Singh* v. *Ghasita*, 1926 Lah 549 (549): 8 Lah L Jour 277: 27 Pun L R 402: 95 Ind Cas 9 [Prior suit for possession by heir of deceased owner against proprietary body—Proprietary body claiming by escheat—Part of property in possession of mortgagee—Subsequent suit for redemption after expiry of period of mortgage is not barred]; *Jairam* v. *Janki Bai*, 1930 Nag 119 (120): 122 Ind Cas 697: 12 Nag L J 156 [Mortgage by tenant with possession—Malguzar suing mortgagee for declaring mortgage as void—Omission to sue him for possession does not bar subsequent suit against tenant and mortgagee for possession]; *Ramhurry Mondul* v. *Mothoor Mohun Mondul*, (1873) 20 Suth W R 450 (453) P C [Different properties—Different defendants—Separate suits maintainable]; *Narayan* v. *Shamrao*, (1903) 27 Bom 379 (383, 386, 388, 389): 5 Bom L R 233 [Auction purchaser may sue separately different persons in possession of the estate]; *Dampanaboyina* v. *Addala Ramaswami*, (1902) 25 Mad 736 (740): 12 Mad L Jour 103 [Plaintiff claiming by right of succession estate in hands of different persons—Separate suits maintainable]; *Jogesh Chandra Banerjee* v. *Hyder Ali*, 1927 Cal 237 (238): 44 Cal L Jour 293: 99 Ind Cas 177 [Purchase at Court sale—Separate suits maintainable by purchaser against different persons in possession]; *Ramachandra Vithal Bhat* v. *Gajanan Narayan*, (1920) 56 Ind Cas 349 (352): 44 Bom 352: 22 Bom L R 296 [Different properties in the possession of different persons—Same title by purchase—Second suit not barred]; *Debi Prasad* v. *Mangal Singh*, 1901 All W N 115 [Plaintiff claiming by right of succession estate in hands of different persons—Separate suits maintainable]; *Puran Sookh* v. *Subban*, (1867) 2 Agra 323 [Property of deceased in hands of several persons—Creditor of deceased not bound to sue all in same suit].

Note 22.

(1) *Jagannadha Rao Pantalu Garu* v. *Sri Raja Vellanki Venkataramana Rao*, (1901) 11 Mad L Jour 332 (333); *Mahomed Ishaqkhan* v. *Rustum Ali Khan*, (1918) 44 Ind Cas 88 (89, 90): 40 All 292: 16 All L J 182; *Doraisami* v. *Subramania*, (1917) 42 Ind Cas 929 (931): 41 Mad 188: 22 Mad L Tim 484: 33 Mad L Jour 699: 1917 Mad W N 847: 6 Mad L W 784; *Deviditta* v. *Nathu*, (1912) 15 Ind Cas 930 (931, 932, 933): 56 Pun Re No. 1912: 251 Pun L R 1912: 245 Pun W R 1912; *Muhammad Baksh* v. *Balkrishnan*, (1915) 29 Ind Cas 731 (733): 72 Pun W R 1915: 160 Pun L R 1915; *Bakshiram* v. *Darku*, (1873) 10 Bom H C R A C J 369; *Becharji* v. *Pujayaee*, (1890) 14 Bom 31 (39, 55, 56); *Seetarama Sastrid* v. *Seetharama Ayyar*, 1928 Notes 23 (b): 108 Ind Cas 406 (1); *Maung Mya* v. *Ma Thin Tin*, 1925 Rang 313 (314): 4 Bur L Jour 113: 94 Ind Cas 611; *Doraisami Ayyar* v. *T. Subramania*, (1917) 42 I C 929: 41 Mad 188: 22 Mad L Tim 484: 33 Mad L Jour 699: 1917 Mad W N 847: 6 Mad L W 784; *Muhammad Ishaq Khan* v. *Muhammad Rustom Ali Khan*, (1918) 44 Ind Cas 88: 40 All 292: 16 All L J 182; *Khota Ram* v. *Nawaz*, 1924 Lah 21 (23, 24): 4 Lah 76: 5 Lah L Jour 238: 72 Ind Cas 765; *Laksmi Narsimham* v. *Laxmipathi*, 1931 Mad 830 (832): 1931 Mad W N 1008 [Court refusing a relief since suit not properly framed—Separate suit directed].

(2) *Gulab Shah* v. *Havali Shah*, (1915) 31 Ind Cas 463 (463): 87 Pun Re No 1915: 181 Pun W R 1915; *Ganpat Rao* v. *Doma Patel*, (1890) 3 C P L R 3 (6); *Ramsing* v. *Ramachandra Gopal Bhide*, (1901) 14 C P L R 104 (106); *Dasari Chellamma* v. *Chelliah*, (1910) 5 Ind Cas 756 (756): 7 Mad L Tim 84; *Ghasi Ram* v. *Nanak Chand*, 1930 Lah 634 (634); *Mt Parameshri* v. *Vasdeo*, 1885 Pun Re No. 35 [Suit for declaration dismissed for not asking consequential relief. Fresh suit not barred]; *Bhola Singh* v. *Gurdit Singh*, 1884 Pun Re No. 66 [Suit for declaration dismissed for not asking for consequential relief—Fresh suit not barred]; *Gulab Shah* v. *Haveli Shah*, (1915) 31 Ind Cas 463 (463): 87 P R 1915: 181 Pun W R 1915.

Note 23.

(1) *Saliman Sahib* v. *Bontala Haman Sahib*, (1913) 20 Ind Cas 418 (419): 38 Mad 247: 25 Mad L Jour 125; *Zia-ul-Haq* v. *Muhammad Ibrahim*, (1920) 56 Ind Cas 701 (703): 2 Lah L Jour 528; *Nilu* v. *Ashirbad Mandal*, 1921 Cal 321 (322): 33 Cal L Jour 232: 25 Cal W N 129: 60 Ind Cas 809; *Amanat* v. *Imdad*, (1888) 15 Cal 800 (808): 15 Ind App 106: 8 Sar 214: 12 Ind Jur 255: R & J 103; *Ketki* v. *Dinabundhu Patnik*, (1909) 3 Ind Cas 395: 10 Cal L Jour 83; *Mustafa Ali* v. *Ganga Baksh*, (1909) 1 Ind Cas 327 (328): 12 Oudh Cas 21; *Zinat-un-Nissa* v. *Rajan*, (1905) 27 All 142 (144): 1904 All W N 191: 1 All L J 498; *Ittappan* v. *Manavikrama*, (1898) 21 Mad 153 (156, 158): 8 Mad L Jour 92; *Sadya Pillai* v. *Chinni*, (1878-80) 2 Mad 352 (355): 4 Ind Jur 341; *Ramasami Ayyar* v. *Vythinatha Ayyar*, (1902) 26

O. 2, R. 2, Notes 23—24.

from the same *transaction* as the cause of action in the previous suit.[2]

Where a plaint is returned for presentation to the proper Court, a cause of action arising after the *original* presentation of the plaint should be deemed to have arisen subsequent to the previous suit.[3]

24. First suit for possession—Second suit for mesne profits.—There is a conflict of opinion as to whether a suit for possession bars a subsequent suit for mesne profits accrued *before* the suit. It was held in the undermentioned cases[1] that it does not, on the ground that the second suit is based

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Mad 760 (777): 13 Mad L Jour 448; *Mullick Kefait Hossein* v. *Sheo Pershad*, (1896) 23 Cal 821 (825); *Subbaraya Chetty* v. *Rathanavelu Chetty*, (1909) 2 Ind Cas 313 (313): 32 Mad 330: 5 Mad L Tim 105; *Munshee Bazloor Raheem* v. *Shumsoonnissa Begum*, (1866-67) 11 Moo Ind App 551 (605): Marsh 286: 2 Suth 59: 2 Sar 259: 2 Hay 190: 8 Suth W R P C 3; *Purushotham* v. *Atmaram*, (1899) 23 Bom 597 (601): 1 Bom L R 76; *Thyila* v. *Thyila*, (1881) 4 Mad 308 (310): 5 Ind Jur 407; *Kaveri* v. *Sastri*, (1903) 26 Mad 104 (107): 13 Mad L Jour 58; *Pittappur Raja* v. *Suriya Rao*, (1885) 8 Mad 520 (524): 12 Ind App 116: 9 Ind Jur 274: 4 Sar 638; *Andi* v. *Thatha*, (1887) 10 Mad 347 (350); *Subbayya* v. *Venkatesappa*, (1883) 6 Mad 49 (53); *Shankar* v. *Dattatrayya*, 1929 Bom 460 (462): 31 Bom L R 1123; *Jaimaja* v. *Askaur*, 1928 Lah 238 (239): 108 Ind Cas 613: 9 Lah 451: 29 Pun L R 548; *Muhammad Rowther* v. *Abdul Rahiman Rowther*, 1923 Mad 257 (260): 1922 Mad W N 845: 17 Mad L W 188: 32 Mad L Tim 82: 72 Ind Cas 207: 46 Mad 135; *Kathiri* v. *Kannan*, 1925 Mad 1172 (1173): 86 Ind Cas 949; *H H Maharaj of Cooch-Behar* v. *Raja Mahandra Ranjan*, 1921 Cal 277 (279): 34 Cal L Jour 465: 66 Ind Cas 923; *Kulada Prasad Chatterji* v. *Khudiram Mirsa*, 1923 Cal 371 (373): 70 Ind Cas 187: 27 Cal W N 673: 37 Cal L Jour 545; *C Siva Prosad Saw* v. *Sreemati Bhadra Moni Dassi*, 1929 Cal 93 (96): 48 Cal L Jour 368: 114 Ind Cas 139; *Sonba* v. *Babya*, 1924 Nag 89 (90): 20 Nag L R 28: 78 Ind Cas 376; *Lallu Prasad* v. *Babulal*, 1924 Nag 214 (214, 215): 76 Ind Cas 218; *S L Rangier* v. *Ramia Santhu*, 1930 Mad 264 (267): 127 Ind Cas 139; *Hira Lal* v. *Kali Charan*, 1929 Oudh 162 (166): 6 Oudh W N 142: 117 Ind Cas 412; *Hardeo Sing* v. *Bharani Sahai*, 1921 Pat 143 (145): 1921 Pat H C C 125: 60 Ind Cas 496; *Ramasami* v. *Vythianatha*, (1903) 26 Mad 760 (766): 13 Mad L Jour 448; *Musst Bhag Jogni* v. *Sakhi Mahton*, 1923 Pat 575 (575): 1923 Pat H C C 234: 77 Ind Cas 500; *Ramdhan* v. *Purushottam*, 1926 Nag 109 (114): 88 Ind Cas 699: 22 Nag L R 49; *Bhandari* v. *Nihalchand*, 1929 Rang 55 (59): 6 Rang 691: 117 Ind Cas 52; *Mg Ko Lay* v. *Maung Nyo*, 1927 Rang 237 (238): 6 Bur L Jour 85: 104 Ind Cas 370; *Ganga Prasad* v. *Kodulal*, 1927 Nag 322 (322, 323): 52 Mad L Jour 59: 99 Ind Cas 902; *Gulab Shah* v. *Haveli Shah*, (1915) 31 Ind Cas 463 (463, 464): 87 Pun Re 1915: 181 Pun W R 1915; *Munsharam* v. *Ganesh Chandra*, (1912) 16 Ind Cas 383 (384): 17 Cal W N 521; *Hazari Lal* v. *Ram Chander*, (1911) 10 Ind Cas 26 (27) All; *Mandal & Co* v. *Fazul Ellahie*, (1915) 26 Ind Cas 209 (209): 41 Cal 825; *Sumeka Dasi* v. *Balkunda Chandra Das*, (1915) 30 Ind Cas 607 (608) Cal; *Dasarathi Naidu* v. *Palala Kumaramma Raja*, (1918) 45 Ind Cas 969 (971): 7 Mad L W 557: 1918 Mad W N 427: 24 Mad L Tim 311; *Venkatasubba Rao* v. *Vigneswarudu*, 1928 Mad 840 (842): 1928 Mad W N 336: 28 Mad L W 82: 56 Mad L Jour 52: 110 Ind Cas 554; *Balwant Singh* v. *Chittan Singh*, (1871) 3 N W P 27; *Dparam* v. *Gouree Shankur*, (1871) 3 N W P 20; *Udmi* v. *Raji*, 1894 Pun Re No 23; *Ram Bhaj* v. *Devia*, 1881 Pun Re No 123; *Ratipal* v. *Bepin Chandra Chatterji*, (1917) 41 Ind Cas 80 (82): 4 Oudh L J 354; *Parmeshri* v. *Vasdeo*, 1885 Pun Re No 35; *Pragji Rudarjee* v. *Endarjee Bhimbhai*, (1872) 9 Bom H C 257; *Mothoor Mohun Mun Dul* v. *Khemunkuree Dossee*, (1866) 5 Suth W R 182 (184); *Mahandar* v. *Janki*, (1905) 2 All L J 342 (344); *Md Hafiz* v. *Mirza Md Zakaria*, 1922 P C 23 (26): 42 Mad L Jour 248: 20 All L J 17: 26 Cal W N 297: 15 Mad L W 377: 65 Ind Cas 79: 44 All 121: 1922 Mad W N 89: 24 Bom L R 341: 3 Pat L Tim 279: 30 Mad L Tim 224: 1 Pun W R 1922: 35 Cal L Jour 126: 49 Ind App 9 P C; *Deo Dutt* v. *Raj Bali*, 1928 Oudh 411 (412, 413): 5 Oudh W N 653: 112 Ind Cas 266; *Manmatha Nath Bose* v. *Jagat Ram Roy*, (1921) 59 Ind Cas 517 (519) Cal; *Swaminathan Chetty* v. *Palinappa Chetty*, (1915) 26 Ind Cas 228 (230): 41 Ind App 142: 18 Cal W N 617: 17 Nag L R 56 P C; *Sri Ram* v. *Kanshi Ram*, (1917) 40 Ind Cas 255 (257): 121 Pun L R 1917: 87 Pun W R 1917; *Jardine Skinner & Co* v. *Ranee Shama Sundaree*, (1870) 13 Suth W R 196 (197); *Hingu Lal* v. *Baldeo Ram*, (1902) 24 All 553 (555): 1902 All W N 170; *Ram Gopal Girdharilal* v. *Bhikulal Nandulal*, (1928) 109 Ind Cas 65: 1928 Notes 42 (c); *Abashai Shaikh* v. *Bhimji*, 1932 Bom 86 (88, 89): 33 Bom L R 1563: 135 Ind Cas 801 [Rent and premium under a separate contract—Different cause of action]. See also *Jaffar Hussain* v. *Krishnan*, 1930 Mad 701 (702): 58 Mad L Jour 703: 1930 Mad W N 520: 31 Mad L W 845: 125 Ind Cas 554: 53 Mad 761 [Prior suit confined to particular right of music in a 'medai'—Second suit on general right of music in street—Not barred]; *Becharji* v. *Pujaji*, (1890) 14 Bom 31 (55, 56).

(2) *Hari Chand* v. *Chiragh Din*, 1930 Lah 688 (689): 122 Ind Cas 733; *Payana* v. *Pana Lana*, (1914) 26 Ind Cas 228 (230): 41 Ind App 142: 18 Cal W N 617: 17 Nag L R 56 P C; *Rahini Nandan Chaudhuri* v. *Jadunandan Chaudhuri*, 1926 Cal 1022 (1026, 1028): 30 Cal W N 873: 97 Ind Cas 73.

(3) *Vankat Bhat* v. *Yamuna*, 1925 Nag 54 (57): 80 Ind Cas 286; *Mohsin Ali* v. *Ibrahim Ali*, 1890 All W N 243 (244).

Note 24

(1) *Manual Hag* v. *Mt Bakhtawari Bai*, (1891) 4 C P L R 88 (89); *Dubash Kadar* v. *Fakir Meera*, (1910) 8 Ind Cas 445 (447-448): 3 Bur L Tim 56; *Oktama* v. *Mabwa*, (1900-1907) 1 L B R 13 (14); *Sitaram* v. *Bhagavant*, (1869) 6 Bom H C R A C J 109; *Imad Ali* v. *Boonyad Ali*, (1870) 14 Suth W R 92 (93); *Raja Bikrama Singh* v. *Prab Dial*, 1889 Pun Re No 129; *Babu Issur Dutt* v. *Alluk Misser*, (1867) 7 Suth W R 429 (429); *Protap Chunder Burooah* v. *Ranee Surno Moyee*, (1869) 13 Suth W R 15 (19): 4 Beng L R 113 F B; *Ramachandra Adaram* v. *Lodha Gouri*, 1924 Bom 368 (368, 370): 20 Bom L R 288: 80 Ind Cas 259; *Bhimrav* v *Sitaram*, (1895) 19 Bom 532 (538, 539) [Future mesne profits]; *Miyan Khan* v. *Sarfaraz Khan*, (1921) 60 Ind Cas 65 (66) All; *Mon Mohun Sirkar* v. *Secretary of State*, (1890) 17 Cal 968

on a cause of action different from that of the first. The High Court of Allahabad[2] and the Oudh Judicial Commissioner's Court[3] have taken a contrary view. There is also a conflict of opinion as to the maintainability of a separate suit for mesne profits accruing *after* the institution of the prior suit for possession, some cases being in favour of the maintainability of such a suit[4] and others being against it.[5] But where the claims for possession and mesne profits are based on the *same allegations* of facts, the reliefs cannot be split up.[6]

Though a suit for possession and a suit for mesne profits may be treated as being based on distinct causes of action, a claim for mesne profits cannot itself be split up; the plaintiff should include the whole of the mesne profits accrued due at the time of the suit.[7]

A suit for mesne profits is no bar to a subsequent suit for possession.[8]

25. First suit for interest, second for principal.—See Note 10 ante, under the heading "first suit for interest on a mortgage and second suit for the principal".

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(971); *Kishare Lal Roy* v. *Sharut Chunder Mozumdar*, (1882) 8 Cal 593 (594): 10 Cal L Rep 359: 4 Shome L R 253; *Lalessor Babui* v. *Janki Bibi*, (1892) 19 Cal 615 (617); *Gutta* v. *Maganti*, (1908) 31 Mad 405 (406): 4 Mad L Tim 192 [11 Mad 151 not followed]; *Fatima Bibi* v. *Abdul Majid*, (1892) 14 All 531 (537): 1892 All W N 154; *Nawab Mahomad Kootubooddeen Khan* v. *Mahomed Nijabat Ali Khan*, (1869) Pun Re No 44; *Paramasukh* v. *Yadoji*, (1918) 46 Ind Cas 743 (744, 745): 15 Nag L R 101; *Ponnammal* v. *Ramamrida Aiyar*, (1915) 27 Ind Cas 679 (681): 38 Mad 829: 17 Mad L Tim 125: 28 Mad L Jour 127: 1915 Mad W N 130; *Radha* v. *Sakhu*, 1921 Nag 112 (113): 17 Nag L R 62; *Sheo Kumar* v. *Narayana Das*, (1902) 24 All 501 (503): 1902 All W N 139 [Suit for possession under S 9, Specific Relief Act no bar to suit for mesne profits]; *Thavasi* v. *Arumugam*, (1915) 28 Ind Cas 1 (4): 30 Mad L Jour 826: 2 Mad L W 157: 1915 Mad W N 170 [Suit for possession under S 9, Specific Relief Act no bar to suit for mesne profits]; *Ma Myaing* v. *Ma B Ohit*, 1926 Rang 137 (138): 5 Bur L Jour 47: 4 Rang 103: 95 Ind Cas 380 [Diss. from 3 L B R 56]. See also *Loknath Singh* v. *Dwarika Singh*, 1931 Pat 233 (233, 234): 10 Pat 329: 12 Pat L Tim 540: 133 Ind Cas 766 [Possession and mesne profits distinct reliefs—Cause of action not necessarily the same]. Also *Rameswar* v. *Dilu*, (1894) 21 Cal 550 (552, 553). See, however, *Kashinath* v. *Nathoo Keshav*, (1914) 25 Ind Cas 73 (74): 16 Bom L R 454: 38 Bom 444.

(2) *Suraj Bali* v. *G J Wallace*, 1882 All W N 3 (3); *Nanak Chait* v. *Bakhtawar Singh*, 1883 All W N 198 (198); *Mewa Kuar* v. *Banarsi Prasad*, (1895) 17 All 533 (535, 536): 1895 All W N 121; *Mashulla Khan* v. *Chiranji Lal*, 1881 All W N 58 (58); *Bhirgee Nath* v. *Narsingh Tewari*, (1916) 35 Ind Cas 475 (477): 36 All 61: 14 All L J 1161; *Lalji Mal* v. *Hulasi*, 1881 All W N 41 (42): 3 All 660 [Suit by usufructuary mortgagee]. See also *Reference under Court Fees Act*, S 5 (1894) 16 All 401 (408, 409): 1894 All W N 124.

(3) *Shahamat Husain* v. *Murali Prasad*, (1906) 9 Oudh Cas 224.

(4) *Mon Mohun Sirkar* v. *Secretary of State*, (1890) 17 Cal 968 (971); *Shwe Bon* v. *Mi U Tha Nyo*, (1916) 32 Ind Cas 696 (696): 9 Bur L Tim 92; *Khuddus* v. *Mahammad Hussain*, 1926 Mad 1015 (1016): 51 Mad L Jour 252: 24 Mad L W 290: 1926 Mad W N 814: 97 Ind Cas 389; *Ram Janam Singh* v. *Khub Lal Singh*, 1925 Pat 145 (2) (147): 6 Pat L Tim 78: 80 Ind Cas 710; *Equitable Coal Company, Ltd* v. *Bagala Sunderi Debi*, 1924 Cal 442 (443): 71 Ind Cas 972; *Jagannatha Rao Pantulu Garu* v. *Vellanki Venkatarama Rao*, (1901) 11 Mad L Jour 332 (333); *Budhilal* v. *Mokhanchand*, 1928 Nag 65 (1) (65): 105 Ind Cas 777; *Wajid Khan* v. *Whahid Hussain*, 1931 Oudh 131 (132): 7 Oudh W N 831: 128 Ind Cas 751: 6 Luck 243; *Mahommad Shakur* v. *Mt Husani Bibi*, 1927 All 772 (773): 101 Ind Cas 816; *Lakshmibhai* v. *Jagannath*, 1932 Bom 222 (223, 224): 34 Bom L R 447: 56 Bom 292: 138 Ind Cas 579; *Jai Kishen* v. *Pashori Lal*, 1932 Lah 448 (449): 137 Ind Cas 775: 33 Pun L R 570 [Partition suit —Subsequent suit for subsequent mesne profits]; *Ram Karan* v. *Nakchhad*, 1931 All 429 (432): 1931 All L J 673: 133 Ind Cas 298 S B; *Ganga Ram* v. *Muteera*, (1932) 54 All 65 (68): 1932 All 510; *Parsotam Ram* v. *Mangal Ram*, 1932 All 45 (45): 1931 All L J 606: 135 Ind Cas 254 [When subsequent mesne profit was *asked for* in prior suit there is no bar under O 2, R 2].

(5) *Sadid-ud-din* v. *Salim-ud-din*, 1875 Pun Re No 72; *Goswami Gordhan Lalji Maharaj* v. *Bishambar Nath*, 1927 All 716 (716, 717): 49 All 597: 25 All L J 409.

(6) *Laljimal* v. *Hulasi*, (1881) 3 All 660 (661, 662): 1881 All W N 41; *Debi Dial* v. *Ajaib Singh*, (1881) 3 All 543 (544, 545): 1881 All W N 33.

(7) *Roukminee Koer* v. *Ram Tohul Roy*, (1874) 21 Suth W R 223 (224); *Saem Sirdar* v. *Kamaluddy Sirdar*, (1874) 22 Suth W R 424 (425); *Madan Mohan* v. *Sheo Shankar*, (1886) 12 Cal 482 (484): 4 Sar 674 P C. But see *Kuladaprasad Chatterjee* v. *Khudiram Misra*, 1923 Cal 371 (372, 373): 70 Ind Cas 187: 27 Cal W N 673: 37 Cal L Jour 545 [Suit for mesne profits upto delivery of symbolical possession is no bar to suit for mesne profits accruing subsequently].

(8) *Manohar Lall* v. *Gouri Sankar*, (1882) 9 Cal 283 (287): 12 Cal L Rep 434: 5 Shome L R 128; *Bhairao Prasad* v. *Sangram Singh*, (1888) 1 C P L R 143 (144); *Muthu Karuppa Kothan* v. *Sitha Viriyan Chetty*, (1909) 1 Ind Cas 644 (645): 5 Mad L Tim 220; *Tirupati* v. *Narasimha*, (1888) 11 Mad 210 (212). But see *Sheo Ratan*

O. 2, R. 2, Note 26.

26. Other Examples.—

(1) *A* sues *B* for injunction restraining *B* from interfering with *A's* possession. The suit is dismissed as *A* is found not to be in possession. *A* then sues *B* for possession. The suit is not barred.[1]

(2) *A* sues *B* for declaration of his right to certain land. The suit is dismissed on the ground that *A* might and ought to have sued for possession. Then he sues *B* for possession. The suit is not barred as the *causes of action* for the two suits are not the same.[2]

(3) The dismissal of a suit for specific performance of an agreement to transfer land is no bar to a suit for the return of the consideration money.[3]

(4) The dismissal of a suit for sale as on a simple mortgage does not bar a suit for possession as on a usufructuary mortgage.[4]

(5) Where a suit is compromised, a second suit based on the compromise is not barred.[5]

(6) Distinct trespasses on different parts of the plaintiff's land committed at different times give rise to different causes of action.[6]

(7) A person whose property had been wrongfully attached in execution of a decree, sued for and obtained a decree that the property was not liable to attachment and sale under the decree. This does not bar a suit for damages for wrongful attachment.[7]

Misra v. *Ram Dhani*, (1906) 9 Oudh Cas 322 (325) [Suit for mesne profits bars suit for possession]; *Hiromal* v. *Farid Khan*, (1915) 29 Ind Cas 939 (941): 9 Sind L R 23.

Note 26.

(1) *Mahamad Khan* v. *Shafi Mahammad*, 1930 Sind 87 (88, 89): 120 Ind Cas 509; *Bandey Ali* v. *Gokal Miser*, (1912) 13 Ind Cas 154 (155): 34 All 172: 9 All L J 111. But see contra *Gokul Miser* v. *Bande Alibeg*, (1910) 8 Ind Cas 9 (16) All.

(2) *Sliman Sahib* v. *Bontala Haman Sahib*, (1913) 20 Ind Cas 418 (419): 38 Mad 247: 1913 Mad W N 554: 25 Mad L Jour 125; *Narayan* v. *Bhiwaji*, (1910) 6 Ind Cas 926 (927): 6 Nag L R 81; *Maung Thein Daw* v. *Ma Shwe Ein*, 1926 Rang 123 (123, 124): 5 Bur L Jour 64: 95 Ind Cas 892; *Darbo* v. *Keshorai*, (1879) 2 All 356 (357); *Mohan Lal* v. *Bilaso*, (1892) 14 All 512 (518): 1892 All W N 80; *Kamola Kaminy Debia* v. *Lokenath Kur*, (1882) 8 Cal 825 (826) (Note); *Luchmi Narain Singh* v. *Asserup Koer*, (1883) 9 Cal 43 (47): 5 Shome L R 87; *Nonoo Singh* v. *Anand Singh*, (1886) 12 Cal 291 (293, 294); *Jibunti Nath* v. *Shib Nath*, (1882) 8 Cal 819 (824): 10 Cal L Rep 537; *Ram Sewak* v. *Nakched*, (1882) 4 All 261 (267); *Sarauli* v. *Kunj Behari Lal*, (1883) 5 All 345 (354); *Ram Charan* v. *Tulsi Ram*, 1929 All 306 (307): 1929 All L J 492: 119 Ind Cas 562; *Tulsi Ram* v. *Ganga Ram*, (1875-78) 1 All 252 (253); *Maung Ba Thaung* v. *Ma Shin Min*, (1917) 37 Ind Cas 15 (18): 9 L B R 37: 10 Bur L Tim 189; *Aiyanar Raja* v. *Alagar Raja*, (1919) 52 Ind Cas 434 (435) Mad; *Maung Pyaw* v. *Maung Po Ok*, (1899-1900) L B R 410; *Lalchand Hiralal Marvadi* v. *Hasto Bai Premsukh Narainbas*, (1894) 7 C P L R 73. But see contra *Subhan Ali* v. *Imami Begam*, 1922 Nag 129 (134): 65 Ind Cas 194: 21 Nag L R 124: 4 Nag L J 192. But see also *Kashi Rai* v. *Mt Kali Kueri*, 1923 All 554 (555): 77 Ind Cas 756 [Prior suit for mere declaration dismissed on merits—Subsequent suit for possession held barred—*Res-judicata*].

(3) *Parangodan Nair* v. *Perumtoduka Illot Chata*, (1904) 27 Mad 380 (381); *Munni Babu* v. *Koer Kamta Singh*, 1923 All 321 (321): 45 All 378: 21 All L J 265: 72 Ind Cas 86: 4 L R A 176; *Hingan Lal* v. *Mansa Ram*, 1894 All W N 157 (158). Contra *Chidambara Nadar* v. *Srinivasa Ayyangar*, (1898) 8 Mad L Jour 61 (62).

(4) *Raghava Chariar* v. *Seshadri Iyengar*, (1905) 15 Mad L Jour 374; *Veerana Pillai* v. *Muthukumara Asari*, (1904) 27 Mad 102 (105): 13 Mad L Jour 439.

(5) *Prasanni* v. *Narain*, (1905) 2 All L J 680 (681): 1905 All W N 128; *Musammat Ind Kaur* v. *Sujan Singh*, 1894 Pun Re No 47; *Gupta Narain* v. *Bijoya Sundari*, (1898) 2 Cal W N 663 (664); *Zia-ul-Haq* v. *Muhammad Ibrahim*, (1920) 56 Ind Cas 701 (703): 2 Lah L Jour 528 [First suit for dissolution of partnership and accounts—Suit referred to arbitration—Award fixing shares—Second suit for partition is not barred].

(6) *Kothanda Ramappa* v. *Subbanna*, (1900) 10 Mad L Jour 136 (138); *Lallu Prasad* v. *Babu Lal*, 1924 Nag 214 (214): 76 Ind Cas 218; *Riayatullah* v. *Nasir*, (1884) 6 All 616 (617): 1884 All W N 185.

(7) *Manzur Hussain Khan* v. *Muzahrul Samad*, 1927 Oudh 48 (48): 95 Ind Cas 299; *Maikulal* v. *Nazir Ahmad*, (1920) 55 Ind Cas 657 (657): 7 Oudh L J 310. See *Lal Bihari* v. *Paltan*, (1902) 5 Oudh Cas 304 (306) [Suit for declaration that property not liable to attachment and sale, dismissed—Second suit for compensation for illegal attachment is barred].

(8) A suit by reversioners for declaration of their reversionary rights and a suit by them for possession are based on distinct causes of action.[8] O. 2, R. 2, Note 26.

(9) A suit by a Mahomedan widow for *dower* does not bar a suit by her for declaration of her right to possess her husband's estate for her life, in accordance with a local custom.[9]

(10) A suit by Hindu reversioners for injunction restraining alienations by a Hindu widow is no bar to a suit for declaration that a gift by the widow is inoperative and cannot affect plaintiff's rights.[10]

(11) A suit for possession of land held under a will, in consequence of plaintiff having been wrongfully deprived of it, is no bar to a suit for personal property under the will.[11]

(12) A suit for the wrongful conversion of goods given in a will, is no bar to a suit to obtain payment of the legacies.[12]

(13) Where a Hindu widow transfers by several alienations, different portions of her husband's estate, the reversioners have a distinct cause of action in respect of each alienation.[13]

(14) A suit by a Hindu reversioner during the widow's lifetime for a declaration that a transfer by the widow is not binding on him is no bar to a suit after the widow's death, for possession of the property transferred.[14]

(15) A suit for declaration that property is not liable to attachment and sale under a decree is no bar to a suit for possession.[15]

(16) A suit by a Hindu daughter to establish her title to her father's estate as heir in reversion on her mother's death is no bar to a suit for possession of a specific portion of the estate.[16]

(17) A suit to eject the defendant on the basis of a lease is no bar to a suit based on title.[17]

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(8) *Manmatha Nath Bose* v. *Jagat Ram Roy*, (1921) 59 Ind Cas 517 (519) Cal; *Muhammad Ali* v. *Mir Haidar*, (1915) 28 Ind Cas 301 (302): 82 Pun L R 1915: 223 Pun W R 1915.

(9) *Mahomad Riasat Ali* v. *Hasain Banu*, (1894) 21 Cal 157 (168): 20 Ind App 155: 6 Sar 374: 17 Ind Jur 484: R & J 133 P C.

(10) *Chand Kour* v. *Partab Singh*, (1888) 16 Cal 98 (102): 15 Ind App 156: 5 Sar 243: 12 Ind Jur 331 P C.

(11) *Pittapur Raja* v. *Surya Ram*, (1885) 8 Mad 520 (524): 12 Ind App 116: 9 Ind Jur 274: 4 Sar 638 P C.

(12) *Venkatadri Appa Rao Bahadur* v. *Parthasarathi Appa Rao*, 1925 P C 105 (108): 48 Mad 312: 48 Mad L Jour 627: 52 Ind App 214: 23 All L J 261: L R 6 P C 82: 27 Bom L R 823: 87 Ind Cas 824: 1925 Mad W N 441: 3 Pat L R 208: 29 Cal W N 989 P C.

(13) *Looloo Singh* v. *Rajender Laha*, (1867) 8 Suth W R 864 (865); *Govind* v. *Janaki Bai*, 1930 Nag 3 (4): 121 Ind Cas 41: 26 Nag L R 121; *Bahadur Singh* v. *Sultan Husain Khan*, 1922 Oudh 171 (175): 8 Oudh L J 535: 66 Ind Cas 455: 3 U P L R 83; *Sonu Khuashal Khadake* v. *Bahinibai Krishna*, (1916) 33 Ind Cas 950 (952): 40 Bom 351: 18 Bom L R 45; *Kooer Golab Singh* v. *Rao Kurun Singh*, (1873) 10 Beng L R 1: 14 Moo Ind App 176: 2 Suth 474; *Pragji Rudarji* v. *Endarji Bhimbhai*, (1872) 9 Bom H C 257.

(14) *Kashi Ram* v. *Musammat Amri*, (1910) 5 Ind Cas 207 (208): 32 All 189: 7 All L J 153; *Asa Singh* v. *Indar Singh*, 1898 Pun Re No 91.

(15) *Ganpat Rai* v. *Hira Singh*, 1891 Pun Re No 29; *Ambu* v. *Kellûama*, (1891) 14 Mad 23 (24, 25): 1 Mad L Jour 28.

(16) *Mt Jaggo Bai* v. *Utsava Lal*, 1929 P C 166 (169): 56 Ind App 267: 51 All 439: 1929 All L J 716: 33 Cal W N 809: 30 Mad L W 60: 10 Pat L Tim 527: 31 Bom L R 891: 6 Oudh W N 589: 50 Cal L Jour 52: 117 Ind Cas 498: 1929 Mad W N 762: 57 Mad L Jour 160 P C.

(17) *Ram Singh* v. *Jowala Singh*, 1896 Pun Re No 55; *Mangalathammal* v. *Veerappa*, (1919) 52 Ind Cas 813 (816): 1919 Mad W N 287; *Nagasamy Ayyar* v. *Perumal Ayyar*, (1903) 13 Mad L Jour 475 (476). See also *Parambath* v. *Puthengattil*, (1905) 28 Mad 406 (408).

O. 2. R. 2, Note 26.

(18) Where a vendee or other transferee of property sues for possession but the suit is dismissed, he is not debarred from suing for the return of the consideration money.[18]

(19) The dismissal of a suit for redemption on the basis of one mortgage, is no bar to a suit on the basis of another mortgage.[19]

(20) Where a suit is dismissed for want of a cause of action, a second suit on the basis of the true cause of action is not barred.[20]

(21) A suit for redemption and a suit for ejectment on the ground of title are based on distinct causes of action.[21]

(22) The dismissal of a suit for enhancement of rent is no bar to a suit for recovery of rent at the rate originally fixed.[22]

(23) A decree for rent at the original rate is no bar to a suit to recover the difference between the rent at the old rate and that at the enhanced rate for the same period (where plaintiff obtained a decree for enhancement of rent after a decree for rent at old rate was passed).[23]

(24) A promissory-note or other negotiable instrument creates a distinct cause of action from the original debt for which the instrument was given,[24] so that, if several promissory-notes are given for portions of the same

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(18) *Venkatarama Ayyar* v. *Venkatasubramanian*, (1901) 24 Mad 27 (31): 10 Mad L Jour 217; *Lukhan Chandra Mondal* v. *Takim Dhali*, 1924 Cal 558 (562): 28 Cal W N 1033: 80 Ind Cas 357; *Pattaracharier* v. *Alamelumangai*, 1927 Mad 273 (275-276): 25 Mad L W 11: 100 Ind Cas 40; *Lalita Prasad Narayan Singh* v. *Sukhdeo Narayan Singh*, 1929 Pat 241 (241): 120 Ind Cas 479; *Ramdhan* v. *Purushottam*, 1926 Nag 109 (114): 88 Ind Cas 699: 22 Nag L R 49; *Lakshmi Das* v. *Balak Ram*, (1912) 16 Ind Cas 24 (25): 104 Pun Re 1912: 182 Pun L R 1912: 156 Pun W R 1912; *Pachiakutti Udayan* v. *Panchanada Patten*, (1900) 10 Mad L Jour 204 (205); *Hanuman Kamut* v. *Hanuman Mandar*, (1888) 15 Cal 51 (53); *Lakshman Chandra* v. *Takim Dhali*, 1926 P C 118 (119): 30 Cal W N 1009: 24 Mad L W 328 P C. See also *Hanuman* v. *Hanuman*, (1892) 19 Cal 123 (126): 18 Ind App 158: 6 Sar 91 P C [Privy Council expressly left the question open].

(19) *Ram Sahai* v. *Ahmedi Begam*, (1911) 9 Ind Cas 53 (54): 33 All 302: 8 All L J 47; *Ramasami* v. *Vythianatha*, (1903) 26 Mad 760 (775); *Thrikaikat Madathal Raman* v. *Thrithiral Krishnan Nair*, (1906) 29 Mad 153 (154): 16 Mad L Jour 48. See also *Maung Kyaw* v *Magauk*, (1915) 27 Ind Cas 732 (733): 8 Bur L Tim 101 [Cause of action based on a distinct contract].

(20) *Ram Soondur Sein* v. *Krishno Chunder Goopto*, (1872) 17 Suth W R 380 (382); *Venkata Pappaya Rao* v. *Secretary of State for India*, (1915) 26 Mad 51 (51): 12 Mad L Jour 432; *Balbhaddar Nath* v. *Ram Lal*, (1904) 26 All 501 (503): 1904 All W N 89: 1 All L J 228; *Dasarathi Naidu* v. *Palla Kumaramall Raja*, (1918) 45 Ind Cas 969 (972): 7 Mad L W 557: 1918 Mad W N 427: 24 Mad L Tim 311; *Mt Prab Devi* v. *Harkishen Das*, 1884 Pun Re No 47; *Hazari Lal* v. *Ram Chander*, (1911) 10 Ind Cas 26 (27) All; *Udai Ram* v. *Court of Wards, Aligarh*, (1915) 29 Ind Cas 678 (679) Rang; *Laccha Mal* v. *Hirde Nath*, 1925 Lah 459 (2) (460): 7 Lah L Jour 236: 87 Ind Cas 994: 6 Lah 384: 26 Pun L R 280: 26 Pun L R 558. See however *Muthu Narayana Reddi* v. *Rayalu Reddi*, (1896) 6 Mad L Jour 51 (52). See also *Abdul Hakim Khan* v. *Karan Singh*, (1915) 30 Ind Cas 951 (952, 953): 37 All 646: 13 All L J 929 [Deliberate omission to sue for right relief operates as bar].

(21) *Naro Balvant* v. *Ram Chandra*, (1889) 13 Bom 326 (329); *Amanat* v. *Imdad Husain*, (1888) 15 Cal 800 (808): 15 Ind App 106: 5 Sar 214: 12 Ind Jur 255: R & J 108 P C; *Kuppu Naidu* v. *Venkatakrishna*, (1897) 20 Mad 82 (83): 6 Mad L Jour 229; *Parambath* v *Puthengattil*, (1905) 28 Mad 406 (408); *Zinat-un-nissa* v. *Rajan*, (1905) 27 All 142 (144): 1904 All W N 191: 1 All L J 498; *Jaimal* v. *Ganeshi Mal*, 1924 Lah 143 (144): 4 Lah 187: 5 Lah L Jour 296: 75 Ind Cas 528: *Khanshi Ram* v. *Ralla Ram*, 1927 Lah 752 (753): 104 Ind Cas 820; *Ram Bali* v. *Ram Asre*, 1925 Oudh 386 (388): 12 Oudh L J 105: 86 Ind Cas 686; *Ganpat Singh* v. *Tohfa*, (1912) 15 Ind Cas 15 (16): 10 All L J 86; *Elkur Ramchandriah* v. *Chavva Papanna*, (1913) 21 Ind Cas 42 (42): 1913 Mad W N 646; *Shridhar Vinayak* v. *Narayan*, (1894) 11 Bom H C 224 (230). But see *Muthu Narayana Reddi* v. *Rayalu Reddi*, (1896) 6 Mad L Jour 51 (52).

(22) *Khedaroonissa* v. *Boodhee*, (1870) 13 Suth W R 317 (318); *Sudduruddin* v. *Bani*, (1888) 15 Cal 145 (149, 150). Contra *Kunnock Chunder Mookerjee* v. *Guru Dass Biswas*, (1883) 9 Cal 919 (920): 12 Cal L Rep 919.

(23) *Deb Narain Bhakat* v. *Jagadish Chandra Deo*, 1928 Cal 684 (685): 32 Cal W N 870: 110 Ind Cas 395. But see *Manmatha Pal Chaudhary* v. *Surendra Nath Bose*, 1925 Cal 463: 40 Cal L Jour 538: 85 Ind Cas 162.

(24) *Natesa Mooppan* v. *Ramachandra Ayyar*, (1915) 27 Ind Cas 116 (118): 27 Mad L Jour 728: 1 Mad L W 1070; *M K M V Chetty* v. *Ma Mya*, 1925 Rang 304 (304): 4 Bur L Jour 130: 94 Ind Cas 628; *Umed Dholchand* v. *Pir Saheb Jiva Miya*, (1883) 7 Bom 134 (136, 137); *Firm of Sadasuk Jankidas* v. *Krishnen Pershad*, (1919) 50 Ind Cas 216 (219): 1918 P C 146: 46 Cal 663: 29 Cal L Jour 340: 17 All L J 405:

debt, each promissory-note can be sued on separately.[25] O. 2, R. 2, Note 26.

(25) A suit for cancellation of a deed of transfer, does not preclude a suit for possession of the property.[26]

(26) A suit for divorce on the ground of misconduct, among the Burmese Buddhists, is no bar to a suit for partition.[27]

For other instances, *see* the undermentioned cases.[28]

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25 Mad L Tim 258: 36 Mad L Jour 429: 21 Bom L R 605: 1 U P L R P C 37: 1919 Mad W N 310: 23 Cal W N 937: 10 Mad L W 143: 46 Ind App 33 P C; *Saminathan Chetty* v. *Palniappa Chetty*, (1915) 26 Ind Cas 228 (230): 41 Ind App 142: 18 Cal W N 617: 17 Nag L R 56; *Beniram* v. *Ramachandra*, (1915) 26 Ind Cas 302 (304): 36 All 560: 12 All L J 959. But see *Mundar Bibi* v. *Baij Nath Prasad*, (1920) 54 Ind Cas 424 (425): 42 All 193: 18 All L J 81. See also *Bhag Bhari* v. *Gujar Mal*, (1917) 38 Ind Cas 623 (625): 63 Pun Re 1917: 40 Pun W R 1917 [Where there was held to be only one cause of action].

(25) *Ananthanarayana* v. *Savitri*, (1912) 13 Ind Cas 458 (461): 36 Mad 151: 1912 Mad W N 59: 11 Mad L Tim 63: 22 Mad L Jour 231. But see *Preonath* v. *Bisnath*, (1907) 29 All 256 (259): 4 All L J 85: 1907 All W N 41 [Where a second suit was held to be barred].

(26) *Durga Prasad* v. *Jagat Jit Singh*, 1928 Oudh 359 (362): 5 Oudh W N 265: 3 Luck 487: 112 Ind Cas 169. But see *Maung On Gaing* v. *Ma On Sin*, (1916) 33 Ind Cas 135 (136): 9 Bur L Tim 93 [Where it was held that such a suit was barred].

(27) *Maung Pye* v. *Ma Me*, (1902-1903) U B R Buddhist Law, Divorce, p. 6; *Ma Gyan* v. *Maung Su Wa*, (1897-1901) U B R, Vol II, p 28; *Maung Tha Chi* v. *Ma E Mya*, (1900-1902) 1 L B R 7 (8); *Maung Pe* v. *Ma Lon Ma Gale*, (1911) 11 Ind Cas 497 (498): 38 Cal 629: 38 Ind App 140: 15 Cal W N 766: 14 Cal L Jour 15: 8 All L J 789: 13 Bom L R 464: (1911) 2 Mad W N 397: 4 Bur L Tim 153: 6 L B R 18: 10 Mad L Tim 479 P C. But see *Lan Ma Gale* v. *Mg Pe*, (1909) 4 Ind Cas 306 (2) (308): 5 L B R 114.

(28) *Parmeshwari Das* v. *Lachman Prasad*, 1930 All 824 (825): 1930 All L J 1066: 129 Ind Cas 439 [Plaintiff agreeing to construct defendant's house and provide funds approximately to the extent of Rs. 2,000—Plaintiff's money repayable gradually in ten years—House hypothecated to plaintiff to secure repayment—No provision made in case expenditure exceeded Rs. 2,000—On accounts being taken, defendant found liable for Rs. 1,400 over and above Rs. 2,000—Defendant executing sarkhat for Rs. 1,400—Plaintiff suing on basis of this sarkhat prior to expiry of ten years of original agreement—As sarkhat was a contract for distinct and separate sum, suit was not premature]; *Ganesh Ram Pal* v. *Mohesh Ram Pal*, (1909) 4 Ind Cas 534 (535): 13 Cal W N 669 [Suit for specific performance of a contract to reconvey land to plaintiff bars a suit for mesne profits to which plaintiff is entitled on account of the delay in reconveyance]; *Har Dayal* v. *Aya Ram*, (1914) 22 Ind Cas 664 (665): 83 Pun L R 1914: 43 Pun W R 1914 [Suit for dissolution of partnership no bar to suit for property held independently of partnership]; *Sabir Hussain* v. *Rirasat Ghaus*, 1929 All 696 (697): 1929 All L J 1162 [Redemption and contribution suits against mortgagor are different causes of action]; *Yashwant* v. *Vithal*, (1897) 21 Bom 267 (271) [Separate contracts contained in the same document give rise to distinct causes of action]; *Mahabeer Singh* v. *Rambhajan*, (1869) 16 Cal 545 (548) [Defendant cutting and carrying away crops and *subsequently* dispossessing plaintiff—Suit for possession and mesne profits and suit for damages for removal of crops—Causes of action are different]; *Abdur Nasir* v. *Rasulan*, (1893) 20 Cal 385 (387) [Suit for exclusion from joint property—No bar to suit for partition]; *Maung Lu Tha* v. *Maung Po U*, (1921) 64 Ind Cas 174 (176) Rang: 1921 L B R 13 (15, 16): 11 L B R 1 [Suit for exclusive possession of a specific portion on the ground of prior partition dismissed—Second suit for partition of whole not barred]; *Moyi* v. *Avuthraman*, (1899) 22 Mad 197 (200) [Suit for possession of land—Subsequent conversion of movables on the land—Second suit for damages for conversion not barred]; *Abdul Hamid* v. *Surbuland Khan*, 1902 Pun Re No 78: 1902 Pun L R 137 [Suit for value of crops misappropriated no bar to suit for possession of land on which the crops were lying]; *Chaladom Tholan* v. *Kakkath Kunha*, (1902) 25 Mad 669 (671): 12 Mad L Jour 406 [Previous suit for injunction restraining defendants from digging up and removing shells, dismissed—Subsequent suit for value of shells removed not barred]; *Banda Hasan* v. *Abadi Begam*, (1882) 4 All 180 (181) [Suit for rent in Revenue Court is no bar to suit to enforce mortgage executed by tenant to secure payment of rent]; *Chuni Lal* v. *Banaspat*, (1887) 9 All 23 (25): 1886 All W N 279 [Rent suit in Revenue Court no bar to suit to enforce mortgage executed to secure payment of rent]; *Okhoy Koomar* v. *Mahatap*, (1880) 5 Cal 24 (26) [Suit for abatement of rent which has been decreed is no bar to suit for refund of the excess rent paid]; *Hansraj* v. *Lalji*, (1904) 28 Bom 447 (449-450): 6 Bom L R 454 [Suit on account stated is no bar to suit on a mortgage]; *Nataraja Ayyar* v. *Subramania Ayyar*, (1909) 1 Ind Cas 806 (806): 5 Mad L Tim 294 [Wrong description of property by clerical error—Subsequent suit for declaration that property belonged to plaintiff not barred]; *Subbaraya* v. *Krishna*, (1883) 6 Mad 159 (163, 166) [Suit for rent bars suit to enforce a forfeiture for non-payment of the same rent]; *Kannan* v. *Tenju*, (1882) 5 Mad 1 (3) [Malabar Tarwad—Suit by Karnavan against Anandarvan for recovery of tarwad property—Some items omitted—Separate suit can be brought for these]; *Abdur Rashid* v. *Qudratunnissa Bibi*, 1924 All 713 (715): 22 All L J 432: L R 5 All 321: 79 Ind Cas 338: 46 All 542 [Suit for share of inheritance and suit for dower—Causes of action are different]; *Kaisar Begam* v. *Nizam Ahmad*, (1908) 11 Oudh Cas 69 (73) [Suit for dower and suit for share of inheritance—Causes of action are different]; *Seikh Abdu Rashid* v. *Mt Qudrat-un-Nissa*, 1922 All 510 (511, 512, 513): L R 3 All 587: 70 Ind Cas 817 [Suit for dower is no bar to suit for share of inheritance]; *Umda Begam* v. *Muhammadi Begam*, (1911) 9 Ind Cas 200 (202): 39 All 291: 8 All L J 27 [Suit for portion of dower as prompt is no bar to suit for balance as for deferred dower]; *Nagathal* v. *Ponnusami*, (1890) 13 Mad 44 (45) [Suit to cancel document on the ground that defendant had agreed to execute a release, is based on a different cause of action from a suit to obtain declaration that it had been executed for a nominal purpose]; *Mohar Singh* v. *Daulat Ram*, 1928 Lah 534 (1), (534): 11 Lah L Jour 64: 110 Ind Cas 491 [Suit for possession by landlord—Suit for compensation for contumacious holding—Causes of action are separate]; *Raghunath Singh* v. *Achuthanand*, (1918) 43 Ind Cas 374 (2), (375): 3 Pat L W 283 [Obstruction to water-course—Suit for injunction for removal of obstruction no

O. 2, R. 2, Note 27.

27. **"Shall not afterwards sue."**—The rule says "shall not *after-*

bar to suit for damages accruing after decree in such suit]; *Shib Singh* v. *Jograj Singh*, 1930 All 116 (117): 121 Ind Cas 827 [Suit for money had and received for plaintiff's use, and suit for account, are based on different causes of action]; *Ghelabhai Jinabhai* v. *Chhagan Narasi*, 1930 Bom 60 (60) 31 Bom L R 1232: 54 Bom 11: 122 Ind Cas 417 [Suit on one Khata—Account running through other Khatas also—Suit dismissed—Subsequent suit on all Khatas is maintainable]; *Bika* v. *Balanda*, 1925 Lah 193 (194): 78 Ind Cas 579 [First suit dismissed as properties were wrongly described—Second suit not barred]; *Piari* v. *Khiali Ram*, (1881) 3 All 857 (858): 1881 All W N 100 [First suit for foreclosure dismissed as premature—Second suit for another relief (for sale) not barred]; *Bhagjogni* v. *Sakhi Mahton*, 1923 Pat 575 (575, 576): 1923 Pat H C C 234: 77 Ind Cas 500 [Suit for compulsory registration no bar to suit for possession]; *Nanak Chand* v. *Nareni*, 1883 All W N 6 (6) [Suit for compulsory registration no bar to suit for possession]; *Dwijendra Narain Roy* v. *Jogesh Chandra*, 1924 Cal 600 (610): 39 Cal L Jour 40: 79 Ind Cas 520, (Do.); *Azim* v. *Bahdur Khan*, 1928 Lah 63 (64): 103 Ind Cas 348 [Two successive mortgages—Sale to prior mortgagee—Suit for redemption by puisne mortgagee entitled to pre-empt, decreed—His subsequent suit for pre-emption is not barred]; *Jaimaja Singh* v. *Mt Askaur*, 1928 Lah 238 (239): 9 Lah 451: 29 Pun L R 548: 108 Ind Cas 613 [Suit for pre-emption of one portion of land no bar to suit for redemption of another portion]; *Karippavi* v. *Karutiprath Kannan*, 1925 Mad 1172 (1172): 86 Ind Cas 949 [Suit for possession based on one *marupat* is no bar to suit based on another *marupat*]; *Subbaya* v. *Venkatessappa*, (1883) 6 Mad 49 (53) [Suit on accounts stated no bar to suit for dissolution of partnership entered into subsequent to the settlement of accounts]; *Shankar Vasudeo Thite* v. *Dattatraya Vishnu Sardeshmukh*, 1929 Bom 460 (462): 31 Bom L R 1123: 122 Ind Cas 428 [Suit prompted by order of Magistrate no bar to suit for other properties though claimed under the same title]; *Muhammad Umar Khan* v. *Amtul Rahim Bibi*, 1923 All 311 (312): 21 All L J 267: 71 Ind Cas 965: 45 All 376: 4 L R A Civ 169 [Suit for setting aside sale no bar to suit for possession as heir]; *Lachha Mal* v. *Hirde Nath*, 1925 Lah 459 (460): 7 Lah L Jour 236: 87 Ind Cas 994: 6 Lah 384: 26 Pun L R 280: 26 Pun L R 558 [Suit for injunction restraining *A* from selling to *B* is no bar to suit for specific performance of agreement to sell, against *A*]; *Maharaja Singh* v. *Sri Raja Suryapal Singh*, 1929 All 29 (30): 113 Ind Cas 758: 9 L R All Rev 306 [Assignees of revenues of different properties mortgaging their rights to plaintiff —Plaintiff can sue separately for the revenues assigned by each mortgagor]; *Kaveri Ammal* v. *Sastri Ramier*, (1903) 26 Mad 104 (108): 13 Mad L Jour 58 [Suit to set aside alienation by widow is no bar to suit for possession on the ground that the widow has no right at all to the estate]; *Ishardas* v. *Masud*, (1884) 6 All 70 (71): 1883 All W N 211 [Plaintiff in a suit obliged to pay stamp duty payable by defendant —Plaintiff may sue separately for the amount so paid]; *Abdul Kasim Khan* v. *Jaggu Singh*, (1910) 5 Ind Cas 439: 13 Oudh Cas 19 [Suit for declaration that defendants had no higher rights than ordinary tenants no bar to suit for possession]; *Kadir Ibrahim* v. *Arunachalam Chettiar*, (1909) 4 Ind Cas 1082 (1082): 33 Mad 238: 19 Mad L Jour 737 [Prior suit on alleged entrustment of paddy no bar to suit for rent]; *Muhammad Kamil* v. *Imtiaz Fatma*, (1909) 4 Ind Cas 457 (459): 31 All 557: 36 Ind App 210: 10 Cal L Jour 297: 11 Bom L R 1210: 14 Cal W N 59: 19 Mad L Jour 697: 13 Oudh Cas 183 P C [First suit for share inherited from sister no bar to suit for share inherited from father]; *Ketki* v. *Dinabandhu Patnaik*, (1909) 3 Ind Cas 395 (396): 10 Cal L Jour 83 [Different plots—Different causes of action—Different suits maintainable]; *Mt Imtaz Fatima* v. *Muhammad Kamil*, (1905) 8 Oudh Cas 65 (74) [Claim for maintenance on basis of agreement with *A* is distinct from claim to inherit estate left by *A*]; *Kunchuni Nair* v. *Subramania Pattar*, (1910) 5 Ind Cas 758 (759): 33 Mad 162: 7 Mad L Tim 87 [Suit for revocation of agency is no bar to suit for dismissal of agent for misconduct]; *Daya Shankar* v. *Ganga Sahai*, (1909) 4 Ind Cas 763 (767-768): 12 Oudh Cas 347 [Suit for redemption as full owner dismissed—Second suit for redemption as co-owner not barred discussed under S 11 mainly]; *Gadulula Venkattamma* v. *Yadki Honkaran*, (1909) 4 Ind Cas 97 (97): 6 Mad L Tim 375 [Interference with possession is a different cause of action from dispossession]; *Nawab Syed Mahomad Zaki Ali Khan* v. *N S M Jafar Ali Khan*, (1899) 2 Oudh Cas 17 (20) [Cause of action against administrator failing in his duty is different in cause of action against trespasser withholding possession]; *Kanhaiyalal* v. *Kunwar Lal Bahadur*, (1910) 7 Ind Cas 284 (285) All [Suit for declaration that certain alienations do not bind plaintiff no bar to suit for partition]; *Mir Ihtisham Haider* v. *Mir Baqar Ali*, (1906) 9 Oudh Cas 235 (235) [Suit based on gift, no bar to suit for share of inheritance]; *Kalidhun* v. *Shiba Nath*, (1882) 8 Cal 483 (514): 11 Cal L Rep 57 [Decree declaring right to accounts is no bar to suit for amount found due on adjustment of accounts]; *Pramada Dasi* v. *Lakhi Narain Mitter*, (1886) 12 Cal 60 (63) [Suit for legacy and suit for share of inheritance—Causes of action are different]; *Gobind Mohan* v. *Sheriff*, (1881) 7 Cal 169 (171): 8 Cal L Rep 357: 4 Shome L R 146: 6 Ind Jur 30 [Decree declaring plaintiff's right to accounts is no bar to suit for money found due on adjustment of accounts]; *Sodhi Harnam* v. *Sodhi Sunder Singh*, 1882 Pun Re No 168 [First suit ignoring agreement between the parties—Second suit on the basis of the agreement not barred]; *Mallick Fatteh Muhammad* v. *The Administrator-General of Bengal*, 1883 Pun Re No 59 [Suit for profits of land which defendant, as plaintiff's agent, had misappropriated—Second suit for possession not barred]; *Massa Singh* v. *Khan Singh*, 1883 Pun Re No 110 [Separate sales of different plots—Separate suits for possession maintainable]; *Ketki* v. *Dinabandhu*, (1909) 3 Ind Cas 395 (396): 10 Cal L Jour 83 [Different parcels of land—Different causes of action—Different suits maintainable though alternative claim common to all suits is set up]; *Ramlochun Lall* v. *Goorpershad*, (1893) 5 N W P 172 [First suit to set aside sale in defendant's favour—Second suit for possession of other lands, against same defendant, not barred]; *Upendra Lal* v. *Secretary of State*, (1893) 20 Cal 716 (719) [Separate suits maintainable in respect of injury to permanent and lease-hold interests in land]; *Indar* v. *Mussammat Rao*, (1911) 11 Ind Cas 35 (36): 4 Pun Re 1912: 201 Pun L R 1911: 46 Pun W R 1912: 160 Pun W R 1911 [Suit against sister for share of property left by father is no bar to suit against sister's husband for property left by the sister]; *Mani Singh* v. *Allah Ditta*, (1920) 55 Ind Cas 630 (631): 2 Lah L Jour 204 [Suit for injunction prohibiting defendant from removing fodder from land, dismissed—Second suit for recovery of money advanced under a contract and for damages for breach of that contract, not barred]; *Gandla Pedda Naganna* v. *Sivanappa*, (1915) 26 Ind Cas 232 (233, 235): 38 Mad 1162: 16 Mad L Tim 310: 27 Mad L Jour 520 [Suit based on certain title to certain property no bar to suit to recover some other property on some other ground]; *Rathinasabapathi* v. *Gopala*, 1929 Mad 545 (561): 56 Mad L Jour 673: 29 Mad L W 696: 121 Ind Cas 126 [Suit by mother of minor for maintenance, no bar to suit by minor for share of inheritance]; *U Oh* v. *U Shwe Thaung*, 1929 Rang 285 (287); *Deo Datt* v. *Raj Bali*, 1928 Oudh 411 (412, 413): 5 Oudh W N 653: 112 Ind Cas 266 [Prior suit based on forfeiture of widow's rights on the ground of unchastity—Subsequent suit to recover possession

wards sue" Hence, the rule does not apply to suits filed *simultaneously*.[1] **O. 2, R. 2, Note 27.**

after death of widow—Cause of action is different]; *Rommoy Hazra* v. *Premchand Naskar*, (1901) 5 Cal W N 423 (426) [Suit for apportionment of mortgage debt against purchasers of portions of mortgaged property not barred by omission to make them parties to mortgage suit]; *Mussammat Badshah* v. *Sahib*, 1903 Pun Re No 87; *Mahammad Din* v. *Rahim Gul*, 1886 Pun Re No 6 [Suit for pre-emption dismissed—Suit for possession on ground of title not barred]; *Durga Nath Roy* v. *Roy Kalee Narain*, (1875) 24 Suth W R 212 (213) [Lessee resuming possession of lands on behalf of landlord—Suit by landlord for the lands is no bar to suit for lands leased to the same defendant and wrongfully retained by him]; *Gooroo Dutt* v. *Sooroo*, (1871) 16 Suth W R 264 (264) [Claim as heir of *S's* father dismissed—Suit for possession of same property as heir of *S* not barred]; *Buroda Sundaree Dossee* v. *Raj Bullub Sen*, (1872) 18 Suth W R 202 (203) [Suit for declaration of right to share in debt no bar to suit for payment of share on debt]; *Sabber Khan* v. *Kali Dass*, (1864) 1 Suth W R 199 (200) [Suit to recover from co-sharer, share of surplus proceeds of sale in execution of arrears of rent, not barred by former suit by plaintiff, on requisition of Collector for declaration of his right to share in the fund then in the Collectorate]; *Bura* v. *Jhanda*, 1900 Pun Re No 113: 26 Pun L R 1901 [Suit for share of *patti* no bar to suit for share in *shamilat* land]; *Azimdad Khan* v. *Ghansam Das*, (1904) 1 All L J 20 (25) [Formal possession given by Court—Judgment-debtor persisting in taking rents from tenants—There is new cause of action]; *Bapu Rao* v. *Govind Rao*, (1903) 16 C P L R 107 (111), (Do.); *Maung Kyin Pein* v. *Ma Pwa Me*, 1922 U B 1 (2): 4 U B R 62: 64 Ind Cas 953 [Mortgaged property sold in execution of money-decree for interest alone—Suit for payment of mortgage money out of sale proceeds of the property deposited in Court —Second suit to enforce the mortgage lien not barred—Cause of action distinct]; *Mst Nousha Begum* v. *Mst Umrao Begum*, (1875) 7 N W P H C R 60 [Suit on basis of will no bar to suit for share of inheritance]; *Nawab Mehdi* v. *Md Wajid Ullee*, (1869) 1 N W P 70; *Sunkar Dyal Singh* v. *Paremesur Dyal Singh*, (1866) 6 Suth W R 44 (46) [Suit for declaration of title as reversioner to widow—Previous suit based on title as heir to ancestral joint estate prior to widow—Causes of action different]; *Brahannayaki* v. *Krishna*, (1886) 9 Mad 92 (95) [Purchaser of portion of equity of redemption obtaining under redemption decree, portion purchased by him, is not precluded from suing for possession of the other portion, on his purchasing them]; *Sundara Reddiar* v. *Subbia Goundan*, (1913) 18 Ind Cas 610 (611): 24 Mad L Jour 28: 13 Mad L Tim 266: 1913 Mad W N 369 [Mortgagee agreeing to pay off certain debts of the mortgagor as also to satisfy a previous mortgage decree obtained against the mortgagor—Mortgagee paying off debts and then suing the mortgagor for them—Subsequent satisfaction of the previous mortgage decree and subsequent suit therefor is not barred]; *Bikhomal* v. *Rajalmal*, (1913) 19 Ind Cas 393 (394): 6 Sind L R 140 [Suit for declaration that mortgage has been satisfied dismissed—Second suit for redemption not barred]; *Maung Kyaw* v. *Ma Gauk*, (1915) 27 Ind Cas 732 (733): 8 Bur L Tim 101 [Dismissal of a suit for redemption according to the terms of a mortgage is no bar to suit for redemption on a subsequent agreement]; *Girdhari Das* v. *Raghunath Prasad*, 1887 All W N 77 [Suit by Zemindar, owner of land, to avoid sale of land—Subsequent suit by Zemindar for haqq-i-chahn-ram in respect of sale of house, not barred]; *Muhammad Abdul Aziz* v. *Rafi-un-nissa Bibi*, (1912) 17 Ind Cas 833 (833): 10 All L J 469 [Suit for partition pending—Second suit against the lambardar for profits not barred]; *Balbhadder Nath* v. *Ram Lal*, (1904) 26 All 501 (503, 504): 1 All L J 228 [Suit for possession on the ground that partition had taken place dismissed—Second suit for partition not barred]; *Thimmappa* v. *Manjaya*, 1923 Bom 440 (441): 25 Bom L R 491: 73 Ind Cas 424 [Suit for profits is no bar to subsequent suit for partition]; *Maung Lu Tha* v. *Maung Po*, 1921 L B 13 (15): 11 L B R 94: 64 Ind Cas 174 [First suit for possession of a part on the allegation that it had fallen to plaintiff on a partition—Second suit on the basis, that the whole was yet undivided and for plaintiff's share in the entirety is not barred]; *Sheobaran Singh* v. *Bhagwan Sahai*, (1919) 50 Ind Cas 953 (955): 17 All L J 313: 41 All 286 [First suit against lambardar for profits—Second suit for mesne profits not barred]; *Abdul Nasir* v. *Rasulan*, (1893) 20 Cal 385 (387) [Suit for exclusion from joint property and suit for partition of joint property—Causes of action different]; *Mallikarjunaprasad* v. *Durga Prasada*, (1901) 24 Mad 147 (157): 27 Ind App 151: 5 Cal W N 74: 10 Mad L Jour 294: 2 Bom L R 945: 7 Sar 761 P C [Suit for partition by younger brother of Zemindar dismissed as the property was impartible—Suit for maintenance not barred]; *Shanmugam Pillai* v. *Panchali Ammal*, 1926 Mad 683 686): 23 Mad L W 551: 50 Mad L Jour 681: 95 Ind Cas 209: 49 Mad 596 [Purchaser of interest of undivided Hindu co-parcener—Suit by purchaser for declaration of his right to possession under O 21, R 103 is no bar to suit for partition]; *Jalim Singh* v. *Choone Lal*, (1911) 11 Ind Cas 540 (542): 15 Cal W N 882 [Adjustment of account is a new cause of action]; *Kala Chand* v. *Jotindra Nath*, (1920) 57 Ind Cas 852 (854) Cal [A title suit is no bar to a suit to declare a right of way]; *Sri Ram* v. *Kanshi Ram*, (1917) 40 Ind Cas 255 (257): 121 Pun L R 1917: 87 Pun W R 1917 [Suit for gifted property and suit for share in inheritance—Causes of action are different]; *Khairati* v. *Akko*, 1882 Pun Re No 108 [Sale by widow—Suit to set aside by reversioners—Suit dismissed on ground of there being legal necessity—After a widow's death plaintiff suing again for *pre-emption*—Suit not barred]; *Syed Yar Khan* v. *Ramchand*, 1882 Pun Re No 24 [Suit by reversioner during widow's lifetime for lands alienated by widow dismissed—Second suit after widow's death on the ground of alienation not binding him, not barred]; *Devanai Ammal* v. *Mahadeva*, 1931 Mad 313 (315): 132 Ind Cas 196: 34 Mad L W 993 [Executors agreeing to pay interest on legacy but declining to pay principal except on production of succession certificate—Prior suit by legatee for interest alone—O 2, R 2 does not bar subsequent suit for principal]; *Har Dat Ray* v. *Ram Pal Rai*, 1894 All W N 61 (62) [First suit for damages for misappropriation of fruits of trees—Second suit for possession of the trees—Second suit based on denial in previous suit, of plaintiff's title to the trees—Second suit not barred]; *Humayun Qadar* v. *Zakir Husain*, 1931 Oudh 57 (58): 7 Oudh W N 1156: 130 Ind Cas 79 [Suit for declaration of title to land—Second suit for recovery of share of compensation money, paid under the Land Acquisition Act]; *Mohar Singh* v. *Daulat Ram*, 1928 Lah 534 (1), (534): 11 Lah L Jour 64: 110 Ind Cas 491 [Prior suit for possession of demised premises—Subsequent suit for compensation for holding over not barred]; *Raja Nilmoney* v. *Unnoda Prasad*, (1868) 10 Suth W R 41 (46): 1 Beng L R 93 & 97 F B [Decree for abatement of rent—Suit for refund of excess rent realised after the decree not barred]; *Kandhaiya Singh* v. *Kundan*, 1925 All 486 (487): 23 All L J 461: 87 Ind Cas 257: 47 All 561 [Prior suit to set aside sale and for possession dismissed —Subsequent suit for balance of sale price not barred].

Note 27.

(1) *Zahur Hussain* v. *Muhammad Husan*, 1888 All W N 147; *Lala Seva Ram* v. *Kanai Ram*, 1890 Pun Re No 76; *Kaleshar Prasad* v. *Jagan Nath*, (1875-78) 1 All 650 (651).

O 2, R. 2, Notes 27—30.

The Allahabad High Court has held in the undermentioned case that the suit which bears the *later number* should be presumed to have been filed later and should be held as barred.[2] According to the High Court of Madras, the plaintiff in such a case, should be given an option to choose as to which of the two suits should be dismissed and which should be allowed to go on.[3]

The bar of R. 2 applies only to a later *suit*. It does not apply to any other remedy open to the plaintiff.[4] Thus, a landlord who is precluded by R. 2 from suing for the rent of any particular year can enforce the summary process of *distraint* provided for by the Madras Rent Recovery Act.[5]

The burden of establishing a bar of the suit under O. 2, R. 2 is on the defendant,[6] and the Court is not bound to take up the point *proprio motu*.[7] Further the objection under O. 2, R. 2 should be treated as a preliminary point and the defendant cannot raise it for the first time in appeal except on terms which would indemnify the other side for the omission to take it at the proper time.[8]

28. Set-off.—A defendant who claims a set-off under O. 8, R. 6 is in the position of the plaintiff [*Vide* O. 8, R. 6 (2)] and if he omits any portion of the claim he is entitled to make by way of set-off he cannot subsequently sue in respect of it.[1]

29. Plea in defence not barred.—The rule precludes only a subsequent *suit*. It does not bar a plea in *defence*.[1]

30. Insolvency proceedings, not suits.—The rule, as has been seen already, merely bars a fresh *suit* on the same cause of action. It does not enable the official assignee to apply to the Insolvency Court for a declaration that the right of a certain creditor of the insolvent to sue for a certain debt is barred under this rule.[1]

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(2) *Murti* v. *Bhola*, (1894) 16 All 165 (172, 173): 1894 All W N 65. See also *Standard Electric and Motor Works* v. *Picture Palace*, 1924 Rang 161 (162): 1 Rang 682: 2 Bur L Jour 218: 76 Ind Cas 791.

(3) *Appasami* v. *Ramasamy*, (1886) 9 Mad 279 (280): 10 Ind Jur 219; *Rayalu Ayyar* v. *Ramudu Ayyar*, 1926 Mad 934 (936): 1926 Mad W N 583: 51 Mad L Jour 351: 49 Mad 869: 97 Ind Cas 443.

(4) *Gulam Mahommad* v. *Lalchand*, (1919) 53 Ind Cas 552 (552): 13 Sind L R 153. But see *Vaji Ram* v. *Purusholum Das*, (1905) 7 Bom L R 138 (141) ["To sue" applies to any legal proceedings]. See also *Khirodamoyi Barmani* v. *Bagala Sundari*, (1906) 4 Cal L Jour 492 (495) [*Quaere*.—Where a proceeding for revocation of probate is a suit or not].

(5) *Raja Eswara Doss* v. *Venkatarayar*, (1898) 21 Mad 236 (237).

(6) *Abdul Qadir* v. *Imam Din*, 1927 Lah 840 (840, 841): 102 Ind Cas 31; *Farzand Ali* v. *Zafar Ali*, (1918) 46 Ind Cas 119 (120): 1918 Pun W R 132 [Bar to be specially pleaded and proved]; *C B Skinner & Co* v. *Rance Shama Sundaree*, (1873) 19 Suth W R 429 (430); *Shibba* v. *Dalpat*, (1909) 2 Ind Cas 115 (116) All; *Upendra Lal* v. *Secretary of State*, (1893) 20 Cal 716 (719).

(7) *Gopal Das* v. *Gulam Mohi-ud-din*, (1915) 27 Ind Cas 579 (580): 23 Pun L R 1915: 237 Pun W R 1915; *Muhammad Nur* v. *Musammat Mahroia*, 1885 Pun Re No 87.

(8) *Maung Pe* v. *Ma Lon Ma Gale*, (1911) 11 Ind Cas 497 (498): 38 Cal 629: 15 Cal W N 766: 8 All L J 739: 13 Bom L R 464: 14 Cal L Jour 15: (1911) 2 Mad W N 397: 4 Bur L Tim 153: 6 L B R 18: 10 Mad L Tim 479 P C; *Jhim Mal* v. *Bechu Narain Singh*, 1881 All W N 144 (144) [Plea of bar taken in First Court but not raised in Lower Appellate Court or memorandum of second appeal—Plea not allowed to be raised at hearing of second appeal]; *Mustafa Ali* v. *Ganga Baksh Singh*, (1909) 1 Ind Cas 327 (328): 12 Oudh Cas 21 [Plea not allowed in second appeal]. But see *Ganga Ram* v. *Mutesra*, (1932) 54 All 65 (68): 1932 All 510 [Plea allowed in appeal as being one of law].

Note 28.

(1) *Nawbut Pattak* v. *Mahesh Narain Lall*, (1905) 32 Cal 654 (657): 1 Cal L Jour 364.

Note 29.

(1) *Karmon Bai* v. *Chotha Ram*, (1919) 50 Ind Cas 909 (910) Lah; *Punnu Ram* v. *Gulam Hussain*, 1926 Lah 494 (494): 7 Lah 297: 27 Pun L R 463: 96 Ind Cas 630; *Akbar Hussain* v. *Ragunandan Das*, 1921 Lah 351 (351): 8 Pun L R 1921: 57 Ind Cas 348; *Shib Shankar Lal* v. *Soni Ram*, (1909) 3 Ind Cas 725 (729): 32 All 33: 6 All L J 931: 6 Mad L Tim 348.

Note 30.

(1) *Saumy Rao* v. *Official Assignee*, 1925 Mad 1120 (1120, 1121): 49 Mad L Jour 474: 22 Mad L W 17: 48 Mad 703: 91 Ind Cas 403.

31. Execution Proceedings.—O. 2, R. 2 does not apply to execution proceedings. (*See* notes under S. 141, C. P. C.) Thus, where a decree grants different reliefs, as, for example, possession of land and mesne profits, the decree may be executed by means of separate and successive applications in respect of each relief.[1] **O. 2, R. 2, Notes 31—35.**

The rules applicable to proceedings in execution are applicable to proceedings for restitution also, and hence, O. 2, R. 2 does not apply to such proceedings.[2]

But where a particular sum of money is due under the decree and the decree-holder fails, in his application for execution, to claim the whole amount, he cannot, on general principles of *res judicata* be allowed to apply again for the balance of the amount so omitted in the first application.[3]

32. Proceedings under Para. 20 of Sch. 2 of the Code.—The rule does not apply to an application to file an award under Sch. 2, Para. 20 of the Code. Hence, the failure to ask for possession in such an application does not preclude a separate suit for possession.[1] Similarly, where only one matter arising out of a dispute is referred to arbitration, a separate suit in respect of other matters arising from the *same dispute* is not barred.[2]

But the privilege of abandoning a portion of his claim to bring his suit within the jurisdiction of any Court applies also to an applicant for the filing of an award.[3]

33. Application to sue in forma pauperis.—An application to sue in *forma pauperis* becomes a suit only after it has been accepted. Hence, where it has been rejected it does not amount to a *suit* and therefore the provisions of O. 2, R. 2 do not apply to it.[1]

34. Exceptions to the rule as to the splitting up of claims.—See Note 14 *ante*.

35. Amendment of Plaint.—The bar of suit under this rule applies only where a decree has been passed in the previous suit. The rule does not preclude the amendment of plaint by the addition of the claim which had

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Note 31.

(1) *Sadho Saran* v. *Hol Pande*, (1897) 19 All 98 (100): 1893 All W N 57; *Ibrahim* v. *Ghulam Hussain*, 1921 Sind 13 (16): 15 Sind L R 11: 62 Ind Cas 507; *Balasubramania* v. *Saarnambal*, (1913) 21 Ind Cas 32 (34): 38 Mad 199: 1913 Mad W N 685: 14 Mad L Tim 196: 25 Mad L Jour 367; *Veeraragava Rao* v. *Mallapragada Gurunadha Rao*, (1915) 30 Ind Cas 246 (246): 2 Mad L W 688: 1915 Mad W N 793 [Mesne profits and possession, decree for—Separate applications maintainable]; *Radha Charan* v. *Man Singh*, (1890) 12 All 392 (395, 396): 1890 All W N 119; *Radha Kishen Lall* v. *Radha Prasad Singh*, (1891) 18 Cal 515 (517); *Har Prasad* v. *Radha Krishan*, (1909) 2 Ind Cas 105 (106) All [Objection to attachment by judgment-debtor regarding a portion of the property does not bar subsequent objection regarding other portions of the property]; *Upendra Nath Bose Roy Chowdhury* v. *K B Dutt*, 1926 Cal 1019 (1021): 53 Cal 582: 43 Cal L Jour 596: 96 Ind Cas 562; *Chunnilal Sath* v. *Gulabchand*, 1932 Nag 89 (90): 28 Nag L R 77.

(2) *Krupasindhu* v. *Balbhadra*, (1918) 47 Ind Cas 47 (48): 3 Pat L Jour 367; *Somasundaram Pillai* v. *Chokkalingam Pillai*, (1917) 38 Ind Cas 806 (808): 40 Mad 780: 5 Mad L W 267; *Radha* v. *Sakhu*, 1921 Nag 112 (113): 17 Nag L R 62.

(3) *Shyama Charan* v. *Protap Chandra*, 1930 Cal 349 (350): 51 Cal L Jour 280: 34 Cal W N 907: 126 Ind Cas 764; *Subramania Chettiar* v. *Moses*, 1929 Rang 182 (183): 119 Ind Cas 223.

Note 32.

(1) *Sultan Singh* v. *Nidhan Singh*, 1902 Pun Re No 65: 107 Pun L R 1902.

(2) *Firm of Brijlal Jagannath* v. *Firm of Allah Ditta Mahboob Illahi*, 1925 Sind 242 (243): 86 Ind Cas 393.

(3) *Grish Chunder* v. *Brojonath*, (1873) 20 Suth W R 56 (57).

Note 33.

(1) *Narain Singh* v. *Jaswant Singh*, (1899) 21 All 359 (360, 361): 1899 All W N 123.

O. 2, R. 2, Notes 35—36.

been omitted.[1]

36. Revenue and Village Courts.—The rule has been held to apply to proceedings in the Revenue Court for the recovery of the rent.[1] But proceedings in Revenue Court for *partition* are not "suits" and the rule does not consequently apply to them.[2]

The provisions of the Civil Procedure Code are not applicable to Village Munsif's Court and hence, this rule does not apply to a suit brought in such Courts.[3]

O. 2, R. 3.

R. 3. [S. 45, Paras. 1 and 3.] (1) *Save as otherwise provided*,[2] a plaintiff may unite in the same suit several causes of action[3] against the same defendant,[6] or the same defendants jointly;[7] and any plaintiffs having causes of action in which they are jointly interested against the same defendant [10] or the same defendants jointly[12] may unite such causes of action in the same suit.

Joinder of causes of action.

(2) *Where* causes of action are united, the jurisdiction[16] of the Court as regards the suit shall depend on the amount or value of the aggregate subject matters at the date of instituting the suit.

[1877—45, R. S. C. O. 18, R. 1. See Rr. 4 to 6 below].

Synopsis.

1. Scope of the rule.
2. "Save as otherwise provided."
3. The rule presupposes existence of several causes of action.
4. Cause of action. See S. 20.
5. Alternative reliefs.
6. One plaintiff, one defendant, several causes of action.
7. One plaintiff, two or more defendants, causes of action joint against all the defendants.
8. One plaintiff, separate causes of action against several defendants, i.e., misjoinder of defendants and causes of action.
9. Conspiracy to commit wrong or breach of contract.
10. Two or more plaintiffs, one defendant, plaintiffs jointly interested in the causes of action.
11. Two or more plaintiffs, one defendant —causes of action in which plaintiffs are severally interested—misjoinder of plaintiffs and causes of action.
12. Two or more plaintiffs, two or more defendants—plaintiffs jointly interested in each of the causes of action against all the defendants jointly.
13. Two or more plaintiffs, two or more defendants—plaintiffs severally interested against the defendants sever-

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Note 35.

(1) *Upendra Narain Roy* v. *Raj Janaki Nath Roy*, (1918) 47 Ind Cas 129 (130, 131): 45 Cal 305: 22 Cal W N 611; *Beni Prasad* v. *Shambu Nath*, 1885 All W N 167 (168); *Fateh Khan* v. *Muhammad Isa*, (1919) 52 Ind Cas 464: 6 Pun L R 1919: 84 Pun Re 1919; *Ram Tarrun Koondoo* v. *Hossein Buksh*, (1877-78) 3 Cal 785 (786): 2 Cal L Rep 385.

Note 36.

(1) *Pratap Chandra Jana* v. *Secretary of State*, 1922 Cal 101 (103): 35 Cal L Jour 304: 67 Ind Cas 375: 49 Cal 1026. See also *Madho Prakash Singh* v. *Murli Manohar*, (1883) 5 All 406 (413): 1883 All W N 92 [Rule applies to suits under N W P Rent Act (XII of 1881). See also *Purbhoo* v. *Ramjeavan*, (1869) 1 N W P 119 [Para 2 applies to suits under Act X of 1859).

(2) *Kalka Prasad* v. *Manmohan Lal*, (1916) 33 Ind Cas 86 (87): 38 All 302: 14 All L J 373; *Hazim Hussain* v. *Ali Raza Khan*, 1927 Oudh 498 (499): 4 Oudh W N 947.

(3) *Augustus Bros* v. *Fernandez*, (1915) 31 Ind Cas 59 (62): 29 Mad L Jour 474: 18 Mad L Tim 377: 2 Mad L W 890: 1915 Mad W N 765.

ally—misjoinder of parties and causes of action.
14. Procedure in cases of misjoinder.
15. Addition of unnecessary parties.
16. Jurisdiction.
17. Revision.

Claim suits—Different purchasers. See Note 7, Pt. (6).
Contribution suits. See Note 8, Pt. (15).
Defendants claiming under derivative titles. See Note 7, Pts. (7) to (10).
Defendants not claiming under same trespasser. See Note 7, Pt. (11).
Ejectment suits against different tenants of different properties. See Note 8, Pt. (3).
Paramount title in mortgage suits. See O. 34, R. 1, Notes; see also Note 8, F.-N. (2).
Partition suits. See Note 8, Pt. (14).
Partnership suits or suits for dissolution. See Note 4, F.-N. (4).
Pre-emption suits. See Note 15, Pt. (1).
Reference to arbitration—Distinct agreements but one transaction. See Note 6, F.-N. (1).
Rent suits. See Note 6, F.-N. (1).
Single cause of action—Diffeernt titles or alienations. See Note 7, see also Note 11.
Strangers to contracts. See Note 8, Pt. (7).
Suits under S. 73, C. P. C. See Note 7, Pt. (4).
Two or more defendants and single cause of action. See Note 7, Pts. (5) and (6).

1. Scope of the rule.—Order 1 relates to *parties* to suits. Order II relates to *frame* of suits. But the two orders cannot be treated as relating to two distinct topics. The question of parties involves that of a cause of action, and *vice versa*. A person is made a party because there is a cause of action against him, and when causes of action are joined, parties are joined.[1] This rule must, therefore, be read with O. 1, Rr. 1 and 3.[2] The Legislature, has in fact, effected a compromise of two fundamental principles by means of the rules, embodied in Orders 1 and 2, *first*, that needless *multiplicity of suits* should be avoided and *secondly* that the trial of suits should not be embarrassed by simultaneous investigation of totally unconnected controversies.[3] The rules in Orders 1 and 2 may thus overlap to some extent in their application to concrete cases.[4] A plaintiff may not only join different causes of action against the same defendant or the same defendants as provided in O. 2, R. 3 but he may also join different causes of action against different defendants if he is able to bring his case within the purview of O. 1, R. 3.[5]

The fact that several causes of action have been properly joined under this rule does not prevent the Court, whenever necessary, from holding separate trials of the different issues that may arise in the suit.[6]

The question of misjoinder must be decided on the *allegations* in the plaint and not on what is *found* to be correct ultimately.[7]

Order 2, Rule 3—Note 1.

(1) *Ramendra Nath* v. *Brojendra Nath*, (1917) 41 Ind Cas 944 (945, 949): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158.

(2) *Ramendra Nath* v. *Brojendra Nath*, (1917) 41 Ind Cas 944 (945): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158; *Mahadeo* v. *Nago*, (1911) 12 Ind Cas 357 (358): 7 Nag L R 130; *Janokinath* v. *Ramrunjan*, (1879) 4 Cal 949 (952, 958): 4 Ind Jur 348.

(3) *Ramendra Nath* v. *Brojendra Nath*, (1917) 41 Ind Cas 944 (950): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158. See also *Shoroop* v. *Mothoor*, (1865) 4 Suth W R 109 (110).

(4) *Ramendra Nath* v. *Brojendra Nath*, (1917) 41 Ind Cas 944 (950): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158.

(5) *Jethanand* v. *Chetumal*, 1926 Sind 66: 90 Ind Cas 970.

(6) *Tufail Mahomed* v. *Hira Singh*, (1911) 10 Ind Cas 48 (49): 167 Pun L R (1911): 120 Pun W R 1911; *Ramendra Nath* v. *Brajendra Nath*, (1917) 41 Ind Cas 944 (947, 951, 952) 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158.

(7) *Shankar Anand Rao Wagh* v. *Sadashiv Shankar Wagh*, (1905) 7 Bom L R 925; *Iswar Das Marwari* v. *Raghunadan Muhton*, (1919) 51 Ind Cal 609 (611); *Chandulal Suklal* v. *Dagdu Mahadu*, 1925 Bom 342 (342): 27 Bom L R 472: 87 Ind Cas 435 [Five different contracts by defendant

O. 2, R. 3, Notes 2—5.

2. "**Save as otherwise provided.**"—This rule is to be applied subject to any provisions of law to the contrary, such as rules 4 and 5 of this Order,[1] or the provisions of the Agra Tenancy Act which enacts that a joinder of several causes of action against the same defendant in a rent suit is not competent.[2] This rule is also subject to the general principles of pleading, and a plaintiff cannot on the authority of this rule claim on alternative titles which arise out of inconsistent facts, though he may claim even on inconsistent titles.[3]

3. **The rule presupposes several causes of action.**—This rule enables the joinder of several causes of action in one suit subject to certain restrictions.[1] It presupposes that there are *several* causes of action to be united in a single suit; so where there is really but a *single* cause of action no question of misjoinder arises.[2] A joinder of several *reliefs* is not a joinder of several *causes of action*, in a suit based on a single cause of action,[3] nor does an *ancillary relief* claimed in a suit amount to a distinct cause of action.[4]

See also "Cause of action"—Section 20.

4. **Cause of action.**—See S. 20, Notes 14 to 31.

5. **Alternative Reliefs.**—Alternative reliefs may be claimed either on the same cause of action against different defendants or on different causes of action against the same defendant or defendants. The former class of cases is provided for in O. 1, R. 3. The present rule deals with the latter

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with different plaintiffs—Latter sue jointly—Plaint on the basis of a *joint contract*—No misjoinder but the plaintiffs' suit will fail on the ground of want of cause of action]; *Janokinath* v. *Ramrunjun*, (1879) 4 Cal 949 (952, 953): 4 Ind Jur 348; *Damodar Das* v. *Girdhari Lal*, (1905) 27 All 564 (566): 1905 All W N 100: 2 All L J 692; *Rahim Baksh* v. *Brijbhukan*, (1904) 1 All L J 188 (190, 191); *Ramendra Nath* v. *Brajendra Nath*, (1917) 41 Ind Cas 944 (948): 45 Cal 111: 21 Cal W N 794: 27 Cal L Jour 158 [The contrary view in the following cases that it depends upon the *facts found* is not good law]; *Ram Narain Dutt* v. *Annoda Prasad Joshi*, (1887) 14 Cal 681 (686); *Baroo* v. *Nassim*, (1874) 21 Suth W R 206 (207).

Note 2.

(1) *Bhimnath* v. *Jagarnath*, 1925 Pat 674 (675) 1925 Pat H C C 294: 89 Ind Cas 814: 7 Pat L Tim 82.

(2) *Jagannath* v. *Tori*, (1905) 3 All L J 610 (612): 29 All 18 (19): 1906 All W N 253; *Hira Lal* v. *Hoti Lal*, 1924 All 720 (721): 22 All L J 459: 79 Ind Cas 560 [Objection under O. 2, R. 6 was taken in this case]; Such a joinder under Bengal Tenancy Act is not improper see *Prafulla Nath* v. *Satya Bhusan*, 1929 P C 171 (174): 33 Cal W N 822: 56 Ind App 238: 57 Mad L Jour 132: 30 Mad L W 310: 10 Pat L Tim 829: 119 Ind Cas 618 P C; *Dijendra Nath* v. *Saylendra Nath*, (1897) 24 Cal 197 (205): 1 Cal W N 236.

(3) *Bhimnath Misra* v. *Jagennath Prasad*, 1925 Pat 674 (675): 1925 Pat H C C 294: 89 Ind Cas 814: 7 Pat L Tim 82.

Note 3.

(1) *Mashar Ali* v. *Sajjad Hussain*, (1902) 24 All 358 (360): 1902 All W N 85; *Chiragh Din* v. *Bhagwan Das*, (1916) 32 Ind Cas 40 (40): 100 Pun Re 1915: 189 Pun W R 1915.

(2) *Haramund* v. *Prosunno Chunder*, (1883) 9 Cal 763 (765): 12 Cal L R 556; *Serajal Hug* v. *Abdul Rahman*, (1902) 29 Cal 257 (259): 6 Cal W N 300 [Suit for possession on sale or refund of purchase money, only one cause of action]; *Bhogilal* v. *Jethalal*, 1929 Bom 51 (53): 30 Bom L R 1588: 114 Ind Cas 262 [Transferor and transferee suing jointly for rent due to each—one cause of action]; *Harchandar* v. *Lal Bahadur*, (1894) 16 All 359 (361): 1894 All W N 119 [Ouster by same defendants—Cause of action single—Though on different dates and on different portions but as part of same cause of contest]; *Balkrishen* v. *Bistoo*, (1874) 22 Suth W R 532 (533) [Mortgage by conditional sale—Suit by mortgagee against vendor and his transferees for possession and declaration of the invalidity of transfers—One cause of action]; *J P Wise* v. *Gureeb Hossein Chowdhry*, (1870) 13 Suth W R 271 (272); *Thiagaraja* v. *Giyana Sambandha Sannadhi*, (1888) 11 Mad 77 (81, 82) [Eviction of tenants holding different lands but under one muchlika]; *Kinno Monee Debia* v. *Shohoram Sircar*, (1865) 3 Suth W R 127 (128); *Mt Ackjoo Bibi* v. *Lallah Ramachender Lall Sahai*, (1875) 23 Suth W R 400 (400); *Rutunessur Das* In the matter of (1870) 14 Suth W R 381 (382); *Nanku* v. *Board of Revenue*, (1875-78) 1 All 444 (446) F B; *Shib Prasad Chaudhuri* v. *Vakai Pali*, (1906) 33 Cal 601 (603, 605); *Kalinath* v. *Ayesha*, (1913) 20 Ind Cas 347 (348) Cal; *Sahibji* v. *Peeru*, (1919) 49 Ind Cas 188 (190): 10 Pun Re 1919.

(3) *Bhogilal* v. *Jetta Lal*, 1929 Bom 51 (53): 30 Bom L R 1588: 114 Ind Cas 262 [Suit to recover rent—Transferor and transferee joining in —Only one cause of action—Though relief several].

(4) *Simhadri Appa Rao* v. *Prathpati*, (1906) 29 Mad 29 (31); *Patinharkur* v. *Raman Varma*, (1914) 24 Ind Cas 519 (521): 28 Mad L Jour 669; *Sadu* v. *Ram*, (1892) 16 Bom 608 (617). See also *Subramaniya* v. *Sadasiva*, (1884) 8 Mad 75 (76); *Limaya* v. *Walve*, 1924 Pat 65 (66): 2 Pat L R 132: 1923 Pat H C C 276: 76 Ind Cas 950 [Partnership Suits].

class of cases.[1]

Though, in the case of several defendants, this rule uses the word "jointly" and does not use the word "in the alternative" found in O. 1, Rr. 1 and 3, joinder of alternative causes of action will not be repugnant to this rule, provided *in respect of each of the alternative causes of action*, the several defendants are "jointly" interested.

6. One plaintiff, one defendant, several causes of action.—This rule authorises a plaintiff to unite several causes of action against a single defendant[1] subject, however, to the limitation that, if all the causes of action cannot be conveniently tried together, an order may be made directing separate trials of the same. But the joinder of *numerous* causes of action amounting to an abuse of the process of the Court is not contemplated by this rule. Thus where the plaintiffs joined in one action, claims for infringement of 23 patents, Collins, M. R., said: "*Prima facie* a dozen causes of action cannot be combined in one writ; they must be so *intimately connected* as to justify their being included in one writ".[2] A person who is made a defendant in different capacities is not the "same defendant" within the meaning of this rule.[3]

7. One plaintiff, two or more defendants—Causes of action joint against all the defendants.—It is a condition precedent to the applicability of the rule that the defendants must be *jointly* liable in respect of *each and every one* of the causes of action sought to be joined.[1] It is not, however,

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Note 5.

(1) *Chandrika Prasad* v. *Hiralal*, 1924 Pat 280 (282): 75 Ind Cas 433: 5 Pat L Tim 49: 2 Pat L R 82: 1923 Pat H C C 357 [Rescission of contract or specific performance in the alternative]; *Nathusa* v. *Phulchandsa*, (1912) 14 Ind Cas 399 (401): 8 Nag L R 7 [Original contract, or substituted contract in the alternative]; *G A Sundara Iyer* v. *Arumugam Pillai*, 1924 Mad 520 (521): 44 Mad L Jour 361: 17 Mad L W 374: 32 Mad L Tim 118: 72 Ind Cas 325 [Claim under pronote can be combined with claim on original consideration in the alternative]; *Kabir Khan* v. *Khawani*, 1887 Pun Re No 41. See also *Lakshmibai* v. *Hari*, (1872) 9 Bom H C R 1. See also *Suraj Bikram Singh* v. *Chandra Bhan Singh*, (1912) 17 Ind Cas 334 (337) Oudh. But see *Fatima Begum* v. *Muhammad Zakaria*, 1895 Pun Re No 96; *Keshoree Lal* v. *Gobind Ram*, (1872) 4 N W P H C R 70 [Declaration of right to redeem and for damages not claimable in same suit].

Note 6.

(1) *Maharajah Rajunder Kishwar Singh Bahadur* v. *Sheopursum Misser*, (1863-66) 10 M I A 438 (450): 5 Suth W R P C 55: 1 Suth P C J 628: 2 Sar P C J 174 [A claim for arrears of rent and to remove cloud on title]; *Dreyfus & Co* v. *Gur Ditta Mul*, (1911) 9 Ind Cas 655 (656): 35 Pun Re 1911: 85 Pun L R 1911: 70 Pun W R 1911 [Sch II, Para 17—Single application for three distinct agreements to refer]; *Chiragh Din* v. *Bhagwan Das*, (1916) 32 Ind Cas 40 (40): 1915 Pun Re No 100: 189 Pun W R 1915 [Several pronotes executed by the same defendants]; *Beam Shankar* v. *Kedar Nath*, (1919) 53 Ind Cas 456 (456): 22 Oudh Cas 183: 1 U P L R (J C) 85 [Claim for share of profits and arrears of revenue]; *Mahamed Ali Khan* v. *Nisar Ali Khan*, 1928 Oudh 67 (78): 1 Luck Cas 592: 109 Ind Cas 835 [Claim for mutwa'lliship can be joined with claim for wakf property as appendage thereto]; *Chockalinga Pillai* v. *Kumara Viruthalam*, (1869) 4 Mad H C R 334 (335) [Rent due in four instalments—All fallen due—Claimable in single suit]; *Ganga Sahai* v. *Bansi*, (1919) 52 Ind Cas 649 (649): 42 All 64: 17 All L J 993: 1 U P L R (H C) 129 [Declaration of title and mesne profits]; *Jagomohan* v. *Mani Lal*, (1869) 3 Beng L R App 77: 11 Suth W R 542 [For possession of a house and rent]; *Bashashar Lal* v. *Natha Singh*, 1908 Pun Re No 30: 102 Pun L R 1908: 35 Pun W R 1908 [For possession and mesne profits]; *Gudar Tewary* v. *Brij Nandan Pershad*, (1901) 5 Cal W N 880 (881) [Both enhancement and arrears of rent at an enhanced rate]; *Shib Prosad Chouduri* v. *Vakai Pali*, (1906) 33 Cal 601 (605) [Rent of holding and fishery attached to the holding consolidated]; *Rhidayanath* v. *Krishna*, (1907) 34 Cal 298 (301): 11 Cal W N 497: 6 Cal L Jour 153 [Rent of several holdings]; *Broja Kishoree* v. *Khema Soondooree Dossee*, (1867) 7 Suth W R 409 (409) [Claim for a hundi with a claim for return of money paid in excess of rent due]; *Janakee Chowdhranee* v. *Dwarakanath Chowdhry*, 1 Hay 555.

(2) *Saccharin Corporation* v. *Wild*, (1903) 1 Ch 410.

(3) *Ramaswamy Pillai* v. *Marimuthu Goundan*, 1928 Mad 764 (769); *M Ariff* v. *Rahmat Bee*, (1919) 50 Ind Cas 528 (529): 11 Bur L Tim 222. See also *Harendra Nath* v. *Purna Chandra*, 1928 Cal 199 (202): 55 Cal 164: 32 Cal W N 885: 109 Ind Cas 755 [Claim by plaintiff in personal capacity against some defendants and as shebait against some separate suits ordered].

Note 7.

(1) *Bhagwati Prasad Gir* v. *Bindeshri Gir*, (1884) 6 All 106 (108): 1883 All W N 229 [Dissented from on another point in 3 Ind Cas 735: 32 All 14]; *Narsingh* v. *Mangal*, (1883) 5 All 163 (171): 1882 All W N 202 F B; *Umabai* v. *Bhau Balwant*, (1909) 3 Ind Cas 165 (169):

O. 2, R. 3, Note 7.

necessary, that each of such defendants should be interested in all the *reliefs* claimed provided they are interested jointly in the main questions raised in the litigation.[2] Thus where two agents are jointly liable to render accounts, though not each for the same period of time[3] or where several defendants are sued for refund of monies by each under a wrong order for rateable distribution[4] there is no misjoinder.

Where there is only a *single* cause of action against several defendants there can be no misjoinder of causes of action. Thus where *A* sues *B* and his mortgagee *C* for a declaration of his right to his share of the property and for possession thereof, the cause of action is the *infringement of A's* right by the mortgage and dispossession effected by *B* and *C* respectively, and consequently there is no misjoinder of defendants and causes of action.[5] Similarly when *A* sells a certain property to *B* and thereafter in execution of a decree obtained by *X* against *A*, the property is sold and purchased in portions by *C*, *D* and *E*, and *B* sues *A*, *X* and *C*, *D* and *E* to set aside the execution sale, the cause of action is only one against all the defendants and there is no misjoinder.[6]

Where possession is claimed against *A* and also against persons holding by *derivative titles* under *A* the cause of action is a *single* one and there is no misjoinder.[7] Thus where a reversioner sues to set aside the alienations by a Hindu widow in favour of several defendants, the suit is not bad for mis-

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34 Bom 358: 11 Bom L R 499. *See also* the following cases—*Prodyot Kumar Tagore* v. *Mahomed Hussain*, (1910) 7 Ind Cas 86 (88) [Claims in one suit for possession of land in tenant's holding and also those encroached upon]. *See* the following cases *Birendra Kishore Manikya* v. *Padma Lochan*, (1919) 51 Ind Cas 826 (827) Cal [Defendants, co-sharers with plaintiff in certain tenures—Plaintiff paying up two decrees for rent and averting the sales of the holdings—Single suit for contribution in respect of the two causes of action will lie]; *Jankibai* v. *Shrinivas Ganesh Valsankar*, (1914) 20 Ind Cas 533 (535): 38 Bom 120: 15 Bom L R 684 [Claim against several co-parceners for stridhan jewels joined with a claim for maintenance]; *Iswar Das Marwari* v. *Raghunadhan Mahton*, (1919) 51 Ind Cas 609 (610) [Suit for the recovery of a sum of money on the basis of two rokkas with an allegation that all the defendants were benefited by the loan although one of the rokkas was executed by two and the other by one only of the several defendants]; *Sarada Charan* v. *Iswar Samli*, (1907) 11 Cal W N 1154 (1156); *Nisar Huseln* v. *Nisar Ali*, (1906) 3 All L J 123: 1906 All W N 54; *Parthasarathy Naicken* v. *Thanduvaraya Mudaliar*, (1907) 17 Mad L Jour 515 (516); *Shambu Dyal Singh* v. *Iswar Saran*, 1923 A'l 306 (310): 75 Ind Cas 597.

(2) *Bhagwati* v. *Bindeshri*, (1883) 6 All 106 (108): 1883 All W N 229; *Umabai* v. *Bhau Balwant*, (1909) 3 Ind Cas 165 (169): 34 Bom 358: 11 Bom L R 499; *Shahzahid Husain* v. *Shah Zafar Hussain*, (1909) 2 Ind Cas 3 (4): 6 All L J 456; *Jogemaya* v. *Girindra Nath*, (1900) 4 Cal W N 590.

(3) *Degambar* v. *Kallynath*, (1881) 7 Cal 654 (658): 9 Cal L R 265; *Damodar Das* v. *Girdhari Lal*, (1905) 27 All 564 (566): 1905 All W N 100: 2 All L J 692.

(4) *Gouri Prasad* v. *Ram Ratan*, (1886) 13 Cal 159 (162). See also *Jhaman Lal* v. *Sant Lal*, (1896) 1897 Pun Re No 43.

(5) *Kubra Jan* v. *Ram Bali*, (1908) 30 All 560 (562): 5 All L J 647: 1908 All W N 235: 4 Mad L Tim 392; *Indar Kuar* v. *Gur Prasad*, (1889) 11 All 33 (35): 1888 All W N 283; *Mazhar Ali* v. *Sajjad Husain*, (1902) 24 All 358 (360): 1902 All W N 85.

(6) *H Mozoomdar* v. *Prosunno Chunder Biswas*, (1883) 9 Cal 763: 12 Cal L R 556; *Gumani* v. *Ramcharan*, (1876) 1 All 555. See also *Srinath Das* v. *Khetter Mohun*, (1889) 16 Cal 693: 16 Ind App 85: 5 Sar 315: 13 Ind Jur 132 P C. See, however, *Mussumut Rutta Bibi* v. *Dumree Lal*, (1870) 2 N W P H C 153 [Different alienations from same person in different trials].

(7) *Nundo Kumar* v. *Banomati*, (1902) 29 Cal 871 (880); *Umabai* v. *Vithal*, (1909) 1 Ind Cas 120 (121): 33 Bom 293: 5 Mad L Tim 230: 11 Bom L R 34; *Lakhi Charan* v. *Chuni Miah*, (1913) 18 Ind Cas 852 (853) Cal; *Shoroop* v. *Mothoor*, (1865) 4 Suth W R 109 (110); *Antu* v. *Vishnu*, (1897) 22 Bom 630 (632); *Kesar Singh* v. *Thakar Das*, 1901 Pun Re No 10: 81 Pun L R 1901; *Kanth Narayan Singh* v. *Prem Lal Paurey*, (1865) 3 Suth W R 102 (103) [Suit by son against father and several purchasers from him. The case holding to the contrary are of doubtful authority]. See *Kacharbhoj Vaija* v. *Bai Rathore*, (1883) 7 Bom 289 (290); *Ganeshi Lal* v. *Khairati Singh*, (1894) 16 All 279 (283): 1894 All W N 82; *Koondun Lal* v. *Rao Himmut Singh*, (1871) 3 N W P 86; *Raghoonath Sahai* v. *Mahomed Nazeer*, (1872) 4 N W P H C R 108; *Golam Mustafa Khan* v. *Sheo Soondaree Burmonee*, (1868) 10 Suth W R 187 (187); *Raja Ram Tewary* v. *Luchmun Prasad*, (1867) 8 Suth W R 15 (16): B L R Sup 731 F B; *Sheo Rattan* v. *Ghisiawan*, (1906) 9 Oudh Cas 326 (329) [A suit for *bare declaration* of invalidity of several alienations held to stand on a different footing from a suit for possession]: *Musst Gopal Devi* v. *Jai Narayan*, 1905 Pun Re No 1: 83 Pun L R 1905: 11 Pun W R 1905, (Do.).

joinder[6] inasmuch as the plaintiff's cause of action against the alienees is the same as that against the alienor from whom they derive their title.[9] Similarly where *A* leases certain lands to *B* and thereafter, ignoring the lease, again leases out the same in separate parcels to *C* and *D* and on that basis *A*, *C* and *D* dispossess *B*, a suit by *B* against *A*, *C* and *D* is not bad for misjoinder.[10] The position will be different where the defendants do *not claim* under the same trespasser[11] or where the unity of the cause of action is broken up by joining with it a cause of action on an alienation by a stranger.[12]

O. 2, R. 3, Notes 7—8.

8. One plaintiff, separate causes of action against several defendants, (i.e.,) misjoinder of defendants and causes of action.—A suit against several defendants for causes of action accrued against each of them *separately* and in respect of which they are *not jointly* liable is bad for misjoinder.[1] "Such a joinder complicates the case before the judge and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him, though admissible against one or more of the others. Moreover, it is vexatious and harassing to the different defendants.[2] In *Sethuratnam Iyer* v. *Venkatachala Goundan*[3] where a single suit was filed to eject several tenants in possession of different parcels of the land of the plaintiff Sir Lawrence Jenkins, in delivering the judgment of the Board, said: "They (the defendants) are not in joint possession; on the contrary, they have *separate*

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(8) *Sami Chetty* v. *Ammani*, (1873) 7 Mad H C R 260 (262); *Balkrishna Das* v. *Hira Lal*, (1914) 24 Ind Cas 95 (96): 36 All 406: 12 All L J 509; *Sonu Khushal Khadake* v. *Bahinibai Krishna*, (1916) 33 Ind Cas 950 (952): 40 Bom 351: 18 Bom L R 45; *Ishan Chandra* v. *Rameswar*, (1897) 1 Cal W N s n 232; *Provabati* v. *Rameshwar*, (1910) 6 Ind Cas 248 (249) Cal *Ishan Chunder Hazra* v. *Rameshwar Mondol*, (1897) 24 Cal 831 (832); *Dhapi* v. *Barham Deo Prasad*, (1900) 4 Cal W N 297; *Jiwan Singh* v. *Garbha Singh*, 1921 Jour 12 (1): 30 Pun L R 1921: 59 Ind Cas 522: 25 Pun W R 1921; *Chuhar Mall* v. *Bakhtwaddi*, 1890 Pun Re No 149; *Tufail Mahomed* v. *Hira Singh*, (1911) 10 Ind Cas 48 (48): 120 Pun W R 1911: 167 Pun L R 1911. See also *Abdul* v. *Ayaga*, (1889) 12 Mad 234 (235) [Alienees from *Karnavan* of Tarwad]; *Parbati Kunwar* v. *Mahomed Fatima*, (1907) 29 All 267 (270, 272): 4 All L J 121: 1907 All W N 36 [Property claimed under one title from defendants professing to hold under various titles]; *Dorasamy Pillai* v. *Anganmal*, (1908) 18 Mad L Jour 265 (266): 3 Mad L Tim 286: 18 Mad L Jour 484 [Alienations by guardian]. See also *Lal Chand* v. *Manohri*, (1918) 44 Ind Cas 549 (550): 64 Pun W R 1918: 59 Pun Re 1918. But see *Mata Pershad* v. *Bhugmanee*, (1869) 1 N W P H C R 128 [Suit against alienees from guardian—No relief sought for against guardian]: *Looloo Singh* v. *Rajender Laha*, (1867) 8 Suth W R 364 (365).

(9) See the following cases:—*Vasudeva* v. *Kaleadi*, (1874) 7 Mad H C R 290 (293) F B; *Mahomed* v. *Krishnan*, (1888) 11 Mad 106 (111) [Malabar Stanom]; *Chuhar Mal* v. *Bakhtwaddi*, 1890 Pun Re No 149.

(10) *Nundo Kumar Naskar* v. *Banomali Gayan*, (1902) 29 Cal 871 (880).

(11) *Afzal Shah* v. *Lachmi Narain*, (1917) 42 Ind Cas 856: 40 All 7: 15 All L J 809.

(12) *Hari Ballabh Rai* v. *Gopal Lal Singh*, (1910) 6 Ind Cas 577 (579) Cal [Alienations by reversioner's father and brother—Alienations by widow—Separate causes of action].

Note 8.

(1) *Narsingh Das* v. *Mangal Dubey*, (1883) 5 All 163 (170): 1882 All W N 202 F B; *Mullick Kefait* v. *Sheo Pershad*, (1896) 23 Cal 821 (826); *Baboo Motee Lal* v. *Ranee. The wife of Maharajah Bhoop Singh*, (1867) 8 Suth W R 64 (67): 2 Ind Jur N S 245; *Hurro Monee Dossea* v. *Onookool Chunder Mookerjee*, (1867) 8 Suth W R 461 (462); *Panchooree Mahtoon* v. *Kale Churn*, (1868) 9 Suth W R 490 (492); *Probhooram* v. *Robinson*, (1869) 11 Suth W R 398 (399): 3 Beng L R App 49; *Mussamut Pegoo Jan* v. *Mullick Wirzuddin*, (1872) 18 Suth W R 464 (465); *Raja Ram Tewary* v. *Luchmun Persad*, (1867) Ben L R Sup Vol 731: 8 Suth W R 15; *Guru Prasad Das* v. *Narendra Narain Maity*, (1909) 1 Ind Cas 361 (362); *Mangal* v. *Girdhari*, 1892 Pun Re 127; *Ariff* v. *Rahmat Bee*, (1919) 50 Ind Cas 528 (529): 11 Bur L Tim 222; *Johnson D Po Min* v. *U Ogh*, 1932 Rang 132 (135) [Suit under S 92 C P C —Some defendants strangers to trust—Misjoinder]; In re *Burstall* v. *Beyfus*, (1884) 26 Ch D 35 (39); *Pointon* v. *Pointon*, (1871) L R 12 Eq 547.

(2) *Raja Ram Tiwari* v. *Luchmun*, (1867) 8 Suth W R 15 (16): Beng L R Sup 731 [Per Sir Barnes Peacock, C J]. See also *Tinkarhi Dasse* v. *Narendranath Mukerji*, 1932 Cal 512 (513, 514): 59 Cal 548 [Paramount title in mortgage suits]. Also *Jaggeswar Dutt* v. *Bhuban Mohan*, (1906) 33 Cal 425 (441): 3 Cal L Jour 205.

(3) *Sethuratnam Iyer* v. *Venkatachella Goundan*, 1920 P C 67 (70): 43 Mad 567: 47 Ind App 76: 1920 Mad W N 61: 27 Mad L Tim 102: 56 Ind Cas 117: 11 Mad L W 399: 38 Mad L Jour 476: 18 All L Jour 707: 22 Bom L R 578: 26 Cal W N 485 P C.

O. 2, R. 3, Note 8.

holdings and should have been separately sued..... But the plaintiff, in disregard of the provisions of the Code, has united in the same suit not merely several causes of action but several actions or suits against separate defendants with the result that the litigation has been conducted throughout as though the defendants were a community with common interests." The principle underlying the said observation equally applies to suits for possession against *several trespassers*,[4] unless the trespass is committed *jointly* by all the defendants.[5]

Where the first defendant was the executant of a bond to the plaintiff and in a suit for the money due on the bond the other defendants were joined on the ground that they had colluded with the 1st defendant in taking assignments of his property to defraud the plaintiff.[6] Their Lordships of the Privy Council held that there was a misjoinder, as the plaintiff's cause of action for the money was only as against the 1*st defendant* and not as against the other defendants.

In suits on contracts, strangers to the contract having distinct interests by themselves cannot be joined,[7] but if the third party is only a *benamidar*[8] or is otherwise liable in law for the contract[9] there is no distinct interest. Where several defendants enter into contracts with the plaintiff but each is liable only for his transaction *separately*[10] or where there is a separate cause of action against each of the several defendants[11] a single suit against all of them is incompetent.

A cause of action arising out of a joint liability of some defendants cannot be united with another cause of action under a transaction in which one of them *alone* was concerned.[12] Nor can separate causes of action against separate sets of defendants be joined in one suit.[13]

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(4) *Ranee Surut Soondaree Debia* v. *Soorjoo Kant Acharjee Chowdhry*, (1869) 11 Suth W R 397 (397): 2 Ben L R App 53; *Afzal Shah* v. *Lachmi Narain*, (1917) 42 Ind Cas 856 (858): 40 All 7: 15 All L J 809; *W Dhar* v. *Hoon Mag*, (1919) 52 Ind Cas 927 (928): 12 Bur L Tim 106; *Chiranji Lal* v. *Baukta Chari*, (1910) 5 Ind Cas 835 (838): 59 Pun L R 1910: 12 Pun W R 1910. In the light of the Privy Council case referred to above the following cases cannot be accepted as laying down the correct law:—*Bankhu* v. *Nathi*, (1908) 7 Cal L Jour 460 (465); *Lakshi Charan Shaha* v. *Chuni Miah*, (1913) 18 Ind Cas 852 (853); *Kalinath Bose* v. *Ayesha Bibi*, (1913) 20 Ind Cas 347 (348); In re *Krishnaswamy Pathan*, (1910) 8 Ind Cas 885 (885): 9 Mad L Tim 173.

(5) *Omur Ali* v. *Weylayet*, (1879) 4 Cal L R 455 (458).

(6) *Mohammed Zahoor Ali* v. *Rutta Koer*, (1866-67) 11 Moo I A 468 (473): 9 Suth W R P C 9: 2 Suther 107: 2 Sar 320.

(7) *Luckumsey* v. *Fazulla*, (1881) 5 Bom 177 (179); *Rangayya* v. *Subramania*, (1917) 40 Ind Cas 429 (436, 441): 40 Mad 365: 32 Mad L Jour 575: 5 Mad L W 797: 21 Mad L T 385 F B; *Ahmedbhoy* v. *Dinshaw*, (1911) 12 Ind Cas 813 (822): (1911) 13 Bom L R 1061: *Muthappa* v. *Muthu Palni*, (1904) 27 Mad 80 (82); *De Houghton* v. *Money*, (1866) L R 2 Ch App 164.

(8) *Mokund Lall* v. *Chotay Lall*, (1884) 10 Cal 1061 (1069).

(9) *Jamsetji* v. *Kashinath*, (1901) 26 Bom 326 (328): 3 Bom L R 898.

(10) *Nanasiraya* v. *Kadir Ammal*, (1894) 17 Mad 168 (175): 4 Mad L Jour 31; *Baroo Sircar* v. *Mossim Mundle*, (1874) 21 Suth W R 206 (207).

(11) *Paresh Chandra* v. *Jogendra*, 1927 Cal 93 (95): 97 Ind Cas 955; *Imrit* v. *Dhunput*, (1872) 18 Suth W R 288 (288): 9 B L R 241; *Muzhur Hossein* v. *Dinobundho*, Bourke Oudh Cases 8: Cor 94; *Gopal Das* v. *Hasna Singh*, (1910) 8 Ind Cas 926 (928): 4 Sind L R 152; *Chandra Kumar Basu* v. *Rani Sashi Mukhi Debi*, 1924 Cal 511 (511): 71 Ind Cas 324; *Banee Krishun* v. *Koondun Lal*, (1870) 2 N W P H C R 221; *Jaggeswar* v. *Bhuban Mohan*, (1906) 33 Cal 425 (441): 3 Cal L Jour 305.

(12) *Pulavarty Venkanna* v. *Jupudy Sarayya*, (1909) 4 Ind Cas 1097 (1101): 19 Mad L Jour 102: 5 Mad L Tim 117; *Parchomal* v. *Paman Das*, (1909) 4 Ind Cas 600 (602): 3 Sind L R 108; *Lakshmanan Chetti* v. *Karuppan Chetti*, (1883) 6 Mad 273 (276); *Saina Mal* v. *Shah Bag*, 1888 Pun Re No 189: *Gokal Chand* v. *Khwaja Ali Shah*, 1890 Pun Re No 32.

(13) *Ram Prasad* v. *Sachi Dassi*, (1902) 6 Cal W N 585 (587, 589); *Chakuri Singh* v. *Suraj Kuar*, (1905) 2 All L J 91 (94); *Gulrajmal* v. *Paman Mal*, (1915) 27 Ind Cas 344 (350): 8 Sind L R 69 [*Obiter*]; *Anand Sarup* v. *Asadali*, (1915) 28 Ind Cas 602 (603): 13 All L J 842 (Do.). See, however, *Mussamut Ameerun* v. *Mus-*

In suits for partition, no cause of action can be joined which has no bearing on the question of partition.[14] O. 2, R. 3, Notes 8—10.

Regarding suits for specific performance of contracts and suits for contribution, *see* the undermentioned cases.[15]

Though a suit may fall outside this rule, by reason of joinder of distinct causes of action, against different defendants, it may be supported by the terms of O. 1, R. 3, if the several causes of action are so connected with the *same act or transaction* as to give rise to a *common question of law or fact* at the trial.[16] *See also* notes to O. 1, R. 3.

9. Conspiracy to commit wrong or breach of contract.—Distinct causes of action against several defendants may be united in one suit if the joint liability of the defendants arises by reason of a conspiracy or common design to commit the injury.[1] Thus *A* and *B* combine together to assault *C*[2] or to keep him out of possession of certain lands,[3] a suit by *C* against *A* and *B* for damages for the assault or for declaration of his right to the property is maintainable. The view that the joinder will be bad if the conspiracy or common design is *found* against ultimately[4] does not seem to be sound inasmuch as the question of misjoinder must be decided on the *allegations* made in the plaint. *See* note 1 *ante*.

10. Two or more plaintiffs, one defendant—Plaintiffs jointly interested in the causes of action.—Where two or more plaintiffs are *jointly* interested in two or more causes of action against the same defendant, they can join all the causes of action in the same suit.[1] It is enough if the plaintiffs are *jointly* interested though not *equally* interested in the causes of action;[2] con-

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samut Wuseehun, (1869) 12 Suth W R 11: 3 Beng L R A C 190.

(14) *Ramakrishna* v. *Krishna Iyer*, (1908) 18 Mad L Jour 85 (87) [Suit for partition between Melwaramdars. No question between Melwaramdars and the Kudivaramdars to be joined]; *Saminada* v. *Subba*, (1877) 1 Mad 333 (334, 335) [Question of ejectment of cultivating ryots].

(15) *Ramachandra Ganesh* v. *Ramachandra Kondaji*, (1896) 22 Bom 46 (49) [Specific performance]; *Krishnasamy* v. *Sundarappayyar*, (1894) 18 Mad 415 (417): 5 Mad L Jour 164, (Do.); *Appala Naidu* v. *Changalavala Jogiraju*, (1916) 32 Ind Cas 237 (238): (1916) 1 Mad W N 11, (Do.); *Hira Chand* v. *Abdul*, (1875-78) 1 All 455 (456) [Contribution]; *Rajaput Rai* v. *Nawab Muhamed Ali Khan*, (1873) 5 N W P 215, (Do.); *Mahomed Mirza* v. *Khajah Abdul Kureem*, (1876) 25 Suth W R 41 (41), (Do.).

(16) *Ramendra Nath Roy* v. *Brojendra Nath Das*, (1917) 45 Cal 111 (122, 123): 21 Cal W N 794: 41 Ind Cas 944: 27 Cal L Jour 158; *Aiyathurai* v. *Muhamed Meera*, (1908) 31 Mad 252 (257): 18 Mad L Jour 238 [O. 1, R. 3 applies also to a case *several causes of action*]; See also *Sahib Ji* v. *Piru*, (1919) 49 Ind Cas 188 (190): 10 Pun Re 1919 and *Rajkumar Mazumdar* v. *Probal Chandra Ganguli*, (1905) 9 Cal W N 656 (661) [Rent for two leases—Properties undivided and leases alike].

Note 9.

(1) *Natesa* v. *Ganapathi*, (1891) 14 Mad 103 (108); *Ganami* v. *Ram Charan*, (1878) 1 All 555 (556) [Collusive attachment and Court sale]; *Srimohan* v. *Macgregor*, (1901) 28 Cal 769 (783) [Combination to deprive plaintiff of rights in joint family]. But see *Ram Chunder Paul* v. *Omara Churn Deb*, (1871) 16 Suth W R 155 (155); *Gujadhur Pershad* v. *Saheb Roy*, (1873) 19 Suth W R 203 (203).

(2) *Varajlal* v. *Ramdat*, (1902) 26 Bom 259 (264): 3 Bom L R 878. See also *Singa Reddi Obala Reddi* v. *Madava Rau*, (1897) 20 Mad 360 (362).

(3) *Lokenath* v. *Keshab*, (1886) 13 Cal 147 (158): 11 Ind Jur 105.

(4) *Ram Narain* v. *Annoda Prosad*, (1887) 14 Cal 681 (686); *Sudehendu Mohun Roy* v. *Durga Dasi*, (1887) 14 Cal 435 (439).

Note 10

(1) *Tulsa* v. *Gopal Rai*, (1884) 6 All 632 (633): 1884 All W N 208: 9 Ind Jur 155; *Shamsundar Bonadar* v. *Kunjoban Hota*, (1900) 13 C P L R 130 (135); *Bhojlal* v. *Jethalal*, 1929 Bom 51 (53, 54): 30 Bom L R 1588: 114 Ind Cas 262; *Raghunatha Udayanna Thevar* v. *Chokkalinga Chetty*, (1896) 6 Mad L Jour 136 (137). See also *Bhagwan Chandra Dey* v. *Dayal Hari Das*, (1912) 16 Ind Cas 623 (624); *Chethru Mahton* v. *Muhamed Karim Nawab*, (1919) 50 Ind Cas 328 (328): 4 Pat L Jour 297; *Kanagammal* v. *Panchapakesa Odayar*, (1914) 23 Ind Cas 82 (84): 26 Mad L Jour 343: 1914 Mad W N 327.

(2) See *Lingammal* v. *Venkatammal*, (1882) 6 Mad 239 (242): 6 Ind Jur 463.

O. 2, R. 3, Notes 10—11.

flicting or antagonistic interests among the plaintiffs cannot be joint interest.[3]

This rule has no application when the cause of action is a single one, though all the plaintiffs may be jointly interested in it.[4] As has been seen already in Note 8 above this rule is subject to O. 1, R. 1 and therefore several plaintiffs may unite several causes of action in the same suit though they may not be jointly but severally interested in them all, provided their rights to relief arise out of the *same act or transaction* and a *common question of fact or law* arises for trial.[5]

11. Two or more plaintiffs, one defendant—Causes of action in which plaintiffs are severally interested—Misjoinder of plaintiffs and causes of action.—Under this rule more plaintiffs than one, having distinct causes of action, might join in a suit against the same defendant, only if they are all jointly interested in the causes of action. But this rule is to be read subject to the provisions of O. 1, R. 1. O. 1, R. 1 enables several plaintiffs to unite in one suit, though their causes of action may be distinct and separate, if their rights to relief arise out of the same act or transaction or series of acts or transactions, and a common question of fact or law would arise if they brought separate suits. Thus two or more plaintiffs cannot properly unite in one suit two or more causes of action, in which they are *separately* interested unless they can do so under O. 1, R. 1.[1]

Where a single wrongful act or infringement, gives rise to separate causes of action in favour of several plaintiffs, a single suit by all of them is maintainable under O. 1, R. 1.[2-a] The undermentioned cases[2] held to be bad under the old Code may, it is submitted, be maintainable under O. 1, R. 1 of the present Code. It was decided under the old Code that claims to property by several plaintiffs under *independent* titles to portions thereof, cannot be joined in the same suit.[3]

Five persons brought a single suit against the same defendant basing their claim on a single contract. But the evidence revealed five different contracts, one with each of the plaintiffs. In such a case no question of misjoinder of parties or causes of action can arise. The suit will have to be dismissed on the ground, that there was no *single* contract in respect of which they can maintain a single suit. Nor could any one of the plaintiffs be granted the

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(3) See *Lingammal* v. *Venkatammal*, (1882) 6 Mad 239 (242): 6 Ind Jur 463; *Baijnath* v. *Chhowaro*, (1904) 26 All 218 (220): 1903 All W N 240.

(4) *Muthuvijaya* v. *Chockalingam*, (1896) 19 Mad 335 (336, 337); *Ebrahim* v. *Fulbai*, (1902) 26 Bom 577 (582, 583): 4 Bom L R 180; *Sundar Jah* v. *Bansman Jah*, (1906) 33 Cal 367 (370): 10 Cal W N 508; *Haramoni Dassi* v. *Hari Churn Chowdhry*, (1895) 22 Cal 833 (838). But see *Rahim Baksh* v. *Amiran Bibi*, (1896) 18 All 219 (221): 1896 All W N 33.

(5) *Nilamadhal Mitra* v. *Jotindranath Mitra*, (1913) 18 Ind Cas 764 (765): 17 Cal W N 341.

Note 11.

(1) *M C Roy Chowdhry* v. *A C C Chowdhry*, (1897) 24 Cal 540 (543); *Ramjas Agarwala* v. *Linton Molesworth & Co*, 1923 Pat 411 (412): 73 Ind Cas 71.

(2-a) *The Universities of Oxford and Cambridge* v. *George Gill and Sons*, (1899) 1 Ch 55; *Drincqbier* v. *Wood*, (1899) 1 Ch 393.

(2) *Rajjo Kuar* v. *Debi Dial*, (1895) 18 All 432 (434): 1896 All W N 139 [*Cf.* Gift in fraud of several creditors, S 53 of the Transfer of Property Act as amended by Act XX of 1929]; *Aldridge* v. *Barrow*, (1907) 34 Cal 662 (670): 11 Cal W N 680 [One act libel against several plaintiffs]; *Ramanuja* v. *Devanayaka*, (1885) 8 Mad 361 (363, 364): 9 Ind Jur 264 [Proceedings dismissing several trustees of a temple]; *Ali Serang* v. *Beadon*, (1885) 11 Cal 524 (526) [Wrongful detention of several plaintiffs in jail by the Superintendent].

(3) *Sarala Sundari Dasi* v. *Sarada Prasad Sur*, (1905) 2 Cal L Jour 602 (605-609); *Salima Bibi* v. *Sheik Muhammad*, (1895) 18 All 131 (136, 139): 1896 All W N 2.

benefit of election under O. 1, R. 2 as no one plaintiff could be said to be entitled to the contract *as set up*.[4]

O. 2, R. 3, Notes 11—14.

12. Two or more plaintiffs suing two or more defendants on several causes of action must be jointly interested in each of the causes of action against all the defendants.[1]

13. Two or more plaintiffs, two or more defendants—Plaintiffs severally interested against defendants severally—Misjoinder of parties and causes of action.—Where each plaintiff has only a separate right against each defendant[1] or the defendants jointly,[2] or different sets of plaintiffs are *separately* entitled against *different sets* of defendants[3] the suit is bad for misjoinder. It may be here pointed out that where the several plaintiffs have separate rights against the *defendants jointly*, then such plaintiffs might join in the same suit.

14. Procedure in cases of misjoinder.—Under the old Code where the plaint was bad for misjoinder or multifariousness, the Court could return the plaint for amendment, or reject it or dismiss the suit if the necessary amendment is not made. If the suit was dismissed, and the plaintiff appealed, the appellate Court might remand it for returning the plaint for amendment.[1]

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(4) *Chandulal Suklal Shet* v. *Dogdu Mahadu Chaudhuri*, 1925 Bom 342 (342): 27 Bom L R 472: 87 Ind Cas 435.

Note 12.

(1) *Salima Bibi* v. *Sheikh Muhammad*, (1896) 18 All 131 (136): 1896 All W N 2; *Alah Buksh* v. *Sadiq Ali*, 1903 Pun Re No 38: 1903 Pun L R No 87; *Asa Singh* v. *Indar Singh*, 1898 Pun Re No 91. See aso *Girija Nath Ray* v. *Sinendra Nath Ray*, (1912) 16 Ind Cas 84 (85): 16 Cal L Jour 1. See also *Ramsewak* v. *Nakched*, (1882) 4 All 261 (274). See also *Lachmi Prasad* v. *Gokul*, 1922 All 80 (80, 81): 20 All L J 157: 66 Ind Cas 206 [Single suit for redemption, though shares of each of several mortgagees specified but redemption agreed to be indivisible]. And *Sheikh Muhammad Baksh* v. *Ramdat*, 1896 Pun Re No 5 [Two different bonds for same transaction single cause of action]. Also *Maung Cho* v. *Ma Chaw*, (1906) 4 L B R 183 (186, 187) [Appointment of Trustee and vesting of trust properties].

Note 13.

(1) *Aiyavu* v. *Vellaya*, (1910) 6 Ind Cas 15 (15): 34 Mad 55: 1910 Mad W N 229: 8 Mad L Tim 6.

(2) *Varajlal* v. *Ramdat*, (1901) 26 Bom 259 (264, 265): 3 Bom L R 878. See also *Romoona* v. *Manicko*, (1866) 9 Suth W R 525 (526).

(3) *Ramkishen* v. *Trebeni Prasad*, (1897) 1 Cal W N s n 103. See also *Bansi Lal Ram* v. *Ram Chand*, 1930 Lah 843 (846): 127 Ind Cas 353: 31 Pun L R 976 [Consolidation of two such suits wrong].

Note 14.

(1) The following are all cases under the old Code *Rajput Rai* v. *Nawab Mahomed Ali Khan*, (1873) 5 N W P H C 215 [Misjoinder—Liable to be dismissed]; *Karan Singh* v. *Muhammad Ismail*, (1885) 7 All 860 (862): 1885 All W N 247, (Do.); *Mohima Chandra* v. *Atul Chandra*, (1897) 24 Cal 540 (545), (Do.); *Aldridge* v. *Barrow*, (1907) 34 Cal 662 (671): 11 Cal W N 680, (Do.); *Ram Narain* v. *Annoda*, (1887) 14 Cal 681 (687), (Do.); *Sudehndhu* v. *Durga*, (1887) 14 Cal 435 (439), (Do.); *Gouri Prasad* v. *Ram Ratan*, (1886) 13 Cal 159 (162), (Do.); *Kachar* v. *Bai Rathore*, (1883) 7 Bom 289 (291), (Do.); *Fakirappa* v. *Rudrappa*, (1892) 16 Bom 119; *Varajlal* v. *Ramdat*, (1902) 26 Bom 259 (266): 3 Bom L R 878; *Janokinath* v. *Ramrunjan*, (1897) 4 Cal 949 (953, 954): 4 Ind Jur 648; *Mokund Lall* v. *Chotay Lall*, (1884) 10 Cal 1061; *Khadarsaheb* v. *Chotibibi*, (1884) 8 Bom 616 (619); *Luckumsey* v. *Fazullah*, (1880-81): 5 Bom 177 (179); *Muthappa* v. *Muthu Pukni*, (1903) 27 Mad 80 (83); *Namasivaya* v. *Kadir*, (1893) 17 Mad 168 (176): 4 Mad L Jour 31; *Ramanuja* v. *Devanayaka*, (1885) 8 Mad 361 (365): 9 Ind Jour 264; *Khimji* v. *Purushotham*, (1884) 7 Mad 171 (176); *Lingammal* v. *Venkatammal*, (1883) 6 Mad 239 (244): 7 Ind Jur 244; *Lakshmanan Chetti* v. *Karuppan Chetty*, (1883) 6 Mad 273 (276); *Sheo Ratan* v. *Ghisiawan*, (1906) 9 Oudh Cas 326 (330); *Alah Buksh* v. *Sadiq Ali*, 1903 Pun Re No 38: 87 Pun L R 1903; *Mangal* v. *Girdhari*, (1892) Pun Re No 127; *Bhagwan Singh* v. *Dhiyan Singh*, 1890 Pun Re No 32; *Sina Mal* v. *Shah Bag Hussain*, 1888 Pun Re No 189; *Tara Prosunno* v. *Koomaree*, (1875) 23 Suth W R 389 (390); *Trainee* v. *Hunsman*, (1873) 20 Suth W R 240 (241); *Mahomed Hosein* v. *Potun*, (1873) 20 Suth W R 147 (148); *Suroop* v. *Nimchand*, (1870) 13 Suth W R 284 (285); *Wise* v. *Gureeb Hossein*, (1870) 13 Suth W R 271 (272); *Ram Kanaye* v. *Prosunno Coomar Sein*, (1870) 13 Suth W R 175 (176); *Sandes* v. *Wildsmith*, (1893) 1 Q B 771; *Woopendra Narain Sen* v. *Aghore Nath Chatterjee*, (1905) 9 Cal W N 498 (500); *Rance Surut Sundaree Debia* v. *Soorjoo Kant Acharji Chowdhry*, (1869) 11 Suth W R 397 (398): 2 Beng L R App 53; *Ram Dayal* v. *Ram Doolal*, (1869) 11 Suth W R 273 (274): 2 Beng L R A C 341; *Gulam Mustafa* v. *Sheo Soonduree*, (1868) 10 Suth W R 187 (187); *Romoona* v. *Manicko Moyee*, (1868) 9 Suth W R 525 (527); *Panchoowaree Mahtoon* v. *Kali Churn*, (1868) 9 W R 490 (492); *Hurro Monee* v. *Onookool*, (1867) 8 Suth W R 461 (462); *Looloo Singh* v. *Rajendur Laha*, (1867) 8 W R 364 (365); *Moti Lal* v. *Ranee*, (1867) 8 Suth W R 64 (67): 2 Ind Jur N S 215; *Raja Ram Tewary* v. *Luchmun Pershad*, (1867) 8 Suth W R 15 (16): Beng L R Sup 731 P B; *Shoroop* v. *Mothoor*, (1865) 4 Suth W R 109 (110); *Ram Prasad* v. *Suchi Dassi*, (1902) 6 Cal W N 585 (588); *Bhaju* v. *Chunni Lal*,

O. 2, R. 3, Notes 14—17.

Under the provisions of the present Code, S. 99 and O. 2, R. 7, the misjoinder is regarded only as an *irregularity* and no suit will be dismissed on the mere ground of misjoinder of causes of action.[2] As a general rule the question of misjoinder will not be considered unless objection is taken at the proper time. *See* Rule 7 of this Order. When a valid objection is taken at the proper time the Court may allow appropriate amendments or withdrawal under the provisions of the Code.[2-a] This power exists, though, with regard to cases of misjoinder of *causes of action*, there is no provision in this Code corresponding to O. 1, R. 9 relating to misjoinder of *parties*. A plea of misjoinder cannot under the present Code be taken in appeal as a ground for the reversal of a decree or for a remand unless it has affected the *merits of the case* or *jurisdiction of the Court*[3] *see* S. 99 *ante*. If the merits have been affected the Court may remand the case for a separate finding on any one or more of the claims in the suit[4] or for any amendment that may be deemed necessary.[5]

15. Addition of unnecessary parties.—The question of misjoinder will have to be determined only with reference to necessary parties in the suit. So in suits for pre-emption where the vendor is not a necessary party to the suit, the joinder as defendants of different vendors of the same vendee, will not make the suit bad for misjoinder.[1]

16. Jurisdiction.—The value of a suit in which more causes of action than one have been united is the aggregate value of the several subject matters at the date of suit.[1]

17. Revision.—Where the Lower Court either misunderstands the nature of judicial *discretion* or otherwise wrongly holds that a suit is bad for misjoinder of causes of action, a revision will lie.[1]

(1907) 5 Cal L Jour 95 (105): 11 Cal W N 284; *Sarala Sundari* v. *Sarada Prosad*, (1905) 2 Cal L Jour 602 (608, 609); *Munshi Maniruddin* v. *Baboo Ram Chund*, (1869) 2 Beng L R A C 341: 11 Suth W R 273; *Heirs of Bapu Keble* v. *Narayan*, (1868) 5 Bom H C R A C J 30; *Tewaree Raghunath Sahai* v. *Syed Mohamed Nazeer*, (1872) 4 N W P H C 108; *Koondun Lal* v. *Hunmut Singh*, (1871) 3 N W P H C R 86; *Mussamut Rutta Bibi* v. *Dunree Lal*, (1870) 2 N W P 153; *Banee Krishun* v. *Koondun Lal*, (1870) 2 N W P H C R 221; *Mata Prasad* v. *Musst Bhugmanee*, 1 N W P H C 128; *Chakauri Singh* v. *Suraj Kuar*, (1905) 2 All L J 91 (94); *Baij Nath* v. *Chowarro*, (1904) 26 All 218 (220): 1903 All W N 240; *Rajoo Kuar* v. *Debi Dial*, (1896) 18 All 432 (435): 1896 All W N 139; *Rahim Buksh* v. *Amiran Bibi*, (1896) 18 All 219 (221): 1896 All W N 39; *Salima Bibi* v. *Sheikh Muhammad*, (1896) 18 All 131 (141): 1896 All W N 2; *Ganeshi* v. *Khairati*, (1894) 16 All 279 (283): 1894 All W N 92; *Behari Lal* v. *Kodu Ram*, (1893) 15 All 380 (381): 1893 All W N 150; *Bhagwati* v. *Bindeshri*, (1883) 6 All 106 (108): 1883 All W N 229.

(2) *Appala Naidu* v. *Chengalrai Jogiraju*, (1916) 32 Ind Cas 237 (238): (1916) 1 Mad W N 77.

(2-a) See *Barro* v. *Hem Chunder*, (1908) 35 Cal 495 (509): 12 Cal W N 490 [The suit was allowed to be continued in respect of one cause of action].

(3) *Saroda Prosad Roy* v. *Kailash Bashini Guha*, (1913) 18 Ind Cas 117 (118): 17 Cal W N 128; *Rup Narain* v. *Gopal Devi*, (1909) 3 Ind Cas 282 (285): 36 Ind App 103: 36 Cal 780: 6 All L J 567: 10 Cal L Jour 58: 13 Cal W N 920: 5 Mad L Tim 423: 11 Bom L R 833: 93 Pun Re 1909: 146 Pun W R 1909: 68 Pun L R 1910: 19 Mad L Jour 548; *Khetoosee* v. *Banee Madhub*, (1869) 12 Suth W R 114 (115).

(4) *Aiyaru Muppan* v. *Vellaya Nadan*, (1910) 6 Ind Cas 15 (16): 34 Mad 55: 1910 Mad W N 229: 8 Mad L Tim 6.

(5) *Parchomal* v. *Pamandas*, (1909) 4 Ind Cas 600 (603): 3 Sind L R 108.

Note 15.

(1) *Paira Ram* v. *Kesho Nath*, 1924 Lah 156 (157): 73 Ind Cas 892: 6 Lah L Jour 349: 82 Ind Cas 605; *Harbans Tewari* v. *Tota Sahu*, (1909) 3 Ind Cas 735 (736): 32 All 14: 6 Mad L Tim 300: 6 All L J 926 [Dissenting from 4 All 163 and 6 All 106]; *Kallian Singh* v. Gur Doyal, (1882) 4 All 163 (165): 1881 All W N 171; *Bhagwati* v. *Bindeshri*, (1883) 6 All 106 (108): 1883 All W N 229.

Note 16.

(1) *Chiragh Din* v. *Bhagwan Das*, (1916) 32 Ind Cas 40 (40): 100 Pun Re 1915: 189 Pun W R 1915; *Luchmee Persaud* v. *Mt Kylassoo*, (1867) 7 Suth W R 174 (176): Beng L R Supp Vol 620: 2 Ind Jur N S 89 [Land and mesne profits]. But see *Rameswar* v. *Dilu*, (1894) 21 Cal 550 (552, 553) [Future mesne profits not affecting jurisdiction].

Note 17.

(1) *Shanmukha Nadan* v. *Arunachalla Chettiar*,

Only certain claims to be joined for recovery of *immoveable property*.

R. 4. [S. 44, Rule A.] No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except—

(*a*) claims *for* mesne profits or arrears of rent in respect of the property claimed *or any part thereof*;

(*b*) *claims for* damages for breach of any contract under which the property or any part thereof is held; and

(*c*) *claims in which the relief sought is based on the same cause of action*:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

[1877—44-A. R. S. C., O. 18, R. 2.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Suit must be for the recovery of immovable property.
4. Leave of the Court—When can be granted.
5. Joinder of claims for mesne profits or arrears of rent—Cl. (a).
6. Claims in which relief is sought on the same cause of action—Cl. (c).
7. Suit for foreclosure or redemption—proviso.
8. Objection as to misjoinder of causes of action. See Rule 7, below.
9. Appeal.
10. Revision. See O. 2, R. 3, Note 17.

Counter-Claims. See Note 2, Pt. (3).
Joinder of claims for moveables and immoveables. See Note 6, Pt. (3) and illustration 1.
Suits on title to immoveables. See Note 3, Pt. (2).
Various reliefs on a single cause of action. See Note 6, Pt. (7).

1. Legislative changes.—

1. The words "or to obtain a declaration of title to immoveable property" which occurred in the old S. 44 (*a*) have been omitted.
2. The words "or any part thereof" have been added to clause (*a*).
3. Clause (*c*) of the old Code has been omitted and a new clause has been substituted.
4. The proviso to the rule is new.

2. Scope of the rule.—This rule declares that, in suits for the recovery of immoveable property, only the claims specified in the three clauses can be joined.[1] If any other claim is sought to be added the *leave of the Court* must be obtained; and such leave may be granted if the claims joined may be conveniently disposed of in one suit. The object of the rule appears to

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1922 Mad 332 (333): 45 Mad 194: 42 Mad L Jour 97: 30 Mad L Tim 172: 69 Ind Cas 961: 1921 Mad W N 799: 14 Mad L W 642: *Velappa* v. *Chidambara*, 1922 Mad 174 (175): 1922 Mad W N 316: 46 Mad 186: 43 Mad L Jour 277: 70 Ind Cas 684; *Arunachallam Chettiar* v. *Arunachallam Chettiar*, 1922 Mad 436 (436): 16 Mad L W 175: 1922 Mad W N 453: 43 Mad L Jour 218: 69 Ind Cas 966.

Order 2, Rule 4—Note 2.

(1) See *Jugo Mohun* v. *Monee Lall Choudhry*, (1869) 11 Suth W R 542 (543): 3 Beng L R App 77 [Possession and rent properly claimed in a single suit]; *Bashashar Lal* v. *Natha Singh*, 1908 Pun Re No 30: 102 Pun L R 1908: 85 Pun W R 1908, (Do.).

O. 2, R. 4, Notes 2—4.

be, to avoid a joinder of claims of a character *dissimilar* to a claim for recovery of immoveable property.[1-a] and to prevent consequent embarrassment in the trial of the suit.

The rule does not apply to a joinder of several claims where the relief sought is based on the *same cause of action*. Nor does it apply to joinder of several claims all for the recovery of immoveable property.[2] On the contrary, Rule 3 warrants the joinder of such claims against the same defendant or defendants jointly.

This rule applies to counter-claims also.[3]

3. **Suit must be for the recovery of immoveable property.**—This rule will have no application unless the suit is for the *recovery* of immoveable property.[1] The omission of the words "or to obtain a declaration of title to immoveable property" in S. 44-A of the Code of 1882 has rendered this rule inapplicable to a suit for declaration of title. Such a suit is not one for the *recovery* of immoveable property.[2] A suit upon a mortgage for recovery of money and a claim for arrears of rent on the lease of the mortgaged property executed by the mortgagor[3] or a suit for a share in a mortgage decree[4] or a suit for a specific performance of an agreement to sell immoveable property[5] is not a suit for recovery of immoveable property within the meaning of this rule. So also a suit to restrain a trespass on immoveable property is not a suit for the recovery of immoveable property.[6]

4. **Leave of Court—When can be granted.**—Though the leave of the Court must ordinarily be obtained before instituting the suit, it can be obtained even afterwards in proper cases.[1] Where leave of the Court would be necessary for the joinder of several claims it is optional with the plaintiff either to apply for leave under this rule or to file separate suits in respect of each of them; this rule does not compel him to obtain leave and assert all his claims at the same time.[2]

(1-a) *Chidambaram Pillai* v. *Ramaswamy Pillai*, (1882) 5 Mad 161 (161, 162): 6 Ind Jur 409 [Section obscure]; *Ambika Dat* v. *Ram Udit Pande*, (1894) 17 All 274 (276): 1895 All W N 76; *Nisar Husain* v. *Nisar Ali*, (1906) 3 All L J 123 (124): 1906 All W N 54; *Bandhan Singh* v. *Solhu*, (1886) 8 All 191 (194): 1886 All W N 46 [Joinder of a claim for grain]; *Probhuram Hajara* v. *Robinson*, (1869) 11 Suth W R 398 (399): 3 Beng L R 49 [Claim for damages and registration]; *Malla Reddy* v. *Seshadri Reddy*, (1895) 5 Mad L Jour 53 (54, 57) [Joinder of money claim]; *Raghubar* v. *Jwala*, (1903) 25 All 229 (230): 1903 All W N 19 [Suit on several mortgages—Even assuming it is a suit for recovery of immoveable property not barred—5 Mad 161 followed].

(2) *Chidambaram Pillai* v. *Ramasamy Pillai*, (1882) 5 Mad 161 (161): 6 Ind Jur 409; *Ambika Dat* v. *Ram Udit Pande*, (1894) 17 All 274 (276): 1895 All W N 76; *Nisar Husain* v. *Nisar Ali*, (1906) 3 All L J 123 (125): 1906 All W N 54: *Harbans* v. *Tota Sahu*, (1909) 3 Ind Cas 735 (736): 32 All 14: 6 Mad L Tim 300: 6 All L J 926 [Suit for pre-emption in respect of four sales, all to the same vendee]; *Abdul Aziz* v. *Maryan Bibi*, 1926 All 710 (711): 25 All L J 48: 97 Ind Cas 176 [Recovery of part as owner and rest as pre-emptor]; *Sri Mohan Thakur* v. *Macgregor*, (1901) 28 Cal 769 (784, 785); *Bejoy Chandra Nag* v. *Banku Behari Mazumdar*, (1909) 4 Ind Cas 116 (118): 13 Cal W N 451: 9 Cal L Jour 336 [Suit for recovery of land and also for right of way. The latter being held to be immoveable property].

(3) *Compton* v. *Preston*, (1882) 21 Ch D 138.

Note 3.

(1) *Gledhill* v. *Hunter*, (1880) 14 Ch D 492; *Nistarni Dassee* v. *Nundo Lal Bose*, (1903) 30 Cal 369 (384): 7 Cal W N 353.

(2) *Gledhill* v. *Hunter*, (1880) 14 Ch D 492.

(3) *Govinda* v. *Mana Vikrama*, (1891) 14 Mad 284 (286).

(4) *Gorachand* v. *Basanta Kumar*, (1911) 12 Ind Cas 684 (686): 15 Cal L Jour 258.

(5) *T F Brown* v. *G M Cutts*, (1880) 5 Cal L Rep 487 (490).

(6) *Spears' Glass Works, Ltd* v. *Spear*, 37 L J N C 578.

Note 4.

(1) *Lloyd* v. *Great Western Dairies*, (1907) 2 K B 727 C A; *Naziran* v. *Abdus Samad*, (1887) All W N 266 (266) [May be given even in appeal].

(2) *Sheo Ratan Singh* v. *Sheo Sahai Mier*, (1884) 6 All 358 (362): 1884 All W N 115; *Lalessor Babui* v. *Janki Bibi*, (1891) 19 Cal 615 (617).

Where leave is not obtained as required by this rule and a suit is dismissed on the ground of misjoinder of causes of action, the time occupied in the previous proceedings may be deducted in computing the period of limitation for instituting separate suits.[3] O. 2, R. 4, Notes 4—6.

5. Joinder of claims for mesne profits or arrears of rent Cl. (a).—As to whether claims for recovery of *immoveable property* and claims for *mesne profits* before suit—constitute one cause of action or distinct causes of action, there is a conflict of opinion. According to one view, Cl. (*a*) itself shows that they constitute different causes of action. According to the other view Cl. (*a*) is not really an exception but is merely an *explanation*. *See* the cases in Note 24 to O. 2, R. 2.

6. Claims in which relief is sought on the same cause of action.—Cl. (*c*) is not really an exception to the rule, but has been inserted in order to avoid the possibility of mistake and to make the rule perfectly clear.[1] This rule has to be read with O. 2, R. 2 which directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action.[2] Therefore there is nothing irregular in seeking to recover in one suit *immoveable* and *moveable* property, if the cause of action is the *same* in respect of both.[3]

Illustrations.

1. A Hindu widow sues her husband's co-parceners for recovery of immoveable and moveable properties, being her deceased husband's share in the family properties under a partition which had not been completed during her husband's lifetime. The suit is not bad for misjoinder under this rule. *Ganesh Dutt* v. *Tewach*, I. L. R. 31 Cal. 262 P. C.

2. *A* files an administration suit in which he joins a claim to a relief in regard to a partnership business and a claim for the recovery of immoveable property on the *same cause of action*. The suit is not bad for misjoinder.[4]

But if the two claims are based on *different* causes of action, the joinder of the two claims will violate this rule.[5] Thus in a suit against an administrator to recover *damages* for malfeasance, a claim for the recovery of immoveable property in the hands of the administrator and certain others, cannot be joined.[6] But though the plaintiffs may sue on a *single* cause of action, it may entitle him to various kinds of relief. In such a case no leave of the Court is

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(3) *Venkiti Nayak* v. *Murugappa Chetti*, (1897) 20 Mad 48 (61).

Note 6.

(1) *Chhabil Das* v. *Massu*, (1913) 19 Ind Cas 981 (984): 4 Pun Re 1914: 207 Pun W R 1913: 145 Pun W R 1913: 243 Pun L R 1913.

(2) *Giyana Sambandha Pandara Sannadhi* v. *Kandaswamy Thambiran*, (1887) 10 Mad 375 (506).

(3) *Ganesh Dut* v. *Mt Jewach Thakorain*, (1904) 31 Cal 262 (272): 14 Mad L Jour 8: 31 Ind App 10: 8 Cal W N 146: 8 Sar 575: 6 Bom L R 1; *Giyana* v. *Kandasamy*, (1887) 10 Mad 375 (506); *Mazhar Ali Khan* v. *Sajjad Husain Khan*, (1902) 24 All 358 (360): 1902 All W N 85; *Gandharap* v. *Jaswant*, 1883 All W N 37 (38) [Cause of action being two separate awards, declaring title to the ornaments and land in the possession of defendants]; *Ganesh Dut* v. *Mt Jewach*, (1904) 6 Bom L R 1 (5): 31 Cal 262: 14 Mad L Jour 8: 31 Ind App 10: 8 Cal W N 146: 8 Sar 575; *Beni Madhab* v. *Gobind Chandra*, (1918) 46 Ind Cas 165 (166): 22 Cal W N 669; *Chhabil Das* v. *Massu*, (1913) 19 Ind Cas 981 (984): 4 Pun Re 1914: 207 Pun W R 1913: 145 Pun W R 1913: 243 Pun L R 1913; *Banarsi Dass* v. *Municipal Committee, Delhi*, 1907 Punj L Rep 28: 5 Pun W R 1907.

(4) *Nathubhai* v. *Narayanacharya*, 1927 Bom 470 (471): 29 Bom L R 937: 104 Ind Cas 764: 51 Bom 800; *Nistarini Dassi* v. *Nando Lal Bose*, (1899) 26 Cal 891 (922): 3 Cal W N 670.

(5) *Hingu Lal* v. *Baldeo Ram*, (1902) 24 All 553 (555): 1902 All W N 170; *Kuthan* v. *Sadayan*, (1907) 17 Mad L Jour 135 (139).

(6) *Janardan* v. *Jankibati*, (1917) 40 Ind Cas 860 (862): 2 Pat L Jour 642: 4 P L W 337: 1918 Pat H C C 170.

O. 2, R. 4, Notes 6—10.

necessary to bring a suit for all such reliefs. Thus, no leave is required to join a claim for an injunction, or for an account of rents and profits, or for appointment of a receiver, or for any declaration that merely establishes the plaintiff's right to possession, inasmuch as all these things, are simply *machinery* to enforce the plaintiff's one cause of action.[7]

7. Suit for foreclosure or redemption—Proviso.—The High Court of Patna has held in the undermentioned case[1] that, where in a suit for redemption, the plaintiff claimed to be put into possession of the mortgaged property not only as against the mortgagee but also against persons in possession under a paramount title, leave of the Court is necessary for a joinder of those claims.

8. Objection as to misjoinder of causes of action.—See rule 7 below.

9. Appeal.—An order rejecting an application for leave to join two causes of action is not appealable, though, if the plaint is rejected, it will be appealable as a *decree*.[1]

10. Revision.—See O. 2, R. 3, Note 17.

O. 2, R. 5.

R. 5. [S. 44, Rule B.] No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Claims by or against executor, administrator or heir.

[R. S. C. O. 18, R. 5.]

Synopsis.

1. Scope of the rule.
2. Claim by or against executor or administrator or heir, as such.
3. "Estate", meaning of.
4. Joinder of personal claims when permissible.
5. Amendment of plaint.
6. Objections as to misjoinder. See Rule 7 below.
7. Appeal. See S. 99.
8. Revision. See O. 2, R. 3.

Maintenance claims against surviving coparceners. See Note 3, Pt. (2).
Misjoinder—Procedure. See Note 5.
Misjoinder under this rule. See Note 5, F.-N. (1).
Moneys in hands of executors as such—not attachable for personal claims. See Note 1, F.-N. (2).
Non-description in cause-title not fatal. See Note 3, F.-N. (1).

1. Scope of the rule.—The following propositions follow from this rule:—

(*a*) Subject to the provisions of Rr. 1 to 3 *ante*, any number of claims by or against an executor, administrator or heir may be joined

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(7) *Gledhill* v. *Hunter*, (1880) 14 C D 492.

Note 7.

(1) *Khub Lal Upadhya* v. *Jhabai Kandu*, 1924 Pat 613 (615): 3 Pat 244: 78 Ind Cas 885: 5 Pat L Tim 578.

Note 9.

(1) *Bandhan Singh* v. *Solhu*, (1886) 8 All 191 (194): 1886 All W N 46.

in one suit, provided the plaintiff or defendant, as the case may be, sues or is sued *as such*. O. 2, R. 5, Notes 1—3.

(*b*) A claim by or against an executor, etc., *as such* cannot be joined with a claim by or against him *personally* in the same suit except

(*i*) Where the *personal* claim arises with reference to the *estate* of the deceased or

(*ii*) Where the plaintiff or defendant was *jointly entitled to or liable for with the deceased* in regard to the personal claim.

This rule deals with suits by or against only 3 classes of persons *viz.*, *executors, administrators or heirs*. But those are not the only classes of persons who owe their legal condition to the death of another. A Legatee or the next of kin, for example, also come under the same category. The reason why executors, administrators and heirs are alone singled out by the legislature in the rule is that, while acquiring title from the deceased in the same manner as the legatees or the next of kin, they, in addition *represent* him. The closing words of this rule indicate this reason.[1] For the application of the principle of this rule to execution proceedings, *see* the case in foot-note.[2]

2. Claim by or against executor, administrator or heir as such.—A person is said to claim *qua* heir when, in making the claim, he is alleged to *represent* the estate of a deceased person. The words "claim by an heir as such" mean claim by him in a representative capacity, that is, as representing the person whose heir he claims to be.[1] He is not *claiming as an heir* if he claims *for himself*; for, the fact of his being an heir is only the foundation of his claim and does not give him a representative capacity. Where, for example a Muhammadan widow sues her daughters for her share in her deceased husband's estate,[2] or *A* sues the executors of *B* for property in their possession on the ground that *A* inherited the property from *B*[3] the claim of the plaintiff is not *as an heir* but in one's own and personal right.

In a suit to administer the assets of a deceased person various acts of maladministration may be sought to be redressed in the same suit.[4]

Under S. 328 of Act X of 1865, an administrator is liable for neglect to get in any part of the property of deceased person.[5]

3. "Estate"—Meaning of.—The word "Estate" means not only the estate rightly and properly held by executors, but also the "estate" which

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Order 2, Rule 5—Note 1.

(1) *Hafiza* v. *Mahomed Cassum*, (1907) 31 Bom 105 (110, 111): 8 Bom L R 734.

(2) *K Hill* v. *M M Greenburg*, (1917) 38 Ind Cas 563 (564): 9 Bur L Tim 226 [Moneys with executor as such—Not attachable for personal claims].

Note 2.

(1) *Ahmeddin* v. *Sikandar Begum*, (1896) 18 All 256 (259): 1896 All W N 52. See also *Sodi Hukam Singh* v. *Bhagwan Devi*, (1899) Pun Re No 79.

(2) *Ahmeddin* v. *Sikander Begum*, (1896) 18 All 256; *Hafizaboo* v. *Mahomed*, (1907) 31 Bom 105 (110).

(3) *Hafizaboo* v. *Mahomed Casim*, (1907) 31 Bom 105 (110, 111): 8 Bom L R 734 [Dissenting from 6 Bom 390 (393, 394)]. But see *Abdul Ali* v. *Miakhan*, (1911) 10 Ind Cas 890 (891): 13 Bom L R 268: 35 Bom 297 [Plaintiff claiming property as *heir* of two different persons on the alternative—Held cause of action related to different "Estates"].

(4) *Nistarini* v. *Nundo Lall*, (1899) 26 Cal 891 (923): 3 Cal W N 670.

(5) *Khusurubhai* v. *Hormajsha*, (1893) 17 Bom 637 (644).

O. 2, R. 5, Notes 3—8.

they hold *in the belief* that they are executors.[1] The claim of a Hindu widow of a deceased undivided co-parcener for maintenance against the surviving co-parceners, is not against the *estate* of the deceased husband.[2]

4. Joinder of personal claims when permissible.—A *personal* claim can be joined with a claim as *representing* the estate, if it arises with reference to the *same estate*. Thus a suit against an executor for the administration of the estate of a deceased person, and for an account of the partnership carried on by the executor and the deceased is not bad for misjoinder.[1] Similarly where *A* and *B* carried on a partnership and after *A's* death his son *C* continued the partnership with *B*, and subsequently *C*, as administrator sued *B* for accounts of the partnership between *A* and *B* and also for dissolution of his own partnership it was held that there was no misjoinder inasmuch as his *personal* claim arose out of the estate.[2] The expression "arises with reference to" is not to be narrowly construed.[3]

5. Amendment of plaint.—Where two claims are joined in contravention of this rule, the practice is to amend the plaint by striking out one of them and proceeding with the other.[1]

6. Objection as to misjoinder.—*See* Rule 7 below.

7. Appeal.—*See* S. 99.

8. Revision.—*See* O. 2, R. 3.

O. 2, R. 6, Note 1.

R. 6. [S. 45, Para. 2 and Ss. 46 and 47.] *Where* it appears to the Court that any causes of action *joined in one suit* cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

Power of Court to order separate trials.

[R. S. C. O. 18, R. 1.]

Synopsis.

1. Scope of the rule.
2. Power to order separate trials.
3. Powers of appellate Court.
4. Consolidation of suits.

Pre-emption suits. See Note 3, F.-N. (1). Rent suits. See Note 1, F.-N. (1).

1. Scope of the rule.—This rule will apply only when it is open to a plaintiff to *combine* several causes of action in one suit. It does not apply to a case of *misjoinder* of causes of action.[1] *See also* O. 2, R. 3, Note 6.

Note 3.

(1) *Nirpendra Nath Roy* v. *Birendra Nath Roy*, (1917) 41 Ind Cas 615 (624): 21 Cal W N 939 [The defendants believed they had the character of executors and took possession as executors though they were found to be not so]; *Jagattarini* v. *Prafulla Chandra*, (1916) 35 Ind Cas 792 (793) and (794) [Claim for certain ornaments not *belonging to the estate* of the testator but of which possession was obtained by executors as such—Non-description in cause-title not fatal].

(2) *Jankibai* v. *Shrinivas Ganesh*, (1913) 20 Ind Cas 533 (534, 535): 38 Bom 120: 15 Bom L R 684 [Survivorship in Hindu Law—No estate].

Note 4.

(1) *Nathubai* v. *Narayanacharya*, 1927 Bom 470 (472, 473): 29 Bom L R 937: 104 Ind Cas 764: 51 Bom 800.

(2 & 3) *Arunachallam Chettiar* v. *Arunachallam Chettiar*, 1922 Mad 436 (436, 437): 16 Mad L W 175: 1922 Mad W N 458: 43 Mad L Jour 218: 69 Ind Cas 966.

Note 5.

(1) *Ashabai* v. *Haji Tyeb*, (1882) 6 Bom 390 (394). See also *Krishna Rao* v. *Rukmani Sewak Singh*, (1887) 9 All 221 (224): 1887 All W N 31.

Order 2, Rule 6—Note 1.

(1) *Muthappa* v. *Muthu Palni*, (1904) 27 Mad

Under the Code of 1882, the power given by this rule could be exercised only before the first hearing, unless the parties otherwise agreed.[2] The words "before the first hearing" which occurred in the old section have now been omitted in this rule and the scope of this rule has been enlarged.

2. Power to order separate trials.—Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, it may order separate trials.[1] If the facts alleged in the plaint arise out of facts that are common to two causes of action joined in one suit, the Court should not exclude one of them on the ground that it would not be convenient to try those two causes of action together.[2] In cases where the Court orders separate trials, it should deal with separate causes of action as sub-suits under the title and number of the principal suit from which they spring,[3] and should not order the plaintiff to file *separate* plaints.[4]

3. Powers of the appellate Court.—If the trial Court does not think fit to act under this rule but tries all the causes of action together, it is not proper for the appellate Court to interfere with the discretion of the trial Court in that matter.[1]

4. Consolidation of suits.—Although the Code contains no express provision, it has an inherent power *Ex debito Justitioe* to consolidate proceedings.[1] Such power will be exercised only where it is asked for, before the trial of the suits begin, and only, where the parties are the same and the evidence given is common in all cases.[2] If the trial Court consolidates cases, and passes a single decree, a single appeal may be preferred against the decree.[3]

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80 (84); *Hira Lal* v. *Hoti Lal*, 1924 All 720 (721): 22 All L J 459: 79 Ind Cas 560 [Under the Agra Tenancy Act different suits must be filed in respect of different holdings]; *Krishnappa Chetty* v. *Maung Hman*, (1913) 18 Ind Cas 181 (182): 5 Bur L Tim 234; *Serajul Haq* v. *Abdul Rahman*, (1902) 29 Cal 257 (259): 6 Cal W N 300; *Sunili Sundari Devi* v. *Sri Krishna Chakravarthi*, 1928 Cal 514 (516): 112 Ind Cas 649; *Prahlad* v. *Gopee*, (1872) 4 N W P 30; *Kosella* v. *Behari*, (1869) 12 Suth W R 70 (71). But see *Gur Prosad* v. *Gur Prosad*, (1914) 25 Ind Cas 438 (438): 19 Cal L Jour 316 [The rule as to separate trials applied to a case of misjoinder]; *Ram Coomar Mytee* v. *Koomar Narain Dass*, (1873) 20 Suth W R 482 (482), (Do.).

(2) *Singa Reddi* v. *Madava Rau*, (1897) 20 Mad 360 (362); *Damodar* v. *Gokal*, (1881) 7 All 79 (100): 1884 All W N 303 F B.

Note 2.

(1) *Fatima Bibi* v. *Abdul Majid*, (1892) 14 All 531 (536): 1892 All W N 154 [Claim for immoveable property and meane profits]; *Ramasamy Pillai* v. *Marimuthu Goundan*, 1928 Mad 764 (767); *Subramaniya* v. *Sadasiva*, (1895) 8 Mad 75 (76) [Suit against several alienees]; *Hari Ballab* v. *Gopal Lal*, (1910) 6 Ind Cas 577 (578): 12 Cal L Jour 646, (Do.); *Juggut Chunder* v. *Ear Mahomed*, (1875) 24 Suth W R 217 (218) [Suit by landlord against tenant in respect of different holdings]; *Madho Prasad* v. *Lachman*, (1925) 12 Oudh L J 191, (Do.); *Girjesh Bahadur Pal* v. *Nayeshar Rai*, 7 L R 139 Rev. (Do.).

(2) *Nandrani Dasi* v. *Harichandra Gangopadaya*, (1916) 36 Ind Cas 29 (31) All.

(3) *Khadar* v. *Chotibibi*, (1884) 8 Bom 616 (619). See also *Lal Chand* v. *Manohri*, (1918) 44 Ind Cas 549 (550): 64 Pun W R 1918: 59 Pun Re 1918 [Several alienations—Procedure].

(4) *Rutta Bebee* v. *Dumru*, (1870) 2 N W P 153.

Note 3.

(1) *Piara Ram* v. *Kesho Nath*, 1924 Lah 156 (157): 6 Lah L Jour 349: 73 Ind Cas 892: 82 Ind Cas 605 [Single suit for pre-emption in respect of four sales in four plots of land from different owners and at different dates and for different prices impleading the vendee and also the various vendors of the four sales]; *Ram Nidhee* v. *Goluck Chunder*, (1869) 11 Suth W R 280 (280).

Note 4.

(1) In the matter of *Thakur Dassee*, (1906) 33 Cal 927 (932): 3 Cal L Jour 67; *Nand Kishore Sing* v. *Ram Golam Sahu*, (1913) 40 Cal 955 (959-960): 18 Ind Cas 207: 16 Cal L Jour 508. But see In re *Falls of Ettrick*, (1894) 22 Cal 511 (518).

(2) *Peacock* v. *Byjnath*, (1883) 10 Cal 58 (60); *Janardan* v. *Shib Pershad*, (1916) 36 Ind Cas 179 (180): 43 Cal 95: 20 Cal W N 475; *Kalicharan* v. *Manodabali Dasi*, (1912) 15 Ind Cas 897 (899): 17 Cal W N 526: 16 Cal L Jour 591; *Nihal Singh* v. *Ali Ahmed*, (1871) 15 Suth W R 110 (111); *Surendro Pershad* v. *Nundun*, (1874) 21 Suth W R 196 (197) [Parties and subject-matter different—Consolidation refused].

(3) *Enayetoollah* v. *Radha Churn Roy*, (1871) 15 Suth W R 395 (395).

O. 2, R. 7, Note 1.

R. 7. [New.] *All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.*

Objections as to misjoinder.

[*See* S. 99, O. 1, Rr. 9 & 13.]

Local Amendments.

LAHORE.—

After Rule 7 of Order 2, *insert*:—

R. 8.—(1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed, and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the Plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the Court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in Rule 18 of Order VI and as required by the provisions of the Court Fees Act.

Synopsis.

1. Objections to misjoinder of causes of action.
2. Waiver of objections.

1. Objections to misjoinder of causes of action.—Under Ss. 46 and 47 of the old Code, a plaint which was bad for misjoinder of causes of action could be returned for amendment under S. 53 thereof; failure to comply with the order for amendment resulted in the rejection of the plaint. These provisions have not been re-enacted in this Code and this rule provides instead, that an objection on the ground of misjoinder of causes of action, must be taken at the earliest possible opportunity, and, in all cases in which issues are settled, at or before such settlement of issues. The wording is similar to that in O. 1, R. 13.

The plea of misjoinder cannot for the first time be taken in appeal or in second appeal.[1] The defect of misjoinder is not a ground for reversing a decree; for S. 99 provides that no decree shall be varied or reversed on account of misjoinder of causes of action, unless the defect has affected the merits of the case or jurisdiction of the Court.[2] If an objection as to misjoinder is

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Order 2, Rule 7—Note 1.

(1) *Maula* v. *Gulzaf Singh*, (1894) 16 All 130 (131): 1894 All W N 11; *Tulsha* v. *Gopal Rai*, (1884) 6 All 632 (633): 1884 All W N 208: 9 Ind Jur 155; *Upendra* v. *Tara Prosunno*, (1903) 30 Cal 794 (800): 7 Cal W N 609; *Dwarika* v. *Nidhi Ram*, (1917) 40 Ind Cas 462 (463); *Girish Chandra* v. *Kunja Behari*, (1915) 26 Ind Cas 781 Cal; *Harichurn* v. *District Judge*, (1910) 6 Ind Cas 327: 11 Cal L Jour 513; *Dhondiba* v. *Ramchandra*, (1880-81) 5 Bom 554 (561): 6 Ind Jur 92; *Fakirapa* v. *Rudrapa*, (1892) 16 Bom 119 (122); *Khan Bahadur* v. *Ali Akbar*, (1913) 20 Ind Cas 22: 225 Pun L R 1913: 161 Pun W R 1913; *Bhup Singh* v. *Jiwan Singh*, (1911) 9 Ind Cas 385: 1911 Pun L R 2: 1911 Pun W R 28.

(2) *Narayana* v. *Narayana*, (1914) 25 Ind Cas 25 (25) Mad; *Sivasankaram* v. *Perumal*, (1909) 4 Ind Cas 106: 7 Mad L Tim 78; *Aiyavu Muppan* v. *Vallaya Nadan*, (1910) 6 Ind Cas 15: 7

taken in the written statement, the Court must raise an issue and decide it.[3] Where in a case requiring leave under O. 2, R. 4 an objection as to misjoinder is raised but nothing is said about it in the judgment, the Court must be deemed to have impliedly granted the necessary leave.[4] Where a suit is bad for misjoinder of causes of action, the Court should not dismiss the suit; but should give the plaintiff an opportunity to amend his plaint and to proceed with the claim in respect of one of the causes of action.[5] O. 2, R. 7, Notes 1—2.

2. Waiver of objections.—An objection on the ground of misjoinder of causes of action being of a "dilatory character and quite besides the merits" will be deemed to have been waived if not taken at the proper time.[1] The same will be the case where the objection is raised but not *pressed*.[2] It has been held by the Bombay High Court that even if a party to the suit waives his objection on this point, it is still open to the *Court* to take the objection at any time on its own initiative and adopt the procedure laid down in Rule 6 of this order.[6]

ORDER III.

RECOGNIZED AGENTS AND PLEADERS. O. 3, R. 1.

R. 1. [S. 36.] Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except *where* otherwise expressly provided by

Appearances, etc., may be in person, by recognized agent or by pleader.

All L J 567: 8 Mad L Tim 6: 1910 Mad W N 229: 34 Mad 55; *Provabati Debi* v. *Rameswar Mandal*, (1910) 6 Ind Cas 248 Cal; *Tarinee Churn Ghose* v. *Hunsman Jha*, (1873) 20 Suth W R 240; *Nujmooddeen* v. *Zuhoorun*, (1868) 10 Suth W R 45; *Behari Lal* v. *Kodu Ram*, (1893) 15 All 380 (382): 1893 All W N 150; *Kalian Singh* v. *Guru Dayal*, (1882) 4 All 163 (165): 1881 All W N 171; *Bulaki* v. *Mulchand*, (1881) All W N 15 (15); *Chakauri* v. *Suraj*, (1905) 2 All L J 91 (94); *Shunkar Patakh* v. *Lala Sheo Churn*, (1870) 2 N W P 443; *Muthappa Chetti* v. *Muthupalani*, (1904) 27 Mad 80 (84) [Where it affects the merits of the case it ought not to be allowed].

(3) *Rajaram* v. *Lachman*, (1867) 8 Suth W R 15: Beng L R Sup 731; *Imrit Nath* v. *Roy Dhunpot*, (1872) 9 Beng L R 241: 18 Suth W R 288; *Ram Dayal* v. *Ram Doolal*, (1869) 11 Suth W R 273 (274): 2 Beng L R A C 341.

(4) *Jagarnath Das* v. *Pabaru Singh*, 1882 All W N 207 (208).

(5) *Harbans Tiwari* v. *Tota Sahu*, (1909) 3 Ind Cas 735 (735): 32 All 14: 6 All L J 926: 6 Mad L Tim 300; *Sarala Sundari Dasi* v. *Saroda Prasad Sur*, (1904) 2 Cal L Jour 602 (607); *Woopendra Narain* v. *Aghorenath*, (1905) 9 Cal W N 498 (500); *Sudhendu* v. *Durga*, (1887) 14 Cal 435 (439, 440) [Plaintiff's refusal to amend —Plaint to be rejected and not suit to be dismissed]; *Shadi* v. *Mt Aishan*, 1878 Pun Re No 55 [Even the Appellate Court can order amendment]; *Lingammal* v. *Venkatammal*, (1882) 6 Mad 239 (245): 7 Ind Jur 244 [Appellate Court can order return for amendment]; *Bansidhar* v. *Raghubir*, (1911) 10 Ind Cas 737 (738): 7 Nag L R 43; *Krishna* v. *Rakmini*, (1887) 9 All 221 (224): 1887 All W N 31 [Where all the evidence is taken, suit should not be dismissed for misjoinder but should be disposed of on the merits]; *Gur Prosad* v. *Gur Prosad*, (1914) 25 Ind Cas 438 (438): 19 Cal L Jour 316 [Here the Court ordered separate trials under O 2, R 6]. But see *Bhagwati* v. *Bindeshri*, (1884) 6 All 106 (108). But see *Mahomed Hossein* v. *Potun*, (1873) 20 Suth W R 147 (148).

Note 2.

(1) *Midnapore Zemindari, Ltd* v. *Kumar Nares Narain Roy*, 1921 Cal 368 (371): 33 Cal L Jour 317: 63 Ind Cas 161; *Hazuri Mal Malawa Mal* v. *Ghulam Hussain*, 1928 Lah 289 (290): 10 Lah L Jour 40: 108 Ind Cas 52; *Ramaswamy Pillai* v. *Marimuthu Goundan*, 1928 Mad 764 (771); *Ghanshyam Das* v. *Ragho Singh*, 1931 Pat 64: 10 Pat 234: 130 Ind Cas 257: 11 Pat L Tim 898; *Dhondiba* v. *Ramachandra*, (1880-81) 5 Bom 554 (561-562): 6 Ind Jur 92 [Case of want of leave under O 2, R 4]; *Maula* v. *Gulzar Singh*, (1894) 16 All 130 (131): 1894 All W N 11, (Do.); *Satischandra* v. *Asrufuddin*, (1908) 8 Cal L Jour 196 (199), (Do.); *Lloyd* v. *Great Western and Metropolitan Diaries Co, Ltd*, (1907) 23 Times Rep 570 followed in 8 Cal L Jour 196, (Do.); *Bhim Nath Misra* v. *Jagarnath Prasad*, 1925 Pat 674 (675): 1925 Pat H C C 294: 89 Ind Cas 614: 7 Pat L Tim 82, (Do.); *Sanna* v. *Ganapa*, (1903) 5 Bom L R 185 (185, 186), (Do.); *Hanmani* v. *Sakhubai*, 1886 Bom P J 170, (Do.) [In such cases leave must be presumed to have been given]; *Khub Lal* v. *Jhapsi Kundu*, 1924 Pat 613 (615): 3 Pat 244: 78 Ind Cas 885: 5 Pat L Tim 573, (Do.).

(2) *Nathubai* v. *Narayanacharaya*, 1927 Bom 470 (471): 29 Bom L R 937: 104 Ind Cas 764: 51 Bom 800; *Tarinee Churn* v. *Hunsman Jha*, (1873) 20 Suth W R 240 (241).

(3) *Ahmedbhoy* v. *Dinshaw*, (1911) 12 Ind Cas 813 (822, 824): 13 Bom L R 1061.

O. 3, R. 1, Notes 1—2.

any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

[1877—36, 49, 50, 417, 418, 435.]

[1859—26, 16.]

Synopsis.

1. Amendments after 1908.
2. Scope of the rule.
3. Appearance and act.
4. Appearance of party in person.
5. Appearance by recognised agent.
6. Appearance by pleader.
7. "Except where otherwise expressly provided." See Note 2, above.
8. Direction to appear in person—Proviso.

Appearing, applying or acting. See Order 3, Rule 4.

Application for leave to sue in forma pauperis. See Note 2, Pt. (4).

Recognised agent of a Sovereign-prince.. See Order 3, Rule 2, Note 7.

1. Amendments after 1908.—By the Civil Procedure (Second Amendment) Act, XXII of 1926, the words "appearing, applying or acting" were substituted for the words "duly appointed to act" which occurred after the words "or by a pleader".

2. Scope of the rule.—This rule enacts that an appearance application or act, in or to any Court may, *except where otherwise expressly provided* by any law for the time being in force, be done

(1) by a party in person, or

(2) by his recognised agent, or

(3) by a pleader, appearing, applying or acting on his behalf.

This is the general rule. There are, however, other modes of appearances, applications, or acting, expressly prescribed by the Code for particular cases which, by reason of the words "except where otherwise expressly provided by any law for the time being in force" are taken out of the operation of the general rule to the extent so prescribed. Thus O. 5, R. 1, sub-Rule 2 enacts that a *defendant* to whom summons has been issued under sub-Rule 1 may appear

(*a*) in person, or

(*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(*c*) by a pleader accompanied by some person able to answer all such questions.

The form of summons given in form No. 1 of Schedule B of the Code also requires the defendant to appear in the above manner. The test, therefore, as to whether a *defendant* has *appeared* is to see whether such of the requirements of O. 5, R. 1 and of the summons, as relate to appearance have

or have not, been complied with.[1] A defendant who is not present in person at the hearing[2] and whose pleader is also absent or has no instructions to go on with the case[3] cannot be said to have appeared at the hearing. O. 3, R. 1, Notes 2—4.

Other express provisions to the contrary are furnished by O. 33, R. 3 and O. 44, R. 1 under which an *application* to sue or appeal in *forma pauperis* should be presented to the Court in *person* unless he is exempted from appearing in Court.[4]

This rule does not recognise the practice of parties, their agents or their pleaders making applications to the Court by post.[5]

3. Appearance and act.—"These words have a well defined and well-known meaning. *To appear* for a client in Court is to be present and to represent him in the various stages of the litigation at which it is necessary that the client should be present in Court by himself or by some representative. To *act* for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court."[1]

4. Appearance of party in person.—The mere presence of a party in Court at the hearing is sufficient to constitute "appearance".[1] The purpose for which he appeared or the action which he took on appearance is immaterial.[1-a] Thus, the fact that he asks for adjournment which is refused,[2] or that he does not put in any answer or written statement,[3] will not prevent his presence from being an "appearance". Where the party does not actually appear before Court when the suit is called on for hearing, the fact that he

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Order 3, Rule 1—Note 2.

(1) *Enatulla Basunia* v. *Jibon Mohan Roy*, (1914) 23 Ind Cas 769 (770): 41 Cal 956: 18 C W N 775: 19 C L J 535.

(2) *Kalichurn Dutt* v. *Modhoo Soodun*, (1866) 6 Suth W R 86 (87) [Being present at previous hearing will not affect the case]; *Jonardan Dobey* v. *Ramdhone Singh*, (1896) 23 Cal 738 (758) F B, (Do.); *Purus Ram* v. *Juyuntee Pershad*, (1869) 1 N W P H C R 154 [Mere putting in of written statement is not appearance].

(3) *Kaliappa Mudaliar* v. *Kumarasami*, 1926 Mad 971 (973): 97 Ind Cas 517: 1926 M W N 616: 51 Mad L Jour 290; *Sheo Churnlall* v. *Heera Lall*, (1882) 11 Cal L Rep 537 (539); *Mst Bibee Haloo* v. *Mst Atwaro*, (1867) 7 Suth W R 81 (81); *Hira Dai* v. *Hira Lal*, (1885) 7 All 538 (540): 1885 All W N 144; *Shrimant Sayajirao* v. *S Smith*, (1896) 20 Bom 736 (744); *Shankar Dat* v. *Radha Krishna*, (1898) 20 All 195 (198): 1898 All W N 17; *Dhan Bhagut* v. *Ramessur Dutt*, (1873) 20 Suth W R 53 (53); *Amrith* v. *Ray Dhanpat*, (1872) 8 Beng L Rep 44: 15 Suth W R 503 (504); *Md Hossein* v. *Muntozul*, (1872) 18 Suth W R 400 (400); *Dayal* v. *Kapoor*, (1879) 4 Cal 318 (321): 3 Cal L Rep 482; *Ramtahal Ram* v. *Rameshar Ram*, (1886) 8 All 140 (142): 1886 All W N 42; *The Administrator General of Bengal* v. *Lala Dyaram Das*, (1871) 6 Beng L R 688; *Soonderlal* v. *Gourprasad*, (1898) 23 Bom 414 (421, 422); Chitty's S C C R 561 [Instructed only to apply for adjournment]; *Venkatarama* v. *Nataraja*, (1913) 18 Ind Cas 360 (361): 13 Mad L Tim 140: 24 Mad L Jour 235: 1913 M W N 165; *G P Cooke* v. *The Equitable Coal Co, Ltd*, (1904) 8 Cal W N 621 (621).

(4) Ex parte *Devgir Guru*, (1866-67) 4 Bom H C R A C J 91.

(5) *Maung Po Khan* v. *Agun Salaboy*, (1872-92) Low Bur Rul 504.

Note 3.

(1) *Kali Kumar* v. *Nobinchandra*, (1881) 6 Cal 585 (590): 7 Cal L Rep 562: 4 Shom L R 115. See also *Moran* v. *Dewan Ali*, (1872) 8 Beng L R 418.

Note 4.

(1) See cases in foot-note (1-a) and foot-note (4) below.

(1-a) *Soonderlal* v. *Gourprasad*, (1899) 23 Bom 414 (422); *Chitty's S C C R* 561; *Gopal Baksh* v. *Daulat Rai*, (1896) 16 All W N 92 (92); *Hinghu Singh* v. *Jhuri Singh*, (1918) 46 Ind Cas 390 (391): 40 All 590: 16 All L J 462 [One plaintiff representing other plaintiffs. His presence is appearance of all]; *Ram Narain* v. *Jagdeo Misri*, (1910) 10 Ind Cas 903 (904): 33 All 690: 8 All L J 839 [If party present, no default of appearance].

(2) *Onkar* v. *Kamalchand*, 1924 Nag 26 (27): 76 Ind Cas 288; *Rangasami* v. *Manikkam Pillai*, (1917) 40 Ind Cas 223 (225): 1917 Mad W N 241; *Kumara Woopendra Krishna* v. *Nobin Krishna*, (1872) 17 Suth W R 370 (371): 3 B L R O C 113.

(3) *Gohilokbur* v. *Bishonath*, Marsh 32; *Sirarajadhani* v. *Kuppatulu*, (1864-65) 2 M H C R 311 (312).

O. 3, R. 1, Notes 4—6.

was present in the precincts of the Court house[3-a] or the fact that he appeared on a previous occasion[3-b] do not constitute appearance. But suppose a party has *engaged a pleader* and *is also present in Court* at the hearing. It has been held by the High Court of Bombay[4] where the pleader so engaged is absent at the hearing but the party himself is ready to go on with the case, he must be deemed to "appear" in the case. According to the High Court of Madras, where the pleader so engaged reports "no instructions" and the party *takes no further part in the proceedings* his mere presence in Court will not make it an appearance in the suit.[5] The reason given is that the appearance contemplated by the rule must be not as a *man* but as a *party* and with the intention of *acting as such party*, and that his mere presence when his pleader reports no instructions will not amount to an appearance inasmuch as he is merely there as the person who is represented by the pleader. The High Courts of Calcutta[6] and Patna[6-a] have also taken a similar view.

A party can himself, appear, act or make applications on his behalf. A barrister or a pleader appearing before the Court as a litigant ought not to address the Court from the same place and in the same way as an advocate or even in the robes of such advocate or pleader.[7]

5. **Appearance by recognised agent.**—*See* O. 3, R. 2 and also S. 9, Agra Tenancy Act, III of 1926 and S. 32 (ii) of C. P. Land Revenue Act, II of 1917.

6. **Appearance by pleader.**—The appearance of the pleader of a party is, under this rule, equivalent to the appearance of the party himself.[1] The mere presence of the pleader, however, unlike the presence of the party, is not necessarily an "appearance" within the meaning of the rule.[2] We have seen in Note 2, *supra* that a *defendant* who has received a suit summons can under O. 5, R. 1, appear by a pleader *only when he is duly instructed and able to*

(3-a) *Manilal* v. *Virchand*, (1911) 12 Ind Cas 903 (904): 13 Bom L R 1222.

(3-b) *Paria Ram* v. *Juguntee Pershad*, (1869) 1 N W P H C R 154; *Hira Dai* v. *Hira Lal*, (1885) 7 All 538 (541): 1885 All W N 114.

(4) *Ismailebrahim* v. *Mahomed Haji Mahomed*, (1909) 3 Ind Cas 992 (993): 33 Bom 475: 10 Bom L R 1172.

(5) *Kaliappa* v. *Kumarasami*, 1926 Mad 971 (973): 97 Ind Cas 517. See also *Gopal Row* v. *Mariua Susuue Pillai*, (1907) 30 Mad 274 (276): 17 Mad L Jour 225; *Palahinandi* v. *T Naku and others*, 1927 Mad 109 (110): 51 Mad L Jour 684: 99 Ind Cas 32.

(6) *Sikandar* v. *Kushal*, 1932 Cal 418 (419): 36 Cal W N 158: 59 Cal 756: 138 Ind Cas 87; *Sardarmal* v. *Jeharmal*, 1932 Cal 425 (426): 36 Cal W N 160: 59 Cal 906: 138 Ind Cas 342.

(6-a) *Damodar Das* v. *Raj Kumar Das*, 1922 Pat 485 (487): 1 Pat 188: 69 Ind Cas 837; *Lalji Sahu* v. *Lachmi Narain Singh*, (1918) 47 Ind Cas 27 (28) Pat; *Md Bakar Ali* v. *Chulhai Mahton*, (1919) 52 Ind Cas 290 (291) Pat; *Ram Dhan* v. *Rushan Pragas*, (1920) 54 Ind Cas 715 (717): 5 Pat L Jour 17: 1 Pat L Tim 156 [Presence for *conducting the case* held necessary]; *Mahant Damodar Das* v. *Raj Kumar*, 1922 Pat 485 (487): 1 Pat 188 (194, 195): 69 Ind Cas 837, (Do.); *Sakalraj Dube* v. *Jadurani*, 1925 All 58 (58): 5 L R (All) Civ 615: 80 Ind Cas 950.

(7) In re: *West Hope Town Tea Co, Ltd*, (1887) 9 All 180 (181): 1887 All W N 7: 11 Ind Jur 270.

Note 6.

(1) *Maung Po Lwin* v. *Maung Po Kin*, (1897-1901) U B R, Vol 2, 240; *Mowar Raghbir* v. *Gowri Charan*, (1918) 46 Ind Cas 492 (492) Pat [Presence of party himself not necessary]; *Jankee Ram Dass* v. *Chandrabally Debia*, (1867) 7 Suth W R 295 (296) [Notwithstanding no written statement was filed]; *Bhagwan Prasad* v. *Madan Murari Lal and others*, 1929 All 811 (812): 1929 All L J 1183: 119 Ind Cas 15 [Party gone to fetch senior pleader—Junior pleader applying for time—Held no default of appearance]; *Jowahir Singh* v. *Debi Singh*, (1896) 18 All 119 (120): 1896 All W N 9; *Sheoal Mab Singh* v. *Bodhal Singh*, (1911) 9 Ind Cas 857 (858) [Notwithstanding physical disability to argue]; *Baldeo Tribhuvan Das* v. *Baldeo Das Dwarkadas*, (1909) 3 Ind Cas 45 (46) Bom; *Kashi* v. *Debi*, (1875) 7 N W P H C R 77. See *Ambalavana* v. *Subramania*, (1871) 6 M H C R 262 (264); *Khedu Naik* v. *Rajib Ray*, 1927 Pat 291 (292): 6 Pat 383: 103 Ind Cas 711: 9 Pat L Tim 63.

(2) *Gujraj Singh*, Appellant, (1868) 10 Suth W R 355 (356); *Murlidhar* v. *Fakir Baksh*, 1925 Oudh 549 (550): 28 Oudh Cas 166: 85 Ind Cas 811: 1 Oudh W N 736; *Brojo Soonduree Dossia* v. *Gilmore*, (1867) 7 Suth W R 336 (336):

O. 3, R. 1, Note 6.

answer all material questions relating to the suit or when he is accompanied by some person able to answer all such questions. There is no specific provision that when a *plaintiff* appears by a pleader, the latter should be so instructed or accompanied. But it has been held that the principle of O. 5, R. 1 applies also to the case of a plaintiff appearing by a pleader.[3] In order therefore to constitute the presence of the pleader of a party, whether plaintiff or defendant, an "appearance" on his behalf, it is necessary that he should have been *duly instructed and able to answer all material questions relating to the suit.*[4] Thus where the pleader of a party is absent,[5] or refuses to appear for him,[6] or reports " no instructions ",[7] or is instructed only to apply for an adjournment on the refusal of which he withdraws from the case[8] there is no " appearance " on behalf of the party. But if, without reporting " no instructions " he simply asks for an adjournment on the ground that he is not prepared with the case, it cannot be said that there is no appearance.[9]

As to appointment of pleaders, their authority and their duties *see* O. 3, R. 4. *See also* the Legal Practitioners Act XVIII of 1879.

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(3) *Arunachala Goundan* v. *Katha Goundan*, 1924 Mad 842 (843): 82 Ind Cas 107.

(4) *Arunachala Goundan* v. *Katha Goundan*, 1924 Mad 842 (843): 82 Ind Cas 107; *Moti Lal* v. *Nand Ram*, 1924 Bom 139 (139): 25 Bom L R 1222: 82 Ind Cas 124; *Bheemacharya* v. *Fakirappa*, (1866-67) 4 Bom H C R 206; *Firm of Jai Narain Ramjash* v. *Sitaram Marwari*, 1923 Pat 520 (521): 1023 Pat H C C 175: 74 Ind Cas 941; *Namperumal Naidu* v. *Alwar Naidu*, 1928 Mad 831 (834-836): 110 Ind Cas 377; *Mensee Devjee & Co* v. *Maung Than*, (1921) 62 Ind Cas 57 (59): 10 L B R 329 [Pleader instructed only to apply for adjournment—Held no appearance]. See also Note 2.

(5) *Beejoy Gobind* v. *Radha Benode*, (1868) 10 Suth W R 348 (348); *Sakairaj Dube* v. *Jadurani*, 1925 All 58 (58): 5 L R All (Civ) 615: 80 Ind Cas 950; *Mohesh Chunder Bose* v. *Thakoor Doss Gossamee*, (1873) 20 Suth W R 425 (426); *Sheonandan* v. *Jamna*, (1887) 7 All W N 65 (66).

(6) *Arunachala Goundan* v. *Katha Goundan*, 1924 Mad 842 (843): 82 Ind Cas 107 [Refusing to appear and failing to appear are in the same category].

(7) *Arunachala* v. *Katha Goundan*, 1924 Mad 842 (843): 82 Ind Cas 107; *Soonder Lal* v. *Gourprasad*, (1899) 23 Bom 414 (420, 422): Chitty's S C C R 561; *Mariannissa* v. *Ramkalpa Gorain*, (1907) 34 Cal 235 (239): 5 Cal L Jour 260; *Rukam* v. *Tarachand*, 1922 All 68 (68): 20 All L J 123: 65 Ind Cas 775; *Basdeo Narain* v. *Harak Narain*, 1923 Pat 156 (157): 68 Ind Cas 942; *R B Poddar & Co* v. *D D Tatachariar*, 1928 Mad 234 (1), (234): 1927 Mad W N 897: 107 Ind Cas 815; *Chandramathi* v. *Narayanaswami*, (1910) 5 Ind Cas 23 (24): 33 Mad 241: 19 Mad L Jour 760: 7 Mad L Tim 369; *Ramamja* v. *Rangaswami*, (1908) 18 Mad L Jour 51 (54): 3 Mad L Tim 225 [And also withdraws from the case]; *Ram Kishan* v. *Jaladurai*, (1918) 46 Ind Cas 488 (489): 3 Pat L Jour 481: 1918 Pat H C C 236 [Though pleader present in Court]; *Durga Das* v. *Layaqat Hayat Khan*, (1929) 117 Ind Cas 73: 1929 Notes 26 (b); *Manmatha Nath* v. *Jamini Nath*, 1926 Cal 246 (246): 90 Ind Cas 768; *Ganga Bai and others* v. *Gudar Rai and others*, (1910) 5 Ind Cas 499 (500) Cal.

(8) *Buldeo Misser* v. *Sayud Ahmed Hossein*, (1871) 15 Suth W R 143 (143); *Fakir Mohomed* v. *Veeran*, (1910) 6 Ind Cas 851 (854) 3 Sind L R 208; *Satis* v. *Ahara Prasad*, (1907) 34 Cal 403 (417): 11 Cal W N 329: 5 Cal L Jour 247: 2 Mad L Tim 123 F B (overruling 27 Cal 529); *Lalta Prasad* v. *Nand Kishore*, (1900) 22 All 66 (76): 1899 All W N 176 F B; *Gopala* v. *Maria*, (1907) 30 Mad 274 (276): 17 Mad L Jour 225; *Maung Pway* v. *Saya Pe*, 1927 Rang 46 (47): 4 Rang 408: 99 Ind Cas 717; *Rampertab Mull* v. *Jakeeram*, (1896) 23 Cal 991 (995); *Habib Baksh* v. *John Mall*, 1928 All 760 (761): 111 Ind Cas 150; *Mucaliarakati Mohamed* v. *Manavikrama, the Zamorin Rajah Avl and others*, 1923 Mad 13 (13, 15): 42 Mad 882: 16 Mad L W 434: 43 Mad L Jour 317: 1922 Mad W N 604: 69 Ind Cas 513 [Taking no further part, tantamount to withdrawal]; *Raj Kishore Ray* v. *Raja Ramranja* (1905) 1 Cal L Jour 76 n, (Do.); *Manikkam Pillai* v. *Mahudam Bathumal*, 1925 Mad 21 (22): 47 Mad L Jour 398: 20 Mad L W 427: 85 Mad L Tim 48: 1924 Mad W N 689: 82 Ind Cas 102: 47 Mad 819 F B [Pleader writing on plaint that he had no further instructions than to apply for adjournment—Held sufficient withdrawal]; *Syed Shah Mahomed Maudood* v. *Maharajah Sir Rameshwar Singh*, 1923 Pat 530 (531): 1 Pat L R 281: 74 Ind Cas 693 [Reporting no instructions after refusal of adjournment]; *Sir Bejoy Chand Mahtop* v. *Satish Chandra Chowdary*, (1911) 9 Ind Cas 842 (843) Cal [Pleader unable to proceed for want of evidence—Tantamount to no instructions and withdrawal]; *Shyam Sunder Lal* v. *Shib Ram*, (1930) 124 Ind Cas 402 All: 1930 Notes 23 (c); *Sikander Ali* v. *Kushal Chandra Sarma*, 1932 Cal 418 (418): 36 Cal W N 158. But see *Jasoda* v. *Rameshwari Dasi*, (1912) 13 Ind Cas 374 (374): 14 Cal L Jour 603 [And where judgment was given on merits]; *Mylne* v. *Koir*, 1928 Rang 191 (193): 6 Rang 323; *Alladhino* v. *Nawalmal*, (1907) 1 Sind L R 224.

(9) *Ramchandra* v. *Madhav Purshottam*, (1892) 16 Bom 23 (24, 28); *Patinhare Tarkatt Rama Mannadi* v. *Vellur Krishna Menon*, (1903) 26 Mad 267 (268); *Trimbak* v. *Krishna Rao and others*, 1929 Nag 89 (89): 11 Nag L J 238: 115 Ind Cas 173; *Robert Watson & Co* v. *Srimathi Ambika Dasi*, (1900) 27 Cal 529 (531): 4 Cal W N 237 [Pleader asking for time after reporting no instructions—Amounts to appearance]; *Akula Bakkayya* v. *Aluri Venkatanarasimham*, (1917) 39 Ind Cas 948 (949): 33 Mad L Jour 553: 1917 Mad W N 565; *Viswanatha* v. *Sami Asari*, 1924

O. 3, R. 1, Notes 7—8.

7. **"Except where otherwise expressly provided."**— *See* Note 2 above.

8. **Direction to appear in person—proviso.**—A Court has jurisdiction to direct, under this proviso, a party to appear in person, and on his failure to do so, to dismiss the suit under O. 9, R. 12.[1] Where in a suit for rent, the defendant pleaded discharge but was prepared to withdraw the plea if the plaintiff would depose that there was no discharge and thereupon the Court ordered the plaintiff's appearance under O. 10, R. 4, and on his failure to do so dismissed the suit under that rule, it was held that the proper procedure was to have ordered the plaintiff to appear under this proviso and not under O. 10, R. 4.[2] Where the Court directs the attendance of a party but omits to quote the section under which the order is made, it must be deemed to be made under this rule.[3]

O. 3, R. 2.

R. 2. [S. 37.] The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

Recognized agents.

(*a*) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(*b*) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

[1877—37; 1859—17, B.]

Local Amendments.

BOMBAY—

Order 3, Rule 2, clause (*a*) as amended.

Persons holding general powers of attorney or in the case of proceedings on the Original Side of the Bombay High Court attorneys holding the requisite special powers of attorney from parties not resident within the local limits of the jurisdiction of the Court

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Mad 43 (44): 18 Mad L W 209: 1923 Mad W N 802: 73 Ind Cas 982; *Jhalkan Singh* v. *Uttamchand*, (1904) 17 C P L R 1 (2); *Madan Lal* v. *Gobardhan*, (1909) 2 Ind Cas 621 (622) All; *Ganesh* v. *Bangilal*, 1925 Nag 236 (238): 83 Ind Cas 257; *Fazal Ahmed* v. *Bahadur Singh*, 1893 All W N 25 (25); *Ganga Das* v. *Indarman*, 1893 All W N 208 (209); *Kashi Pershad* v. *Debi Das*, (1875) 7 N W P H C R 77; *Chiranjilal* v. *Kundan Lal*, (1898) 20 All 294 (296): 1898 All W N 35. See also *Raghapa Bin Hanmapa* v. *Parapa Bin Shivapa*, (1875-77) 1 Bom 217 (219). But see *Shibendra Narain Choudhuri* v. *Kinoo Ram*, (1886) 12 Cal 605 (606).

Note 8.

(1) *Sri Prabhu* v. *Dwarka Prasad*, (1919) 50 Ind Cas 323 (324) Pat; *Vaiguntathammal* v. *Velliammai*, (1917) 41 Ind Cas 719 (721): 41 Mad 256 [If the party so directed refuses to appear the Court may declare him *ex parte* even though he has engaged a pleader who is prepared to appear for him; *Ayya Nadan* v. *Thenammal*, (1920) 55 Ind Cas 945 (947) Mad.

(2) *Kishnammal* v. *Paruwathan*, 1926 Jour 175 (1).

(3) *Abdul Jalil* v. *Humera Bibi*, (1909) 2 Ind Cas 463 All.

within which limits the appearance, application or act is made or done, authorizing them to make and do such appearances, applications and acts on behalf of such parties.

O. 3, R. 2, Notes 1—2.

Synopsis.

1. Legislative changes.
2. Persons holding powers of attorney.
3. Power of attorney.
4. Objection to authority.
5. Persons carrying on business.
6. Recognised agent of Government. See O. 27, Rr. 2 and 4.
7. Recognised agent of princes.

Amendment of clause (a) by the Bombay High Court. See Note 2, Pt. (3).

Extent of agent's powers. See Note 2, Pts. (7) to (13).

Resident. See Note 2, Pts. (1) to (3) and Note 5, Pt. (1).

Where business is stopped. See Note 5, Pts. (3) and (4).

1. Legislative changes.—

The word "general" preceding the words "powers of attorney" and the sentence "from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance application or act is made or done" which occurred in the old section have now been omitted from sub-clause (*a*). The result is that the rule has become more comprehensive and authorises any person holding a simple power of attorney to act or make applications or appearances in Court. The clause making specific provisions for *mukhtears* was therefore found unnecessary and has been deleted.[1] *See* undermentioned cases relating to *mukhtears*.[2]

The last paragraph of old S. 37 directing the Lieutenant-Governor of the Punjab, the Chief Commissioner of Oudh and the Central Provinces to declare from time to time, the persons competent to act as recognised agents of parties, has been omitted as being no longer necessary.[3]

2. Persons holding powers of attorney.—As seen in Note 1 already, it was necessary under the old S. 37 that the principal should be a person not resident within the jurisdiction of the Court.[1] But the term "non-resident" was construed very liberally.[2] The Bombay High Court has, however, amended

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Order 3, Rule 2—Note 1.

(1) See the Statement of Objections and Reasons.

(2) In re *Maharaja of Burdwan*, (1867) 7 Suth W R 475 (476) [A Mukhtearnama under seal is as valid as a mukhtearnama under signature]; Re *Gujraj Singh*, (1868) 10 Suth W R 355 (356); *Kristo Chunder Gooptoo* v. *Fuzul Ali Khan*, (1872) 17 Suth W R 389 (390); In the matter of *Ishur Kant*, (1875) 24 Suth W R 233 (233) [Meaning of the words "act" and "plead" explained]; *Kali Kumar* v. *Nobin Chunder*, (1881) 6 Cal 585 (591): 7 Cal L Rep 562: 4 Shom L R 88 [Distinction between mukhtear and private agent pointed out]; *Tusudduq Hussain* v. *Girhar Narain*, (1887) 14 Cal 556 (566): 12 Ind Jur 22; In re *Khoda Bux Khan*, (1888) 15 Cal 638 (646); *Gunnamayee Debi* v. *Nobin Chandra*, (1897) 1 Cal W N 11 (12); *Raj Mohan* v. *Basiruddin*, (1904) 8 Cal W N 401; *Saudagore Sahu* v. *Jaggerrallr*, (1905) 1 Cal L Jour 96n.

(3) See the undermentioned cases relating to recognised agents in the Punjab, Oudh and Central Provinces:—*Devee Chand* v. *Plowden*, 1867 Pun Re No 26 [The proviso applies to principals whether living within or outside jurisdiction]; *Hazur Singh* v. *Jiwah*, 1875 Pun Re No 28; *Jodh Singh* v. *Wassawa*, 1878 Pun Re No 9 [The authority need not be in writing]; *Karam Chand* v. *Ude Singh*, 1890 Pun Re No 134, (Do.); *Fateh Din* v. *Ralli*, 1907 Pun Re No 109: 199 Pun W R 1907; *Secretary of State* v. *Meher Baksh*, 1905 Pun Re No 84: 160 Pun L R 1905: 116 Pun W R 1905 [Collector is competent to institute suit on behalf of the Secretary of State for India without obtaining a power of attorney in his favour].

Note 2.

(1) *Thornhill* v. *Talor*, (1866) 1 Agra 115; *Murari Lal* v. *Umrao Singh*, (1901) 23 All 499 (500): 1901 All W N 161; *Kasumri* v. *Beni Prasad*, (1904) 26 All 19 (21): 1903 All W N 172; *Damodar Dass* v. *Inayat Husain*, (1906) 28 All 135 (136): (1906) 2 All L J 626: 1905 All W N 221; *Bishan Das* v. *Lakshmi Chand*, (1869) 6 Bom H C R A C J 159; *Parvatibai* v. *Vinayak Pandurang*, (1888) 12 Bom 68 (70-71); *Tara Nath* v. *Jamna Nath*, 1899 Pun Re No 5.

(2) *Ram Chandra* v. *Keshav*, (1881) 6 Bom 100 (102) [A person who went for a few months from his usual place of residence to his native province to get his sister married was held during his absence to be "not resident" at that place]; *Zemindar of Ettiapuram* v. *Subba Reddy*, (1904) 14 Mad L Jour 223 (225) [Power of attorney given by zamindar during absence for Delhi Durbar —Suit was properly presented only after his return —Held Zemindar was non-resident].

O. 3, R. 2, Note 2.

the present rule by practically bringing it in conformity with the old section.[3]

An agent who holds a power of attorney should be allowed to appear and act under this rule but the defendant may question his authority to do so.[4] He can show that a plaint signed by an authorised agent is not valid by reason of the suit not having been instituted with the approval of the plaintiff.[5] It is the duty of the first Court to decide the question of authority; it should not be left for decision to the appellate Court.[6]

A recognised agent is competent to refer a matter in dispute to arbitration[7] unless specially restricted by the power[8] and may file an affidavit of documents[9] or sign an amended plaint;[10] but all acts and appearances should be done *only on behalf of and in the name of the plaintiff*. He cannot bring the suits in his *own* name.[11] He has no right of audience and cannot plead or examine witnesses.[12] No power can be given in such a way as to evade the special provisions relating to the appointment of pleaders.[13]

Where there is a valid authority, mere formal defects will not invalidate the acts of the agent.[13-a] Thus a defect in the signature in the plaint[14] or in the description of the agent[15] is only an irregularity and does not invalidate the proceeding. It has been held that even where there is no authority originally to do an act, it could be given subsequently by the principal *ratifying* the unauthorised acts.[16] A suit should not be dismissed for defect in

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(3) *Achut Sitaram* v. *Tara Chand*, 1923 Bom 41 (41): 72 Ind Cas 1003; *Nanjibai* v. *Popatlal*, 1932 Bom 367 (368): 34 Bom L R 628: 138 Ind Cas 797 [Bom High Court Rules—*General power of attorney* essential for signing plaint].

(4) *Nam Narain Singh* v. *Raghu Nath*, (1892) 19 Cal 678 (679) 19 Ind App 135: 6 Sar 202; In the Goods of *Myine*, (1906) 33 Cal 625 (629): 9 Cal W N 986 [In the Calcutta High Court under R 748 of the Rules and Orders of the Court, Court may require further evidence of the execution of the power of attorney]; *Habib-un-nissa* v. *Musharaf Ali*, (1916) 33 Ind Cas 661 (661): 18 Oudh Cas 372.

(5) *Amirunnissa* v. *Ram Charan*, (1918) 31 Ind Cas 859 (859) U P; *Dhunput Singh* v. *Jhoomuk Khawas*, (1879) 3 Cal L Rep 579 (580).

(6) *Raman Lalji* v. *Gokul Nathji*, (1917) 39 Ind Cas 462 (464): 39 All 343: 15 All L J 309.

(7) *Hari Singh* v. *Musst Lachmi*, 1882 Pun Re No 1; *Hurdeo* v. *Thana*, 1882 Pun Re No 48; *Ahmed* v. *Musst Bhaghari*, 1883 Pun Re No 170; *Ram Das* v. *Abbas Khan*, 1893 Pun Re No 51 F B [1870 Pun Re No 64 dissented from].

(8) *Bhagwandass* v. *Nund Lall*, (1886) 12 Cal 173 (178); *Saturji* v. *Dulhin Bulap Koer*, (1897) 24 Cal 469 (472).

(9) *Goswami Shai Maganlalaji* v. *Bai Krishna*, 1890 P J 158.

(10) *Palaniappa Chetty* v. *P M R M Firm*, (1914) 25 Ind Cas 136 (137): 7 Bur L Tim 199.

(11) *Choonee* v. *Hur Prasad*, (1869) 1 N W P H C R 277: *Carter* v. *Misree Lal*, (1870) 2 N W P C R 179; *Ladlee Pershad* v. *Gunga Pershad*, (1872) 4 N W P H C R 59; *Mokha* v. *Bisseesur*, (1870) 13 Suth W R 344 (345) 5 Beng L R App 11. See *Gobind Dass* v. *Jaykishen Dass*, (1867) 2 Agra 101; *Thakurdas* v. *Golam Mohyuddin*, 1882 Pun Re 20; *Fyazoodeen* v. *Pudmee*, (1872) 4 N W P H C R 68; *Lala Manohar* v. *Kishen Dyal*, (1871) 3 N W P H C R 175; *Juggun Nath* v. *Beck*, (1870) 2 N W P 60.

(12) *Prannath Choudhry* v. *Ganendra Mohun Tagore*, (1865) 3 Suth W R 108 (108); *Harchand* v. *B N Ry Co*, (1915) 28 Ind Cas 838 (838): 19 Cal W N 64.

(13) *Nga Nyun* v. *Nga Po*, (1914) 25 Ind Cas 163 (163): 7 Bur L Tim 206.

(13-a) *Subramania* v. *Ramachandra*, (1903) 26 Mad 197 (198, 199) [Vakalatnama—Omission to date—Not fatal]; *Shyam Sunder Koer* v. *Rahmatunnissa*, 1932 Pat 3 (4): 133 Ind Cas 171: 12 Pat L Tim 558 [Vakalatnama—Omission of pleader's name in margin—Mere clerical error]; *Khaira* v. *Nathu*, (1920) 55 Ind Cas 990 (991): 2 U P L R (L) 88 [Pleader's power of attorney—Not signed by party or agent by mere oversight].

(14) *B B & C I Ry Co, Ltd* v. *Sivaji Mills Co, Ltd*, 1927 All 514 (515): 101 Ind Cas 698.

(15) *Amir Shah-Desa Shah* v. *Cox & Co*, 1929 Lah 759 (760); *Mulchand* v. *Radhabai*, 1923 Nag 281 (282): 6 Nag L J 179: 73 Ind Cas 251; *Chhayunnessa Bibi* v. *Basirar Rahman*, (1910) 5 Ind Cas 532 (534): 37 Cal 399: 11 Cal L Jour 285 [A mukhtearnamah in which the name of the mukhtear is omitted by mistake, may be amended by Court]. But see *Muhammad Ali Khan* v. *Jasram*, (1914) 23 Ind Cas 464 (464): 36 All 46: 11 All L J 1015.

(16) *Ladd Govindoss Krishnadoss Varu* v. *Muthiah Chetty*, 1925 Mad 660 (668): 48 Mad L Jour 721 [Leave to sign and verify plaint granted subsequently not fatal]; *Ganga Ram* v. *Dina Nath*, 1912 Pun Re No 118: 51 Pun W R 1913: 18 Ind Cas 526: 86 Pun L R 1913; *Allah*

the authority of the agent, but should give the defaulting party an opportunity to remedy it.[17]

3. Power of attorney.—The term "power of attorney" is not defined in the Civil Procedure Code. Broadly speaking it is a formal instrument by which authority is conferred on an agent. Such an instrument should be construed strictly and as giving only such authority as it confers *expressly* or by *necessary implication.*

Every agent has got an implied authority to do whatever is necessary for, or ordinarily incidental to the effective execution of his express authority in the usual way.[1] Thus a power authorising a person to take all steps necessary to complete the execution of a decree can sign and present an execution application to save the decree from the bar of limitation.[1-a] Similarly an agent authorised to get a postponement of a judicial sale has power to raise a loan for the attainment of that object.[2] A power of attorney to defend a suit includes a power to appeal against an order refusing to set aside a decree passed *ex parte*[3] as it includes a necessary step for the defence in the suit or to establish the grounds of defence in the suit.[3-a]

The authority given must, however, be construed with reference to the special purpose for which it is given. Thus a power to conduct suits generally does not authorise the agent to bring them to a close in an out of the ordinary way.[4] An agent authorised to act only in connection with one particular matter as the realisation of an amount due, is one acting under a special power of attorney.[5] An authority to sign on behalf of the principal does not include a power to execute deeds as such.[6] Where the manager of a firm files the vakalat as its agent, it should be clearly described as such to avoid further litigation.[7]

4. Objection to authority.—An objection to the validity of a power of attorney must be taken very early at the trial Court, and if not taken must be deemed to have been waived.[1] A defect in the authority of the agent is

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Baksh v. *M O Rohtak*, 1926 Lah 223 (224): 27 Pun L R 18: 92 Ind Cas 966. See *Wali Muhamed* v. *Ishak Ali*, 1931 All 507 (511): 1931 All L J 777: 134 Ind Cas 26 S B. But see *Sheikh Palat* v. *Sarwan Sahu*, (1920) 55 Ind Cas 271 (271) Pat [Appeal presented by pleader without a vakalatnama—Vakalatnama signed by party after limitation and produced—Invalid].

(17) *Raman Lalji* v. *Gokul Nathji*, (1917) 39 Ind Cas 462 (464): 39 All 343: 15 All L J 309; *Uttamram Vittal Das* v. *Thakoredas Parshottam Das*, 1922 Bom 113 (113): 46 Bom 150: 68 Ind Cas 217: 23 Bom L R 911: *Naujibai* v. *Popatlal*, 1932 Bom 367 (370): 34 Bom L R 628: 138 Ind Cas 797.

Note 3.

(1) *Mahomed Sulaiman* v. *Marhar*, 1931 All 320 (320): 133 Ind Cas 606: 1931 All L J 904 [Power to defend suit—Includes authority to appoint pleader].

(1-a) *Venkataramana Iyer* v. *Narasinga Rao*, (1913) 18 Ind Cas 135 (136): 38 Mad 134: 1913 Mad W N 72: 13 Mad L Tim 114: 24 Mad L Jour 180.

(2) *Ghasiram* v. *Raja Mohan Bikram*, (1907) 6 Cal L Jour 639 (647).

(3) *Firm Champa* v. *Banarsi Das*, 1927 Lah 134 (134): 99 Ind Cas 690.

(3-a) *Cassim Momoojee* v. *Gopal Lal*, (1899) 3 Cal W N 579 (581).

(4) *Thakur Pershad* v. *Kalka Pershad*, (1874) 6 N W P Rep 210 [By joining in a reference to arbitration]; *Keshav Bapuji* v. *Narayanan*, (1886) 10 Bom 18 (20); *Sadashiv* v. *Maruti*, (1890) 14 Bom 455 (457) [By offering to be bound by the oath of the opposite party given in a particular form].

(5) *Vardaji Kasturji* v. *Chandrappa Piraji*, (1916) 36 Ind Cas 805 (806): 41 Bom 40: 18 Bom L R 821; *H Ephrayim* v. *Turner Morrison & Co*, 1930 Bom 511 (512): 32 Bom L R 1178: 128 Ind Cas 609 [And a plaint signed by such an agent is irregular].

(6) *Radha Kishen* v. *Nauratan*, (1907) 6 Cal L Jour 490 (500, 516).

(7) *Madangopal* v. *Jhamandas*, 1926 Sind 51 (53): 89 Ind Cas 401.

Note 4.

(1) *Gopal Singh* v. *Bhaga*, 1924 Lah 296 (297): 69 Ind Cas 365; *Parvatibai* v. *Vinayak*, (1888) 12 Bom 68 (71) [Cannot raise in execution].

O. 3, R. 2 Notes 4—7.

only an irregularity not affecting the merits of the case within S. 99 of the Code and will not be a ground for interference in appeal.[2]

5. Persons carrying on business.—The person must really carry on business for and in the name of parties not resident within the local limits of the jurisdiction of the Court within which the applications, appearances or acts are to be done.[1] The sub-Rule refers to a *Gumastha* or person acting *for others*, and does not include a partner carrying on business *for himself and for others*.[2] When a firm has ceased to carry on business, a person engaged in collecting the assets of such a firm, is not a recognised agent according to the Calcutta High Court[3] but is one according to the Bombay High Court.[4]

6. Recognised agent of Government.—*See* O. 27, Rr. 2 and 4.

7. Recognised agent of Princes.—*See also* S. 85 *ante*.

Section 85 does not prevent the institution of a suit by an independent Prince in his own name and through a recognised agent appointed under this rule.[1]

A political agent appointed by the Government to manage the estates of a Chief, is not a recognised agent within the meaning of this rule so as to enable him to sue on behalf of the chief in British Courts.[2]

O. 3, R. 3.

Service of procession recognized agent.

R. 3. [S. 38.] (1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

[1877—38, 1859—17.]

Synopsis.

1. **Service of process on recognised agent.**

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(2) *Bisandas* v. *Lakshmichand Kishanchand*, (1869) 6 Bom H C 159; *Charles Palmer* v. *Sorabji*, (1886) Bom P J 837 (388); *Ganapathy Nana* v. *Jivanabai*, 1923 Bom 44 (44): 24 Bom L R 1302: 76 Ind Cas 34: 47 Bom 227; *Munnoo Dosse* v. *Ishan Chunder Bannerjea*, (1871) 15 Suth W R 245 (245); *Tha Zan* v. *Tha Dun*, (1907-08) 4 L B R 284 (286); *Fateh Din* v. *Ralli*, 1907 Pun Re No 109: 199 Pun W R 1907; *Autoo* v. *Bidhoomookhee*, (1879) 4 Cal 605 (606). 13 P L T 89 [Residence within or without jurisdiction immaterial for purposes of service of summons as recognized agent—*Obiter*].

(2) *Luchmeeput* v. *Sibnarain*, 1 Hyde 97.

(3) *Mokha Hurruckhraj* v. *Biseswar Dass*, (1870) 13 Suth W R 344 (345): 5 Beng L R App 11.

(4) *Tukoji Maharaj Holkar* v. *Pitambardas Naranji*, (1872) 9 Bom H C R 427.

Note 5.

(1) *Fateh Din* v. *Ralli*, 1907 Pun Re No 109: 199 Pun W R 1907; *Murali Lal* v. *Umrao Singh*, (1901) 23 All 499 (500): 1901 All W N 161; *Firm Ram Gopal* v. *Narain Das*, (1918) 45 Ind Cas 932 (932): 1918 Pun W R 105 [Service on the *munim* of party resident within jurisdiction not sufficient]; *Ibne Hasan* v. *Din Dayal*, 1931 All 449 (450): 1931 All L J 404: 132 Ind Cas 808 [Person looking after Zamindari property of judgment debtor not a recognized agent for deposit under O 21, R 89]. See, however, *Sunder Lal* v. *Commissioner of Income-tax*, 1931 Patna 282 (284): 10 Pat 441: 133 Ind Cas 679:

Note 7.

(1) *Maharaja of Bharatpur* v. *Kacheru*, (1897) 19 All 510 (512): 1897 All W N 135; *Beer Chunder Manika* v. *Ishan Chunder Burdhun*, (1884) 10 Cal 136 (137): 8 Ind Jur 259; *The Maharajah of Jammu and Kashmir* v. *Chaubhatta*, 1889 Pun Re No 165.

(2) *Venkatrav Raja* v. *Madhavrao Ramchandra*, (1887) 11 Bom 53 (55); *Girdhari Das* v. *Powlett*, (1876-80) 2 All 690 (694).

O. 3, R. 3, Note 1.

1. Service of process on recognised agent.—This rule provides for the mode of service of processes on a recognised agent, and says that service on a recognised agent is as effectual as service on the party in person. "It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or, in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings".[1] The rule, however, does not prohibit service on the parties themselves.[2] A person holding a power of attorney is at liberty to refuse to accept service of summons and appear in a suit brought against the principal even though he is authorised by the power to appear and defend suits.[3] Service of notice on a muktear who is not the recognised agent of the judgment-debtor is not sufficient service within the meaning of this rule.[4]

O. 3, R. 4.

R. 4. [*S.* 39] (1) *No pleader*[3] *shall act for any person in any Court, unless he has been appointed*[14] *for the purpose by such person by a document in writing signed by such person or by his recognised agent or by some other person duly authorised by or under a power of attorney to make such appointment.*

Appointment of pleader.

(2) *Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court*[16] *by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended*[17] *so far as regards the client.*

(3) *For the purposes of sub-Rule* (2) *an application for review of judgment, an application under section* 144 *or section* 152 *of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.*

(4) *The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to*

Order 3, Rule 3—Note 1.

(1) *Ram Rambal* v. *Balbahaddar*, (1903) 25 All 1 (18): 29 Ind App 203: 4 Bom L R 832: 6 Cal W N 849: 8 Sar 340. See *Sundar Lall* v. *Commissioner of Income-tax*, 1931 Pat 282 (284): 10 Pat 441: 133 Ind Cas 679: 13 Pat L Tim 89 [Principal of recognized agent need not be a resident outside jurisdiction for operation of this rule—*Obiter*].

(2) *Ram Lall* v. *Surdaree*, 1864 Suth W R Mis 21 (21).

(3) *Luchmee Chund, In re*, (1882) 8 Cal 317 (326).

(4) *Kristo* v. *Fuzul Ali*, (1872) 17 Suth W R 389 (390).

O. 3, R. 4, Notes 1—2.

write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.

(5) *No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating—*

(a) *the names of the parties to the suit,*

(b) *the name of the party for whom he appears, and*

(c) *the name of the person by whom he is authorised to appear:*

Provided that nothing in this sub-Rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.

[1877—S. 39, 1859—S. 18.]

Local Amendments.

BOMBAY.

In sub-Rule (3) the words "or any application relating to such appeal" shall be inserted between the words "order in the suit" and "and any application or act".

Synopsis.

1. Amendments after 1908.
2. Scope of the rule.
3. Pleader.
4. Authority to abandon issue or claim.
5. Power to make admissions.
6. Power to withdraw suit.
7. Power to compromise the suit.
8. Power to refer to arbitration.
9. Delegation of authority.
10. Control and conduct of suit.
11. Liability of pleader for misconduct.
12. Privileges of pleaders.
13. Duties.
14. Appointment of pleaders.
15. Acceptance of engagement.
16. "Until determined with the leave of the Court."
17. "Until all proceedings in the suit are ended."
18. Bombay Pleaders' Act, 1920.

A document in writing. See Note 14.
Advocates. See Note 2, F.-N. (1) and Note (3).
Defective vakalatnama. See Note 14.
Fresh vakalatnama when necessary. See Note 17.
Revocation of authority. See Note 16.
"Signed." See Note 14.

1. Amendments after 1908.—The present rule was amended by the second amending Act of 1926. In sub-Rule 2 the words " when accepted by a pleader " which occurred after the words " every such appointment " have been omitted. Sub-Rules 2 to 5 and the proviso are new.

2. Scope of the rule.—This rule provides in what *manner* a pleader should be appointed and till what time the appointment is to be in force. It assumes that a pleader that is appointed, is *competent* to appear. It is only

an enabling provision by which a pleader, when he accepts an engagement and files vakalatnamah, is entitled to conduct the proceedings till he or his client dies, or till the termination of the proceedings. It does not give an absolute right to any practitioner to appear in Court in any matter he chooses. It is subject to the rules governing the qualifications of the various classes of pleaders and the rules governing the procedure of Courts.[1] The proviso to R. 23 of the Appellate Side Rules of the Madras High Court requiring that when a vakalatnamah is executed by a man who is either blind, illiterate or unacquainted with the language in which the vakalatnamah is written, the officer before whom it is executed, shall certify that the contents of the vakalatnamah were explained to the executant who seemed to understand it and signed in his presence, is *intra vires* and does not conflict with anything that is contained herein.[2]

As to appointment of pleaders *see* Note 14, *infra*.

3. Pleader.—The term "pleader" signifies all persons who are entitled to appear and plead, and includes an advocate, vakil or attorney.[1] It must, however, be read in the narrowest sense and does not include *agents*.[1-a] A pleader in India combines in himself the duties performed in England by a Barrister and Attorney, in that he can both *plead and act*, whereas a Barrister can only *plead* and an attorney can only *act*.[2]

The status of an advocate of the Calcutta High Court, it has been held, does not differ from that of a Barrister in England.[3] In the undermentioned case[3-a] it was held that an advocate of the Allahabad High Court can also act for his client.

4. Authority to abandon issue or claim.—A Pleader's general powers in the conduct of a suit include, the power to abandon an issue, which, in his discretion, he thinks it inadvisable to press.[1] He may ask for an issue, or give up an issue, and the same will be binding on his client.[2] But he cannot relinquish a portion of the *claim* in the suit, *unless specially authorised* to do so.[3] It is the duty of the pleader in such cases to consult his client, and get

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Order 3, Rule 4—Note 2.

(1) *Veerappa Chettiar* v. *P G Sundaresa Sastrigal*, 1925 Mad 1201 (1202): 48 Mad 676: 49 Mad L Jour 366: 22 Mad L W 606: 92 Ind Cas 300; *Nga Nyun* v. *Nga Po Go*, (1914) 25 Ind Cas 163 (164): 7 Bur L Tim 206 [An unqualified person cannot practise as an Advocate]; *In Re*, Ram Dayal De, 1932 Cal 1 (3): 35 Cal W N 1100: 135 Ind Cas 789: 59 Cal 370 [Sub-Rule (5) contrary to rule framed by Calcutta High Court under Letters Patent—Latter to prevail]; *Thakoordas Mukherjee* v. *Ameer Munidel*, (1870) 14 Suth W R (Civil) 168 (168) [Pleader himself the appellant cannot certify memo of appeal —H C Rules]; *Oliullah* v. *Bachu Lal*, (1888) 15 Cal 706 (707) [Pleader cannot be heard in Second Appeal in the absence of a memo of grounds and without order of admission of appeal].

(2) *In the matter of A Vakalath*, 1928 Mad 472 (473): 109 Ind Cas 206.

Note 3.

(1) *In re, the Pleaders of the High Court*, (1884) 8 Bom 105 (137): 8 Ind Jur 306, 378; *In the matter of Filing Powers by an Advocate or Pleader*, 1926 Rang 215 (216): 4 Rang 249: 98 Ind Cas 15: 5 Bur L Jour 221; *Newen In re*, (1903) 1 Ch 818, (Do.).

(1-a) *Batna* v. *Dewa Singh*, 1928 Lah 733 (734): 108 Ind Cas 513.

(2) *In re Khoda Bux*, (1888) 15 Cal 638 (644).

(3) *Askaran Choutmal* v. *E I Ry & Co*, 1925 Cal 696 (698): 52 Cal 386: 29 Cal W N 566: 88 Ind Cas 413.

(3-a) *Bhaktawar Singh* v. *Sant Lal*, (1887) 9 All 617 (621): 1887 All W N 153 [Advocate can perform all the duties of a Pleader].

Note 4.

(1) *Venkata* v. *Bhashyakarlu*, (1902) 25 Mad 367 (377): 29 Ind App 76: 6 Cal W N 641: 4 Bom L R 543: 8 Sar 258 P C; *Luchman* v. *Rajan*, (1917) 38 Ind Cas 800 (802): 20 Oudh Cas 49.

(2) *Venkata Narasimha* v. *Bhasyakarlu*, (1899) 22 Mad 538 (543, 544); *Surajpal* v. *Debi*, (1916) 34 Ind Cas 390 (392): 3 Oudh L Jour 156.

(3) *Abdul Subhan* v. *Shib Kisto*, 3 Beng L R (App) 15; *Gour Pershad* v. *Sookdeb*, (1869) 12 Suth W R 279 (280); *Chunder Kumar* v. *M S Mohammad*, (1872) 18 Suth W R 436 (436)

O. 3, R. 4, Notes 4—5.

his *express* consent before giving up any such portion of the claim.[4] Similarly a pleader cannot, unless authorised to do so, bring the suit to a close by offering to be bound by the oath of the opposite party.[5] An opinion expressed by the pleader in the course of arguments adversely to the claim of the client, which he undertook to advocate, is also not binding on the client.[6]

5. **Power to make admissions.**—Verbal admissions made by a pleader should be received with caution,[1] but the Court will nevertheless accept a statement of a pleader from the bar without burdening him with an oath.[1-a] An admission on a *question of fact* will always bind the client[2] unless the pleader has been induced or misled by a mistake[3] or misapprehension[4] as to the actual facts. An order or judgment based on the admission of the pleader, can generally speaking, be set aside upon any ground which would invalidate an agreement.[5] But a party repudiating the admission should do so at the earliest possible opportunity.[6]

Admissions made by a pleader against instructions[7] or at a time when he was not engaged by the client[8] or as to what is beyond the scope of the suit[9] will not, however, bind the client.

Cal; *Court* v. *Berlin*, (1897) 2 Q B 396 [Attorney cannot abandon]; *Underwood* v. *Lewis*, (1894) 2 Q B 306, (Do.).

(4) *Ghasirana Goenka* v. *Haribax Goberdhonedas*, 1930 Cal 477 (479): 34 Cal W N 210: 126 Ind Cas 765; *Amir Ali* v. *Inderjeet Singh*, (1871-1872) 14 Moo Ind App 203 (207): 9 Beng L R 460: 2 Suth 479: 2 Sar 731 P C.

(5) *Sadasiv Rayaji* v. *Maruti Vithal*, (1890) 14 Bom 455 (457); *Mahomed Mammud Chowdry* v. *Bchary Lal Saha*, 1930 Cal 463 (465): 34 Cal W N 310: 129 Ind Cas 408 [But the Court can infer such authorisation]. But see, *Deoraj Misra* v. *Mt Abhai Raji*, 1927 All 584 (584): 102 Ind Cas 38: 25 All L J 729: 49 All 842 [Agreement to be bound by the statement of certain witnesses—No special power necessary].

(6) *Krishnaswamy* v. *Rajagopal*, (1895) 18 Mad 73 (83): 4 Mad L Jour 212.

Note 5.

(1) *Shaara Begam* v. *Nanhi Begam*, (1907) 29 All 29 (32, 33): 34 Ind Cas 1: 11 Cal W N 130: 9 Bom L R 80: 17 Mad L Jour 32: 5 Cal L Jour 4: 1 Mad L Tim 429 P C; *Natha* v. *Jodha*, (1884) 6 All 406 (415): 1884 All W N 140; *Venkataramanna* v. *Chavela*, (1870) 6 Mad H C R 127 (130).

(1-a) *Nistarney* v. *Nundolal Bose*, (1899) 3 Cal W N 694 (695); *Weston* v. *Peary Mohan*, (1913) 23 Ind Cas 25 (30): 40 Cal 898: 18 Cal W N 185; *Hickman* v. *Berens*, (1895) 2 Ch 638: 64 L J Ch 785: 73 L T 323: 12 R 602 (C A) cited in 27 Cal 428; *Nundo Lal Bose* v. *Nistarini Dassi*, (1900) 27 Cal 428 (439): 4 Cal W N 169.

(2) *Kower Narain* v. *Sreenath*, (1868) 9 Suth W R 485 (486); *Jahadali* v. *Ajimanneesa*, (1918) 44 Ind Cas 18 (19) Cal; *Vishin Das* v. *Municipality of Hyderabad*, (1916) 34 Ind Cas 494 (495): 9 Sind L R 220; *Hur Dayal* v. *Heera Lall*, (1871) 16 Suth W R 107 (108); *Khajah Abdul* v. *Gourmonee*, (1868) 9 Suth W R 375 (376); *Nellayadiyu Ammal* v. *Subramanya*, (1917) 40 Mad 687 (694): 31 Mad L Jour 269: 38 Ind Cas 617; *Haller* v. *Worman*, (1861) 3 L T 741; *Rajunder* v. *Bijai*, (1837-41) 2 Moo Ind App 253 (259, 260): 1 Sar 253 [The client need not be present at the time of admission]; *Berkeley* v. *Chittur Kooar*, (1873) 5 N W P 2 (4) [Admission as to payment and state of the accounts—Is binding]; *Kalekanund* v. *Giribal Debia*, (1868) 10 Suth W R 322 (323) [Admission as to receipt of money]; *Sreemutty Dossee* v. *Pitambar*, (1874) 21 Suth W R 332 (332) [Admission of liability—Sufficient to warrant a decree]; *Hingan* v. *Mansa*, (1896) 18 All 384 (387): 1896 All W N 101 [Acknowledgments of debts by Pleader will save limitation]; *Narendra* v. *Bhupendra*, (1896) 23 Cal 374 (387), (Do.); *Rupchand* v. *Balwant*, (1887) 11 Bom 591 (593); *Sheo Nath Singh* v. *Lala Banaidar*, 1931 All 415 (2) (416). See also *Oonabuttee* v. *Parshee Nath*, (1871) 15 Suth W R 135 (136) [Admission by pleader is evidence against party in another case].

(3) *Doddava* v. *Yellawa*, 1922 Bom 233 (234): 70 Ind Cas 417; *Brij Bhukan* v. *Mahadeo*, (1916) 35 Ind Cas 205 (206) All; *Holt* v. *Jesse*, (1876) 3 Ch D 177: 46 L J Ch 254: 24 W R 879 cited in 1925 Cal 696 (701).

(4) *Holt* v. *Jesse*, 3 Ch D 177: 46 L J Ch 254: 24 W R 879 [Cited in 15 C P L R 73 (75); *Kyone Hoe* v. *Kyon Soon Sun*, 1925 Rang 314 (316): 3 Rang 261: 91 Ind Cas 509 [Consent given under misapprehension can be withdrawn before order is made]; *Bhan Singh* v. *Pirthmi Chand*, (1916) 36 Ind Cas 212 (213): 104 Pun L R 1916: 179 Pun W R 1916.

(5) *Huddersfield Banking Co* v. *Lister*, (1895) 2 Ch 273; *Attorney-General* v. *Tomline*, (1877) 7 Ch Div 388.

(6) *Lachman* v. *Rajjan*, (1917) 38 Ind Cas 800 (802): 20 Oudh Cas 40; *Nagabhushanam* v. *Jagannaikulu*, 1925 Mad 1031 (1032): 22 Mad L W 234: 49 Mad L Jour 671: 90 Ind Cas 775. See *Sheo Nath* v. *Lala Bansidhar*, 1931 All 415 (2) (416) [Want of authority of pleader to make admission must be proved].

(7) *S P M Muthiah Chetty* v. *K R A R Karuppan Chettiar*, 1927 Mad 852 (859): 26 Mad L W 465: 39 Mad L Tim 240: 50 Mad 786: 53 Mad L Jour 606: 105 Ind Cas 5.

(8) *Wagstaff* v. *Wilson*, (1832) 4 B and Ad 339.

(9) *Arul Khadar* v. *Andhu Set*, (1865) 2 Mad H C R 423 (426).

An erroneous admission by a pleader on a *question of law* is of no effect and does not preclude the party from claiming his legal rights in a higher tribunal.[10]

6. Power to withdraw suit.—A *vakalatnamah* couched in general terms suffices *prima facie* to authorise a pleader to apply for a withdrawal of the suit and, in the absence of anything to show that the pleader has acted contrary to instructions or is otherwise guilty of misconduct, the client is bound by such act on the part of the pleader.[1]

7. Power to compromise the suit.—In the absence of *specific authority*, a pleader ordinarily employed cannot enter into a compromise on behalf of the client, and, if he does so, the compromise is not binding on the client[1] unless the latter *acquiesces* in or *ratifies* the same.[2] Where the original *vakalatnamah* itself specially empowers the pleader to compromise the suit, no second or special vakalatnamah is again necessary to compromise it.[3] A strict interpretation ought to be placed upon the terms empowering the pleader to enter into a compromise.[4] Thus, a power to file a compromise does not include a power to *make* a compromise or *sign* it;[5] nor does an authority to compromise

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(10) *Thakur Prasad Singh* v. *Chandrika Pershad*, 1925 Oudh 150 (151): 11 Oudh 436: 81 Ind Cas 742; *Krishnaji* v. *Rajmal*, (1900) 24 Bom 360 (363): 2 Bom L R 25; *Narayan* v. *Venkatacharya*, (1904) 28 Bom 408 (412): 6 Bom L R 434; *Louis Dreyfus & Co* v. *Ghandamal & Co*, (1919) 13 Sind L R 128 (130): 52 Ind Cas 878; *Hassomal* v. *Shaik Ghulam Md*, (1914) 8 Sind L R 156 (164): 27 Ind Cas 357; *Maharani Beni Pershad* v. *Dudnath Roy*, (1899) 3 Cal W N cccxxi; *Dwar Buksh* v. *Fatik Jali*, (1899) 26 Cal 250 (252): 3 Cal W N 222; *Ram Kant Chowdhry* v. *Brindabun Chunder Doss*, (1871) 16 Suth W R 246 (247); *Ramchandra Agarwala* v. *Syameswari Dasya*, 1925 Cal 1171 (1172): 42 Cal L Jour 71: 90 Ind Cas 98; *Nanak Chand* v. *Muhammad Khan*, 1924 Lah 702 (705): 75 Ind Cas 1048; *Kanhaya Bakhsh Singh* v. *Sheo Nath*, 1925 Oudh 665 (666): 87 Ind Cas 956; *Lakshmi* v. *Venkatrao*, 1925 Nag 207 (208, 209): 82 Ind Cas 1052; *Secretary of State* v. *Siba Prasad*, (1918) 27 Cal L Jour 447 (449): 45 Ind Cas 983; *Beni Pershad* v. *Dudhnath Roy*, (1899) 26 Ind App 216: 27 Cal 156: 4 Cal W N 274: 7 Sar 580; *Rama Iyengar* v. *Kasinivenda*, (1912) 16 Ind Cas 746 (746): 23 Mad L Jour 327; *Krishna Prasad* v. *Udit Narain Singh*, (1911) 9 Ind Cas 621 (622) Cal.

Note 6.

(1) *Ram Coomar* v. *Collector of Beerbhoom*, (1866) 5 Suth W R 80 (81); *Kailash* v. *Haradhan*, (1912) 14 Ind Cas 190 (190): 16 Cal W N 932.

Note 7.

(1) *Sarat Kumari Dasi* v. *Amullyadhan Kundu*, 1923 P C 13 (15): 32 Mad L Tim 137: 71 Ind Cas 632: 17 Mad L W 481: 27 Cal W N 629: 25 Bom L R 548: 37 Cal L Jour 501: 1923 Mad W N 392; *Sirdarkhatun* v. *Murad Ali* (1915) 9 Sind L R 218 (219): 34 Ind Cas 928; *Sourindra Nath* v. *Heramba Nath*, 1923 P C 98 (99): 45 Mad L Jour 453: 1923 Mad W N 734: 33 Mad L Tim 294: 4 L R P C 138: 84 Ind Cas 721 P C; *Ganpat Lal* v. *King Emperor*, 1927 Pat 199 (200): 6 Pat 217: 8 Pat L Tim 470: 102 Ind Cas 337: 28 Cr L Jour 529: 8 A I Cr R 117; *Jogapati* v. *Ekambara*, (1898) 21 Mad 274 (277): 8 Mad L Jour 40; *Basan Goda* v. *Churchi Giri Gouda*, (1910) 5 Ind Cas 968 (969): 34 Bom 408; 12 Bom L R 223; *Sirdar Begum* v. *Izzutoolnisa*, (1870) 2 N W P 149 (150); *Jaipal Tewary* v. *Tapeswari*, (1918) 45 Ind Cas 321 (322) Pat; *Digbijoy* v. *Atta Rahman*, (1912) 17 Cal W N 156 (159); *Premsookh* v. *Pirthee Ram*, (1867) 2 Agra 222; *Nandolal* v. *Nistarini*, (1900) 27 Cal 428 (448, 449): 4 Cal W N 169; *Devendranath Sarkar* v. *Ram Rach Pal Singh*, 1926 Oudh 315 (316): 3 Oudh W N 277: 93 Ind Cas 302: 13 Oudh L Jour 482; *Mt Waqboolan* v. *Habib Ullah*, 1927 Oudh 222 (223): 1 Luck Cas 19: 102 Ind Cas 470; *Sirdar Khatun* v. *Murad Ali*, (1915) 9 Sind L R 218 (224): 34 Ind Cas 928 [Specific authority may be inferred]; *Mt Wazir Begam* v. *Mt Piyari Begam*, 1898 Pun Re No 50; *Mistri Mahomed Umar* v. *Seth Chinansing*, (1914) 25 Ind Cas 935 (936): 8 Sind L R 91 [But the presumption, where the pleader compromises, is that he does so under his client's authority]. See *Bhut Nath* v. *Ram Lall*, (1900) 6 Cal W N 82 (87); *Parankuer* v. *Manni Lal*, 1929 Oudh 211 (212): 122 Ind Cas 283.

(2) *Sirdar Khatun* v. *Murdali*, (1916) 34 Ind Cas 928 (928): 9 Sind L R 218; *Askaran* v. *E I Ry*, 1925 Cal 696 (700, 702): 52 Cal 386: 29 Cal W N 566: 88 Ind Cas 413. See also *Ramaswami Chettiar* v. *Kandaswami Aiyar*, (1921) 60 Ind Cas 22 (22): 12 Mad L W 562 [Parties themselves entering into compromise—No question of authority of pleader arises].

(3) *Kolipara Venkamma* In Re, (1912) 17 Ind Cas 391 (391): 23 Mad L Jour 381: 12 Mad L Tim 348; *Dayal Singh* v. *Hara Singh*, 1928 Lah 642 (643): 108 Ind Cas 262.

(4) *Thenal Ammal* v. *Sokkammal*, (1918) 41 Mad 233 (235): 22 Mad L Tim 149: 41 Ind Cas 429; *Hukum Singh* v. *Tunda Singh*, 1921 Jour 23 (3): 19 All L Jour 63: 60 Ind Cas 912 [Vakalatnama expressly specifying presentation of compromise petition as one of the acts authorised—Vakil held empowered to compromise]; *Manikka Mudaliar* v. *Devasikamani*, (1912) 13 Ind Cas 595 (596): 1912 Mad W N 158 [Compromise settling none of the matters in dispute—Whole matter left to be fought out in fresh litigation—Client's property meanwhile surrendered to adversary—*Held* Vakil acted improperly in entering into the agreement which he had no power to do although he had power to enter into compromise]. See *Sheo Nath* v. *Lala Bansidhar*, 1931 All 415 (2) (416).

(5) *Ram Kirat* v. *Gajadhar Shukla*, 1930 Oudh 112 (113): 7 Oudh W N 153: 125 Ind Cas 171; *Mt Hubraji* v. *Chandra Bali*, 1928 Oudh 386 (386): 5 Oudh W N 677: 111 Ind Cas 829.

O. 3, R. 4, Notes 7—8.

a suit necessarily give an authority to *negotiate* the terms thereof without reference to his client.[6]

A *counsel*, as distinguished from a *pleader* can compromise a suit in the absence of any limitation on his authority. *Express* authority as in the case of a pleader is not required.[7] But his authority extends only to matters *involved in the suit* and not to collateral matters.[8]

As regards *attorneys* or *solicitors* the law in England is that they are entitled in the exercise of their discretion to enter into a compromise on behalf of the client. If they act *bona fide* and not against the express directions of the client, the compromise will be binding on him.[9]

A compromise entered into by a pleader duly authorised cannot be interfered with unless there is fraud, collusion, mistake, or misapprehension on the part of the pleader.[10] But the Court has plenary powers to enquire into the justice or the *bona fides* of a settlement reported to it[11] and where grave injustice is likely to result by allowing the compromise to stand, it can interfere and set it aside.[12] Where the client expressly *prohibits* the compromise and notifies his dissent to the opposite side, the compromise is not valid and will be set aside.[13]

8. **Power to refer to arbitration.**—Section 506 of the old Code (Sch. II, para. 1) required special authority for a pleader to make reference to arbitration. In the present Code, the words as to special authority have been omitted (*vide* Schedule II, para. 1). The effect of the omission is according to the High Court of Lahore and the Sind Judicial Commissioner's Court, that a pleader can on the strength of his general power, refer to arbitration

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(6) *Thenal Ammal* v. *Sokkammal*, (1917) 41 Ind Cas 429 (429, 430): 41 Mad 233: 22 Mad L Tim 149.

(7) *Sourendra Nath Mitra* v. *Tarubala Dasi*, (1930) 158 (161): 34 Cal W N 453: 1930 All L J 489: 58 Mad L Jour 551: 32 Bom L R 645: 51 Cal L Jour 309: 123 Ind Cas 545: 11 Pat L Tim 461: 31 Mad L W 803: 57 Ind App 133: 57 Cal 1311: 31 Pat L R 884 P C; *Jamshedji* v. *Sorabji Nasoroji*, 1921 Bom 414 (417): 25 Bom L R 1137: 85 Ind Cas 504; *Jang Bahadur* v. *Shankar Rai*, (1891) 13 All 272 (275): 1891 All W N 61 [If client notifies revocation of authority to opposite side, then compromise not binding]; *Carrison* v. *Rodrigues*, (1886) 13 Cal 115 (117), (Do.); *Nilmoni Choudhury* v. *Kedar Nath Daga*, 1922 Pat 232 (234): 3 Pat L Tim 371: 67 Ind Cas 96: 1 Pat 489, (Do.); *Matthews* v. *Munster*, (1887) 20 Q B D 141; cited in 13 All 272 (274) F B; *B N Sen & Bros* v. *Chuni Lal Dutt & Co.* 1924 Cal 651 (653): 51 Cal 385: 83 Ind Cas 611; *Jagapat Singh Dugar* v. *Puran Chand Nahatta*, 1924 P C 200 (201): 47 Mad L Jour 136: 5 L R P C 145: 26 Bom L R 772: 85 Mad L Tim 136: 1924 Mad W N 646: 20 Mad L W 571: 83 Ind Cas 380 [But authority to compromise any way he likes is doubtful]. But see *M Haroon* v. *M Ebrahim*, (1921) 64 Ind Cas 528 (530): 13 Bur L Tim 224 [A barrister practising in Burma cannot bind his client by a compromise]. See also *Kyone Hoe* v. *Kyon Soon Sun*, 1925 Rang 314 (316): 3 Rang 261: 91 Ind Cas 509 [Compromise given under misapprehension can be withdrawn before order is drawn up].

(8) *Nandalal* v. *Nistarini*, (1900) 27 Cal 428 (449): 4 Cal W N 169; *Johurmull Bhutra* v. *Kedarnath Bhutra*, 1927 Cal 714 (716): 31 Cal W N 953; *S P M Muthiah Chetty* v. *K R A R Karuppan Chettiar*, 1927 Mad 852 (854): 26 Mad L W 465: 39 Mad L Tim 240: 50 Mad 786: 58 Mad L Jour 606: 105 Ind Cas 5; *Neal* v. *Lennox*, 1902 A C 465: 57 W R 140; *Tarubala* v. *Surendra*, 1925 Cal 866 (869): 41 Cal L Jour 213: 29 Cal W N 597: 88 Ind Cas 369 [Compromise without reference to the client—Not binding].

(9) *Fray* v. *Voules*, (1859) I E and E 839; Halsbury Vol. 26, para 1230; Professional Ethics by Sundara Iyer, 300; *Macaulay* v. *Polley*, (1897) 2 Q B 122; *Butler* v. *Knight*, L R 2 Ex 109; *Chambers* v. *Mason*, (1858) 5 C B N S 59 [Compromise by solicitor binding on the client, if the client induces him to believe that he is authorized]; *Little* v. *Spreadbury*, (1910) 2 K B 658, (Do.).

(10) *Ekka* v. *Dhuki*, 1926 Pat 73 (74): 4 Pat 766: 92 Ind Cas 179: 7 Pat L Tim 362; *Rajunder Narain Rao* v. *Bijai Govind Singh*, (1839) 2 Moo Ind App 181: 1 Moo P C 117: 1 Sar 175; *Hickman* v. *Berens*, (1895) 2 Ch 638; *Wilding* v. *Handerson*, (1897) 2 Ch 534; *Jagannathdas Gurubakhshdas* v. *Ramdas Gurubakhshdas*, (1870) 7 B H C O C 79 (83, 86, 89); *Halsbury* Vol 2, Para 670; *Swinfein* v. *Swinfein*, (1857) 1 C B N D 364: 25 L J P 303 also reported in 26 L J C P 97; *Bibee Soloman* v. *Abdul Azeez*, (1881) 6 Cal 687 (706): 8 Cal L Rep 169.

(11) *Matthews* v. *Munster*, (1888) 20 Q B 141: 57 L Q B 40: 57 L J 922: 36 W R 178: 52 J P 260.

(12) *Shepherd* v. *Robinson*, (1919) 1 K B 474; Halsbury Vol 2, para 668.

(13) *Carrison* v. *Rodrigues*, (1886) 13 Cal 115 (119, 120).

on behalf of his client.[1] A contrary view has been taken by the High Court of Patna and the Nagpur Judicial Commissioner's Court.[2]

But if the reference is made contrary to the client's *instructions* and he objects to such reference the award can be set aside.[3]

9. Delegation of authority.—Under the section as it stood before the amendment of 1926 referred to above, there was a conflict of opinion as to whether a pleader engaged by the party could delegate his authority to another pleader and request him to appear on his behalf.[1] Under the new proviso to the section, however, it is clear that such a delegation can be made.[1-a]

A presentation by the pleader's clerk is equivalent to a presentation by the pleader.[2] But the Punjab Chief Court has held that the Code does not recognise the status of a pleader's clerk.[3] The presence of the pleader's clerk will not, however, amount to *appearance* by the pleader himself.[4] Nor can the pleader completely delegate to his clerk the duties he owes to his client without being responsible for his defaults.[5]

10. Control and conduct of suit.—A counsel has authority to do what he considers best for his client in the management and conduct of the suit and if, in the exercise of such authority, he enters into any agreement with the opposite side it will be binding on the client unless any limitation was imposed on his authority and unless such limitation was communicated to the opposite side.[1] Parties are bound by the *bona fide* acts of their pleaders acting within the scope of their authority and a mere error of judgment on their part affords no valid ground for avoiding such acts.[2]

If a party has employed more than one pleader, the senior among them has the entire control of the case.[3]

Note 8.

(1) *Sri Krishen Rochumal* v. *Relumal Periomal*, (1916) 34 Ind Cas 845 (848): 9 Sind L R 183; *Thadomal* v. *Menghraj*, 1930 Sind 190 (191): 123 Ind Cas 694; *Aziz* v. *Motram*, 1926 Lah 563 (564): 96 Ind Cas 277 [But one pleader appearing for another can't refer to arbitration]; *Amir Shah* v. *Abdul Aziz*, 1932 Lah 373 (374): 136 Ind Cas 712: 33 Pun L R 388, (Do.).

(2) *Jaipal Tewary* v. *Tapeswari Tewary*, (1918) 45 Ind Cas 321 (322) Pat; *Hussainbhai Bohra* v. *Bhanelal*, 1924 Nag 338 (342): 79 Ind Cas 48.

(3) *Chuni Lal Mandal* v. *Hira Lal Mandal*, 1928 Cal 378 (380): 32 Cal W N 44: 106 Ind Cas 309; *Kashiram* v. *Mt Guddoo*, 1922 Nag 39 (40): 65 Ind Cas 679: 5 Nag L J 229: 18 Nag L R 140 [Pleader can't revoke the appointment of arbitrator by the client].

Note 9.

(1) *Matadin* v. *Genga Bhai*, (1887) 9 All 613 (Mis Case No 1) (616, 617): 1887 All W N 152 [He can]; *Shidappa* v. *Shedappa*, (1898) 22 Bom 654 (658), (Do.); *Prag* v. *Deputy Commissioner, Bahraich*, (1906) 9 Oudh Cas 65 (68-69), (Do.); *Kyaw* v. *Thaing*, (1910) 8 Ind Cas 958 (959): 3 Bur L Tim 131, (Do.); *Emperor* v. *Rajani Kanta Bose*, 1922 Cal 515 (525): 49 Cal 782: 26 Cal W N 589: 35 Cal L Jour 356: 71 Ind Cas 81: 24 Cr L Jour 33 [Permission express or implied of the client is required]; *Shivdayal* v. *Khetu*, (1896) 20 Bom 293 (295) [He cannot]; *Suratram* v. *Atmaram*, 1929 Nag 109 (109): 12 Nag L J 54: 118 Ind Cas 58 [Second Grade Pleaders cannot delegate]; *Dhanoolal* v. *Mt Bafi*, (1917) 37 Ind Cas 103 (104, 105): 12 Nag L R 189 [Oral delegation illegal].

(1-a) See *Amir Shah* v. *Abdul Aziz*, 1932 Lah 373 (374): 136 Ind Cas 712: 33 Pun L R 388 [Can delegate only to "plead" not to "act"].

(2) *Queen-Empress* v. *Karuppa Udayan*, (1896) 20 Mad 87 (87): 2 Weir 470.

(3) *Mula Mal* v. *Atma Ram*, 1896 Pun Re No 86.

(4) *Begg Sutherland & Co* v. *Bahadur Chand*, 1928 Lah 841 (842): 110 Ind Cas 177.

(5) *Muruga Chetty* v. *Rajasami*, (1912) 22 Mad L Jour 284 (294): (1912) 1 M W N 332: 11 Mad L Tim 280: 14 Ind Cas 823.

Note 10.

(1) *Strauss* v. *Francis*, (1866) L R 1 Q B 379 (382); *Lakmi* v. *Joy Ram*, (1902) 15 C P L R 73 (75, 77); *Jang Bahadur* v. *Sankar*, (1891) 18 All 272 (275) F B.

(2) *Jonathan Collins Zizer* v. *The Judges of the Supreme Court of Nigeria*, 1929 P C 33 (34): 29 Mad L W 111: 1923 All L J 53: 116 Ind Cas 387.

(3) *Sreenecbash* v. *Umbika Churn*, (1869) 12 Suth W R 375 (375); *Dods* v. *Stuart*, (1872) 17 Suth W R 49 (59): 8 Beng L R 340.

O. 3, R. 4, Note 11.

11. Liability of pleader for misconduct.—A pleader is liable to be suspended or dismissed from practising if he is guilty of misconduct of the kind specified in S. 13 of the Legal Practitioners Act, XVIII of 1879. As to what amounts to misconduct and what does not, *see* the undermentioned cases.[1]

Practising in contravention of S. 10 of the Legal Practitioners Act, *i.e.*, without a proper certificate as required by S. 7 of the Act amounts to misconduct.[2] A pleader who has been convicted of any criminal offence implying a defect of character which unfits him to be a pleader is liable to be suspended or dismissed by the High Court[3] (Section 12 of the Legal Practitioners Act). But before any action is taken, against a pleader he should be given notice of the charges levelled against him and an opportunity of vindicating his character.[4] The misconduct of a pleader cannot, however, be a ground for deciding the *suit* against his client.[5]

Note 11.

(1) In re *Purna Chander Dutt*, (1904) 31 Cal 44 (46): 7 Cal W N 373 [Pleader appropriating client's money]; In the matter of *Jogendra Narayan Bose*, (1901) 5 Cal W N 48 (48) [Scope of the Legal Practitioners Act explained]; In the matter of *Babu Madheva Singh*, (1923) Pat 185 (187): 1923 Pat H C C 42: 1 Pat L R Cr 36: 72 Ind Cas 875 [Purchase of property *benami* and also appearing in the legal proceedings regarding the property]; *Fuzeelum* v. *Omdah*, (1868) 10 Suth W R 469 (472): 11 Beng L R 60 (Note), (Do.); *Aghorenath* v. *Ram Charan*, (1896) 23 Cal 805 (817) [Pleader purchasing in execution in the name of his clerk]; *Subbarayadu* v. *Kotoya*, (1892) 15 Mad 389 (398): 2 Mad L Jour 166, [Do., through agent]; *Muni Reddi* v. *Venkatta Rao*, (1912) 17 Ind Cas 544 (552): 23 Mad L Jour 447: 12 Mad L Tim 615: 1912 Mad W N 1029: 37 Mad 238 F B [Purchase of actionable claims]; *Nagendrabala* v. *Debendranath*, (1918) 27 Cal L Jour 388 (390): 22 Cal W N 491: 44 Ind Cas 13 [Acquiring a beneficial interest in the subject-matter of the litigation]; *Jug Roop* v. *Chingun Lal*, (1878-80) 2 N W P H C 46 (47) [Pleader should not purchase the decree of his client]; *Wajid Hossein* v. *Ahmed Raza*, (1872) 17 Suth W R 480 (483) [Pleader purchasing property sold to his client—Highly objectionable]; *Ramchandra* v. *Kaluraju*, (1877-78) 2 Bom 362 (364) [Agreement to pay additional fee in the event of success is *nudum pactum*]; In the matter of *an Advocate, a Vakil, a Pleader, a Muktear*, (1906) 4 Cal L Jour 262 (264, 267) [Agreement to furnish funds for a litigation]; In the matter of *Peary Mohun Gooho*, (1873) 11 Beng L R 312 (319, 320) [Giving percentage on fees]; In the matter of *Ram Kinkur Sein*, (1870) 13 Suth W R 67 (67): 6 Beng L R 617 (n) [Drawing document of a fraudulent nature]: In the matter of *A Pleader*, (1903) 26 Mad 448 (449, 450): 13 Mad L Jour 65 [Writing anonymous letter]; *W E A Macaulay* v. *Judges of the Supreme Court of Seirra Leone*, 1928 P C 264 (265): 110 Ind Cas 321: 55 Mad L Jour 296: 5 Oudh W N 805: 29 Pun L R 522: 29 Cr L Jour 689: 28 Mad L W 958: 10 A I Cr R 511: 1928 Mad W N 831 [Getting exorbitant fee from the client separately while holding brief for another pleader]; In re *S K H*, *an Advocate*, (1907) 34 Cal 729 (733, 734): 6 Cal L Jour 55 [Demanding higher and more exorbitant fee than that fixed]; In the matter of *Naritya Gopal Sen*, (1901) 5 Cal W N 45 (47) [Advising to pay money to witness for giving evidence]; In re *Homanjee Cowasjee*, (1907) 34 Cal 129 (141, 148): 34 Ind App 55: 11 Cal W N 370: 5 Cal L Jour 123: 17 Mad L Jour 67: 9 Bom L R 3: 2 Mad L Tim 96: 4 L B R 27 P C (Do.); In re *Quarry*, (1891) 13 All 93 (94): 17 Ind App 199: 5 Sar 638: 1890 All W N 231 P C [Correspondence with client showing impropriety]; *Sutton* v. *New Beeston & Co*, (1900) 1 Ch 43 [Acting after authority is revoked by the client]; *Nohur* v. *Jaffer Hossein*, (1870) 2 N W P H C 195 (196) [Vakil cannot transfer decree]; *Nohur* v. *Jaffer Hossein*, (1870) 2 N W P H C R 195, (Do.); 4 M H C R App xliii [Vakil changing sides after remand]; *Sarat Chundra Guha*, In re, (1900) 4 Cal W N 663 (665) [Filing a petition untenable in law is not misconduct]; In re *Purna Chandra*, (1916) 23 Cal L Jour 237 (239): 43 Cal 685: 20 Cal W N 275: 32 Ind Cas 657 [Non-professional acts]; In re *Sreenath Roy*, (1872) 17 Suth W R 405 (406) [Omission to examine the records]; Re *Noor Ahmed*, (1872) 17 Suth W R 338 (338), (Do.); In re *Ranchhoddas Nagardas*, (1898) 22 Bom 317 (320) [Presenting document of suspicious appearance]; In the matter of *Kristo Lall Nag*, (1884) 10 Cal 256 (263): 8 Ind Jur 372 [Making use of privileged documents secretly procured by the client]; In re *Lubeck*, (1906) 33 Cal 151 (171, 172): 32 Ind App 217: 1 Mad L Tim 17: 8 Sar 861: 2 All L J 800: 7 Bom L R 894: 2 Cal L Jour 421: 10 Cal W N 57: 15 Mad L Jour 432 P C [Allowing clients to compromise in derogation of their rights]; In the matter of *Ahmed Ashraf*, 1927 All 45 (48): 48 All 542: 98 Ind Cas 493 F B [Signing a false statement and using it in evidence].

(2) In the matter of *Ganga Dayal*, (1882) 4 All 375 (376): 1882 All W N 67.

(3) In the matter of *Rajendro Nath Mukerji*, (1900) 22 All 49 (55): 26 Ind App 242: 3 Cal W N 736: 1 Bom L R 708: 7 Sar 556 P C: In re *Rajendra Nath Mukerji*, (1896) 18 All 174 (176): 1896 All W N 20 F B: In re *Parbati Charan Chatterji*, (1895) 17 All 498 (505, 510): 22 Ind App 193: 6 Sar 635 P C.

(4) *Durga Charan*, In re, (1885) 7 All 290 (290, 291): 1885 All W N 48 F B; In re *Kristo Lall Nag*, (1881-82) 10 Cal 256 (264): 8 Ind Jur 372.

(5) *Lal Chand* v. *Shakeer Mahomed*, (1866) 6 Suth W R 67 (67).

O. 3, R. 4, Note 12.

12. Privileges and rights of pleaders.—A pleader cannot, as a general rule, refuse to take up a case for any member of the public if a fair and proper fee is tendered to him, adequate instructions are given and the case is of a class which the lawyer is accustomed to take up. Such a refusal will amount to professional misconduct.[1] Of course, refusal to accept a brief for valid reasons like having to go to mofussil or having to attend some social function, or owing to physical incapacity cannot be questioned.[1-a] In the conduct of the suit he is entitled to examine witnesses in his chamber before examining them in Court.[2] He can also examine the documents produced by his witness or by his party before tendering them in evidence.[3]

A pleader is not liable for *slander or libel* in respect of words used by him in the course of a judicial enquiry.[4] The Court has no power to cut short his arguments unless they are irrelevant or involve a repetition.[5]

A pleader or solicitor has a *lien* on the papers entrusted to him until all his costs are paid off[6] and the Court will not grant the party leave to change his attorney until such costs are paid.[7] The lien is, however, an *equitable* one and can be claimed only as against the client and not third parties.[8]

A pleader who has not been paid by the client his remuneration can file a suit for the recovery of the fee *agreed upon*[9] or by way of *quantum meruit* under S. 65 of the Indian Contract Act.[10] No written agreement is necessary for such a suit.[11] A promissory note taken by the pleader and not filed in Court as required by S. 28 of the Legal Practitioners Act was, under the Legal

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(1) *Inayat Ali* v. *Fazal-ul-Rahman*, 51 All 892: 1929 All 367; *Allahabad Bank, Ltd* v. *Bakhsh Singh*, 1924 Oudh 372 (372): 11 Oudh L J 337: 80 Ind Cas 826: 27 Oudh Cas 401: 1 Oudh W N 279 [Lawyer has no right to reject when fee agreed upon is paid]; *Lalta* v. *Zahoor Ahmad*, 1925 Oudh 672 (672): 2 Oudh W N 682: 88 Ind Cas 1048, (Do.). But see In the matter of *Nobin Chander*, (1908) 35 Cal 317 (319): 12 Cal W N 381.

(1-a) *Gokul Prasad* v. *Emperor*, 1930 All 262 (263): 115 Ind Cas 641: 1929 All L J 616.

(2) *Jordan* v. *Emperor*, (1912) 14 Ind Cas 763 763): 5 Bur L Tim 38: 13 Cr L Jour 299.

(3) *Mt Phulwanti Kunwar* v. *Janeshar Das*, 1924 All 625 (640): 46 All 575: 22 All L J 521: 5 L R All (Civ) 785: 83 Ind Cas 782.

(4) *Anwaruddin* v. *Fathim Bai Abidin*, 1927 Mad 379 (380): 52 Mad L Jour 269: 25 Mad L W 295: 38 Mad L Tim 130: 1927 Mad W N 164: 100 Ind Cas 537: 28 Cr L Jour 313: 50 Mad 667; *Munster* v. *Lamb*, (1883) 11 Q B D 588 (599); Odgers on Libel, 4th Ed, 225 and cases there cited; In the matter of *R Cruise*, (1870) 14 Suth W R (Cr) 53 (59).

(5) *Muhammad Bakhsh* v. *Emperor*, 1928 Lah 819 (819): 107 Ind Cas 763.

(6) *Kesserbai* v. *Narranji*, (1880) 4 Bom 353 (356); Re *Hawkes*: *Ackerman* v. *Lockhart*, (1898) 2 Ch 1 C A; In re *McCorkindale*, (1881) 6 Cal 1 (5, 6): 6 Cal L Rep 406: 5 Ind Jur 520; *Capital Fire Co*, In re, (1883) 24 Ch D 408 C A; *Boden* v. *Hensby*, (1892) 1 Ch 101; *Basanta Kumar Mitter* v. *Kusum Kumar Mitter*, (1900) 4 Cal W N 767 (769); *Ved and Sopher* v. *R P Wagle & Co*, 1925 Bom 351 (352): 27 Bom L R 556: 49 Bom 505: 88 Ind Cas 81 [Priority of Solicitor's lien]; *Rajah Narendra* v. *Tarubala*, 1921 Cal 67 (68): 48 Cal 817: 25 Cal W N 800: 66 Ind Cas 209 [Lien can be exercised though suit on lien barred].

(7) *Satya Sanker* v. *Golapmani*, (1899) 3 Cal W N ccxi; *Girindro Kumar Dutt* v. *Amulya Charan Ghose*, (1902) 6 Cal W N 306 (308).

(8) *Snell*, In re, (1877) 6 C D 105; *Sheffield* v. *Eden*, (1878) 10 C D 291 C A; In re *Llewellin*, (1891) 3 Ch 145; *Brunton* v. *Electrical Corpn*, (1892) 1 Ch 434; *Mason and Taylor*, In re (1878) 10 C D 729; *Pelly* v. *Wathen*, (1851) 1 De G M & G 16; *Khetter Kristo* v. *Kali Prasanno*, (1898) 25 Cal 887 (889, 890): 2 Cal W N 508.

(9) *Doman* v. *Imam Ali*, (1881) 7 Cal 401 (402); *Buckapatnam Thathacharlu* v. *Kajamiya*, (1883) 6 Mad H C 265 (266) [Cause of action does not ordinarily arise until the pleader has comp'etely discharged his duty]; *Watkins* v. *Dhunno Baboo*, (1881) 7 Cal 140 (144): 8 Cal L Jour 443.

(10) *Ameeroonnissa* v. *Chapman*, (1866) 6 Suth W R 108 (109): 1 Ind Jur N S 334; *Jodoonath Dutt* v. *Rashad Ali*, (1873) 19 Suth W R 105 (106); *Narasimma* v. *Sinnavan*, (1897) 20 Mad 365 (366).

(11) *Ram* v. *Kunji*, (1886) 9 Mad 375 (376); *Brojendra Nath Mullick* v. *Luckheemonee Dassee*, (1902) 29 Cal 595 (605): 6 Cal W N 816. But see *Sarat Chandra* v. *Chandra Kant*, (1898) 25 Cal 805 (807).

O. 3, R. 4, Notes 12—13.

Practitioners Act as it stood before 1926, held to be invalid and unenforceable.[12] Section 28 of that Act, however, has been repealed by Act XXI of 1926.

It may be usefully mentioned herein that a receipt given by counsel for payment made by the client is exempt from stamp duty.[13]

13. Duties.—When a pleader accepts a brief it is his bounden duty to attend to his client's interests throughout the proceedings in the case[1] to represent his interests properly[2] and to prosecute the case with due vigilance.[3] If he fails to do so, he is liable to be dealt with for neglect and is also answerable to the client.[4]

It is also the duty of a pleader to advise his client properly out of Court.[5] A pleader filing an obviously improper and groundless criminal complaint will be guilty of serious misconduct. It is his duty to make due enquiries of the clients and to act with such care and prudence that his good faith could not successfully be questioned.[6] It is not proper for a pleader to associate himself with reckless charges of fraud and criminality or to indulge in abuse; nor should he put questions attacking a witness's honour unless he has reasonable grounds for believing them to be true.[7]

A pleader having once appeared for a client should not appear against him in another litigation arising out of the same dispute[8] and use the information received formerly in his professional capacity.[9] Any contract entered into by the pleader with his client in respect of the subject of litigation or advice is liable to be questioned and undue influence will be presumed to have been exercised.[10]

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(12) *Krishnaswami* v. *Kesava*, (1891) 14 Mad 63 (65); *Sundararaja* v. *Pattanathusami*, (1894) 17 Mad 306 (308).

(13) *Stamp reference*, (1886) 9 Mad 140 (141).

Note 13.

(1) *Sheo Saik Singh* v. *Ausam Singh*, 1922 Oudh 75 (75): 25 Oudh Cas 40: 67 Ind Cas 554: 9 Oudh L J 170; *Government Pleader* v. *Bhaghubhai*, (1912) 14 Bom L R 700 (706): 36 Bom 606: 16 Ind Cas 788.

(2) *Saif Ali* v. *Chiragh Ali Shah*, 1923 Lah 97 (97): 68 Ind Cas 785; *Emperor* v. *Burendra Kumar Ghouse*, 1924 Cal 257 (268, 269): 28 Cal W N 170: 38 Cal L Jour 411: 81 Ind Cas 353 F B.

(3) *Atool Chandra Mookerjee* v. *Sashee Bhusan Mullick*, (1902) 29 Cal 63 (67, 68) 6 Cal W N 215; *Rajah Muthu Krishna* v. *Nurse*, 1921 Mad 320 (320): 44 Mad 978: 41 Mad L Jour 213: 14 Mad L W 154: 1921 Mad W N 562: 69 Ind Cas 695 [Cannot refuse to take steps because his whole fee is not paid]; *Udairaj Singh* v. *Secretary of State*, 1924 All 652 (657): 46 All 553: 22 All L J 446: 88 Ind Cas 212.

(4) *Baldeo Misser* v. *Ahmed Hussain*, (1871) 15 Suth W R 143 (143) [Pleader refusing to argue]; In re: *Krishnaswamy Aiyar*, (1912) 14 Ind Cas 965 (967, 968): 22 Mad L Jour 276: 1912 Mad W N 348: 11 Mad L Tim 296.

(5) *Mathews* v. *Munster*, (1888) 20 Q B D 141 (142); *Achumbit Jha* v. *Bibi Jewun*, (1882) 11 Cal L Rep 11 (12).

(6) *Kishori Lall* in the matter of, 1925 All 247 (249): 23 All L J 125: 6 L R A Civ 244: 86 Ind Cas 408: 47 All 377 F B.

(7) *Raj Bahadur*, in the matter of, 1925 All 641 (641, 642): 23 All L J 469: 6 L R A (Civ) 403: 88 Ind Cas 179: 47 All 729; *Banerjee* v. *Emperor*, 1927 Cal 828 (825): 46 Cal L Jour 227: 55 Cal 85: 104 Ind Cas 717; *Ganga Ram* v. *Panchcowree*, (1876) 25 Suth W R 866 (367).

(8) *M L Hira Devi* v. *K Digbijai Singh*, (1917) P C 80(84): 21 Cal W N 1137: 7 Mad W N 133: 1917 Mad W N 636: 42 Ind Cas 236 P C; *Ramlal Agurwallah* v. *Moonia*, (1881) 6 Cal 79 (83): 5 Ind Jur 583; *Alimuhammad*, in re, (1917) 37 Ind Cas 142 (142): 19 Oudh Cas 237; *Nandipat* v. *Urquhart*, (1870) 13 Suth W R 209 (214, 215): 4 Beng L R A C 181. But see *Gnanasambandha* v. *Ratnasabapathy*, 1928 Mad 592 (593): 110 Ind Cas 544 [He is not debarred unless his service were sought by the party and refused].

(9) *Ramakrishna* v. *Balakrishna*, 1921 Mad 666 (667): 41 Mad L Jour 60: 13 Mad L W 541: 1921 Mad W N 646: 62 Ind Cas 712; *Damodar* v. *Bhabanishanker*, (1902) 26 Bom 423 (430): 4 Bom L R 67 F B; *Veerappa Chettiar* v. *P G Sundaresa Sastrigal*, 1925 Mad 1201 (1205): 48 Mad 676: 49 Mad L Jour 366: 22 Mad L W 606: 92 Ind Cas 300 [Pleader should avoid even the suspicion that they might use such information]; *Pallonji Merwanji* v. *Kallabhai Lallubhai*, (1888) 12 Bom 85 (88, 90, 91) [It must be shown that the pleader is possessed of knowledge which might prejudice the client].

(10) *R A Pushong* v. *Munia Halwani*, (1868) 3 Beng L R (A C) 95 (98); *Nathoo Lall* v. *Burdree Pershad*, (1878-81) 1 N W P H C 1 (3, 34) [Pleader must show that the contract is above board]; *Usmat Koowar* v. *Taylor*, (1865) 2 Suth

Pleaders owe a duty not only to their clients but *also to the Court* and are bound to co-operate with the Court in the orderly and pure administration of justice.[11] Thus a pleader is bound to correct any errors committed by the Court of which he is aware[12] and bring to the notice of the Court facts within his knowledge such as the death of a party.[13] When a matter is heard *ex parte*, he is bound to bring to the notice of the Court adverse as well as favourable authorities on the point.[14] He cannot make personal attacks or unfounded charges of impropriety against the trial judge when the real ground is that he has failed to create an impression in his mind by arguments.[15] Unwarranted or unfounded attacks against the judge on the part of the pleader amount to misconduct.[16]

It is against the etiquette of the bar that a counsel should hold a brief and conduct a case in which he is himself a *witness*, and is personally interested.[17]

14. Appointment of pleaders.—It was held under the old rule that the appointment of a pleader should be in *writing* signed by the party or by the person acting on his behalf[1] and that it should be duly stamped.[2] It was held that the powers intended to be entrusted to a pleader should be specified in the vakalatnamah[3] though mere technical and formal defects therein did not invalidate the pleader's authority.[4]

W R 307 (314); *Achanparam Bath* v. *Gantz*, (1878-81) 3 Mad 138 (140). But see *Parshram Vaman* v. *Hiraman Fatu*, (1884) 8 Bom 413 (414) [Agreement for additional reward—Not invalid].

(11) In the matter of, *Tarini Mohan Barari*, 1923 Cal 212 (215): 26 Cal W N 580: 35 Cal L Jour 403: 69 Ind Cas 209; *Har Dayal Singh* v. *Heera Lal*, (1871) 16 Suth W R 107 (109).

(12) *Fakir Bux* v. *Emperor*, 1926 Sind 244 (245): 95 Ind Cas 753.

(13) *Wajid Ali Khan* v. *Puran Singh*, (1929) P C 58(59): 49 Cal L J 141: 1929 All L J 85: 56 Mad L Jour 304: 29 Mad L W 423: 33 Cal W N 318: 56 Ind App 80: 1929 Mad W N 220: 114 Ind Cas 601: 51 All 267 P C.

(14) *Deo Nandan Prasad* v. *Janki Singh*, (1916) P C 227(229): 14 Cal 573: 44 Ind App 80: 15 All L J 154: 19 Bom L R 410: 25 Cal L J 259: 21 Cal W N 473: 32 Mad L Jour 206: 21 Mad L Tim 240: 5 Mad L W 526: 1917 Mad W N 254: 1 Pat L W 294: 39 Ind Cas 346 P C.

(15) In the matter of, *W S Day, Vakil*, 1924 All 565 (566): 5 L R A Cr 389: 81 Ind Cas 937.

(16) In the matter of the appeal of, *S B Sarbadhicari*, (1907) 29 All 95 (108, 109): 34 Ind App 41: 4 All L J 34: 9 Bom L R 9: 11 Cal W N 273: 5 Cal L Jour 130: 17 Mad L Jour 74: 2 Mad L Tim 1; *Mahendra Lal Roy*, In re, 1922 Cal 550 (551): 27 Cal W N 88: 71 Ind Cas 673; In the matter of, *Dwarka Prasad Mithal*, 1924 All 253 (254): 46 All 121: 21 All L J 893: 4 L R A (Civ) 615: 81 Ind Cas 177 P C.

(17) *Mannargan*, In re, 1925 Mad 1153 (1155): 49 Mad L Jour 95: 1925 Mad W N 702: 91 Ind Cas 65; *Ghadially* v. *Emperor*, 1925 Sind 99 (99): 81 Ind Cas 59: 18 Sind L R 80; *New Brunswick Co* v. *Coneybeare*, (1862) 9 H L C 711 (719); *Chaudri Raj Kumar* v. *Jugal Kishore*, (1896) 18 All 241 (244) [Power not executed by party but by third person invalid].

Note 14.

(1) *Thiruvenkatasami* v. *Pavadai Pillai*, (1922) P C 225(226): 26 Cal W N 376: 24 Bom L R 606: 30 Mad L Tim 109: 48 Ind App 534: 70 Ind Cas 281: 44 Mad 736: 41 Mad L Jour 645: 14 Mad L W 244: 1921 Mad W N 552 P C; *Badri Prasad* v. *Bhagwati Dhar*, (1894) 16 All 240 (244): 1894 All W N 62; *Bhagaban Prasad* v. *Baidi*, (1897) 1 Cal W N ccviii; *Ram Tahal* v. *Sumer Mal*, (1894) 14 All W N 90 (91); *The Oudh* and *Rohilkhand Railway* v. *Shib Charan*, (1886) 6 All W N 172 (172); *Sheikh Palat* v. *Sarwan Sahu*, (1920) 55 Ind Cas 271 (271): 44 Bom 175: 22 Bom L R 49; *Muthuramlinga Sethupathi* v. *Shanmuga Nadan*, 1928 Mad 175 (176): 54 Mad L Jour 65: 1927 Mad W N 885: 27 Mad L W 237: 51 Mad 242: 107 Ind Cas 804 [Stamped signature valid]; *Uram Baksh* v. *Mast Ram*, 1927 Lah 398 (398): 101 Ind Cas 613 [Telegram informing that power is being sent does not amount to an authority]; *Md Rafiq* v. *Md Yasin*, (1932) 32 Pun L R 517 (1), (517), (Do.).

(2) In re *Nubee Bux Mooktear*, (1867) 7 Suth W R 481 (481); *Maharaja of Burdwan Petitioner*, (1867) 7 Suth W R 475 (476).

(3) *In the matter of a Pleader*, (1892) All W N 78 (79) F B.

(4) *Mauda* v. *Beli Ram*, 1927 Lah 522 (523): 102 Ind Cas 476 [Heading not containing the names of the parties]; *Loknath Misir* v. *Sheo Saran Misir*, 1927 All 816 (816): 102 Ind Cas 255 [Vakil's name not appearing in the body of the Vakalathnama]; *Shyam Sunder Kuer* v. *Rahimatunnissa*, 1932 Pat 3 (4): 133 Ind Cas 171, (Do.); *Shambu Nath* v. *Badri Das*, 1921 All 210 (2), (211): 43 All 392: 19 All L J 183: 61 Ind Cas 410, (Do.); *Maharashtraya Jnan Khosh Mandal* v. *Bijjulal*, 1923 Nag 182 (185, 187): 19 Nag L R 36: 6 Nag L J 100: 71 Ind Cas 436, (Do.); *Mulchand* v. *Radhabai*, 1923 Nag 281 (281): 6 Nag L J 179: 73 Ind Cas 251, (Do.); *Dhanoo Lal* v. *Baji*, (1917) 37 Ind Cas 103 (104): 12 Nag L R 189, (Do.); *Muhfozul Huq* v. *Mazhorul Huq*, (1917) 41 Ind Cas 685 (687)

O. 3, R. 4, Notes 14—16.

The manner of appointment under the present rule depends upon the *purpose* for which he is engaged. If he is appointed to *act* in Court, such appointment must, under sub-Rule 1, be *in writing* signed by the party or by a person duly authorised by him.[4-a] If the pleader is appointed for the purpose of *pleading* only he has to file only a *memorandum of appearance* signed by himself under sub-Rule 5.[4-b] Under the proviso to the rule a pleader who has been *engaged by another pleader* to act on behalf of a party can *plead* on behalf of such party without either filing a vakalatnama or a memorandum of appearance.[4-c]

The word ', High Court '' in sub-Rule 3 of the old rule was held to include the Patna High Court also.[5]

15. Acceptance of engagement.—The words '' when accepted by a pleader'' which occurred in the old Section after the words ''every such appointment'' in sub-Rule 2, have now been omitted. Under the old Rule, there was a conflict of opinion whether the acceptance had to be made in *writing*.[1] It was also held that the acceptance should be unconditional,[2] and that a pleader acting for a pardanashin lady should personally satisfy himself that the vakalat had been executed by her before accepting the same.[3]

16. '' Until determined with the leave of the Court.''—The appointment of a pleader may be put an end to by the client or the pleader; but in either case it can be done *only with the leave of the Court*.[1] Once a pleader is appointed his authority continues until and unless

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Cal, (Do.); *Mussammat Masumbi* v. *Dongar Singh*, (1920) 55 Ind Cas 415 (416) Nag, (Do.); *Ram Rup Agrahri* v. *Naik Ram*, 1926 All 252 (253): 91 Ind Cas 865 [Neither the name of the vakil nor of the party inserted in the body of the vakalathnamah]. But see *Muhammad Ali Khan* v. *Jasram*, (1914) 23 Ind Cas 464 (464): 36 All 46: 11 All L J 1015. And *Chitta* v. *Jafo*, 1931 All 767 (768): 132 Ind Cas 566: 1931 All L J 983 [Omission of vakil's name in vakalatnama—*Held* appointment invalid and presentation by pleader unauthorised]; *Dattu* v. *Bhausingh*, 1926 Nag 40 (44): 88 Ind Cas 235 [Omission to sign a power of attorney by a minor's guardian—Not invalid]; *Gulam Mohiuddin* v. *Shankar*, 1924 Nag 159 (160): 78 Ind Cas 79 [Person knowing to sign—Putting his marks—Defect technical]; *Khaira* v. *Mathu*, (1920) 55 Ind Cas 990 (991): 2 U P L R (L) 88 [Omission to sign by party—Oversight—Defect cured]; *Banwar Rai* v. *Chethru Lal*, 1924 Pat 114 (117): 74 Ind Cas 1033: 2 Pat L R (Civ) 174 [One person signing for another with full knowledge and acquiescence of the latter—Defect only formal]; *Ganapati* v. *Jivanabai*, 1923 Bom 44 (44): 24 Bom L R 1302: 76 Ind Cas 34: 47 Bom 227 [Power being a special one instead of a general one as required by rules. Defect can be cured]; *Banth Ram* v. *Rahmatullah*, 1930 Lah 101 (102): 124 Ind Cas 318 [Vakalathnamah signed by one of several defendants]; *Mahomad Jaffer* v. *Sheik Ahmed*, 1926 Bom 336 (336): 28 Bom L R 538: 95 Ind Cas 266 [Vakilpatra not filed—Presentation not invalid]; *Kuru* v. *Udmi*, 1925 Lah 331 (332): 7 Lah L Jour 29: 86 Ind Cas 207, (Do.).

(4-a) *Amir Shah* v. *Abdul Aziz*, 1932 Lah 373 (374): 136 Ind Cas 712: 33 Pun L R 388; *Md Rafiq* v. *Md Yasin*, (1932) 33 Pun L R 517 (1), (517) [Appointment by telegram invalid].

(4-b) See In re *Ram Dayal De*, 1932 Cal 1 (3): 35 Cal W N 1100: 135 Ind Cas 789: 59 Cal 370 [*Held*, that under Rules framed by the Calcutta High Court under S 37, Letters Patent, such a memorandum is invalid unless party or another pleader has put in appearance in the case].

(4-c) In re *Ram Dayal De*, 1932 Cal 1 (3): 35 Cal W N 1100: 135 Ind Cas 789: 59 Cal 370.

(5) *Mt Gobinda Kuar* v. *Jai Narain*, 1925 Pat 614 (615): 6 Pat L Tim 380: 1925 Pat H C C 233: 88 Ind Cas 91.

Note 15.

(1) *Shama Prosad* v. *Taki*, (1901) 5 Cal W N 816 (818) [Need not be in writing]; *Mohesh Chandra Addy* v. *Panchu Mudali*, (1916) 32 Ind Cas 395 (397): 43 Cal 884: 20 Cal W N 287: 23 Cal L Jour 297, (Do.); *Budhu Ram* v. *Kalu Ram*, 1926 Lah 32 (32): 6 Lah 461: 91 Ind Cas 80: 26 Pun L R 721, (Do.); In the matter of *Jogesh Chander Gupta*, (1916) 33 Ind Cas 831 (832): 20 Cal W N 283 [Should be in writing]; *The Firm Mathra Das* v. *The Firm Rama Lal*, 1923 Lah 402 (403): 84 Ind Cas 518, (Do.).

(2) In re *Gopeenath Mudduck*, (1870) 14 Suth W R 7 (8); *Watkins* v. *Fox*, (1895) 22 Cal 943 (943); In the matter of a *Pleader*, (1892) All W N 78 (78); *Ayyanna* v. *Nagabushanam*, (1893) 16 Mad 285 (286) [One of two vakils can accept]; *Kunj Behari Singh* v. *Sheodahin Pandey*, 1922 Pat 504 (507): 3 Pat L Tim 447: 68 Ind Cas 659 [Pleader can accept even after vakalat is filed in Court].

(3) *Shah Muhammad Jamal Ata* v. *Shah Muhammad Hafiz Ata*, 1928 Oudh 449 (458): 5 Oudh W N 847: 112 Ind Cas 522.

Note 16.

(1) *Radhika Bibi* v. *Ramuray*, 1930 Pat 403 (404): 11 Pat L Tim 371: 128 Ind Cas 350: 9

O. 3, R. 4, Notes 16—18.

(1) it is put an end to by a *writing* signed by the client or the pleader and filed in Court, or

(2) The proceedings in the suit terminate.[2]

The statute does not require the writing containing the withdrawal to be in any particular *form*. An endorsement on the back of the plaint that he (the vakil) has no instructions is sufficient.[3]

17. "Until all proceedings in the suit are ended."—A *vakalatnamah* once filed by a pleader in the suit remains in force until all the proceedings in the suit are ended so far as the client is concerned.[1] Thus a fresh *vakalat* is not necessary for the purpose of appearing in execution proceedings[2] or in appeal[3] or for setting aside an *ex parte* decree[4] or for an application to restore a suit dismissed for default.[5] Similarly no new vakalat is necessary for the purpose of appearing in the case after remand by the appellate Court[6] or after a plaint is returned for presentation to the proper Court.[7]

But there is no such general relationship as that of a pleader and client, of a standing and permanent character upon all occasions and for all purposes.[8]

18. Bombay Pleaders Act, 1920.—Section 10 as also Form C of the second Schedule of the Bombay Pleaders Act have been repealed by the Second Amending Act of 1926.

Pat 865; *Emperor* v. *Rajani Kanta Bose*, 1922 Cal 515 (521, 525, 530, 532): 49 Cal 732: 26 Cal W N 589: 35 Cal L Jour 356: 71 Ind Cas 31; *Harrietta A King* v. *James S King*, (1881-82) 6 Bom 416 (429); *Ramasami* v. *Subbuchetti*, (1900) 23 Mad 134 (136) [Leave will not be given for a change of attorney until his costs are provided].

(2) In the matter of *Two Pleaders*, (1917) 41 Ind Cas 328 (329, 331): 2 Pat L Jour 259: 1 Pat L W 483: 1917 Pat H C C 217; *Atul Chandra Ghose* v. *Lakshman Chunder Sen*, (1909) 2 Ind Cas 830 (831): 36 Cal 609: 13 Cal W N 1172; *Ilam Din* v. *Sher Mahomed*, 1930 Lah 134 (135): 31 Pun L R 551.

(3) *V Manickam Pillai* v. *Mahudum Bathummal*, 1925 Mad 21 (22): 47 Mad L Jour 398: 20 Mad L W 427: 35 Mad L Tim 48: 1924 Mad W N 689: 82 Ind Cas 102: 47 Mad 819.

Note 17.

(1) *Sadashiv Ganpat Rao* v. *Vitthal Dass Nanchand*, (1896) 20 Bom 198 (199): 1895 Bom P J 4; *Enuga Sundar Rama* v. *Bezwada Pattabhi Rama Reddi*, (1917) 42 Ind Cas 421 (423): 6 Mad L W 272: 1917 Mad W N 495 [Appointment of vakil by guardian *ad litem* of minor defendant]; *Basanto Kumar Mitter* v. *Kusum Kumar Mitter*, (1900) 4 Cal W N 767 (769) [Case of Attorney]; *Krishna Vijaya* v. *Marudanayagam*, (1892) 15 Mad 135 (136) [Collector as agent of Court of Wards giving vakalatnamah and dying before judgment—Fresh vakalat not necessary]. See *Parja* v. *Dumanun*, (1931) 133 Ind Cas 877 (878): 32 Pun L R 889: 1931 Notes 61 [Death of party terminates authority].

(2) *Gopal Jayachand* v. *Hargovind Khushal*, (1868-69) 5 Bom H C 83; *Gobind Prasad* v. *Hriday Thakur*, 1925 Pat 692 (693): 1925 Pat H C C 234: 91 Ind Cas 211: 7 Pat L Tim 220; *Dagdu Rajaram* v. *Laxman*, 1928 Bom 412 (412): 25 Bom L R 462: 73 Ind Cas 455 [Fresh vakalat not necessary for claim petition].

(3) *Budhu Ram* v. *Kalu Ram*, 1926 Lah 32 (32): 6 Lah 461: 91 Ind Cas 30: 26 Pun L R 721; *Shah Mukhur Lal* v. *Sree Kishen Singh*, (1867) 8 Suth W R 92 (93); *Boora Mal* v. *Tulsi Ram*, 1930 Lah 68 (69, 70): 116 Ind Cas 184; *Ilam Din* v. *Sher Mahomed*, 1930 Lah 134 (135): 31 Pun L R 551.

(4) *Bachubai Jhirao* v. *Ibrahim Isull*, 1922 Bom 207 (209): 24 Bom L R 744: 47 Bom 11: 69 Ind Cas 169.

(5) *Abdul Aziz* v. *Punjab National Bank, Ltd.*, 1929 Lah 96 (98, 99): 114 Ind Cas 76: 10 Lah 570: 30 Pun L R 628; *Raghunath Singh* v. *Raghubir Sahai*, (1893) 15 All 55 (55): 1892 All W N 222 [Fresh vakalat not necessary for restoration of appeal].

(6) Proceedings dated 8—4—1869 or a reference by Civil Judge, Tanjore, (1868-69) 4 Mad H C xliii (xliv).

(7) *Debi Lal* v. *Krishnaji*, 1922 Nag 125 (126): 67 Ind Cas 296: 5 Nag L J 265.

(8) *Mahboob Sir Frajyantu Sree Raja Parthasarathy Appa Rao* v. *Subba Rao*, 1924 Mad 840 (841): 47 Mad L Jour 483: 35 Mad L Tim 84: 1924 Mad W N 517: 84 Ind Cas 276.

O. 3, R. 5, Note 1.

R. 5. [S. 40.] *Any* process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

Service of process on pleader.

[1877—40; 1859—18.]

Local Amendments.

MADRAS.

1. At the end of Rule 5 in Order 3, *insert* the following:—

Explanation:—Service on a pleader who does not act for his client, shall not raise the presumption under this rule.

NAGPUR.

In Rule 5 *substitute* the words "on a pleader who has been appointed to act for any party" *for* the words "on the pleader of any party".

OUDH.

For "on the pleader of any party" *read* "on a pleader who has been appointed to act for any party".

PATNA.

5-B. Notwithstanding anything contained in Order 3, sub-Rules (2) and (3) of Rule 4 of the First Schedule of the Code of Civil Procedure, 1908, no pleader shall act for any person in the High Court, unless he has been appointed for the purpose in the manner prescribed by sub-Rule (1) and the appointment has been filed in the High Court.

Synopsis.

1. Service of process on pleader.

Shall be presumed. See Note 1, Pt. (9).

1. Service of process on pleader.—The words "relative to a suit or appeal" which occurred in the old Code have been omitted with the result that this rule now applies to all proceedings under the Code. The word "pleader" includes an attorney[1] as well as an advocate.[2] The words "personal appearance" include personal appearance to give evidence.[3]

A notice served on an attorney even after a decree *nisi* was passed and the party had left for England, has been held to be equivalent to service on the party.[4] Until the engagement of a pleader is legally determined, any process served on him will be effectual in spite of the pleader's endorsement

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Order 3, Rule 5—Note 1.

(1) *Harriette A King* v. *James S King*, (1881-82) 6 Bom 416 (429).

(2) *Mst Bilas Kuar* v. *Sheo Darshan*, (1904) 7 Oudh Cas 303 (305, 306).

(3) *Shivrudrappa* v. *Kashinath Vishnu*, (1869) Bom H C Rep A C 141.

(4) *Harriette A King* v. *King*, (1882) 6 Bom 416 (429); *Ishur Dutt* v. *Shib Pershad*, (1871) 15 Suth W R 290 (290).

thereon that he is no longer appearing for the party.[5] But when a *proceeding is at an end* the pleader does not continue to act for the party thereafter and service on the pleader is of no avail. Thus where an *ex parte* decree is passed and the suit comes to an end, a service on the pleader is not equivalent to a service on his client.[6] O. 3, R. 5, Note 1.

The process, in order to be effectual, must be addressed to the pleader on whom it is to be served.[7] The pleader himself may, however, waive the correct formalities in effecting service.[8]

The presumption referred to in the rule can be rebutted by actual proof that the pleader did not communicate the matter to the party.[9]

The rule applies only when the Court *orders* that process be served on the pleader.[10] The rule does not apply to criminal proceedings.[11]

R. 6. [S. 41.] (1) Besides the recognized agents described *in rule* 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process. O. 3, R. 6.

Agent to *accept service.*

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a *certified* copy thereof shall be filed in Court.

Appointment to be in writing and to be filed in Court.

[1877—S. 41; 1859—Ss. 50, 51,]

Local Amendment.

SIND.

Add the following as sub-Rule (3) to rule 6 of Order 3:—

"(3) The Court may at any stage of a suit and whether upon application made to it, or of its own motion, direct any party to the suit, not having a recognised agent residing within the jurisdiction of the Court, to appoint within a time to be specified, an agent within the jurisdiction of the Court to accept service of process on his behalf. To every appointment made under this sub-Rule the provisions of sub-Rule (2) shall be applicable."

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(5) *Mst Bilas Kuar* v. *Sheo Darshan*, (1904) 7 Oudh Cas 303 (305); *Sheo Siaq* v. *Ausan*, 1922 Oudh 75 (75): 25 Oudh Cas 40: 67 Ind Cas 554: 9 Oudh L J 170; *Lal Singh* v. *Kartaro*, 1928 Lah 426 (426): 108 Ind Cas 62; *Bhalla* v. *Fazal Mahomed*, (1920) 58 Ind Cas 143 (144): 1920 Pun L R 97: 1920 Pun W R 52 [Notice that judgment will be pronounced in the presence of pleaders is equivalent to notice on party]; *Firm of Bhai Gopal Singh Wadhera & Sons* v. *Pera Mal & Sons*, 1927 Lah 428 (429): 101 Ind Cas 205 [Endorsement that notice may be served on the party].

(6) *Muhammad Jamil* v. *Mst Tufailan*, (1921) 63 Ind Cas 47 (48) Pat.

(7) *Saraswathi Debi* v. *Maharaja Durga Churn Laha*, (1902) 6 Cal W N 927 (928).

(8) *Bhola Nath* v. *Bala Krishna*, 1927 Pat 135 (139): 126 Pat H C C 161: 7 Pat L Tim 739: 95 Ind Cas 321; *Saroj Bala Bose* v. *J Nath Bose*, 1927 Cal 619 (621): 45 Cal L Jour 458: 103 Ind Cas 625.

(9) *Sandya* v. *Upendra Chandra Sinha Roy*, (1909) 2 Ind Cas 547 (548): 13 Cal W N 142.

(10) *Muhammad Jamil* v. *Bibi Tufailan*, (1921) 63 Ind Cas 47 (48) Pat.

(11) *Saraswathi Debi* v. *Maharaja Durga*, (1902) 6 Cal W N 927 (928).

O. 4, R. 1.

ORDER IV.

INSTITUTION OF SUITS.

R. 1. [S. 48.] (1) Every suit shall be instituted by presenting [3] a plaint [2] to the Court or such officer as it appoints in this behalf.[5]

Suit to be commenced by plaint.

(2) *Every plaint* shall *comply with rules contained in Orders VI and VII so far as they are applicable.*

[1877—S. 48; 1859—S. 25. *See* S. 26].

Local Amendments.

ALLAHABAD.

For Rule 1 (1), *substitute* the following:—

"1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf, a plaint, together with a true copy for service with the summons upon each defendant, unless the Court for good cause shown allows time for filing such copies.

(2) The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for."

Re-number the present sub-Rule (2) as sub-Rule (3).

OUDH.

To sub-Rule (2), *add* the following words:—

"and except with the permission of the presiding officer, for reasons to be recorded, no plaint shall be admitted until the necessary process-fee has been paid into Court."

NAGPUR.

Substitute the following *for* Rule 1 (1):—

"1 (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint together with as many true copies on plain paper of the plaint as there are defendants for service with the summons upon each defendant, unless the Court, for good cause shown allows time for filing such copies."

Add the following sub-Rule (2) to Rule 1 and re-number the present sub-Rule (2) as sub-Rule (3):—

"(2) The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for."

Synopsis.

1. Legislative changes.
2. Plaint, meaning of. See S. 26, Note 3 and S. 2 (2), Note 5.
3. Presentation of plaint.
4. Place of presentation of plaint.
5. Plaint to whom to be presented.
6. Time of presentation.
7. Mode of presentation.
8. Suit when commenced. See S. 26.
9. Presentation of plaint in Revenue Court.
10. Suit against dead person. See O. 1, R. 10.
11. Suit against minor. See Note 2 to S. 26 and O. 32.

Courts to which plaint is to be presented. See Note 4, Pt. (1).

Date of suits for limitation purposes. See Note 3, Pt. (1) and see S. 26, Notes.

Defect in presentation. See Note 7, Pt. (6).

Deficiency of Court-fee on presentation. See S. 149, Notes.

Presentation in the case of holidays. See Note 6, Pt. (7).
Presentation to clerks or head-clerks. See Note 5, F.-N. (2).
Presentation to Judge after office hours and outside Court-house. See Note 6, Pt. (2).
Suits in forma pauperis. See S. 26.

1. Legislative changes.—

Sub-Rule (2) is new.

2. Plaint, meaning of.—*See* S. 26, note 3 and S. 2 (2), Note 5.

3. Presentation of Plaint.—The institution of a suit is ordinarily made by the presentation of a plaint to the Court or such officer as it appoints in this behalf and the time of institution for purposes of Limitation Act is the time of presentation of the plaint. *See* Limitation Act, 1908, S. 3, and Explanation thereof.[1]

4. Place of presentation of the Plaint.—The Court in which the plaint has to be presented is the Court of the lowest grade competent to try the matter under Ss. 15-20.[1] In the case of plaints presented to the Court which has no jurisdiction to try the same, *see* O. VII, R. 10 *infra* and S. 14 of the Limitation Act, 1908.

5. Plaint to whom to be presented.—The plaint must be presented either to the *Court* or to *such officer* as it appoints in this behalf.[1] The presentation, therefore, of a plaint to a person not so authorised,[2] or out of office hours, to an officer authorized to receive plaints only *within* office hours, is not a valid presentation, unless such presentation is ratified by the Court on that very day.[3] But the mere registration of a plaint subject to objections does not cure the defect.[4]

6. Time of presentation.—A plaint may be validly received on a Court holiday[1] or out of office hours at the Judge's club or at his private residence.[2] By such act of acceptance, the judge constitutes himself "an officer appointed in this behalf".[3] But the Court is not *bound* to accept it,[4] and when it

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Order 4, Rule 1—Note 3.

(1) *Ponnusami* v. *Kalia Perumal*, 1929 Mad 480 (480): 113 Ind Cas 550.

Note 4.

(1) *Motilal Ram Das* v. *Jamnadas Javerdas*, (1864) 2 Bom H C R 40 [Sadr Amin's Court closed temporarily—Suit cannot be filed in District Court]; *Ramaya* v. *Muhamadbhai*, (1873) 10 Bom H C R 495 (496), (Do.). See also notes to Ss 15 to 20 as to the *forum* for suits; *Ummathu* v. *Pathumma*, 1921 Mad 654 (655): 44 Mad 817: 63 Ind Cas 924 [Presentation to Court having no jurisdiction—Return and representation to proper Court—Suit must be deemed instituted on date of representation].

Note 5.

(1) *Radha Krishna* v. *Swaminatha*, (1917) 40 Ind Cas 587 (587) Mad [Presentation to Head Ministerial Officer duly authorised].

(2) *Rajchandur* v. *Jugal Gope*, (1872) 18 Suth W R 172 (173) [Presentation to Nazir of Court of Small Causes]; *Receiver* v. *Surapparazu*, (1915) 29 Ind Cas 449 (449): 38 Mad 295 F B [Head-clerk not authorized]; *Habeb Shah* v. *Debi Bax Singh*, (1912) 14 Ind Cas 221 (224) Oudh [Clerk not authorized]; *Prabhu Narayan* v. *Sarju Misr*, (1910) 5 Ind Cas 330 (331) All [Plaint handed over to clerk or *Munsarim* is not valid presentation]; *Nandvallabh* v. *Alibhai Isyagani*, (1869) 6 Bom H C R A C 254 [To wrong officer]; *Mudden Mohan* v. *Fakeer Biswas*, (1863) Suth S C C Rep 36 [Presentation to Nazir]; *Rupa* v. *Anwar*, (1872) 4 N W P H C R 35 [To Assistant Collector not authorized].

(3) *Appavu Pillai* v. *Ameer Sahib*, (1914) 23 Ind Cas 360 (360) Mad.

(4) *Prabhu Narain* v. *Sarju Misr*, (1910) 5 Ind Cas 330 (331) All.

Note 6.

(1) *Ununto* v. *Protab*, (1871) 16 Suth W R 230 (232); *Gur Churn* v. *Roossee Goojar*, 1870 Pun Re No 43.

(2) *Madhorao* v. *Manohar Lal*, 1922 Nag 167 (167): 65 Ind Cas 674: 19 Nag L R 23; *Din Ram* v. *Hari Das*, (1912) 34 All 482 (486): 14 Ind Cas 744 [Overruling 7 All H C R 5]; *Sinnappa* v. *Sinnappa Naicker*, 1925 Mad 201 (201): 82 Ind Cas 928 [Club]; *Sattaya Padayachi* v. *Soundarathachi*, 1924 Mad 448 (448): 47 Mad 312: 79 Ind Cas 1017.

(3) *Sattaya Padayachi* v. *Soundarathachi*, 1924 Mad 448 (448): 47 Mad 312: 79 Ind Cas 1017.

(4) *Din Ram* v. *Haridas*, (1912) 14 Ind Cas 744 (744): 34 All 482; *Sattayya Padayachi* v. *Soundarathachi*, 1924 Mad 448 (448): 47 Mad 312: 79 Ind Cas 1017.

O. 4, R. 1, Notes 6—9.

refuses to do so the appellate Court will not interfere.[5] At the farthest an acceptance as aforesaid, is only an *irregularity* the right to object to which may be waived.[6]

S. 4 of the Limitation Act, 1908, provides that when the period of limitation for a suit, appeal, or application expires on a day on which the Court is closed, the suit, appeal, or application may be presented on the re-opening day.[7] Again under S. 14 of the Limitation Act, 1908, where the plaintiff prosecutes a suit *bona fide* in a wrong Court and upon a return of the plaint by that Court, represents it to the proper Court, the period during which the suit was being prosecuted in the wrong Court will be excluded in computing the period of limitation for instituting the suit.[8]

As to the validity of the other proceedings of the Court on holidays, *see* O. 20, R. 1, *infra*.

7. Mode of presentation.—The word "presenting" implies delivery to the Court or to its officer either in *person* or by a recognised agent or pleader of a party.[1] This is also made clear by O. 3, R. 1, *ante* which provides that any appearance, application or act in or to any Court by a party in such Court may, except where otherwise expressly provided, be done by the party in person or by his recognised agent or by his pleader. *See also* the rules of practice framed by the various High Courts.[2] The sending of a plaint by post[3] or the placing thereof on a table when the officer is not present[4] is, therefore, not a proper presentation. Similarly, the presentation of a plaint by a *servant* of the plaintiff who is not his recognised agent is not a valid presentation.[5] Where a plaintiff has attained majority before the institution of the suit but the plaint is presented by a person purporting to be next friend, the presentation is not invalid if the mistake is *bona fide*.[6]

8. Suit when commenced.—*See* S. 26.

9. Presentation of Plaint in Revenue Court.—Revenue Courts have no authority to specify certain days on which plaints shall not be received.[1]

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(5) *Sinnappa Naidu* v. *Sinnappa Naicker*, 1925 Mad 201 (201): 82 Ind Cas 928.

(6) *Ram Das* v. *Official Liquidator*, (1887) 9 All 366 (382): 1887 All W N 34.

(7) *Surendranarayan* v. *Souravini Dasi*, (1906) 3 Cal L Jour 339 (342): 10 Cal W N 535; *Peary Mohan Aich* v. *Ananda Charan*, (1891) 18 Cal 631 (634): *Shooshee Bhusan* v. *Gobind Chunder*, (1891) 18 Cal 231 (234): *Hossein Ally* v. *Donzella*, (1880) 5 Cal 906 (910): 6 Cal L Rep 239; *Behari Lal* v. *Mangal Nath*, (1880) 5 Cal 110 (112): 4 Cal L Rep 371; *Sambasiva* v. *Ramasami*, (1899) 22 Mad 179 (182): 8 Mad L Jour 265; *Boyamma* v. *Balaji Rao*, (1897) 20 Mad 469 (470).

(8) See cases under S 14 of the Limitation Act, 1908.

Note 7.

(1) *Queen-Empress* v. *Arlappa*, (1892) 15 Mad 137 (138): 2 Weir 468 [Case under the Criminal Procedure Code]: *Queen-Empress* v. *Vasudevayya*, (1896) 19 Mad 354 (355), (Do.). See however *Wali Mahomed* v. *Ishak Ali*, 1931 All 507 (511): 1931 All L J 777: 134 Ind Cas 26 S B [Oral authority sufficient].

(2) Madras Civil Rules of Practice, Rule 21, Pun Ch C Instr, Vol I, Rr 13 and 15.

(3) *Lakha* v. *Munshi Ram*, 1900 Pun Re No 88: 189 Pun L R 1900. See also *Moparti Pitchi* v. *Vupulla Kondamma*, (1870-1871) 6 Mad H C R 136 (138) [Case under Act VIII of 1865].

(4) *Taj Uldeen* v. *Gafoorulnissa*, (1871) 3 All H C R 341 (342).

(5) *Uttam Ram* v. *Thakor Das*, 1922 Bom 113 (113): 46 Bom 150: 68 Ind Cas 217. See also *Thakkar Tara Nath* v. *Thakkar Jamna Nath*, 1899 Pun Re 5 [Filing suit by unauthorised person]; *Nanjibhai* v. *Popatlal*, 1932 Bom 367 (368): 34 Bom L R 628: 138 Ind Cas 797 [Plaint not signed by party or person holding general power not properly presented].

(6) *Wali Mahomed* v. *Ishak Ali*, 1931 All 507 (511): 1931 All L J 777: 134 Ind Cas 26 [45 All 701 overruled] S B.

Note 9.

(1) *Gobind Coomar* v. *Hurgopal Nag*, (1869) 11 Suth W R 537 (538): 3 Beng L R App 72.

The general principles as to the place, time, and mode, of presentation of plaints apply to the Revenue Courts as well. Where plaint is presented to the Collector instead of to the Deputy Collector, the institution of the suit is not void for want of jurisdiction but is only voidable at the instance of the defendant.[2] O. 4, R. 1, Notes 9—11.

10. Suit against dead person.—*See* O. 1, R. 10.

11. Suit against minor.—*See* Note 2 to S. 26 and O. 32.

R. 2. [S. 58.] The Court shall cause the particulars *of every suit* to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints *are* admitted. O. 4, R. 2, Notes 1—2.

Register of suits.

[1877—S. 58; 1859—S. 38.]

Local Amendment.

MADRAS.

Sub-Rule (2) *added* under Dis. No. 908 of 1912 has been *deleted* by G. O. No. 2606, Law (General), dated 6th August, 1928.

Synopsis.

1. Regiser of suits.
2. Form of Register. See Appendix H— Form No. 14.

Transfer from general list to list of suits for liquidated claims. See Note 1, Pt. (2).

1. Register of Suits.—As has been seen already in Note 2 to S. 26 above, where two or more suits are filed on the same day they will be presumed to have been filed in the order in which they appear in the Register.[1]

As to the practice of the Calcutta High Court of placing ordinary mortgage suits on the list of suits for liquidated claims *see* R. 281 of the Original Side Rules of that Court and the undermentioned case.[2]

2. Form of Register.—*See* Appendix H, Form No. 14.

ORDER V.

ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

R. 1. [S. 64.] (1) When *a suit* has been *duly instituted* a summons may be issued to *the* defendant to appear and answer the claim on a day to be therein specified: O. 5, R. 1.

Summons.

(2) *Mackintosh* v. *Kashee Nath Biswas*, (1874) 21 Suth W R 450 (452): 18 Beng L R 433 F B.

Order 4, Rule 2—Note 1.

(1) *Murli* v. *Bhola Ram*, (1894) 16 All 165 (173, 175): 1894 All W N 65 F B.

(2) *Benode Lal Roy* v. *Bussunto Kumaridebi*, (1900) 27 Cal 355 (357).

O. 5, R. 1, Note 1.

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-Rule (1) may appear—

(*a*) in person, or

(*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(*c*) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

[1877—Ss. 64, 68; 1859—S. 41. *See* O. 3, Rr. 1, 3, 4 and 5.]

Local Amendment.

OUDH.

Rule 1-*A.—Add* a new sub-Rule (1-*A*) *after* sub-Rule (1) as follows:—

"(1-A) A party shall file with his application for the issue of a summons to the defendant or opposite party a printed summons form, in duplicate, one part being in the Urdu and the other in the Nagri character, duly filled up, except in respect of the date of appearance and of the summons, in a bold, clear and easily legible handwriting; provided that:—

(*a*) if the party to be served is a European British subject, the party applying for the summons shall file a special form which shall be filled up in English; and

(*b*) the presiding officer may, in his discretion, direct that such forms in general or that any particular such form be filled up entirely in the office of the Court."

Synopsis.

1. "Summons may be issued."
2. Contents of summons.
3. Summons not necessary where defendant has appeared.
4. Signature in summons.
5. Fresh summons.
6. "To appear and answer."
7. Duly instituted. See S. 27.
8. Summons to what place to be issued.

1. "Summons may be issued."—Sub-Section (1) of this rule is based on the maxim *Audi alteram partem* "hear the other side", *i.e.*, no one should be condemned unheard. The use of the word "may" in this rule cannot be taken to mean that it is optional with the Court to issue summons or not.[1]

Order 5, Rule 1—Note 1.

(1) See *Gopal Gundappa Nayak* v. *Vishnu Krishna Naick*, (1898) 22 Bom 971 (972) [After registration of plaint summons cannot be refused for default of plaintiff in producing original account-books].

It has been simply used in view of the alternative remedy (*viz.*, of sending a letter instead of a summons) in R. 30, *infra*.

The necessity for serving a summons is dispensed with, however, where the defendant voluntarily appears at the presentation of the plaint and admits the plaintiff's claim and this is what the proviso to sub-Rule 1 enacts.[2] There is no time limit within which a summons to appear has to be issued.[3]

2. Contents of summons.—*See* appendix B, Form 1. The summons should show *what claim* the defendant is called upon to answer and on *what date* he is to be heard. It is not enough if he is made aware generally of the institution of a suit against him.[1]

3. Summons not necessary when defendant has appeared.—*See* Note 1.

An appearance by the defendant in an interlocutory application before the registration of a suit itself is no *appearance* within the meaning of the proviso.[1]

4. Signature in summons.—As to whether signature will include initials. *See* Notes to S. 2 (20).

5. Fresh Summons.—A Court, may, in its discretion, issue a fresh summons if and when necessary. *See* the undermentioned cases.[1]

6. "To appear and answer."—For the meaning of "appearance" *See* O. 17, R. 2; O. 9, R. 9 and O. 3, R. 1.

7. "Duly instituted."—*See* S. 27.

8. Summons to which place to be issued.—The summons should be taken out to the defendant at the place where he ordinarily or voluntarily resides or carries on business or works for gain; if the defendant has several places of residence and summons to one of such places is returned unserved, summons should be taken out to other places of residence, but it is not the duty of the plaintiff to take out summonses to the places where the defendant might have gone from his place of residence.[1] As to the definition of the words "reside" and "residence". *See* Notes 3 to 7, S. 20.

The provisions of the Civil Procedure Code relating to issue and service of summons have been made applicable to proceedings under the following Local Acts:—The Burmah Land and Revenue Act, II of 1876, S. 54-A. The Lower Burmah Town and Village Lands Act, IV of 1898, S. 39; the Indian

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(2) *Bank of Bengal* v. *Currie & Co*, (1869) 3 Beng L R A C 396: 12 Suth W R 432 (434). See also *Khalut Chunder* v. *Saroda Soondery*, Bourke O C 244.

(3) *Grender* v. *Juggadumba*, (1880) 5 Cal 126 (127).

Note 2.

(1) *Gulab Chand* v. *Shankar Lal*, (1913) 35 All 163 (164): 11 All L J 135: 18 Ind Cas 711 [Defendant appears in Court in an interlocutory application before registration of suit—Suit summons still obligatory].

Note 3.

(1) *Gulab Chand* v. *Shankar Lal*, (1913) 35 All 163 (164): 18 Ind Cas 711: 11 All L J 135.

Note 5.

(1) *Urquhart* v. *Gilbert*, 1 Ind Jur N S 224; *Issur Chunder* v. *Aushotosh*, 1 Ind Jur N S 283; *Ghour Churn* v. *Peary Lall*, (1875) 15 Beng L R App 12 (14).

Note 8.

(1) *Madurathachi* v. *Chokalinga*, (1914) 23 Ind Cas 324 (324): 1914 Mad W N 314. See however *Kattampudi Subbiah Chetty* v. *Walji Lalji Sait*, (1915) 29 Ind Cas 26 (27) Mad [In which it does not appear if the place to which the defendant had gone was also a place of residence].

Income-tax Act No. VII of 1918, S. 46; The Madras, Ganjam and Vizagapatam Act XXIV of 1839, Rule 25.

O. 5, R. 2, Note 1.

Copy or statement annexed to summons.

R. 2. [S. 65.] Every summons shall be accompanied *by a copy of the plaint or, if so permitted*, by a concise statement.

[1877—S. 65.]

Local Amendments.

ALLAHABAD.

Omit the words "or, if so permitted, by a concise statement".

OUDH.

Omit the words "or, if so permitted, by a concise statement".

Synopsis.

1. Legislative changes.

1. Legislative changes.—

The words "if so permitted" are new. Concise statement cannot, therefore, be served under the present Code except with the permission of the Court.

O. 5, R. 3, Note 1.

Court may order defendant or plaintiff to appear in person.

R. 3. [S. 66.] (1) *Where* the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) *Where* the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

[1877—Ss. 66, 67; 1859—S. 42. *See* O. 9, R. 12.]

Synopsis.

1. Court may order party to appear in person.
2. Consequence of non-appearance. See O. 9, R. 12, Note 1.

Non-attendance of party on adjourned date. See Note 1, Pt. (2).

1. Court may order party to appear in person.—Under O. 5, R. 1, sub-Rule (2) a defendant has the option to appear in any one of the modes prescribed therein. But the Court *may* require the defendant or a *pro-forma* party,[1] when necessary, to appear *in person*; and in that case summons *shall* order accordingly. A plaintiff may otherwise be ordered to appear in person.

Order 5, Rule 3—Note 1.

(1) *Kuttipali Vadakkedath v. Banerji*, (1915) 30 Ind Cas 351 (352): 18 Mad L Tim 163: 1915 Mad W N 640.

On such an order the party is bound to appear in person only on the date fixed therein. He is not bound to appear in person on any other date to which the suit is adjourned and the dismissal of the case on such date under O. 9, R. 12 for non-appearance is without jurisdiction.[2] For a proviso to this rule *see* rule 4, *infra*.[2-a] This rule is also subject to exemptions provided by the Code in favour of certain individuals such as a Ruling Prince.[3] *See* Ss. 132 and 133. O. 5, R. 3, Notes 1—2.

2. **Consequences of non-appearance.**—*See* O. 9, R. 12, Note 1.

No party to be ordered to appear in person unless resident within *certain limits*.

R. 4. [S. 67.] No party shall be ordered to appear in person unless he resides— O. 5, R. 4.

(*a*) within the local limits of the Court's ordinary original jurisdiction, or

(*b*) without such limits *but* at a place less than fifty or (where there is railway *or steamer* communication *or other established public conveyance* for five-sixths of the distance between the place where he resides and the place where the Court is situate) *less than* two hundred miles *distance* from the Court-house.

[1877—S. 67; 1859—S. 42.]

Local Amendment.

ALLAHABAD.

Rule 4-A.—Add the following Rule 4-A:—

"**4-A.** Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

Summons to be either to settle issues or for final disposal.

R. 5. [S. 68.] The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly: O. 5, R. 5.

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

[1877—S. 68; 1859—S. 41.]

Local Amendments.

CALCUTTA.

Insert the words "for the ascertainment whether the suit will be contested" *after* the words "issues only".

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(2) *Sundar Nath* v. *Mallu*, (1917) 39 Ind Cas 634 (634): 39 All 476: 15 All L J 522.

(2-a) *Krishna* v. *Gobind*, 1885 All W N 143 (144) [Rule 3 is controlled by R 4].

(3) *Juggud Indur Bunwaree* v. *Suraj Ooomar Chowdhry*, Marsh 627.

O. 5, R. 5, Note 1.

MADRAS.

Delete the first paragraph and *substitute* the following in lieu thereof:—

"5. The Court shall determine, at the time of issuing the summons, whether it shall be—

(1) for the settlement of issues only, or (2) for the defendant to appear and state whether he contests or does not contest the claim and directing him if he contests to receive directions as to the date on which he has to file his written statement, the date of trial and other matters, and if he does not contest for final disposal of the suit at once; or (3) for the final disposal of the suit; and the summons shall contain a direction accordingly."

Synopsis.

1. Summons for final disposal.

1. Summons for final disposal.—It is no doubt for the Court to determine at the time of issuing the summons, whether it should be for the settlement of issues only or for the final disposal of the suit. But it is desirable to issue summons for final disposal of suit only in simple cases.[1] It is not proper to issue summons for final disposal in mortgage suits.[1-a]

O. 5, R. 6, Note 1.

R. 6. [S. 69.] The day for the appearance of the defendant shall be fixed with reference to *the* current business of *the Court*, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

[1877—S. 69; 1859—S. 45.]

Fixing day for appearance of defendant.

Synopsis.

1. Sufficient time.

1. Sufficient time.—It is not open to a plaintiff to obtain an *ex parte* decree before the returnable date mentioned in the summons.[1] A defendant is entitled to sufficient time to enable him to appear and answer in person or by pleader,[2] and Courts should carefully see that reasonable time is allowed to the defendant in all cases in order that the Courts themselves may not be made the instruments of fraud and injustice by means of those processes, the vigilant superintendence of the issue and the service of which, is one of the most important duties of the Courts.[3] Thus it has been held that a service in the afternoon of 27th January on an old woman of 65 to appear and answer in a Court some distance off on the morning of 29th January is not a due

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Order 5, Rule 5—Note 1.

(1) In suits under the Agra Tenancy Act (III of 1926) and the Orissa Tenancy Act (II of 1913) summons to defendant shall be for final disposal unless the Court is of opinion that it should be for issues only.

(1-a) *Tuljaram* v. *Sitaram*, (1914) 24 Ind Cas 665 (666): 38 Bom 377: 16 Bom L R 39.

Order 5, Rule 6—Note 1.

(1) *Dhirajlal* v. *Hormusji*, (1908) 32 Bom 534 (539): 10 Bom L R 301.

(2) *Khadar* v. *Rahiman*, (1866) 3 Mad H C R 167 (168); *Chanbasappa Bin Sangappa* v. *Mainaba Bin Mahadshet*, (1870) 7 Bom H C 138.

(3) *Locenath* v. *Sobanath*, (1866) 5 Suth W R (Act X of 1859) 39 (39).

service.[4] The expression, "Duly served" under Art. 164 of the Limitation Act 1908, however, does not mean "served in sufficient time to enable the party to attend the Court on the hearing date" but means only that the summons had been served in such a way that the defendant has *knowledge of the suit*,[5] and an application to set aside the *ex parte* decree must be made within 30 days from the date of decree.[6] The date of service is *prima facie* that shown in the return.[7] O. 5, R. 6, Note 1.

Summons to order defendant to produce documents relied on by him.

R. 7. [S. 70.] The summons to appear and answer shall order the defendant to produce *all* documents in his possession or power upon which *he* intends to rely in support of his case. O. 5, R. 7.

[1877—S. 70; 1859—S. 43.]

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

R. 8. [S. 71.] *Where* the summons is for the final disposal of the suit, it shall *also* direct the defendant to produce, on the day fixed for his appearance, *all* witnesses upon whose evidence he intends to rely in support of his case. O. 5, R. 8.

[1877—S. 71.]

SERVICE OF SUMMONS.

R. 9. [S. 72.] (1) *Where* the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, *unless the Court otherwise directs*, be delivered or sent to the proper officer to be served by him or one of his subordinates. O. 5, R. 9.

Delivery or transmission of summons for service.

(2) The proper officer may be an officer of *a* Court *other* than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

[1877—S. 72; 1859—S. 47.]

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(4) *Ma Shwe Pon* v. *Raman Chetty*, (1900-07) 1 L B R 226 (227).

(5) *Kesarchand Keshowji* v. *Lakhamsi Raisi*, (1917) 42 Ind Cas 611 (612): 11 Sind L R 71.

(6) *Kasarchand* v. *Lakhamsi*, (1915) 27 Ind Cas 351 (352): 8 Sind L R 153.

(7) *Madhub Lall* v. *Woopendranarain*, (1896) 23 Cal 573 (574).

O. 5, R. 9, Notes 1—6.

Synopsis.

1. Object of service of summons.
2. "Resident within the jurisdiction."
3 "Unless the Court otherwise directs."
4. Service by registered post. See Note 2 to R. 10.
5. Proper officer.
6. Service outside jurisdiction.

1. Object of service of summons.—The object of all service other than substituted service to which other considerations apply is only to give notice to the party on whom it is made, so that he might be aware of and be able to resist the suit if he wishes to do so.[1] Where that has been done so that the Court might feel perfectly confident that service had reached him, everything is done that could be required.[2] The mere irregularity in the *manner* of service is, not necessarily a ground for setting aside the decree.[3]

2. "Resident within that jurisdiction."—For the purpose of summons residence is not synonymous with ownership "of property within the territorial limits of the Court". Thus a permanent absentee cannot be described as a resident in a place merely by virtue of ownership.[1] For the meaning of the words "reside" and "residence", *see* Notes 3-7 of S. 20.

3. "Unless the Court otherwise directs."—These words have been added to give the Court power to order service in any other way it thinks proper, *e.g.*, by post.[1] *See also* the Report of the Special Committee wherein they say "increased facilities have been given for the service of processes to which further reference has been made in the notes on clauses. It is hoped that by the gradual introduction of service by post may be found a solution of one of the principal defects in our legal system".

4. Service by registered post.—*See* Note 2 to R. 10.

5. Proper Officer.—The Nazir is the proper officer of the Court to whom the summons is delivered for service and it is for him to return it to the Court if unserved.[1] But he can delegate the execution of a warrant to peons.[2] A service of summons is irregular if it is not made by the proper officer or by his subordinate.[3]

6. Service of summons outside jurisdiction.—Service of summons outside the jurisdiction of the Court issuing it without sending it to the Court having jurisdiction is irregular.[1]

Order 5, Rule 9—Note 1.

(1) *Bhomshetti* v. *Umabai*, (1897) 21 Bom 223 (225): *Kistler* v. *Tettmar*, (1905) 1 K B 39; *Diwan Chand* v. *Parbati*, (1918) 48 Ind Cas 28 (30): 99 P R 1918: 184 P W R 1918.

(2) *Kistler* v. *Tettmar*, (1905) 1 K B 39.

(3) *See* S. 99 *ante* and also *Mackintosh* v. *Kally Das*, (1873) 11 Beng L Rep 1: 19 Suth W R 234; *Gopal Das* v. *Syed Islu*, (1918) 46 Ind Cas 277 (277) Nag.

Note 2.

(1) *Kumud Nath* v. *Jatindra Nath*, (1911) 9 Ind Cas 189 (191) Cal: 38 Cal 394: 13 Cal L Jour 221: 15 C W N 899.

Note 3.

(1) *Khiroda* v. *Nabin*, (1915) 21 Cal L Jour 653 (655): 30 Ind Cas 64 (67): 19 C W N 1231 [Case of pardanishin ladies].

Note 5.

(1) *Parshotam* v. *Abdul*, (1889) 13 Bom 500 (502).

(2) *Dharam* v. *Queen*, (1895) 22 Cal 596 (605, 608).

(3) *Maung San Bwin* v. *Maung Nyi*, 1925 Rang 325 (326): 3 Rang 239: 89 Ind Cas 870.

Note 6.

(1) *Maung San Bwin* v. *Maung Nyi*, 3 Rang 239: 1925 Rang 325: 89 Ind Cas 870.

R. 10. [S. 73.] Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court. O. 5, R. 10, Note 1.

Mode of service.

[1877—S. 73; 1859—S. 48.]

Local Amendments.

LAHORE.

The following proviso should be *added*:—

"Provided that in any case if the plaintiff so wishes, the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule."

PATNA.

Add the following to rule 10:—

"(1) Provided that in any case the Court may, of its own motion, or on the application of the plaintiff, send the summons to the defendant by post in addition to the mode of service laid down in this rule. An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be *prima facie* proof of service."

Synopsis.

1. Mode of service.
2. Service by post.

1. Mode of service.—The Code prescribes three principle modes of serving a summons on a defendant.[1]

(1) Under this rule read with rules 12, 16 and 18 *infra*, *i.e.*, by *delivering or tendering a copy* of the summons to the defendant personally or to his duly empowered agent and taking his signature in token of acknowledgment of such service. This is the mode of service that should normally be adopted unless it is unavoidable to do so.[2]

(2) Where the summons cannot be served in the above manner by reason of the fact that the defendant refuses to sign the acknowledgment of service or cannot be found or has no agent duly empowered to accept service, it should be *affixed to the outer* door or other conspicuous part of the defendant's residence under R. 17, *infra*.[3]

(3) Where the summons cannot be served in either of the above two modes, or there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, the Court may order *substituted service* under R. 20, *infra*, *i.e.*, by affixing a copy of the summons in the Court house and also

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Order 5, Rule 10—Note 1.

(1) *Diwanchand* v. *Parbati*, (1918) 48 Ind Cas 28 (30): 99 Pun Re 1918: 184 Pun W R 1918.

(2) *Dina Nath* v. *Upendra Nandan*, 1924 Cal 1004 (1005): 82 Ind Cas 708: 40 Cal L Jour 154; *Baldeodas* v. *Subkarandas*, 1925 Cal 627 (630): 52 Cal 179: 88 Ind Cas 508; *Cohen* v. *Nursing Dass*, (1892) 19 Cal 201 (202).

(3) *Champat Singh* v. *Mahabir Prosad*, (1918) 43 Ind Cas 632 (634) All; *Sudhansu* v. *Chairman, Patna City Municipality*, 1932 Pat 150 (151): 12 Pat L Tim 911: 135 Ind Cas 110.

O. 5, R. 10, Notes 1—2.

in some conspicuous part of the defendant's last residence, or in such other manner as the Court thinks fit. This, however, unlike the other two modes of service must be done after obtaining the *order of the Court* therefor.

Besides the three modes of service prescribed by the Code, the Court may, in particular cases direct service of the summons by *post*. *See* Note 3 to R. 9 and the following note to this section.

2. Service by Post.—Although the Court may, in a particular case, direct that the summons should be sent by post, the normal mode of service is *personal service.*[1] Service by registered post is, at any time, a poor substitute for personal service; it is allowed to a litigant as a matter of convenience and very slight evidence is enough to displace the presumption of service raised by it.[1-a] Thus where a summons sent by post, was returned as "refused" by a person who was not shown to have been the defendant, it was held that it was not a good service.[2]

Under S. 27 of the General Clauses Act, 1897, where any Act, *passed after* 11*th March*, 1897, authorises or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to have been effected, unless the contrary is proved, at the time, when a properly addressed and stamped letter containing the document, and sent by registered post would in the ordinary course of post reach the addressee. Where, therefore, a summons is sent by registered post as, *e.g.*, under the provisions of R. 25 *infra* properly addressed and is returned endorsed "refused" the Court can treat the service as sufficient.[3] Section 27 of the General Clauses Act 1897 however, does not apply to service by post authorised by an Act passed *before* 11th March 1897. In cases, therefore, arising under the old Code it was held that where a summons sent by Registered post was returned as refused, the service could not be deemed to be sufficient.[4]

A summons cannot be sent by post to any place to which letters are not registered by a post office in India.[5]

Under the Proviso added to this rule by the Lahore High Court, service by Registered post may be ordered even in the first instance. But if the de-

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Note 2.

(1) *See* Rule 12 *infra*. See also *Suresh Chunder* v. *Jugut Chunder*, (1886) 14 Cal 204 (215-216); *Abraham Pillai* v. *Donald Smith*, (1906) 29 Mad 324 (325).

(1-a) *Sunder Spinner* v. *Maken Bhula*, 1922 Bom 377 (377): 46 Bom 130: 23 Bom L R 908: 64 Ind Cas 386; *Govindji Madhwaji & Co* v. *C J Smith*, 1928 Pat 568 (571). See also *Govinda Chandra* v. *Dwarka Nath*, (1915) 26 Ind Cas 962 (964, 968): 19 C W N 489: 20 Cal L Jour 455 [Presumption that notice sent by post was duly served, is not a conclusive presumption of law]; *Mir Tapurah* v. *Gopi Narain*, (1908) 7 Cal L Jour 251 (258), (Do.).

(2) *Jagannath* v. *Sasson*, (1894) 18 Bom 606 608.

(3) *Baluram* v. *Bai Pannambai*, (1911) 35 Bom 213: 11 Ind Cas 351 (352): 13 Bom L R 323; *Roopchand Rangildas* v. *Haji Hussain Hajee*, (1914) 24 Ind Cas 437 (437): 16 Bom L R 204; *Raunaq Ram* v. *Prabh Dayal*, 1930 Lah 439 (440): 31 Pun L Rep 26: 121 Ind Cas 382. See also *Lootf Ali Meah* v. *Pearee Mohun Roy*, (1871) 16 Suth W R 223 (224) [Person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents]; *Ismail Khan* v. *Kali Krishna*, (1901) 6 Cal W N 134 (137), (Do.); *Durga Nath* v. *Rajendra*, (1913) 20 Ind Cas 363 (365): 17 Cal W N 1073.

(4) *Jagannath Brakhbhav* v. *J O Sassoon*, (1894) 18 Bom 606 (607); *Fakhr-Uddin* v. *Ghafur-ud-din*, (1901) 23 All 99 (103): 1901 All W N 1. See *Sonatun* v. *Gopal*, (1871) 15 Suth W R 31 (31) [If the defendant does not appear, a verified statement should be put in to show that he is or has been recently residing in the place to which summons was sent]. See also *Jogendro Chunder* v. *Dwaraka Nath*, (1888) 15 Cal 681 (683) and *Aga Gulam Hussain* v. *Sir A D Sasson*, (1897) 21 Bom 412 (418) where service was held sufficient.

(5) *Cassim Azim* v. *Cassim Md*, (1868) 10 Suth W R 849 (850): 2 B L R A O 59.

fendant fails to appear, *ex parte* proceedings should not be taken but summons should be directed to be served by the ordinary process.[6] The Court has, however, no power to compel the plaintiff to deposit both the process fee and the postal charges, and cannot dismiss the suit for non-payment thereof.[7] In the undermentioned case[8] it was held that service on a party who refused to receive a summons by registered post, was not due service, under the law as it stood before the new proviso. O. 5, R.10, Note 2.

Under the Agra Tenancy Act a summons or notice may, *if the Local Government* by rule, either generally or in respect of any local area or any class of cases so directs, be served by post either in addition to or in substitution for, any other mode of service.

O. 5, R.11, Note 1.

Service on several defendants.

R. 11. [S. 74, Para. 1.] *Save as otherwise prescribed, where* there are more defendants than one, service of the summons shall be made on each defendant.

[1877—S. 74; 1859—S. 48.]

Synopsis.

1. Service on several defendants.

Service on partners. See O. 30, R. 3.

1. **Service on several defendants.**—The proviso to the old section which contained rules relating to the mode of service on partners has been omitted in this section but has been re-enacted under O. 30, R. 3 of the Code.

When there are more defendants than one, service should be made on each one of them.[1] But in a suit against the principal debtor and surety, the omission of the creditor to effect a service of summons on the principal debtor, does not discharge the surety from his liability.[2]

O. 5, R.12.

Service to be on defendant in person when practicable or on his agent.

R. 12. [S. 75.] *Wherever* it *is* practicable, service shall be made on the defendant in person, unless he *has* an agent empowered to accept service, in which case service on such agent shall be sufficient.

[1877—S. 75; 1859—S. 49.]

Synopsis.

1. "Wherever it is practicable."
2. Service on minor.
3. Service on pardanashin lady.
4. Service on agent.

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(6) *Hardasmal* v. *Jagan Nath*, 1926 Lah 579 (580): 95 Ind Cas 874; *Pem Mal Harbhagwan Das* v. *Bishen Das*, 1927 Lah 376 (377): 101 Ind Cas 615.

(7) *Sham Singh* v. *Nur Khan*, 1927 Lah 157 (158): 99 Ind Cas 909: 9 Lah L Jour 96.

(8) *Charan Das* v. *Firm of Puran Lal*, 1929 Lah 235 (236): 116 Ind Cas 620.

Order 5, Rule 11—Note 1.

(1) *Shibon Roy* v. *Kashee Roy*, (1876) 25 Suth W R 394 (395).

(2) *Shaikali* v. *Mohammad*, (1890) 14 Bom 267 (269).

O. 5, R. 12, Notes 1—3.

1. **"Wherever it is practicable."**—As a general rule the summons must be served on the defendant in person unless he has an agent empowered to accept service in which case it would be enough if it is served on him.[1] For that purpose the serving officer must make some substantial effort and proper enquiries to find out the person to be served in the place where he ordinarily resides or carries on business.[2] The mere affixing of the summons on the door without any such attempt is not sufficient.[3]

A person whose name does not correspond to the description, in the summons is justified in refusing it, but if *A* had posed as *B*, and had dealings with the plaintiff and if he is given summons addressed to *B* he knows it is for him, and consequently service in the name of *B*, is sufficient notice of the suit to *A*.[4] Courts can always correct *bona fide* mistakes, in the description of parties appearing in summonses, at the time of hearing, provided the opposite party was not mislead or prejudiced thereby.[5]

2. **Service on minor.**—There are no special provisions as to service on infants and therefore the same rules which apply to adults apply to minors also. There should be personal service or such other service as is prescribed by the Code.[1] Service on the guardian *ad litem* alone of the minor is not good.[2] Where the guardian was evading service but the notice was served on the minor, the former must be deemed to have received information and it was held the minor could not be allowed to plead that the service was irregular.[3]

3. **Service on pardanashin lady.**—When the summons has to be served upon a woman, who is not accustomed to appear in public, as for, *e.g.* a Pardanashin lady, personal service is not possible, and the summons may therefore be served on any adult male member of the family or on her agent empowered to receive summons.[1] If there is no agent so empowered, it can be affixed to the outer door of the house in which she ordinarily resides.[2]

Order 5, Rule 12—Note 1.

(1) *Kassim Ebrahim* v. *Johur Mull*, (1916) 34 Ind Cas 799 (802): 23 Cal L Jour 183: 20 Cal W N 173: 43 Cal 447; *Abraham Pillai* v. *Donald Smith*, (1906) 29 Mad 324, (325).

(2) *Kassim Ebrahim* v. *Johurmull*, (1916) 34 Ind Cas 799 (801): 23 Cal L Jour 183: 20 Cal W N 173: 43 Cal 447; *Romesh Chandra* v. *Durga Charan*, 1922 Cal 128 (128): 70 Ind Cas 292 [Sufficient attempt not made]; *Subramania* v. *Subramania*, (1898) 21 Mad 419 (421); *Sankara Bhatta* v. *Subraya Bhatta*, (1911) 9 Ind Cas 763 (763): (1911) 1 M W N 186: 9 Mad L Tim 358 [Service on brother without any attempt to serve on defendant personally].

(3) *Shiboo Roy* v. *Kashee Roy*, (1876) 25 Suth W R 394 (395).

(4) *A R P L Firm* v. *Ma Gun*, 1926 Rang 73 (74): 3 Rang 515: 93 Ind Cas 91.

(5) *Sardarmal* v. *Aranvayal Sabapathy*, (1897) 21 Bom 205 (210).

Note 2.

(1) In the goods of *Amirta Lal Mullick*, (1900) 27 Cal 350 (361) [Both the minor and the guardian to be served]; *Walter Rebello* v. *Maria Rebello*, (1898) 2 Cal W N 100 (103), (Do.); *Abdul Rab* v. *Eggar*, (1908) 35 Cal 182 (184): 12 Cal W N 160, (Do.); *Jatindra Mohan* v. *Srinath*, (1899) 26 Cal 267 (273): 3 Cal W N 261.

(2) *Suresh Chunder* v. *Jugut Chunder*, (1886) 14 Cal 204 (215) [The guardian may by appearing waive all objections as to service]; *Jatindra* v. *Srinath*, (1899) 26 Cal 267 (273): 3 Cal W N 261 [S 74, O 5 or 12 is not controlled by (S 443) Order 32 Rule 4]. See also *Abdul Rab* v. *Eggar*, (1908) 35 Cal 182 (184): 12 Cal W N 160 [Service on mother not appointed guardian]: *Gobind Ram* v. *Md Ali*, (1911) 11 Ind Cas 317 (318): 35 Pun Re 1912: 211 Pun L R 1911: 115 Pun W R 1911.

(3) *Har Charan* v. *Durga Bux*, L R 4 All 250 (Rev).

Note 3.

(1) *Clark* v. *Mullick*, (1840) 2 Moo Ind App 263 (268): 3 Moo P C 252: 1 Sar 188 [The Judicial Committee ordered service on her servant]; *Najmunnissa* v. *Jagmohan*, 1923 Pat 433 (434): 72 Ind Cas 910: 4 Pat L Tim 89 [A husband to whom a power has been executed with no power to receive summons is not an agent].

(2) *Khoroda Sundari Dasi* v. *Nabin Chandra*, (1915) 30 Ind Cas 64 (65): 21 Cal L Jour 653: 19 Cal W N 1281; *Haidari Khanam* v. *Husnara Begam*, (1920) 57 Ind Cas 594 (595) Oudh; *Bhashiran* v. *Bhishambar*, 1922 Oudh 268 (269): 9 Oudh L J 439: 69 Ind Cas 667; *Najmunnissa* v. *Jagmohan*, 1923 Pat 433 (434): 72 Ind Cas 910: 4 Pat L Tim 89.

4. Service on agent.—A service on the agent is valid only if he is *empowered to accept service* on behalf of the defendant. By R. 6 of O. 3, any person living within the jurisdiction of the Court may be appointed an agent to accept service of process, by instrument in writing signed by the principal.[1] Thus gumastas and servants[2] and managers[3] merely looking after the affairs of the defendant or holding general powers of attorney cannot accept sevrice, but a partner will be deemed an agent of the firm.[4] **O. 5, R.12, Note 4.**

R. 13. [S. 76.] (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons *is issued*, service on any manager, or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service. **O. 5, R.13, Note 1.**

Service on agent by whom defendant carries on business.

(2) For the purpose of this rule the master of a ship *shall be deemed to be* the agent of *the* owner or charterer.

[1877—S. 76.]

Synopsis.

1. Manager or agent personally carrying on business.

1. Manager or agent personally carrying on business.—In order that this rule may apply, two conditions are necessary to be satisfied.

A. The defendant residing without the jurisdiction of the Court must carry on business or work within jurisdiction through a manager or agent, and

B. the suit must relate to such business or work that is, business or work either actually itself carried on by the agent or manager, or forming part of the business, in the sense of a connected course of transactions to the management of which, he has been duly appointed.[1]

The manager or agent contemplated by the rule is one who has an initiative and independent discretion, though possibly subject to general orders

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Note 4.

(1) *Papamma Rao* v. *Revenue Divisional Officer*, (1917) 42 Ind Cas 235 (236): 33 Mad L Jour 472: 1917 Mad W N 878.

(2) *Ram Sunduree* v. *Raneesurut Sunduree*, (1872) 17 Suth W R 33 (33); *Sheocharan* v. *Baij Nath*, (1920) 57 Ind Cas 563 (564): 23 Oudh Cas 104 [So service on a chela is insufficient]; *Nagary* v. *Nambury Venkataratnam*, (1913) 21 Ind Cas 922 (923): 1913 Mad W N 1028: 14 Mad L Tim 535; *Luchmechand* v. *The Bengal Coal Company*, (1882) 8 Cal 317 (326) [A power to appear and defend suits does not include a power to accept summons].

(3) *Papamma Rao Garu* v. *Rev Div Officer*, (1917) 42 Ind Cas 235 (236): 33 Mad L Jour 472: 1917 Mad W N 878.

(4) *Ramachandra Bose* v. *Snead*, (1871) 7 Beng L R App 58; *Kastoor Mull* v. *Jooke Ram*, (1873) 11 Bong L R App 26 [But if the service was not at the place of business but in a separate place of the partner, summons will be deemed to be served on him personally].

Order 5, Rule 13—Note 1.

(1) *Goculdas* v. *Ganesh Lal*, (1879-80) 4 Bom 416 (421); *Mahabir* v. *Balkisan*, 1922 Pat 376 (377): 1 Pat 48: 62 Ind Cas 927: 1922 P H C C 76: 3 Pat L Tim 29.

O. 5. R.13, Note 1.

for guidance,[2] and the business or work must be a continuous one, not occasional.[3] Thus a person simply employed for a particular voyage to obtain freight[4] or a mere servant employed to do a particular work, or a person who acts also for other firms not initiating any business himself, and not standing between the employee's firm and the plaintiff[5] is not an agent or manager within this rule.

A service on the duly appointed agent or manager as contemplated by this rule is valid service whether the fact of service is actually communicated to the principal or not.[6] In order that a service on an agent of foreign corporation may be valid, the agent must have power to enter into contracts on behalf of such corporation.[7]

For the purposes of summons, a Railway Company must be deemed to reside at its principal office.[8]

O. 5, R.14, Note 1.

R. 14. [S. 77.] *Where* in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant *has* no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

Service on agent in charge in suits for immoveable property.

[1877—S. 77; 1859—S. 61.]

Synopsis.

1. Scope of the rule.

1. Scope of the rule.—As to the meaning of the words "suit to obtain relief respecting, or compensation for wrong to, immoveable property". *See* Note to S. 16 *ante*. Where in a suit for foreclosure, it was found that the mortgagor had conveyed his properties in trust to a body of persons it was held that service on one trustee's agent who was in charge of the properties, was sufficient.[1]

O. 5, R.15.

R. 15. [S. 78.] *Where* in any suit the defendant cannot be found and *has* no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Where service may be on male member of defendant's family.

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(2) *Goculdas* v. *Ganesh Lal*, (1879-80) 4 Bom 416 (422).

(3) *Ratansi Pancham* v. *Charles Saunders*, (1871) 8 Bom H C O C 159.

(4) *Ratansi Pancham* v. *Charles Saunders*, (1871) 8 Bom H C O C 159.

(5) *Goculdas* v. *Ganesh Lal*, (1879-80) 4 Bom 416 (423).

(6) *Goculdas* v. *Ganesh Lal*, (1879-80) 4 Bom 416 (424); *Rajaram* v. *Brown*, (1870) 7 Bom H C R O C 97 [Foreign principal carrying on business in India through local firm—Service on manager of local firm is sufficient]. See also *Sunder Lal* v. *Commissioner of Income-tax*, 1931 Pat 282 (284): 10 Pat 441: 133 Ind Cas 679: 13 Pat L Tim 89 [Case under Income-tax Act].

(7) *Reliance Marine* v. *Md Omar*, 1926 Cal 1030 (1030): 97 Ind Cas 286: 43 Cal L Jour 576.

(8) *Hanlon* v. *Indian Branch Railway Company*, 1 Hyde 197.

Order 5, Rule 14—Note 1.

(1) *Michael* v. *Ameena Bibi*, (1883) 9 Cal 733 (734): 13 Cal L Rep 161.

Explanation.—A servant is not a member of the family within the meaning of this *rule*. O. 5, R. 15, Note 1.

[1877—S. 78, 1859—S. 53.]

Local Amendments.

ALLAHABAD.—

For the words "Where in any suit the defendant cannot be found" *read* "When the defendant is absent or cannot be personally served".

BENGAL.—

Cancel Rule 15 and *substitute* therefor the following:—

"15. Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him:

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Article 164 of Schedule I of the Limitation Act, 1908, not to have been duly served.

Explanation.—A servant is not a member of the family within the meaning of this rule."

LAHORE.— .. ..

In Rule 15, *after* the words "where in any suit the defendant cannot be found" the following words were *inserted*:—

"or is absent from his residence."

MADRAS.—

In Rule 15 of Order 5, *delete* the words "the defendant cannot be found" and in lieu thereof *insert* the words "the defendant is absent".

NAGPUR.—

In Rule 15, *substitute* the words "when the defendant is absent or cannot be personally served" *for* the words "where in any suit the defendant cannot be found".

OUDH.—

Order 5, Rule 15.—In Oudh *for* the words "where in . . . . found", *substitute* "where a summons has been issued to a defendant on the institution of a suit and he is absent from the address stated in the summons."

RANGOON.—

For the words "Where in any suit the defendant cannot be found" in the first line of Rule 15, *substitute* the words "Where the defendant is absent".

Omit the word "male" *between* the word "adult" and the word "member" in the third line of Rule 15.

Synopsis.

1. Scope of the rule.
2. "Adult male member of the family."
3. Service on servant not valid—Explanation.

Cannot be found. See Note 1.

1. **Scope of the rule.**—It is only when the defendant *cannot be found* and has no agent empowered to accept service on his behalf that service may be made on any adult member of his family. It cannot be said that the defendant

O. 5, R.15, Notes 1—3.

"cannot be found" when it appears that he was not at home or had left for a particular place when the process server went to effect service on him.[1] It is the duty of the process server to take pains to find out the person to be served[2] and for this purpose he should make enquiries not only of the relations of the defendant but also of the neighbours.[3] In the absence of such an attempt at personal service on the defendant, the service on a member of the family is not sufficient.[4]

2. "Adult male member of the family."—A person above the age of 16 years has been held to be an "adult" within the meaning of this section.[1] The service must be on an adult *male* member of the family. The law does not recognise service on any *female* members of the defendant's family.[2]

Where service was effected on an adult male member of the family under R. 15 and the defendant was in communication with his family members, it was held that the service was sufficient.[3]

3. Service on servant not valid—Explanation.—As the explanation shows, a servant is not a member of the family. A service on a servant therefore is not sufficient.[1] A service on a *munim* is similarly not one, on a member of the family and is not valid.[2]

O. 5, R.16, Note 1.

R. 16. [S. 79.] *Where* the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

[1877—Ss. 79, 80; 1859—S. 54.]

Person served to sign acknowledgment.

Synopsis.

1. Scope of the rule.
2. "Shall require the signature."

Refusal to sign acknowledgment. See Note 2, Pt. (7).

1. Scope of the rule.—This rule contemplates three distinct classes of service:—

Order 5, Rule 15—Note 1.

(1) *Hardyal* v. *Pir Sant Das*, (1911) 10 Ind Cas 242 (243): 136 Pun L R 1911.

(2) *Bhomshetti* v. *Umabai*, (1897) 21 Bom 223 (225); *Ram Harakh* v. *Sarju*, (1912) 16 Ind Cas 600 (601): 16 Oudh Cas 83.

(3) *Dharam* v. *Kanak*, 1921 Cal 638 (639): 68 Ind Cas 991: 35 Cal L Jour 203: 26 Cal W N 359.

(4) *Makhan Das* v. *Mannu Lal*, (1913) 21 Ind Cas 614 (614): 35 All 556: 11 All L J 875 [Service on paternal uncle]: *Sankara Bhatta* v. *Subrayya Bhatta*, (1911) 9 Ind Cas 763 (763): 1911 Mad W N 186: 9 Mad L Tim 358 [Service on brother].

Note 2.

(1) *Haricharan* v. *Chandra Kumar*, (1908) 35 Cal 286 (291).

(2) *Bhomsetti* v. *Umabai*, (1897) 21 Bom 223 (226).

(3) *Intumiah* v. *Darbuksh Bhuiyan*, (1914) 25 Ind Cas 380 (381): 42 Cal 67. See also *Sheo Lal* v. *Gunga Ram*, (1871) Pun Re No 27 [Even if the adult on whom the service was effected began to live in the family after the defendant had left it].

Note 3.

(1) *Hari Singh* v. *Md Said*, 1927 Lah 200 (215): 8 Lah 54: 102 Ind Cas 528.

(2) *Firm of Ram Gopal* v. *Naraindas*, (1918) 45 Ind Cas 932 (933): 105 Pun W R 1918.

(*a*) On the defendant in person. O. 5, R. 16, Notes 1—2.

(*b*) On the defendant's duly appointed agent.

(*c*) Upon any other person on behalf of the defendant.

The third class of service is contemplated by the Law only when the party cannot himself be found.[1]

The words "other person on his behalf" can, according to context, only mean persons as contemplated by the preceding Rules 13 to 15.

2. "Shall require the signature".—As far as possible the officer serving the process should carry out the service in one of the modes prescribed by this rule and Rule 17 *infra*.[1] In other words, the serving officer delivering or tendering a copy of the summons should require the person served to sign an acknowledgment of service under this rule, and on his refusal to do so, should affix a copy of the summons to the outer door or other conspicuous part of his residence as prescribed by Rule 17.[1-a] Where a copy of the summons is *delivered* to the defendant but the latter refuses to sign the acknowledgment of service and the *process*-server *does not affix* the copy as per Rule 17, there is a conflict of opinion as to whether the defendant can be taken to have been validly served. The High Court of Madras,[2] Patna[2-a] and the Judicial Commissioner's Court of Nagpur[3] hold that the service is complete under O. 5, R. 10, when it is tendered to the defendant, and that the omission to obtain the signature is a mere irregularity not affecting the validity of service. The High Court of Bombay,[4] and Chief Court of Punjab[5] have, on the other hand, held that it is not a valid service. The High Court of Patna has also held[6] that where no copy of the summons is retained by the defendant, though tendered to him, and he refuses to sign an acknowledgment, the service is not sufficient unless the affixture is made under Rule 17.

A refusal to receive the summons or sign an acknowledgment of service is not an offence under S. 173 or 180 of the Indian Penal Code.[7]

Order 5, Rule 16—Note 1.

(1) *Abdool Hussain* v. *Esmailji*, (1910) 6 Ind Cas 901 (902): 12 Bom L R 457 Bom.

Note 2.

(1) *Dwarka Prosad* v. *Brij Mohan*, (1911) 11 Ind Cas 39 (40): 33 All 649: 8 All L J 715.

(1-a) *Diwan Chand* v. *Parbati*, (1918) 48 Ind Cas 28 (30): 99 Pun Re 1918: 184 Pun W R 1918.

(2) In re, *S Kuppusamy Iyer*, (1915) 29 Ind Cas 109 (111): 39 Mad 561: 29 Mad L Jour 505: 2 Mad L W 463: 17 Mad L Tim 398: 1915 Mad W N 365.

(2-a) *Nageshwar Buz* v. *Biseshwar Dayal*, (1924) Pat 446 (448): 3 Pat 236: 78 Ind Cas 889 [The defendant took the copy of the summons tendered to him but refused to sign acknowledgment—Hence there was no copy to be affixed].

(3) *Gopaldas Girdhari Lal* v. *Istu*, (1918) 46 Ind Cas 277 (278) Nag .

(4) *Maruti* v. *Vithu*, (1892) 16 Bom 117 (119); *Malji Kashi* v. *Ambi China*, (1906) 8 Bom L R 584 (587); *Gangadhar* v. *Ramachandra*, (1905) 7 Bom L R 159 (160).

(5) *Diwan Chand* v. *Parbati*, (1918) 48 Ind Cas 28 (30): 99 Pun Re 1918.

(6) *Mahadeo Singh* v. *Basgit Singh*, (1925) Pat 441 (442): 4 Pat 135: 91 Ind Cas 184; *Sudhansur* v. *Patna Municipality*, 1932 Pat 150 (151, 152): 12 Pat L Tim 911: 135 Ind Cas 110.

Note.—In the undermentioned case the summons to railway servant was refused on the ground of its not being served through his superior by Rule 28 of Allahabad High Court Rules of Practice. The summons was not affixed and was held that the service was not sufficient. The question whether if it had been affixed it would be sufficient was not decided:—*Wazir Khan* v. *Nagui*, (1909) 1 Ind Cas 163 (163).

(7) *Queen* v. *Punamalai*, (1882) 5 Mad 199 (200): 1 Weir 80: 6 Ind Jur 410 [Refusal to receive summons]; *Queen* v. *Krishna*, (1893) 20 Cal 358 (359) [Refusal to sign]; *Bhoobuneshwar*, In re, (1878) 3 Cal 621 (621): 2 Cal L Rep 80, (Do.); *Reg* v. *Kalya Fakir*, (1867) 5 Bom H C (C C) 34, (Do.).

O. 5, R. 17, Note 1.

R. 17. [S. 80.] *Where* the defendant or *his agent or such* other person *as aforesaid* refuses to sign the acknowledgment, [3] or *where* the serving officer, *after using all due and reasonable diligence*,[5] cannot find the defendant, [4] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix [7] a copy of the summons on the outer door *or some other conspicuous part* of the house in which the defendant ordinarily resides *or carries on business or personally works for gain*, [9] and *shall* then return [11] the original to the Court from which it *was* issued, with a *report* endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, *and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.*

Procedure when defendant refuses to accept service, or cannot be found.

[1877—S. 80; 1859—S. 55.]

Local Amendment.

BENGAL.—

Cancel Rule 17 and *substitute* therefor the following:—

"17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

Synopsis.

1. Legislative changes.
2. Scope of the section.
3. Refusal to sign acknowledgment.
4. "Where defendant cannot be found."
5. After using all due and reasonable diligence.
6. Proof of service. See O. 5, R. 19.
7. Affixture.
8. Service on minor. See O. 5, R. 12.
9. "Resides or carries on business or personally works for gain."
10. Temporary residence of defendant. See Notes 4 and 5 above.
11. Return of service.

1. Legislative changes.—

1. The words "after using all due and reasonable diligence" are new. *See* Note 5 below.
2. The words "or on some other conspicuous part" have been added to provide for the contingency of the house having no outer door.

3. The words "or carries on business or personally works for gain" have been added to remove a doubt as to whether an affixture of the summons to the outer door of the defendant's place of business was a valid service.[1] O. 5, R. 17, Notes 1—4.

4. The words "and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed" have been newly added. *See* Note 11.

2. Scope of the rule.—This rule enacts the second of the three modes of service referred to in Note 1 to O. 5, R. 10, and provides that it should be resorted to when the first of the said modes of service, namely, that prescribed in Rr. 10, 12 and 16, is not possible. The rule is of a highly penal nature and must be strictly complied with in order to give validity to the service purporting to be effected thereunder.[1]

This rule applies also to notices served under S. 49 of the Bengal Tenancy Act[2] and to notices under the Oudh Rent Act.[3]

3. Refusal to sign acknowledgment.—When a summons was offered to the defendant with an intimation of its purport, but the defendant without accepting it, went into his house and shut himself up, and the process-server affixed the summons on the outer door of the defendant's house, it was held, that it was due service.[1] Where the defendant or his agent or other persons referred to in Rr. 13 to 16, *supra* refuse to sign the acknowledgment and the service is effected by affixture to the outer door of the defendant's dwelling, the Court is perfectly justified in treating the service as good.[2]

Where the summons is tendered or delivered to the defendant but he refuses to sign the acknwledgment there is a conflict of opinion on the question whether it is a valid service irrespective of the fact that the *affixture* has or has not been made under this rule. *See* Note 2 to R. 16 of O. 5.

4. "Where the defendant cannot be found".—The affixture of summons will be a valid service under this rule only where, either

1. the defendant or his agent or such other person as is mentioned in Rr. 13 to 15 *refuses* to sign the acknowledgment, or
2. The serving officer, after using all due and reasonable diligence, *cannot find the defendant* and there is no agent or other person on whom the service can be made.

Order 5, Rule 17—Note 1.

(1) *Ananda* v. *Jogendra*, (1908) 8 Cal L Jour 294 (295, 297).

Note 2.

(1) *Kali Narain* v. *Shaikh Bajoo*, (1899) 3 Cal W N 307 (309). See *Gopal Das* v. *Syed Islu*, (1918) 46 Ind Cas 277 (278) Nag.

(2) *Mahadeo Singh* v. *Basgit Singh*, 1925 Pat 441 (441): 4 Pat 135: 91 Ind Cas 184. See also *Rakhal Chandra* v. *Secretary of State*, (1886) 12 Cal 603 (604) [Bengal Act VII of 1880, Public Demands Recovery Act].

(3) *Pir Bakhsh Khan* v. *Deputy Commissioner*, (1910) 5 Ind Cas 804 (804): 13 Oudh Cas 54 [S 132 of the Oudh Rent Act corresponds to O 5, R 17].

Note 3.

(1) *Imam Hussain* v. *Pareshawar*, (1917) 38 Ind Cas 545 (547): 13 Nag L R 46.

(2) *Radha Kishen* v. *Thirtha Ram*, (1918) 43 Ind Cas 718 (720): 31 Pun W R 1918 [Defendant refusing service]; *Mt Bashiran* v. *Bishambar Nath*, 1922 Oudh 268 (269): 69 Ind Cas 667 [Adult male member of family refusing summons]; *Madan Singh* v. *Kesho Prasad*, 1922 Nag 105 (108): 65 Ind Cas 44 [Defendant absent—Undivided father refusing summons]; *Sarat Chander* v. *Joy Sankar*, 1931 Cal 546 (549): 35 Cal W N 332: 134 Ind Cas 80 [Notice under O 21, R 22—Defendant absent—Undivided brother in joint family house refusing to accept notice]; *Balkisandas* v. *Jainarain*, 1928 Nag 80 (81): 23 Nag L R 166: 107 Ind Cas 666 [Agent refusing summons].

O. 5, R. 17, Notes 4—5.

A person cannot be said to be "not found" within the meaning of this rule merely by reason of his being *temporarily absent* at another place.[1] The serving officer, before he can take advantage of the provisions of this rule must use all due and reasonable diligence to find the defendant.[2] He must attend the right place and at a time when he may reasonably expect the defendant to be present; if he fails to find the defendant then, he must take reasonable steps to discover where the defendant is likely to be.[3]

But where, either by reason of the custom of the country or for some other reason *it is impossible for the serving officer to obtain access* to the person to be served, the case will be covered by the description "where the defendant cannot be found by the serving officer."[4] Thus a service by affixture will be good if the defendant is keeping out of the way to avoid service[5] or if he shuts himself up in his house and does not come out for a reasonable time[6] or where the defendant is a *purdanashin* lady who is not able to accept service personally and has no agent or other person to accept service on her behalf[7] or where the defendant is lying sick and the serving officer cannot get access to him.[8]

The words "where the defendant cannot be found by the serving officer" will also cover a case where the absence of the defendant is for an *indefinite period*. The serving officer is not bound to wait indefinitely for the defendant in such a case and will be justified in making the affixture under this rule.[9]

5. **"After using all due and reasonable diligence".**—The words are new and have been added to give effect to the decisions under the old Code

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Note 4.

(1) *Mathura* v. *Sheo Mohan*, 1924 Oudh 237 (238): 74 Ind Cas 792; *Subramaniya Pillai* v. *Subramaniya Iyer*, (1898) 21 Mad 419 (421); *Kunji Behari* v. *Sarju Prosad*, (1916) 32 Ind Cas 826 (827); *Vellayappa* v. *Veerappa*, (1914) 22 Ind Cas 498 (499); *Ram Harakh* v. *Sarju Prosad*, (1912) 16 Ind Cas 600 (601); *Nathu* v. *Sarup Singh*, (1917) 39 Ind Cas 544 (544); *Chintaman* v. *Panna Lal*, 1931 Nag 119 (119, 120): 27 Nag L R 53: 134 Ind Cas 279: *Nihala* v. *Khazan Singh*, 1924 Lah 233 (233): 72 Ind Cas 381; *Goormookh Singh* v. *Koora*, 1868 Pun Re No 79; *Lekh Raj* v. *Davee Chand*, 1868 Pun Re No 35. See also *Kattamudi Subbiah Chetty* v. *Walji Lalji Sait*, (1915) 29 Ind Cas 26 (27) [Facts are however not full—Return was simply that defendant had gone to Gudur].

(2) *Subramaniya Pillai* v. *Subramaniya Iyer*, (1898) 21 Mad 419 (421); *Kunj Behari Lal* v. *Sarju Prosad*, (1916) 32 Ind Cas 826 (827) All; *Chintaman* v. *Panna Lal*, 1931 Nag 119 (120): 27 Nag L R 53: 134 Ind Cas 279 [The defendant being temporarily absent, and there being time to serve him personally, mere affixture held not sufficient]; *Doolee* v. *Nirban*, (1873) 20 Suth W R 62 (62, 63) [Process server told where defendant is—Affixture is bad]; *Chowdhury Dina Nath* v. *Chowdhury Upendra Nandan*, 1924 Cal 1004 (1005): 82 Ind Cas 703, (Do.); *Champat Singh* v. *Mahabir Prosad*, (1918) 43 Ind Cas 632 (634) [Process server knowing where defendant was and still affixing]; *Abbas Hussain* v. *Ashfaq Ahmad*, (1910) 6 Ind Cas 282 (283) [Process server attempting on three different occasions to serve the summons personally on the defendants and having failed is right in effecting substituted service]; *Harba* v. *Chandrabhaga*, 1931 Nag 122 (123): 27 Nag L R 50: 134 Ind Cas 268 (Process server visited the village five times to serve defendant and failed. Presumption is that defendant was evading service and substituted service was held proper].

(3) *Baldeodas* v. *Subkaran Das*, 1925 Cal 627 (630): 52 Cal 179: 88 Ind Cas 508; *Oohen* v. *Nursing Das*, (1892) 19 Cal 201 (202); *Rajendro* v. *Jan Meah*, (1899) 26 Cal 101 (102): 2 Cal W N 574.

(4) *Khiroda Sundari Dasi* v. *Nabin Chandra*, (1915) 30 Ind Cas 64 (66): 21 Cal L Jour 653: 19 Cal W N 1231.

(5) *Nuser Mahomed* v. *Kazbai*, (1886) 10 Bom 202 (204); *Bissonath Sirkar* v. *Tara Prosunno Mozoomdar*, (1874) 22 Suth W R 482 (483).

(6) *Imdad Husain* v. *Par Ashwar*, (1917) 38 Ind Cas 545 (547): 13 Nag L R 46.

(7) *Khiroda Sundari* v. *Nabin Chandra*, (1915) 30 Ind Cas 64 (66): 21 Cal L Jour 653: 19 Cal W N 1231; *Najmunissa* v. *Jagmohan*, 1923 Pat 433 (433): 72 Ind Cas 910.

(8) *Carter* v. *Young*, 42 Abb Pr 169.

(9) *Sankaralinga* v. *Rathnasabapathy*, (1897) 21 Mad 324 (326): 8 Mad L Jour 58; *Madurathachi* v. *Chokalinga*, (1914) 23 Ind Cas 824 (824) [Defendant going about from place to place]; *Basavayya* v. *Kistna*, (1914) 23 Ind Cas 219 (220); *Gontla Venkata Pichayya* v. *Md Abdul Kareem Beg*, (1914) 23 Ind Cas 14 (15); *Kasiviswanathan* v. *Arunachalam*, (1911) 12 Ind Cas 420 (421); *Syed Muhammad* v. *Alagappa Chetty*, 1926 Mad 31 (32): 90 Ind Cas 1042.

O. 5, R.17, Note 5.

which insisted on the necessity of a *bona fide* attempt at personal service.[1] The serving officer will not be deemed to have exercised due and reasonable diligence unless he has made a *real and substantial effort* after proper inquiries, to find the defendant.[1-a] He must attend at the right place and time at which he may expect to find the defendant, and, if he is absent, must make reasonable inquiries and take steps to discover where he is.[2] *In Cohen* v. *Nursing Dass*, I. L. R. (1892) 19 Cal. 201. Sir Comer Petheram, C. J., observed as follows:—

"It is true you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make inquiries and, if necessary, follow him. You should make inquiries to find out when he is likely to be at home and go to the house at a time when he can be found. Before service like this can be effected, it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found—not, as seems to be done in this country, to go to his house in a perfunctory way, and, because he has not been found there, to affix a copy of the summons to the outer door of his house."

If the defendant has two residences, inquiries must be made at *both* the places.[2-a] As has already been seen in Note 4, a mere temporary absence will not justify affixture[3] even though the defendant had previously refused to accept service.[4] Where the process-server, not finding the defendant at his residence tendered the summons to his adult son who refused it and, without making any further inquiry of the son as to where the defendant was affixed the summons to the outer door of the residence it was held that the service was not proper.[5]

It has been held in the undermentioned cases[6] that the applicability of the words "after using all due and reasonable diligence" is specially restricted to the case where there is no agent empowered to accept service nor any other person on whom the service can be made, and that, where there is such a person, a *diligent effort* need not be made to effect personal service. It has also been held therein even if the agent or other person *refuses* the summons, it is still necessary to show that the defendant "cannot be found." It is submitted that this latter view is not correct in as much as the section states "where the defendant *or his agent or such other person aforesaid refuses* to sign the

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Note 5.

(1) *Khudeerun* v. *Chutterdharee*, (1874) 21 Suth W R 242 (243); *Buroda Kant* v. *Raj Churn*, (1875) 24 Suth W R 381 (381); *Doolechand* v. *Nirban Singh*, (1873) 20 Suth W R 62 (62-63); *Sankaralinga* v. *Rathnasabapathy*, (1898) 21 Mad 324 (326): 8 Mad L Jour 58; *Rajendro* v. *Jan Meah*, (1899) 26 Cal 101 (102): 2 Cal W N 574; *Cohen* v. *Narsing Das Addy*, (1892) 19 Cal 201 (203); *Rakhal Chandra* v. *Secretary of State*, (1886) 12 Cal 603 (604); *Sakharam* v. *Padmakar*, (1906) 30 Bom 623 (624): 8 Bom L R 757; *Bhomsetti* v. *Umabai*, (1897) 21 Bom 223 (226); *Sakina* v. *Gouri Sahai*, (1902) 24 All 302 (303): 1902 All W N 68.

(1-a) *Kasim Ibrahim* v. *Johurmal*, (1916) 34 Ind Cas 799 (801, 802): 43 Cal 447; *Patiruddin* v. *Kali Prosonna*, (1907) 5 Cal L Jour 12 (N); *Maung Maung Than* v. *Somasundaram*, (1919) 50 Ind Cas 566 (567): 3 U B R 123; *Anand Ram* v. *Nityananda*, (1916) 32 Ind Cas 744 (747); *Shiboo Roy* v. *Kashee Roy*, (1876) 25 Suth W R 394 (395); *Lonhar Tiwari* v. *Jagloo Tiwari*, (1915) 29 Ind Cas 564 (565) (Board of Revenue, United Provinces); *Sakharam* v. *Padmakar*, (1906) 30 Bom 623 (624): 8 Bom L R 757 [No effort to find him—Affixture not proper].

(2) *Baldeodas* v. *Subkarundas*, 1925 Cal 627 (630): 52 Cal 179: 88 Ind Cas 508; *Baldeodas* v. *Subchurndas*, 1926 Cal 327 (332): 91 Ind Cas 965; *Rash Bihari* v. *Khettro Nath*, (1878) 1 Cal L Rep 418 (420) [Process server seeing the defendant and yet merely affixing—No due service]. See also cases in foot-note 3 to Note 4.

(2-a) *Bhowani Das* v. *Pannachand*, 1925 Cal 801 (802): 52 Cal 453: 88 Ind Cas 929.

(3) See Note 4 to foot-note 1.

(4) *Tota* v. *Badri Prosad*, 1930 Lah 192 (192): 124 Ind Cas 673.

(5) *Sakharam* v. *Padmakar*, (1906) 30 Bom 623 (624): 8 Bom L R 757.

(6) *Madan Singh* v. *Kesho Prosad*, 1922 Nag 105 (108): 65 Ind Cas 44.

O. 5, R. 17, Notes 5—11.

acknowledgment.....the serving officer shall affix a copy" etc.

6. Proof of service.—*See* Order 5, Rule 19.

7. Affixture.—As to the conditions under which alone an affixture could be made under this rule *see* Notes 4 and 5 above. The affixture should be made on the outer door or other conspicuous part *of the house in which the defendant ordinarily resides or carries on business or personally works for gain.*[1] Where the serving officer finds that the defendant *never resided* in the village, he must return the summons *unserved.* Affixture in such a case is absolutely useless.[1-a] Similarly an affixture to the outer door of a house in which the defendant was actually found but which was not his *ordinary place of residence is not sufficient.*[2] Again the rule requires that there should be actual *affixture* of the summons. Merely leaving a copy of the summons on the teapoy of the defendant's house is insufficient.[3]

8. Service on Minor.—*See* Order 5, Rule 12.

9. "Resides or carries on business or permanently works for gain."—*See* S. 20.

10. Temporary residence of defendant.—*See* Notes 4 and 5 above.

11. Return of service.—The law requires that the action of the person charged with the service of summons should be set out in full and must be supported by an affidavit.[1] The return must show that the defendant could not be found, that there was no other person on whom service could be made, that the summons was affixed on the outer door or some other conspicuous part of the house and that the house was one in which the defendant ordinarily resided or carried on business or personally worked for gain.[2] A return that the defendant was not in the village[3] or that the summons was served on the defendant's paternal uncle who was a member of a joint family[4] was held to be defective in the absence of an endorsement that the defendant could not be found So also a report that "respondent was not found" was held to be not good as it did not state that any effort or inquiry was made to find him.[5] The report must say that it was affixed to the *dwelling* house.[6] It must also

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Note 7.

(1) *Baimab Charan Shaha* v. *Bank of Bengal,* (1915) 26 Ind Cas 866 (869, 870) [Affixture on door of place of business sufficient].

(1-a) *Gopaul* v. *Greedharee,* (1866) 6 Suth W R 13 (14); *Barkat Ullah* v. *Fazal Mauda,* (1920) 55 Ind Cas 824 (825); *Akhoy Kumar Saha* v. *Nagendralal Chowdhury,* (1909) 1 Ind Cas 118 (119).

(2) *Bhowanidas* v. *Pannachand,* 1925 Cal 801 (802): 52 Cal 453: 88 Ind Cas 929; *Ananthanarayan* v. *Periyana,* (1869-70) 5 Mad H C R 101 (103) [There may be dwelling sufficient to give jurisdiction and yet not the kind of dwelling necessary to make a good service]; *Sitaram* v. *Kalandi,* (1912) 13 Ind Cas 127 (127) [Temporarily leaving house does not make it any the less a place of ordinary residence]; *Braja Nath* v. *Surendra Krishna,* (1917) 41 Ind Cas 181 (182); *Akhoy Kumar* v. *Nagendra Lal,* (1909) 1 Ind Cas 118 (119); *Ramcoomar Sing* v. *Ram Soonder Singh,* (1872) 17 Suth W R 362 (362); *Gopal Dass* v. *Greedharee Doss,* (1866) 6 Suth W R 13 (14); *Hari Dasi* v. *Fulkumari,* (1905) 9 Cal W N 108 Note; *Kassim Ibrahim Sabji* v. *Johurmull Khemka,* (1916) 34 Ind Cas 799 (801, 802): 43 Cal 447; *Deo Kisan* v. *Bansi,* 1886 All W N 35: 8 All 172 F B [Affixture of a summons upon the house which the defendant had left].

(3) *S N Grama* v. *Bombay Steamships,* 1929 Bom 257 (257): 118 Ind Cas 792.

Note 11.

(1) *Ram Keli* v. *Chajju,* (1913) 20 Ind Cas 318 (319).

(2) *Maung Maung Than* v. *L K S M Somasundaram Chetty,* (1919) 50 Ind Cas 566 (567): 3 U B R 123; *Rajendra Nath* v. *Jan Meah,* (1899) 26 Cal 101 (102): 2 Cal W N 574.

(3) *Vellayappa* v. *Veerappa,* (1914) 22 Ind Cas 498 (499).

(4) *Makhan Das* v. *Mannu Lal,* (1913) 21 Ind Cas 614 (614): 35 All 556.

(5) *Sakharam* v. *Padmakar,* (1906) 30 Bom 623 (624): 8 Bom L R 757; *Abraham* v. *Donald,* (1906) 29 Mad 324 (325); *Cohen* v. *Nursing Das,* (1872-92) L B R 641.

(6) *Buddoo* v. *Ram,* 1 Hyde 132.

refer to the *time* of service[7] to the affixture made[8] and also to the names and addresses of persons, if any, in whose presence, the copy of the summons was affixed.[9] Failure to add, in the return that the defendant's time of return was indefinite or was not known is, however, not a serious mistake.[10] O. 5, R.17, Note 11.

The addition of the words "the name and address of the person, if any, ...identified" merely give effect to the existing practice. The words "if any" have been inserted to prevent a service without any identifier (*e.g.*, where the defendant is known to the process server in person) being deemed illegal.

R. 18. [S. 81.] The serving officer, shall, in all cases in which the summons has been served under *Rule* 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, *and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.* O. 5, R.18, Note 1.

Endorsement of time and manner of service.

[1877—S. 81; 1859—S. 56.]

Local Amendment.

MADRAS.—

Insert the following as Rule 18-A:—

18-A. A District Judge, within the meaning of the Madras Civil Courts Act, 1873, may delegate to the Chief Ministerial Officer of the District Court the power to order the issue of fresh summons to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on the notice board."

Chief Ministerial Officer, District Courts, may be empowered to order issue of fresh summons.

Synopsis.

1. **Form of return.**
2. **Person identifying defendant.**
3. **Presumption as to service.**
4. **Revision.**

1. Form of Return.—*See* Appendix B to Sch. I, Form 11.

The service of a summons or of a notice upon a person is a very important step and the law very properly requires that the action of the person charged with the service of such notice or summons should be set out in full and be supported by his affidavit. Until this has been done the summons cannot be considered to have been duly served.[1]

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(7) *Ranjiban Serowgy* v. *Oghur Nath Chatterjee*, (1898) 25 Cal 401: 2 Cal W N 188 cl. xxxviii.

(8) *Farangu* v. *Hari Kishan*, 1929 Lah 334 (334): 119 Ind Cas 321; *Maruti* v. *Vithu*, (1892) 16 Bom 117 (119).

(9) *Balkisandas* v. *Jainarain*, 1928 Nag 80 (80): 23 Nag L R 166: 107 Ind Cas 666.

(10) *Gontla Venkata Pitchayya* v. *Soudagar Muhammad Abdul Kareem*, (1914) 23 Ind Cas 14 (15).

Order 5, Rule 18—Note 1.

(1) *Ram Keli* v. *Chajju*, (1913) 20 Ind Cas 318 (319) All.

O. 5, R. 18, Notes 2—4.

2. Person identifying defendant.—It is not incumbent on a party to provide an identifier for the purpose of identifying the person served. The identifier can be a person in the village knowing the defendant.[1]

3. Presumption as to service.—There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect.[1] Similarly when there is any entry in the order sheet of the Court, that summons has been served, there is no presumption that such entry is false and the party questioning it, has to show that it is not correct.[2]

It has been held by the Calcutta High Court that the report of the serving officer that a summons was served on a person is not evidence as to service unless the person is examined and the service is proved.[3] But where summons is sent under Rules 24, 26, 27 and 28, the return is evidence. *See* Rules 26 and 30, *infra*.

4. Revision.—The mere fact that lower Courts are wrong on the question of law relating to service of summons is not enough for the High Court to interfere in revision under S. 115. But in cases of patent and extreme hardship S. 15 of the Charter Act, 1861 (now) Government of India Act, 1915, S. 107) can be invoked.

O. 5, R. 19.

R. 19. [S. 82.] *Where* a summons is returned under *Rule* 17, the Court shall, if the return under that *Rule* has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Examination of serving officer.

[1877—S. 82; 1859—S. 57.]

Local Amendment.

BENGAL.—

Cancel Rule 19 and *substitute* therefor the following:—

"19. Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and

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Note 2.

(1) *Nagendranath* v. *Sambu Nath*, 1923 Pat 114 (114): 65 Ind Cas 49.

Note 3.

(1) *Damodhar Prasad* v. *Ram Sarup*, 1928 Pat 327 (329): 71 Ind Cas 843.

(2) *Bindu Bashini* v. *Keshab Lal*, (1917) 37 Ind Cas 66 (68) Cal.

(3) *Sarada Prasad* v. *Krishna Dome*, 1926 Cal 539 (540): 91 Ind Cas 711. See also *Meah Kahn* v. *Narayana Chunder*, (1867) 18 Suth W R 197 (197); In the matter of the petition of *Nilkant*, 1864 Suth W R Mis 9 (9); *Shah Koondan* v. *Noor Ali*, (1868) 10 Suth W R 3 (4); *Ram Soondar* v. *Kalee Komul*, (1866) 6 Suth W R Act X, 92 (93); *Raj Kishore Dutt* v. *Bydynath Shaha*, (1869) 12 Suth W R 365 (366); *Okhoy Chundra* v. *Erskine & Co*, (1865) 3 Suth W R 11 Mis (14); *Mohunt Megh* v. *Shib Pershad Madi*, (1881) 7 Cal 34 (41): 8 Cal L Rep 369: 5 Ind Jur 476: 4 Shome L R 169; *Moinoollah* v. *Goluck Monee*, (1871) 15 Suth W R 270 (270); *Sreenath* v. *Watson & Co*, (1865) 4 Suth W R Mis 4 (5). See however *Mokondonath* v. *Shib Chunder*, (1873) 19 Suth W R 102 (103) [It may be evidence if not objected to].

Note 4.

(1) *Gontla Venkata Pichayya* v. *Mahomed Abdul Kareem Beg*, (1914) 23 Ind Cas 14 (16) Mad.

may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.''

O. 5, R. 19, Notes 1—2.

Insert the following *after* Rule 19:—

''19-A. A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons.''

Synopsis.

1. **"Examine on oath."**
2. **"Shall declare that the summons has been duly served."**
3. **"Or order such service as it thinks fit."**
4. **Proof of service.**

1. ''Examine on oath''.—If the return is not verified by the affidavit of the serving officer, the Court is bound to examine him before deciding as to the sufficiency of service; and the omission to do so is a material irregularity.[1] It cannot be said that there is due service in such a case.[2]

2. ''Shall declare that the summons has been duly served''.—The words ''duly served'' in this Rule mean served in such a manner as to give the defendant information of the proceedings against him.[1] Where therefore it appears from the return of the serving officer that there is no likelihood that the summons will come to the defendant's knowledge in due time or a probability that it will not so come to his knowledge, the Court should not declare the summons as duly served.[2] It has been held by the High Court of Bombay and by the Chief Court of Oudh that the Code in the matter of service of summons does not take into account the female members of the defendant's family and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence.[3] The High Court of Madras and Calcutta have, on the other hand held, that an affixture of notice to the knowledge of the *wife* of the defendant is sufficient service under the law.[4]

Before the Court decides that there has been due service it must be satisfied that the provisions of R. 17 were really complied with, namely that the serving officer had used all due and reasonable diligence to find the defendant before affixing the summons[5] or that the defendant was keeping out of the way for purposes of avoiding service[6] or that he refused service.

Order 5, Rule 19—Note 1.

(1) *Kanhiah* v. *Durga Prosad*, (1915) 31 Ind Cas 479 (479) (Board of Rev, United Provinces); *Karuthan Ambalam* v. *Duraisamy*, 1923 Mad 27 (28): 16 Mad L W 444.

(2) *Ramachandra Rao* v. *Nathoram*, (1890) 3 C P L R 141 (142).

Note 2.

(1) *Kesar Chand* v. *Lakshmanji*, (1917) 42 Ind Cas 611 (612): 11 Sind L R 71.

(2) *Bhomshetti* v. *Umabai*, (1897) 21 Bom 223 (225). See also *Mathura Singh* v. *Sheo Mohan*, 1924 Oudh 237 (238): 74 Ind Cas 792 [First time affixed—No presumption that defendant had notice of the suit]; *Vellayappa Chetty* v. *Veerappa Chetty*, (1914) 22 Ind Cas 498 (498) [Return "Defendant not in village"—Affixture not due service]; *Kattambudi Subbiah* v. *Walji Lalji*, (1915) 29 Ind Cas 26 (27) [Return "Defendant gone to Gudur"—Affixture not sufficient]; *Gomatla Venkata* v. *Abdul Karim*, (1914) 23 Ind Cas 14 (15, 16) [Court should decide it upon circumstances of the case]; *Ganga Ram* v. *Official Receiver, Delhi*, 1932 Lah 248 (249): 33 Pun L R 5: 136 Ind Cas 258 [Service under O 5, R 17 only on the day previous to date of hearing held insufficient]; *Abbas Hussain* v. *Ashafaq Ahmed*, (1910) 6 Ind Cas 282 (283) [Three attempts at personal service made—Service sufficient].

(3) *Bhomshetti* v. *Umabai*, (1897) 21 Bom 223 (226); *Ram Harakh* v. *Sarju Prasad*, (1912) 16 Ind Cas 600 (601): 16 Oudh Cas 83.

(4) *Kasiviswanathan* v. *Somasundaram*, 1922 Mad 93 (94): 70 Ind Cas 611: 45 Mad 875; *Sitaram* v. *Kalandi*, (1912) 13 Ind Cas 127 (128).

(5) *Baldeo Das* v. *Shibchurn*, 1926 Cal 327 (330): 91 Ind Cas 965.

(6) *Lekhu Mal* v. *Chela Mal*, 1888 Pun Re No 104. See also *Emperor* v. *Narbadeshwar*, (1905) 27 All 491 (494): 1905 All W N 66 [Procedure of this rule should be complied with before issuing a warrant under O 16, R 10]; *Nusur Md* v. *Kazbai*, (1886) 10 Bom 202 (205).

O. 5, R. 19, Notes 2—4.

There is a difference of opinion as to whether the declaration of due service under this rule should be *express*. In the undermentioned cases[7] the High Court of Madras has held that an express order is necessary. The High Court of Allahabad also seems to take the same view.[8] In two other cases, however, the High Court of Madras held that the declaration may be an *implied one, e.g.*, where the Court orders attachment on receipt of the return by the process server of the notice.[9] It is submitted that the latter view is not correct. The provision for examination of the serving officer and for further inquiry in the absence of an affidavit by the serving officer, show clearly that the spirit of the section demands an *express* order.

The order should be made as early as possible after the summons is returned, and failure to pass such an order is not a mere irregularity.[10] An *ex parte* decree passed without a declaration of due service is liable to be set aside.[11] Where the summons is returned unserved, the Court should pass subsequent orders, not vaguely but very clearly, stating the reason for non-service.[12]

Where summons is sent by one Court to another Court for service, the serving Court is the proper one to declare as to the propriety of the service.[13] *See also* Notes to R. 23, *infra*.

3. **"Or order such service as it thinks fit."**—Even where the provisions of Rule 17 have been technically complied with, the Court may order fresh summons to another address or order service in another mode where it considers that the defendant could not get knowledge of the suit, by the service effected. In *Khiroda Sundari Dasi* v. *Nabin Chandra Saha*.[1] The High Court of Calcutta observed as follows:—

"It is open to the Court even where there has been a technical compliance with the provisions of Rule 17 to order service in another mode if the Court thinks fit to do so in the interests of justice. The Court may in a case of this description, direct the issue of summons to *purdanashin* ladies by means of notice sent by registered post, so that the cover may, in due course, reach the lady herself."

4. **Proof of service.**—The best proof of service is the return which the serving officer is bound to send to the Court and which must contain all that he has done in the matter of effecting service.[1] Where the fact of service is denied it is for the party alleging service to prove it.[2] As to the admissi-

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(7) *Sundararajalu* v. *Narayanaswamy*, 1927 Mad 813 (813): 103 Ind Cas 825; *Venkobachari* v. *Raghavendrachari*, (1907) 18 Mad L Jour 96 (97).

(8) *Champat Singh* v. *Mahabir*, (1918) 43 Ind Cas 632 (634).

(9) *Sree Krishna Dass*, In re, (1909) 3 Ind Cas 474 (474); *Md Meera* v. *Kadir Meera*, (1914) 22 Ind Cas 302 (303).

(10) *Champat Singh* v. *Mahabir*, (1918) 43 Ind Cas 632 (634).

(11) *Chirakkal Puthiamadathummal* v. *Mulla Mittath*, 1922 Mad 417 (417); *Champat Singh* v. *Mahabir*, (1918) 43 Ind Cas 632 (634).

(12) *Ponna Krishna* v. *Kovvuri Basuri Reddi*, (1912) 15 Ind Cas 188 (188).

(13) *Dwaraka Prosad* v. *Brij Mohan*, (1911) 11 Ind Cas 39 (40, 41): 33 All 649; *Rama Nath* v. *Guggoo Donandan*, (1895) 22 Cal 889 (891).

Note 3.

(1) (1915) 30 Ind Cas 64 (67).

Note 4.

(1) *Ram Coomar* v. *Ram Soonder*, (1872) 17 Suth W R 362 (363).

(2) *Rakhal Chandra* v. *Secretary of State*, (1886) 12 Cal 603 (605).

bility of the report in evidence without the serving officer being examined as a witness *see* Note 3 to Rule 18 *ante*. O. 5, R. 19, Note 4.

R. 20. [Ss. 82, Part 2; 83, 84.] (1) *Where* the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided *or carried on business or personally worked for gain*, or in such other manner as the Court thinks fit. O. 5, R. 20.

Substituted service.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Effect of substituted service.

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Where service substituted, time for appearance to be fixed.

[1877—Ss. 82, 83, 84; 1859—Ss. 57, 58, 85.]

Local Amendments.

OUDH.—

Between Rules 20 and 21, *insert* the following:—

"20-A. (1) Where the defendant resides in British India outside the province of Oudh or within the limits of headquarters town of a district in the province, a summons may be served on him by registered post, and in this case, where an acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service has been received, the process shall, unless the contrary is proved, be deemed to have been served,

(2) Where the registered address of the defendant or opposite party, as defined in Order 8, Rule 11, is within the limits of a headquarters, town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served."

RANGOON.—

After Rule 20, the following shall be *inserted* as Rule 20-A, namely:—

"20-A. (1) Every plaintiff, appellant or applicant on presenting or on entering an appearance to prosecute a plaint, memorandum of appeal, or originating petition or application, shall at the same time file in Court a proceeding stating his address for service.

O. 5, R. 20, Note 1.

(2) Every defendant or respondent who intends to appear and defend any suit, appeal, or originating petition or application shall on or before the date fixed for his appearance in the summons or notice served on him file in Court a proceeding stating his address for service.

(3) Such address for service shall be within the local limits of the jurisdiction of the Court in which the suit, appeal, or petition or application is filed, or of the District Court within whose jurisdiction the party ordinarily resides.

(4) Where any party fails to file an address for service, as required by sub-Rule (1) or sub-Rule (2), he shall, if a plaintiff, appellant or applicant, be liable to have his suit, appeal, petition or application, dismissed for want of prosecution, and, if a defendant or respondent, be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. Any party may apply for such an order against an opposite party, and the Court may on such application make such order as it thinks just.

(5) Where a party is not found at the address given by him for service, and no agent or adult member of his family on whom a notice or process can be served is found at the address, a copy of the notice or process shall be affixed on the outer door or some other conspicuous part of the house or place which has been given as the address for service; and such service shall be deemed to be as effectual as if the notice or process had been personally served on the party.

(6) Where a party is represented by an advocate or pleader, notices or processes for service on him shall be served in the manner prescribed by Order 3, Rule 5, unless the Court directs service at the address for service given by such party.

(7) A party who desires to change the address for service given by him under sub-Rule (1) or sub-Rule (2) shall present a verified petition to that effect, and the Court may direct the amendment of the record accordingly. Notice of every such petition shall be given to all other parties to the proceedings.

(8) Nothing in this rule shall prevent the Court from directing the service of a notice or process in any other manner if it thinks fit to do so."

Synopsis.

1. Scope of the rule.
2. "Where the Court is satisfied."
3. Evasion of service by the defendant.
4. Non-possibility of service for other reasons.
5. Mode of effecting substituted service.
6. "Shall fix such time."
7. Return of substituted service.
8. Substituted service is as effective as personal service.
9. Revision.

Appellate Court's jurisdiction to question propriety of ordering substituted service. See Note 2, Pt. (8).

Service of process on unknown person. See Note 4, Pt. (3).

1. Scope of the Rule.—This rule enacts the third of three modes of service prescribed by the Code and referred to in Note 1 to O. 5, R. 10, and is called *substituted service*. It is to be adopted where there is reason to believe that the defendant is *keeping out of the way* for the purpose of evading service or that for some other reason the *summons cannot be served in the ordinary way*. But it should not be used in a way which is unbusinesslike or ridiculous, *e.g.*, where substituted service is made by affixture to the door of the Court-house by way of serving the defendant admitted on all hands to be in Natal, South Africa.[1]

The substituted service under this rule, unlike the two other modes of service, can only be taken *by order of the Court* to that effect.[2] And it could be

Order 5, Rule 20—Note 1.

(1) *Solaiman Moosaji* v. *Jatindra Nath*, 1929 Cal 553 (557).

(2) See *Barkat Ullah* v. *Fazali Maula*, (1920) 55 Ind Cas 824 (825) Lah.

ordered only in cases where a personal service could have been effected if there were no difficulties in the way.[2-a] Thus a foreign sovereign over whom the Courts have no jurisdiction cannot be ordered to be served by substitution under this rule.[3]

O. 5, R.20, Notes 1—2.

It has been held by the High Court of Allahabad[4] that a notice to show cause why a person should not be appointed guardian of an infant, cannot be served by substituted service under this rule.

The procedure laid down by this rule will also be applicable to the service of notice in appeals.[5]

2. "Where the Court is satisfied".—Before ordering substituted service the Court should be satisfied that the conditions on which alone it can be ordered exist, namely, that the defendant is keeping out of the way to avoid service[1] or that for any other reason, service cannot be effected in the ordinary way.[2] The mere statement of the plaintiff that he cannot ascertain the address of the defendant without proof of reasonable efforts having been made to find out his whereabouts, is not enough to enable the Court to pass an order for substituted service.[3] Where, however, the plaintiff has done his best to get the defendant served personally and fails[4] and the Court is satisfied from the affidavit of the serving officer that the defendant is purposely evading service[5] an order for substituted service can properly be made.

The non-fulfilment of either condition necessary before an order under this rule can be passed is a material irregularity[6] and an *ex parte* decree passed on such service being accepted as sufficient, will be set aside on an application under O. 9, R. 13.[7]

The advisability of effecting substituted service is a matter primarily for the trial Court and the appellate Court has no jurisdiction to consider whether the order of the trial Court is based on sufficient grounds. It has only to see whether the order issued is according to Law and whether the trial Court was satisfied that the conditions of this rule were fulfilled.[8]

(2-a) *Sloman* v. *New Zealand*, (1876) 1 C P D 563 C A; *Field* v. *Bennett*, (1886) 56 L J Q B 89; *Fry* v. *Moore*, (1889) 23 Q B D 395 C A; *Kemp* v. *Nechi*, 1913 W N 62 C A; *Porter* v. *Freudenburg*, (1915) 1 K B at p 887 [Case of Colonial Government].

(3) *Mighell* v. *Sultan of Johore*, (1894) 1 Q B 149 C A; *Statham* v. *Statham and the Gaekwar of Baroda*, 1912 P 92.

(4) *Mt Phool Kuer* v. *Revari Singh*, 1930 All 609 (609, 610): 124 Ind Cas 191: 1930 All L J 1020.

(5) *Widhoo* v. *Bonamalee*, (1869) 11 Suth W R 496 (496). See also S 107 *ante*.

Note 2.

(1) *Ram Rai* v. *Sridhur Pershad*, (1879) 4 Cal L Rep 397 (397); *Gangadhur* v. *Ramachandra*, (1905) 7 Bom L R 159 (160); *Ram* v. *Jogesh*, (1873) 19 Suth W R 353 (356): 12 Beng L R 229 P C; *Bissonath* v. *Tara Prosunno*, (1874) 22 Suth W R 482 (483). See *Rajagopalachari* v. *Subramaniam*, 1932 Mad 472 (472, 473): 1932 Mad W N 133: 138 Ind Cas 146.

(2) *Anand* v. *Ramchandra*, 1926 Jour 162 (3): 94 Ind Cas 395.

(3) *Shwe Tha* v. *Ma Saw Hla*, (1910) 4 L B R 195 (196) F B; *Wali Md* v. *Fazl Dad*, (1928) 107 Ind Cas 282 (283, 289) [Plaintiff each time giving different address—Inference is that correct address is not known to plaintiff—Order under this rule not proper].

(4) *Mir Ahmed* v. *Pir Baksh*, 1930 Lah 397 (399): 129 Ind Cas 689.

(5) *Lekh Raj* v. *Daree Chand*, 1868 Pun Re No 35; *Robertest* v. *Robertest*, 1870 Pun Re No 68; *Kesho Prosad* v. *Ram Raj*, 1931 Pat 420 (421): 12 Pat L Tim 644: 135 Ind Cas 99 [In such cases it is the *duty* of the Court to order substituted service].

(6) *Lekhu* v. *Chela Mal*, 1888 Pun Re No 104.

(7) *Panju Ram* v. *Uttam Chand*, 1928 Lah 799 (800).

(8) *Duraisamy* v. *Balasundaram*, 1927 Mad 507 (507): 102 Ind Cas 243; *Hansraj* v. *Narain Singh*, 1931 Lah 118 (118): 31 P L R 1006: 131 Ind Cas 344.

O. 5, R. 20, Notes 3—6.

3. **Evasion of service by the defendant.**—As to when the defendant must be deemed to be keeping out of the way has to be determined according to the circumstances of each case.[1] Mere temporary absence on the part of the defendant does not amount to evasion.[2] Where the plaintiff knew all along that the defendant had left a certain place two or three years before the suit, and he further knew that the defendant had left his brother in that place and was in communication with him, it cannot be said that there has been an evasion of service by the defendant.[3] But where a man gets away from the serving officer and shuts himself up with the obvious intentions of not allowing the process-server to hold any communication with him, it clearly amounts to evasion.[4]

4. **Non-possibility of service for other reasons.**—Even though the defendant is not keeping out of the way, the Court has got power to order substituted service if it is satisfied that for any other reason the summons cannot be served in the ordinary manner.[1] Thus where by the custom in India the respondent a Hindu woman of rank could not be served personally the judicial committee ordered service under this rule on her Dewan.[2] So also in the case of unascertained persons or persons who cannot be traced and it cannot be ascertained whether they are alive or dead substituted service can be ordered. Thus it has been held where one of the co-owners is missing, the only reasonable course is to make him and his heirs parties and take out substituted service.[3]

5. **Mode of effecting substituted service.**—Service under this rule is effected by affixing a copy of the summons in the Notice Board of the Court-house, by affixing another copy to the outer door of the house in which the defendant was known to have last resided and by advertising in such of the newspapers as the Court may direct.[1] It has been held by the High Court of Lahore that the service by affixture will be bad unless a *copy of the plaint* is also affixed along with the summons.[2] The fact that a copy of the summons was affixed to a tree reasonably near the defendant's hut would not invalidate the service.[3]

6. **"Shall fix such time"—Sub-Rule (3).**—Under this rule the Court is bound to fix a time for the appearance of the defendant and it should see that ample and reasonable time is allowed for notice to come to the knowledge of the person concerned.[1] Thus, the publication of a notice in newspaper in

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Note 3.

(1) *Sankaralinga Mudali* v. *Rathnasabapathy Mudaly*, (1898) 21 Mad 324 (326): 8 Mad L Jour 58; *Raj Narain* v. *Tek Lal*, (1897) 1 Cal W N 104 (104) [Father not knowing where the son is—Process server going to defendant's house thrice and not finding him amounts to evasion].

(2) *Subramaniya Pillai* v. *Subramaniya Iyer*, (1898) 21 Mad 419 (420); *Abraham* v. *Donald Smith*, (1906) 29 Mad 324 (325, 326).

(3) *Ram Kishan* v. *Mulla*, 1924 Lah 191 (191): 69 Ind Cas 467.

(4) *Budhua* v. *Emperor*, 1928 All 118 (118): 107 Ind Cas 563.

Note 4.

(1) *Abheraj Umarkhan* v. *Dolatsangji Surajmulji*, 1926 Jour 162 (2): 96 Ind Cas 17: *Rattan Singh* v. *Pohla Singh*, (1902) Pun L Rep 46.

(2) *Clerk* v. *Mullick*, (1837-41) 2 Moo Ind App 263 (268): 3 Moo P C 252: 1 Sar 186.

(3) *Srinath Das* v. *Probhat Chandra*, (1910) 6 Ind Cas 244 (245, 246, 247).

Note 5.

(1) See also *Rajnarain* v. *Tek Lal*, (1897) 1 Cal W N 104 (106).

(2) *Pesu Mal* v. *Bishen Das*, 1927 Lah 376 (377): 101 Ind Cas 615.

(3) *Punjab Rao* v. *Bali Ram*, 1923 Nag 13 (15): 69 Ind Cas 549.

Note 6.

(1) *Mirza Ali* v. *Syed Hyder*, (1877-78) 2 Bom

Lahore requiring a party at Hardoi to appear in Gurdaspur Court on the next day of the issue of paper is not a valid substituted service.[2] O. 5, R. 20, Notes 6—8.

7. **Return of substituted service.**—There is no provision in the Code for the return of such service showing how and when it was effected. But the Courts generally satisfy themselves by the affidavit or examination of the affixing officer and the production of the newspaper in which the notice was published.

8. **Substituted service is as effective as personal service.**—Sub-Rule (2) of this rule provides that service substituted by order of the Court shall be as effectual as personal service.[1] The words "as effectual" mean "as effectual for the purpose of enabling the Court to proceed with the suit".[2]

Where service has been effected under this rule and an *ex parte* decree is passed the defendant is entitled to show that the circumstances justifying the order for such service did not exist, *e.g.*, he can show that he was not keeping out of the way for the purpose of avoiding service.[3] The fact that the return of the summons was destroyed will be no ground for refusing to set aside an *ex parte* decree.[4]

There is a conflict of opinion as to whether substituted service under this rule "is due service", within the meaning of Art. 164 of the Limitation Act and whether time for an application to set aside an *ex parte* decree passed after such service, runs from the date of the *decree* or from the date of the defendants *knowledge* of the decree. A Full Bench of the High Court of Allahabad[5] has held that substituted service does not *necessarily* amount to "due service" in all cases, and that the question whether it amounts to due service is to be considered by the Court to which an application has been made for setting aside an *ex parte* decree, having regard to all the circumstances of the case such as the place where the defendant was when the summons was issued to him, the manner of service, and the probability or otherwise of his having had knowledge thereof. The High Court of Lahore[6] and the Chief Court of Oudh[7] have, on the other hand, held that substituted service is "due service" even though it does not come to the knowledge of the defendant. In the undermentioned cases[8] the High Court of Madras held the same

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449 (452); *Maung Chit* v. *P N L Narayan*, 1928 Rang 185 (186): 6 Rang 218: 111 Ind Cas 871.

(2) *Charan Das* v. *Firm of Puran Lal*, 1929 Lah 235 (236): 116 Ind Cas 620. See also *Ganga Ram* v. *Official Receiver, Delhi*, 1932 Lah 248 (249): 33 Pun L R 5 [One day between date of substituted service under Rule 17 and hearing of appeal obviously inadequate except in special circumstances].

Note 8.

(1) See also *Lakshumanan Chetty* v. *Paluniappa Chetty*, 1928 Mad 1052 (1052); *Kisur Chand* v. *Bhoobuneswer*, Bourke O C 25.

(2) *Habibullah* v. *Karanju*, (1913) 19 Ind Cas 425 (425, 426): 9 Nag L Rep 35; *Gyanamal* v. *Abdul Hussain*, 1931 Mad 813 (816): 34 Mad L W 496: 1931 Mad W N 1069: 61 Mad L Jour 920: 134 Ind Cas 1202.

(3) *Habibullah* v. *Karanju*, (1913) 19 Ind Cas 425 (425, 426): 9 Nag L R 85.

(4) *Ghallu Ram* v. *Durga Das*, 1904 Pun Re No 42 at p 131: 62 Pun L R 1904

(5) *Ram Bharose* v. *Ganga Singh*, 1931 All 727 (730, 734): 1931 All L J 1049

(6) *Dittu Ram* v. *Nawab*, 1925 Lah 639 (639): 7 Lah L Jour 448: 26 Pun L R 704: 92 Ind Cas 272.

(7) *Thakur Prasad* v. *Lala Barati Lal*, 1931 Oudh 369 (369): 8 Oudh W N 845: 132 Ind Cas 778.

(8) *Narasimha* v. *Balakrishna*, 1927 Mad 487 (488): 52 Mad L Jour 512: 38 Mad L Tim 359: 101 Ind Cas 651; *Shariba Beeby* v. *Abdul Salam*, 1928 Mad 815 (816): 1928 Mad W N 49: 28 Mad L W 513: 51 Mad 860: 55 Mad L Jour 565: 110 Ind Cas 490. See also *Dorai sami* v. *Balasundaram*, 1927 Mad 507 (508): 52 Mad L Jour 477: 38 Mad L Tim 275: 102 Ind Cas 243.

O. 5, R.20, Notes 8—9.

view as that of the High Court of Lahore. In later cases[9] however, the same High Court has dissented from its former view and has held that substituted service is not necessarily "due service" within Art. 164 of the Limitation Act, but that it may or may not amount due service according as the circumstances necessary for its order do, or do not exist and that the defendant should be given an opportunity to show that such justifying circumstances did not exist.

9. **Revision.**—An order made under this rule without ascertaining whether the necessary conditions exist is open to revision.[1]

O. 5, R.21.

Service of summons *where* defendant resides within jurisdiction of another Court.

R. 21. [S. 85.] *A summons may be sent by the Court by which it is issued, whether within or without the province,* either by one of its officers or by post to any Court (not being *the* High Court) having jurisdiction *in* the place where the defendant resides.

[1877—S. 85; 1859—S. 59.]

Local Amendments.

BOMBAY.

Order 5, *Rule* 21.—The following shall be *inserted* as Rule 21-A in Order 5:—

Service of summons by prepaid post wherever the defendant may be residing, if plaintiff so desires.

"21-A. Where the plaintiff so desires, the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post prepaid for acknowledgment provided that such place is at a town or village in British India which is the headquarters of a district or recognised sub-division of a district, such as a taluka, tahsil or mahal, or in which a municipality has been established, or to which the provisions of this rule may from time to time be extended by a Notification by the High Court published in the *Bombay Government Gazette*. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

RANGOON.

In Order 5, the following shall be inserted as Rule 21-A:—

"21-A. When any summons is sent for service by a Court to any Court situated beyond the limits of Burma, it shall, unless it is written in English, be accompanied by a translation in English or in the language of the locality in which it is to be served."

SIND.

Insert the following as Rule 21-A in Order 5:—

"21-A. *Service of summons by prepaid post wherever the defendant may be residing, if plaintiff so desires.*—Where the plaintiff so desires, the Court may notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the

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(9) *Gyanammal* v. *Abdul Husain*, 1931 Mad 813 (816): 34 Mad L W 496: 1931 Mad W N 1069: 61 Mad L Jour 920: 134 Ind Cas 1202; *Muhaidin Kadir* v. *Lakshmanan*, 1931 Mad 812 (813): 1931 Mad W N 1079: 34 Mad L W 633: 61 Mad L Jour 931: 135 Ind Cas 344. See also *Venkatachalam* v. *Subbayya*, 1928 Mad 655 (657): 54 Mad L Jour 448: 108 Ind Cas 889.

Note 9.

(1) *Lekhu Mal* v. *Chela Mal*, (1888) Pun Re No 104. But see *Rajagopalachari* v. *Subramaniam*, 1932 Mad 472 (472): 1932 Mad W N 138.

place where he is residing, and sent to him by registered post prepaid for acknowledgment, provided that such place is at a town or village in British India which is the headquarters of a district or a recognised sub-division of a district, such as a taluka, or to which the provisions of this rule may, from time to time, be extended by a notification by the Court of Judicial Commissioner of Sind, published in the *Sind Official Gazette*. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.'' O. 5, R.21, Notes 1—2.

Synopsis.

1. Service of summons outside jurisdiction. 2 to O. 5, R. 10.
2. Service by registered post. See Note

1. **Service of summons outside jurisdiction.**—As a rule a Court cannot serve its own process outside its jurisdiction.[1] Under this rule a summons against a defendant residing within the jurisdiction of another Court should be sent to *that Court* by one of the officers of the Court issuing the summons, or by post, and it is the duty of the Court so receiving the summons to serve it on the defendant. *See* R. 23. The service of summons effected outside the jurisdiction of the Court issuing it, and without any order of the Court having jurisdiction, is irregular.[2]

2. **Service by Registered Post.**—*See* Note 2 to O. 5, R. 10.

R. 22. [S. 86.] *Where a summons issued* by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such *limits*, it shall be sent to the Court of Small Causes within whose jurisdiction *it is* to be served. O. 5, R.22.

Service within Presidency towns and Rangoon, of *summons* issued by Courts outside.

[1877—S. 86.]

Local Amendments.

BOMBAY.—

The following proviso shall be added to Order 5, Rule 22:—

''Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.''

Order 5, Rule 21—Note 1.

(1) *Sagore* v. *Ram Chundar*, 1 Hyde 136; *Cassim Azim* v. *Cassim Mahomed*, (1868) 10 Suth W R 349 (350): 2 Beng L R (A C) 59 [Special bailiff cannot be sent to serve process in foreign territory].

(2) *Maung San* v. *Maung Nyi*, (1925) Rang 325 (326): 3 Rang 239: 89 Ind Cas 870. But see *Mackintosh* v. *Kalee Das*, (1873) 11 Beng L R 1: 19 Suth W R 234 (236) [Service on defendant residing in another district, by a peon from the Court of the Collector of the District in which the suit is brought, instead of through the Collector of the District in which the defendants resides is not such an irregularity as vitiates the whole proceedings].

O. 5, R.22. **RANGOON.—**

The following proviso shall be added, namely:—

"Provided that where such summons is to be served within the limits of the town of Rangoon, the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place within such limits where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof."

O. 5, R.23, Note 1.

Duty of Court to which summons is sent.

R. 23. [S. 85.] The Court to which *a* summons is sent *under rule* 21 *or rule* 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court *of issue*, together with the record (if any) *of its proceedings with regard thereto*.

[1877—S. 85; 1859—S. 59.]

Local Amendment.

RANGOON.

The following shall be Order 5, Rule 23-A:—

"23-A.—(1) Before re-transmitting a summons received from another Court for service, the Court shall either take down the deposition of the peon serving the summons as to the time when, and the manner in which the summons was served; or cause the peon to make an affidavit before the bailiff, if the bailiff has been empowered to administer oaths; and shall transmit the same, together with the summons, to the Court whence the summons originally issued. In the case of processes received from other provinces the deposition or affidavit of the peon serving the summons, if not recorded in English, shall be translated into English, before the summons is returned to the issuing Court.

(2) In the case of processes received from India, if the person on whom the summons is to be served is not personally known to the process-server an affidavit or deposition by the person, who pointed out to the process-server the said person or his ordinary residence or place of business shall also be attached to the summons.

(3) When a process is forwarded for service by one Court in Burma to another Court in Burma and when the person on whom the process is to be served is not personally known to the process-server the case, in connection with which the process was issued, shall not be heard *ex parte* without an affidavit or deposition of some person who pointed out to the process-server the person to be served or his ordinary residence. The onus shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process-server the person on whom the process is to be served or his ordinary residence or place of business.

(4) When the summons has been returned by the process-server under Rule 17, a declaration of due service or of failure to serve shall be recorded in Form, (Civil) 47, and sent with the summons to the Court by which it was issued."

Synopsis.

1. **Sufficiency of service.** 2. **Form of return.**

1. **Sufficiency of service.**—There is a conflict of opinion as to whether the Court to which the summons has been transmitted for the service has power to declare as to the sufficiency of service and the effect of such a declaration on the powers of the transmitting Court. According to the High Court

of Calcutta, S. 85 (O. 5, R. 23), does not require the Court which served the summons, to make a return to the Court from which it issued touching the sufficiency of service. The duty of the serving Court according to the Calcutta view is to proceed on receipt of the summons, as if it had itself issued it, and then to return it, with the record, if any, framed under this rule, to the Court which issued it. It then devolves upon the Court issuing the summons to determine upon the sufficiency of service before proceeding to try the suit.[1] The Allahabad[2] and Bombay[3] High Courts as well as the Chief Courts of Oudh[4] and Burma[5] hold on the other hand that the last sentence of R. 19 enables the serving Court also to make a declaration as to sufficiency of service as that Court is in the best position to decide whether the process has been duly served or not, and that such a declaration raises a strong presumption of due and proper service. But this presumption obtains only *donee probetur contrarium*, and there may now and then occur cases, where there is something in the return distinctly negativing that presumption. Such occasions are of course rare and on those occasions, the Court issuing the process should not interfere unless it be on strong and good evidence. The certificate of return must, however, be signed by the Judge himself and not by the *munsarim*.[6] O. 5, R. 23, Notes 1—2.

2. Form of Return.—*See* Form 10, Appendix B, Sch. 1.

O. 5, R. 24.

Service on defendant in *prison*.

R. 24. [Ss. 87, 88.] *Where the* defendant *is confined* in *a prison*, the summons shall be delivered or sent by post or otherwise to the officer in charge of the *prison for service on the defendant.*

[1877—Ss. 87, 88.]

O. 5. R. 25.

Service *where* defendant resides out of British India and has no agent.

R. 25. [S. 89.] *Where* the defendant resides out of British India and has no Agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and *sent* to him by post, if there is postal communication between such place and the place where the Court is situate.

[1877—S. 89; 1859—S. 60.]

Local Amendments.

ALLAHABAD.

Rule 25.—*For* the word "shall" in the third line *read* the word "may".

Order 5, Rule 23—Note 1.

(1) *Romanath* v. *Goggodo Nandan*, (1895) 22 Cal 889 (891).

(2) *Dwaraka Prasad* v. *Brij Mohan*, (1911) 11 Ind Cas 39 (41): 33 All 649: 8 All L J 715.

(3) *Nusur* v. *Kazbai*, (1886) 10 Bom 202 (205).

(4) *Mathura Singh* v. *Sheo Mohan*, 1924 Oudh 237 (238): 74 Ind Cas 792: 10 Oudh L J 337.

(5) *Chinan Chetty* v. *Lachuman Chetty*, (1872-92) L B R 639.

(6) *Mathura Singh* v. *Sheo Mohan*, 1924 Oudh 237 (238): 74 Ind Cas 792: 10 Oudh L J 337.

O. 5, R.25, Note 1.

Rule 25-*A.*—*Add* the following as Rule 25-A:—

"25-A.—When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh, the Court may, in addition to, or in substitution for any other mode of service, send the summons by post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service."

MADRAS.—

Substitute the following *for* Rule 25:—

Service where defendant resides out of British India and has no Agent.

"Where the defendant resides out of British India and has no Agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate:

Provided that if, by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon."

NAGPUR.

Rule 25.—*Substitute* "may" for "shall".

Add the following rule as 25-A:—

Service where defendant resides in British India but outside the Central Provinces.

"25-A. (New.)—Where the defendant resides in British India but outside the limits of the Central Provinces, the Court may, in addition to any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service.

OUDH.

Substitute the word "may" in place of the word "shall".

RANGOON.

Rule 25.—In Rule 25, the words "may be addressed" shall be *substituted* for the words "shall be addressed".

Rule 25-*A.*—*After* Rule 25, the following shall be *inserted* as Rule 25-A, namely:—

"25-A.—Where the defendant resides in British India, but outside the limits of the Province of Burma, the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof."

Synopsis.

1. Scope of the rule.
2. Service by post.

1. Scope of the rule.—This rule applies only where the defendant resides out of British India. Where he is a resident of British India but is out of British India only temporarily this rule does not apply.[1] In cases

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Order 5, Rule 25—Note 1.

(1) *Kasi Viswanathan Chetty* v. *Arunachallam Chetty*, (1911) 12 Ind Cas 420 (421): 10 Mad L Tim 566: 21 Mad L Jour 978: (1911) 2 Mad W N 357.

where the defendant resides out of British India service of process is to be effected by registered post.[1-a] O. 5, R.25, Notes 1—2.

Where the respondent had left for England, service on him was ordered to be made through an agent in England appointed for the purpose.[2]

It is advisable to send the summons under this rule in a registered cover[3] rather than in the form of a registered post card.[4]

2. Service by post.—See Note 2, O. 5, R. 10.

R. 26. [S. 90.] *Where*— O. 5, R.26.

Service in foreign territory through *Political Agent* or Court.

(a) *in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or*

[(b) *the Governor-General in Council has, by notification in the Gazette of India, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service,*]

the summons may be sent to such *Political* Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the *Political* Agent or Court returns the summons with an endorsement *signed by such Political Agent or by the Judge or other officer of the Court* that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be *deemed to be* evidence of service.

[1877—Ss. 90, 92, 1859—S. 66.]

Local Amendments.

ALLAHABAD.—

After the words "the summons may" *insert* the words "in addition to, or in substitution for the method permitted by Rule 25."

(1-a) *Abdul Kadya* v. *Shabyode Kunhi*, (1916) 32 Ind Cas 820 (820) Mad; *Aga Gulam* v. *Sassoon*, (1897) 21 Bom 412 (418) [Defendant residing at *Bushire*—Service by post proper]. See also *Mahabir Prasad* v. *Bal Kishun*, 1922 Pat 376 (377): 1922 P H C C 76: 3 Pat L Tim 29: 1 Pat 48: 62 Ind Cas 927.

(2) *Satish Chandra* v. *Porter*, (1909) 1 Ind Cas 158 (161): 36 Cal 226: 13 C W N 18: 9 Cal L Jour 244.

(3) *Sonotun* v. *Gopal*, (1871) 15 Suth W R 31 (31).

(4) *Solaiman Moosaji* v. *Jatindra Nath*, 1929 Cal 553 (557): 33 Cal W N 1199.

O. 5, R. 26, Notes 1—2.

MADRAS.—

Substitute the following *for* Rule 26:—

"Where—

(*a*) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

Service in foreign territory, through political agent or Court or by special arrangement.

(*b*) the Governor-General in Council has, by notification in the *Gazette* of *India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

(*c*) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory;

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant; and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service."

NAGPUR.—

In Rule 26, *insert* the words "in addition to or in substitution for the method permitted by Rule 25", *between* the words "may" and "be sent".

OUDH.—

In Rule 26 (*b*), *after* the words "the summons may", *insert* the words "in addition to, or in substitution for, the method permitted by Rule 25."

Synopsis.

1. Amendments after 1908.
2. Scope and object of the rule.
3. Endorsement is evidence of service.

1. Amendments after 1908.—The words within the brackets in clause (*b*) of this rule have been inserted by Act XVII of 1914.

2. Scope and object of the Rule.—A special bailiff cannot be sent to execute a civil process in a foreign territory.[1] This rule provides for the service of summons in a foreign territory through a political agent or Court. Such summons may be sent direct by the Court and not necessarily through the District Judge[2] A Court is not *bound* to proceed under this rule but can proceed under Rule 25 even where this rule applies.[3]

As no resident of a foreign territory can be compelled to appear before a British Indian Tribunal, service according to this rule is unnecessary if a mere notification of the proceedings is valid under the law of the tribunal.[4]

Order 5, Rule 26—Note 2.

(1) *Cassim Azim* v. *Cassim Md*, (1868) 10 Suth W R 349 (350): 2 Beng L R A C 59.

(2) *Fakhruddin* v. *Ghafuruddin*, (1901) 23 All 99 (101): 1901 All W N 1.

(3) *Fakhruddin* v. *Ghafuruddin*, (1901) 23 All 99 (101): 1901 All W N 1.

(4) *Nuthoo* v. *Gray and Carey*, (1869) Pun Re No 82.

3. Endorsement is evidence of service.—Under Rules 18 and 19 of this Order, the return of the serving officer is no evidence of service.[1] The Court has to satisfy itself of the correctness of the return. But the return of service duly made under this rule is itself evidence of service. O. 5, R.26, Note 3.

R. 27. [S. 422.] Where the defendant is a public officer *(not belonging to His Majesty's military, naval or air forces or His Majesty's Indian Marine Service), or is the servant of a railway company or local authority*, the Court may, if it appears to it that the summons may be most conveniently so served, send *it for service on the defendant* to the head of the office in which he is employed, *together with a copy to be retained by the defendant.* O. 5, R.27, Notes 1—3.

Service on *civil* public officer *or on servant of railway company or local authority.*

[1877—Ss. 422, 468; 1859—Ss. 62, 68.]

Local Amendments.

ALLAHABAD.—

Add the following note to Order 5, Rule 27, *after* Rule 27:—

"*Note to Order 5, Rule 27.*—(1) A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these provinces is given in Appendix II of the General Rules (Civil).

(2) In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order 16, simultaneously with the issue of summons notice shall be sent to the head of the office in which the person concerned is employed, in order that arrangements may be made for the performance of the duties of such persons.

Illustration.

If the Court sees fit to issue a summons to a *Kanungo* or *Patwari* it shall inform the Collector of the district, and if to a sub-Registrar it shall inform the District Registrar to whom the sub-Registrar is subordinate."

MADRAS.—

In the Rule 27, Order 5, *after* the words "send it" *insert* the word "by registered post prepaid for acknowledgment".

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Officer of His Majesty's Naval or Air Forces and His Majesty's Marine Service—How served. See Rule 28, infra.

Public officers. See S. 2, Cl. (17).

1. Legislative changes.—

For the words "or Naval" the words "Naval or Air" have been substituted by Act X of 1927, Schedule I.

2. Scope of the Rule.—This Rule is only permissive. Non-compliance with the provisions of this rule is *per se* no ground for setting aside an *ex parte* decree.[1]

Note 3.

(1) See notes to Order 5, Rule 19.

Order 5, Rule 27—Note 2.

(1) *Megha Kuer* v. *Deo Narain Rai*, (1917) 38 Ind Cas 207 (208): 1 Pat L W 246.

O. 5, R.27, Note 3.

3. **Officer of His Majesty's Naval or Air Force and His Majesty's Marine Service.**—How served.—*See* Rule 28, *infra.*

O. 5, R.28, Notes 1—2.

R. 28. [S. 468.] *Where the* defendant is a soldier or airman, the Court shall send the summons *for service* to his *commanding officer together with a copy to be retained by the defendant.*

Service on soldiers, or airmen.

[1877—S. 468, 1859—S. 62.]

Local Amendments.

ALLAHABAD.

The present Rule 28 shall be numbered 28 (1),

***Add* the following as Rule 28 (2):—**

"(2) Where the address of such Commanding Officer is not known, the Court may apply to the Officer Commanding the station in which the defendant was serving when the cause of action arose to supply the address, in the manner prescribed in sub-Rule (4) of this rule."

***Add* the following sub-Rules (3), (4) and (5):—**

"(3) Where the defendant is an officer of His Majesty's Military Forces, wherever it is practicable, service shall be made on the defendant in person.

"(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted, or outside British India, the Court may apply over the seal and signature of the Court to the Officer Commanding the station in which the defendant was residing when the cause of action arose, for the address of such defendant, and the Officer Commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give, as may lead to the discovery of his address.

"(5) Where personal service is not practicable, the Court shall issue the summons to the defendant at the address so supplied by registered post."

MADRAS.

In O. 5, R. 28 *after* the words "shall send" *insert* the words "by registered post prepaid for acknowledgment".

OUDH.

***Add* the following as 28 (*a*) and re-number the present rule as (*b*):—**

"28 (*a*). Where the defendant is an officer in His Majesty's Military, Naval or Air Forces, the Court shall send the summons direct to him for service together with a copy to be retained by him."

Synopsis.

1. Amendments after 1908. 2. Service on soldiers.

1. Amendments after 1908.—By the Repealing and Amending Act 1927 (Act X of 1927) the words "or airman" were inserted after the word "soldier".

2. Service on Soldiers.—When a summons is sent to a Commanding Officer for service on a soldier under him, he is bound to cause the summons to be served upon him.[1] He cannot refuse to have the same served, on the ground that under S. 144 of the Army Act of 1881 (44 and 45 Vict.) the soldier was entitled to protection, the debt sued upon, being less than £30.[2]

Order 5, Rule 28—Note 2.

(1) *Mahomed* v. *Aggas*, (1887) 10 Mad 319 (322).

(2) *Abraham* v. *Holmes*, (1888) 11 Mad 475 (475, 476).

A soldier, not serving in the army, but serving, in the civil department, and residing beyond the military cantonments will be amenable to the ordinary civil jurisdiction of the Court.[3] O. 5, R. 28, Note 2.

Similarly a mechanic, serving in the Indian marine is subject exactly to the same rules as every other person under the Code as regards service.[4]

When notice of an appeal was accepted by a sepoy in service, and received without demur, he cannot subsequently urge in an application to set aside an *ex parte* decree that he was not duly served as the same was not sent through the Commanding Officer.[5]

See in this connection Note 17 to S. 60, *ante*.

R. 29. [Ss. 87, 88, 468.] (1) *Where a summons is delivered or sent to any person for service under* Rule 24, *Rule* 27 *or Rule* 28, *such person shall be bound to serve it, if possible, and to* return it *under his signature*, with the written acknowledgment of *the defendant, and such signature shall be deemed to be evidence of service.* O. 5, R. 29, Note 1.

Duty of person to whom summons is delivered or sent for service.

(2) *Where* from any cause *service is impossible, the summons* shall be returned to the Court with *a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.*

[1877—S. 468, 1859—S. 62.]

Local Amendments.

ALLAHABAD.

In Rule 29, sub-Rule (1), line 3, *for* the word and figures "Rule 28" *read* "Rule 28 (1)".

MADRAS.

Insert as Rule 29-*A*—

"**29-A.** (New) Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval Forces or His Majesty's Indian Marine Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons."

Synopsis.

1. Duty of persons to whom summons is sent for service.

1. Duty of persons to whom summons is sent for service.—A return of the serving officer under this rule with a written acknowledgment by the defendant is sufficient evidence of service.[1] Where the defendant is not avail-

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(3) *Cohen* v. *Niccarthy*, (1870) 14 Suth W R 231 (232).

(4) *Intu* v. *Darbaksh*, (1914) 25 Ind Cas 380 (381): 42 Cal 67.

(5) *Santu* v. *Arjan Das*, (1912) 13 Ind Cas 318 (318): 131 Pun W R 1912.

Order 5, Rule 29—Note 1.

(1) *Meer Lootf Ali* v. *Abu Bibee*, (1871) 15 Suth W R 203 (204); *Mokoon-donath Bhadoory*

O. 5, R. 29, Note 1. able, the serving officer should not affix the summons to his outer door, but must, under Clause (2) of the rule, make a statement as to what steps he took to procure service, and the reason why service was impossible. It would then be for the Court to order substituted service.[2]

O. 5, R. 30. **R. 30.** [Ss. 91, 92.] (1) The Court may, notwithstanding anything hereinbefore contained, substitute for *a* summons a letter signed by the Judge or such officer as he *may* appoint in this behalf, *where* the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

Substitution of letter for summons.

(2) *A* letter *substituted under sub-rule* (1) shall contain all the particulars required to be stated in *a* summons, and, subject to the provisions of *sub-rule* (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; *and, where* the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

[1877—Ss. 91, 92; 1859—Ss. 64, 65.]

Local Amendments.

ALLAHABAD.

Insert the following as Rule 31 of Order 5:—

"31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court."

Insert the following as Rule 32 of Order 5:—

"32. Ordinarily every process, except those that are to be served on Europeans, shall be written in the Court Vernacular. But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

"In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation."

SIND.

Add the following as Rule 31 in Order 5:—

"31. If a summons issued to a defendant residing in British India is returned unserved, the Court may while issuing a fresh summons for personal service or ordering substituted service of summons also order that a copy of the summons addressed to the defendant at the place where he is residing and be sent to him by registered post, if there is postal communication between such place and the place where the Court is situate."

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v. *Shib Chunder Bhadoory*, (1873) 19 Suth W R 102 (103).

(2) *Goormookh Singh* v. *Koora*, (1868) Pun Re No 79.

ORDER VI.

PLEADINGS GENERALLY.

R. 1. [New] "*Pleading*" *shall mean plaint or written statement.*

Pleading.

[Cf. Jud. Act, 1873, S. 100.]

Synopsis.

1. Scope and object of the order.
2. Purpose of pleading.
3. Counter-claim by defendant. See O. 8, R. 6.

English system of pleadings. See Note 1.

1. Scope and object of the order.—The whole of this order except Rules 14 and 15 is new and has been based upon the system of pleading introduced by the Judicature Act in England which is generally admitted to be the best form of pleading in Civil suits. The object of introducing this order is, as is observed by the Select Committee in their Statement of Objects and Reasons that "it is most necessary that litigants in this country should come to trial with all issues *clearly defined*, and that cases should not be expanded or grounds shifted without reference to the true facts." In their notes on clauses, the Select Committee also observe that they have, however, endeavoured to modify the rigour of the English rules by providing in accordance with S. 55 of the Indian Evidence Act, 1872, that the Court may, notwithstanding the absence of a specific denial, require any fact to be proved by the party who relies upon it. This modification of the rigour of the English rules gives effect to the view that had been taken under the old Code that the strict rule that averments not traversed must be taken to be admitted is not applicable to India.[1]

"Pleading" means plaint or written statement. Thus an application to sue as a *pauper* is not a pleading in as much as it becomes a plaint only after it is granted.[2] Similarly a statement by a pleader[3] or a petition for leave to execute the decree[4] is not a pleading. A defendant's pleading is the written statement. A plaintiff's pleading may be either a plaint or a written statement. Thus where the defendant in his written statement pleads a set off, the plaintiff can file a *written statement* in answer thereto, under O. 8, R. 8. The *parties* may, subsequent to the written statement of the defendants, also file written statements or *additional written statements*, by leave of the Court or under orders of the Court, under O. 8, R. 9.

2. Purpose of pleading.—The object of pleadings is to narrow the parties to *definite issues* and to diminish expense and delay (specially as regards the amount of testimony required on either side at the hearing.[1] *In Sayad*

Order 6, Rule 1—Note 1.

(1) *Deo Nandan Pershad* v. *Meghu Mahton*, (1907) 34 Cal 57 (64): 5 Cal L Jour 181: 11 Cal W N 225.

(2) *Kanagammal* v. *Panchapakesa Odayar*, (1914) 23 Ind Cas 82 (84): 26 Mad L Jour 348: 1914 Mad W N 827. See however *Amar Nath* v. *Rattan Chand Kapur*, (1932) 138 Ind Cas 652 (652, 653) Lah [O 6, relating to amendments apply to applications in *forma pauperis*. *obiter*].

(3) *Mashuq Ali* v. *Hurunnissa*, 1929 Oudh 204 (206): 114 Ind Cas 113.

(4) *Baluk Chand Lal* v. *Nathuni*, (1917) 38 Ind Cas 85 (87): 2 Pat L Jour 24.

Note 2.

(1) *Thorp* v. *Holdsworth*, (1876) 3 Ch D 637 (639); *Appavu Chettiar* v. *Nanjappa Goundan*, (1913) 20 Ind Cas 792 (798): 14 Mad L Tim 117: 25 Mad L Jour 329.

O. 6, R. 1, Notes 2—3.

Muhammad v. *Fatteh Muhammad*[2] Lord Halsbury delivering the opinion of the Privy Council observed "Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues."

3. **Counter-claim by defendant.**—*See* Order 8, Rule 6.

O. 6, R. 2, Note 1.

R. 2. [New] *Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.*

Pleading to state material facts and not evidence.

[Cf. S. 114, 1882.]. [R. S. C. O. 19, R. 4.]

Synopsis.

1. Scope of the rule.
2. Pleadings must state only facts and not law.
3. The facts stated must be material facts.
4. Facts to anticipate opponents' answer, not to be pleaded.
5. Alternative and inconsistent allegations.
6. Matters affecting damages.
7. Pleadings should not state the evidence by which the facts are to be proved.
8. The facts should be stated in a concise form.
9. Variance between pleading and proof.
10. Construction of pleadings.

Facts not material at the stage of the pleading. See Note 4, Pts. (1) to (3). General and fundamental rules of pleading and special applications thereof. See Note 1.

Wilfully false pleadings—Effect. See Rule 15, Note 7, Pts. (2) to (4).

1. Scope of the Rule.—This is the main rule laying down the fundamental principles of pleading. It lays down:—

1. *Affirmatively*, that a pleading shall contain and contain only, *material facts* on which the party pleading relies.
2. *Negatively*, that it shall not contain *facts which are only evidence* by which such material facts are to be proved.

The other rules in this order are all special applications of the general rule laid down in this rule. It will here be convenient to summarise and refer to the other rules as to what the pleadings should or should not contain.

1. All *necessary particulars* must be stated in the pleadings (O. 6, Rr. 4 and 5).

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(2) See also *Kannu Pillai* v. *Kayinari Gopalan Nair*, (1915) 26 Ind Cas 337 (339): 1914 Mad W N 883; *Mir Syed Hasan* v. *Tyiba Begam*, (1915) 26 Ind Cas 547 (586): 1 Oudh L J 591; *Brown* v. *Maclintock*, 6 E and I, 434 (458): *Mashuq Ali* v. *Hurunnissa*, 1929 Oudh 204 (206): 114 Ind Cas 113.

2. The *performance* of conditions precedent need not be alleged but the *non-performance* of such conditions, if relied on, must be pleaded (O. 6, R. 6).

3. No pleading shall, except by way of amendment, raise any *new ground* of claim or allege any fact inconsistent with previous pleadings of the party pleading the same (O. 6, R. 7).

4. *A bare denial of a contract* alleged by the opposite party shall not be construed as a denial of the *legality or sufficiency* in law of such contract (O. 6, R. 8).

5. *Documents* need not be set out at length unless the precise words are material (O. 6, R. 9).

6. *Conditions of the mind* such as malice, knowledge etc., may be alleged as a fact without setting out the circumstances from which the same is to be implied (O. 6, R. 10).

7. *Notice* may be alleged as a fact without setting out the form, or the precise terms of such notice, or the circumstances from which it is to be inferred (O. 6, R. 11).

8. *Implied contracts or relations between persons* may be alleged as a fact and the series of letters, conversations or circumstances from which the contracts are to be inferred, need only be set out generally and not in detail (O. 6, R. 12).

9. Facts which the law presumes in a party's favour, or as to which the burden of proof lies on the other side need not be pleaded unless first denied (O. 6, R. 13).

2. Pleadings must state only facts and not law.—A pleading must state only *facts* and not *law*.[1] The reason is that it is for the *Court itself* to find out and examine all pleas of law that may apply to the facts,[2] and the parties can urge them at any time before judgment is pronounced.[3] It is not enough to plead *merely* that a right or liability exists, or that an act was unlawful or wrongful, or that the defendant is guilty of negligence,[4] or that the plaintiff is entitled as the heir-at-law to certain properties,[5] or that there was a *donatio mortis causa*.[6] The *facts* which establish these pleas must be stated in each case. But it is not necessary to state the *legal effect* of the facts stated.[7] Nor is it necessary to reply to a plea of limitation that "the statute does not apply" or "that the case has been taken out of the statute."[8]

Order 6, Rule 2—Note 2.

(1) *Ephrayim* v. *Turner Marrison & Co.* 1930 Bom 511 (512): 32 Bom L R 1178: 128 Ind Cas 609. See also *Muhammad Sharif* v. *Shamsher Khan*, 1891 Pun Re No 11; *Bishen Sahaye* v. *Beer Kishore*, (1867) 8 Suth W R 295 (297-299); *Hur Churn Dass* v. *Hazeree Mul*, (1862) 1 Ind Jur O C 12.

(2) *Goura Telin* v. *Shriram*, 1926 Nag 265 (265): 92 Ind Cas 926; *Damodhar Das* v. *Rodba*, 1928 Nag 206 (207): 107 Ind Cas 513.

(3) *Goura Telin* v. *Shriram*, 1926 Nag 265 (265): 92 Ind Cas 926.

(4) *Gautret* v. *Egerton*, (1867) L R 2 C P 371; *Day* v. *Brownrigg*, (1878) 10 Ch D 294 (302): 48 L J Ch 173: 39 L T 553: 27 W R 217; *West Rand Central Gold Mining Co* v *Rex*, (1905) 2 K B 391 (400): 74 L J K B 753: 93 L T 207: 21 T L R 562.

(5) *Palmer* v. *Palmer*, (1892) 1 Q B 319: 61 L J Q B 236.

(6) *Townsend* v. *Parton*, (1882) 45 L T 755: 30 W R 287.

(7) *Kone Kier* v. *B Goodman Ltd.* (1928) 1 K B 421 (427): 97 L J K B 263: 138 L T 481: 44 T L R 91.

(8) *Farsyth* v. *Bristowe*, 8 Exch 347 (350): 2 L J Ex 70: 17 Jur 46.

O. 6, R. 2, Notes 2—3.

If a party seeks to oust the jurisdiction of the Civil Court he must allege and prove facts which oust such jurisdiction.[9] If he sues for recovery of land, he must state the nature and particulars of his title.[10] In regard to an allegation that the defendant did an act "wrongfully, unlawfully and improperly" or "without any justification therefor or right so to do" without setting out the facts from which such conduct is to be inferred it was said "these epithets under the present system of pleading are useless and redundant. They add nothing whatever to the plaintiff's case. They are merely now epithets of abuse. They were formerly in declarations essential, because under that form of pleading, legal rights were stated for facts; but facts alone are stated now."[11]

3. The facts stated must be material facts.—The words "material facts" mean:

1. All facts upon which the plaintiff's *cause of action* or the defendant's *defence* depends; in other words all, those facts which must be proved in order to establish the existence of a cause of action or defence;[1] and

2. All facts which, though not necessary to establish the cause of action or defence, but which the party pleading them is *entitled to prove at the trial* are also material facts. Thus in a suit for damages for breach of a contract, the cause of action consists in the making of the contract and of its breach. A fact which is necessary to fix the *quantum* of damages may be proved by the parties at the trial, though the cause of action or the defence does not depend upon it. Such a fact is, therefore also a material fact and must be pleaded in the pleading.[2]

It is essential that *all* the material facts should be stated[2-a] so as not to embarrass the opposite party and so as to put him on his guard and tell him what he has to meet, when the case comes on for trial.[3] Thus a plaintiff suing

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(9) *Ramala Venkatasawmi* v. *Kanumalla Narasimmayya*, (1915) 26 Ind Cas 357 (357, 358): 16 Mad L Tim 596.

(10) *Daires* v. *James*, (1884) 26 Ch D 778; *Darbyshire* v. *Leigh*, (1896) 1 Q B 554 (561); *Hodgins* v. *Hickson*, (1878) 39 L T 644.

(11) *Day* v. *Brownrigg*, (1878) 10 C D 294.

Note 3.

(1) *Darbyshire* v. *Leigh*, (1896) 1 Q B 554; Re *Rica Gold Washing Co*, (1879) 11 Ch D 36 (43); *Matilal* v. *Judhistir*, (1915) 31 Ind Cas 181 (182): 22 Cal L Jour 254: 20 Cal W N 310. See also *Gangadayal* v. *Sm Ohhakina Bhanu*, 1927 Cal 806 (807): 46 Cal L Jour 149: 105 Ind Cas 22; *Jnanendranarayan* v. *Saradasundari*, 1931 Cal 25 (25): 57 Cal 796: 129 Ind Cas 355; *Vajesinghji* v. *Secretary of State*, (1924) P C 216 (217): 47 Mad L Jour 574: 1924 Mad W N 694: 26 Bom L R 1143: 22 All L J 951: 5 L R P C 199: 40 Cal L Jour 478: 82 Ind Cas 779: 21 Mad L W 28: 51 Ind App 357: 48 Bom 613: 29 Cal W N 317 P C [Only where a right that could be decreed exists and is taken away by act of State, the plea of Act of State need be put]; *Abdulla* v. *Pakkeri*, (1878) 2 Mad 346 (350) [Notice to quit is an essential element of the plaintiff's title in ejectment and should be pleaded]; *Mira Mohideen* v. *Asan Mohideen*, (1907) 17 Mad L Jour 421 (422); *Dayabhai* v. *Lakshmi Chand*, (1885) 9 Bom 358 (361); *Damodar Das* v. *Utamaram*, (1878) 10 Bom H C R 414; *Krishna Churn* v. *Protabchunder*, (1881) 7 Cal 560 (568) [Adverse possession must be raised]; *Shiro Kuman* v. *Gobind Shaw*, (1877) 2 Cal 418 (428).

(2) *Millington* v. *Loring*, (1880) 6 Q B D 190 C A: 50 L J Q B 214: 43 L T 657: 29 W R 207: 45 J P 268; *Whitney* v. *Moignard*, (1890) 24 Q B D 630 (631): 59 L J Q B 324; *Lumb* v. *Beaumont*, (1884) 49 L T 772 (774).

(2-a) *Ayers* v. *Hanson*, 1912 W N 193: 56 Sol Jo 735; *Muthiah Chettiar* v. *Loka Singh*, 1927 Mad 1007 (1008): 53 Mad L Jour 504: 39 Mad L Tim 273: 105 Ind Cas 288 [It is desirable that parties should be allowed to state their pleas whenever possible, provided no further delay is caused by such indulgence]; *Sarup Narain* v. *Sheo Shankar Lal*, (1917) 42 Ind Cas 416 (418): 4 Oudh L Jour 522; *Syud Khadim Ali* v. *Mt Nazeer Begum*, (1871) 3 N W P H C R 262 [Suit for declaration].

(3) *Philips* v. *Philips*, (1878) 4 Q B D 127: 48 L J Q B 135: 39 L T 556: 27 W R 436 (C A); *Ledgard* v. *Bull*, (1886) 9 All 191 (205): 13 Ind App 134: 4 Sar 741: 10 Ind Jur 471.

on his title is bound to state the nature of the deeds on which he relies in deducing his title.[4] Similarly a party relying upon the fact that notice of dishonour is not necessary[5] or that the ordinary age of minority of the party has been prolonged up to 21[6] or that a property admittedly purchased by *A* in the name of *B* was for *B's* advancement[7] or that a woman claiming maintenance has lost her right on account of her incontinence[8] is bound to plead those facts in his pleading.

If a party *omits* to state a material fact he will not be allowed to give evidence of that fact at the trial unless the pleading is amended under R. 17 *infra*.[9] If, however, a party states facts which are not material, then, unless such statements are embarrassing or ambiguous, the Courts will not, as a rule, inquire very closely the materiality thereof.[10] Thus where the particulars of a claim were given with reasonable precision, an incorrect description of one particular fact would not be fatal to the claim.[11] Similarly in a suit for restitution of conjugal rights the plea of denial of marriage was held to include the denial of the *validity* of marriage.[12] But a plaint which is unnecessarily prolix, argumentative, and full of irrelevent matter should either be rejected or returned for striking out the unnecessary matter.[13]

4. Facts to anticipate opponents' answer not to be pleaded.—It is no part of the pleading to *anticipate* the opponents' pleading and to state facts in answer thereto. In other words a party should not plead to facts which *have not become material* at the stage of filing his pleading.[1] Thus the defendant need not plead to cause of action not set out in the plaint.[2] Similarly in an action for libel or slander by publishing particular words, the defendant should

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(4) *Matilal* v. *Judhistir*, (1915) 31 Ind Cas 181 (183): 22 Cal L Jour 254: 20 Cal W N 310.

(5) *Jambu* v. *Palaniappa*, (1903) 26 Mad 526 (531): 13 Mad L Jour 252.

(6) *Gharibullah* v. *Khalak*, (1903) 25 All 407 (416, 417): 30 Ind App 165: 5 Bom L R 478: 8 Sar 483: 7 Cal W N 681 P C.

(7) *De Silva* v. *De Silva*, (1903) 27 Bom 103 (112): 4 Bom L R 849. But see *Meenakshi Vethiar Amma* v. *Cheriya Parvathi Nethiar*, 1924 Mad 174 (175): 1923 Mad W N 657: 74 Ind Cas 1012 [Allegation of use of tarwad money for purchase of property in name of a daughter —No allegation of *benami* or Gift—No prejudice to daughter in trial].

(8) *Hajee Sabbo* v. *Ayeshabai*, (1903) 27 Bom 485 (491): 5 Bom L R 475: 7 Cal W N 665: 30 Ind App 127: 8 Sar 477 P C.

(9) *Brook* v. *Brook*, (1886) 12 P D 19; *Ayers* v. *Hanson*, 1912 W N 193: 56 Sol Jo 735; *The Hardwicke*, (1883) 9 P D 32: 53 L J P 23: 50 L T 128: 32 W R 598; *Hyman* v. *Vanden Bergh*, (1908) 1 Ch 167 (169, 171): 77 L J Ch 154: 98 L T 478; *Matt Lal* v. *Judistir Das*, (1915) 31 Ind Cas 181 (182): 22 Cal L Jour 254: 20 Cal W N 310; *Jagannath Vithal* v. *Apaji Vishnu*, (1868) 5 Bom H C A C 217 [Right as reversioner not raised in pleading]; *Mulji Jitha & Co* v. *V N C Macleod*, (1903) 5 Bom L R 991 (995) [Good faith not raised in pleadings]; *Mussamut Humeeda* v. *Mussumat Amatool Mehdee Begum*, (1872) 17 Suth W R 106 (107); *Amar Nath* v. *Gurdas Mal*, (1914) 22 Ind Cas 716 (718): 94 Pun L R 1914: 63 Pun W R 1914; *Ishan Chunder Chowdhry* v. *Sharoda Goop Teah*, (1869) 12 Suth W R 487 (488) [Plaintiff cannot prove a different title, from that which he alleged in the plaint]; *Soorjo Koomar* v. *Gungadhar Roy*, (1869) 12 Suth W R 80 (81), (Do.); *Bhoobun Mohun Mundul* v. *Rash Beharee Paul*, (1871) 15 Suth W R 84 (85), (Do.); *Huro Soondaree Debia* v. *Unnopoorna Debia*, (1869) 11 Suth W R 550 (551), (Do.); *Bhaygo Mutty Bibee* v. *Mahomed Wazil*, (1876) 25 Suth W R 315 (316), (Do.); *Bijoya Debia* v. *Bydonath Deb*, (1875) 24 Suth W R 444 (445), (Do.).

(10) *Knowles* v. *Roberts*, (1888) 38 Ch D 263 (270): 58 L T 259 (C A).

(11) *Namagiri Ammal* v. *Muthu Velappa Goundan*, 1928 Mad 940 (941): 1928 Mad W N 466: 56 Mad L Jour 70: 28 Mad L W 565: 111 Ind Cas 887. See also *Golam Ali* v *Futtick Chunder*, (1868) 10 Suth W R 460 (460).

(12) *Ramjawi* v. *Gopal Chand*, 1921 Lah 291 (292): 3 Lah L Jour 559: 64 Ind Cas 150.

(13) *Bishen Sahaya* v. *Beer Kishore*, (1867) 8 Suth W R 295 (297, 298); *Kanhilal* v. *Treamearne*, (1869) 3 Beng L R App 12 [Irrelevent and improper matters ordered to be taken off the file].

Note 4.

(1) *Niaz Ahmad Khan* v. *Abdul Latif*, 1923 Lah 475 (476): 83 Ind Cas 807.

(2) *Rassam* v. *Budge*, (1893) 1 Q B 571.

O. 6, R. 2, Notes 4—5.

not plead that he used other words than that complained of, and that such words were justified in law.[3]

5. Alternative and inconsistent allegations.—In construing Order 19, R. 4 of the English Rules corresponding to this rule, Lindley, L.J.; observed in In Re *Morgan*: *Owen* v. *Morgan*,[1] as follows:—Now I cannot myself construe that order as prohibiting inconsistent pleadings. One sees perfectly well what is meant by it *viz.*, that each party is to state succinctly and concisely and in a summary form, the material facts on which he relies. Now a person may rely upon one set of facts if he can succeed in proving them and he may rely upon another set of facts if he can succeed in proving them.'' It has been held by the Patna High Court[2] that the scope of the Code is more limited in India and forbids a party *who is not a stranger to the transaction and who has personal knowledge of the true state of facts* from pleading inconsistent facts. And in the undermentioned cases[3] it was held that a party can plead inconsistent facts *at any rate where he is a stranger to the transaction* thus appearing to suggest that he cannot do so if he was not a stranger to the transaction. The view of the High Court of Patna, it is submitted, is not correct and is distinctly opposed to the general trend of decisions of all the High Courts.[4] A perusal of O. 1,

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(3) *Cashin* v. *Cradock*, (1876) 3 Ch D 376: 35 L T 452: 25 W R 4; *Davy* v. *Garret*, (1878) 7 Ch D 473 C A: 47 L J Ch 218: 38 L T 77: 26 W R 225; *Rassam* v. *Budge*, (1893) 1 Q B D 571.

Note 5.

(1) Re *Morgan*, (1887) 35 Ch D 492.

(2) *Bhim Nath* v. *Jaggarnath*, 1925 Pat 674 (675): 1925 Pat H C C 294: 89 Ind Cas 814: 7 Pat L Tim 82.

(3) *Janaganti China Venkata* v. *Kappojee Linganna*, (1912) 15 Ind Cas 382 (382): 1912 Mad W N 413; *Narayanasami* v. *Ramasami*, (1891) 14 Mad 172 (174): 1 Mad L Jour 39; *Perumal* v. *Kaveri*, (1893) 16 Mad 121 (124): 2 Mad L Jour 281; *Krishnapal Singh* v. *District Judge of Agra*, 1928 All 582 (584): 26 All L J 1353: 112 Ind Cas 748. See also *Chandrika Prasad* v. *Hira Lal*, 1924 Pat 280 (282): 5 Pat L Tim 49: 1923 Pat H C C 357: 2 Pat L R 82: 75 Ind Cas 433.

(4) *Bansidhar* v. *Lala Ajudhya Prasad*, 1925 Oudh 120 (122): 27 Oudh Cas 175: 11 Oudh L J 619: 82 Ind Cas 333: 1 Oudh W N 248; *Chotumal* v. *Allibhoy*, 1926 Sind 154 (156): 93 Ind Cas 380; *Narendra* v. *Abhoy Charan*, (1907) 34 Cal 51 (54, 56): 11 Cal W N 120: 4 Cal L Jour 437 [16 Suth W R 198 overruled]; *Bhuwan Mohini* v. *Kumud Bala*, 1924 Cal 467 (472): 28 Cal W N 131: 39 Cal L Jour 140: 82 Ind Cas 934; *Joharmal* v. *Nainsukh*, (1910) 5 Ind Cas 745 (746-7): 6 Nag L R 33; *Woodit Singh* v. *Buldeo Singh*, (1874) 21 Suth W R 12 (12); *Rang Behari* v. *Rahchheypa*, (1912) 13 Ind Cas 128 (130): 15 Cal L Jour 439; *Ameeroonissa* v. *Woomarooddeen*, (1870) 14 Suth W R 49 (50); *Mohammad Shah* v. *Fatta*, (1920) 54 Ind Cas 43 (44): 4 Pun W R 1920: 2 U P L R (Lah) 17; *Jafri Begam* v. *Taleyar Khan*, (1898) 1 Oudh Cas 88 (90); *Purnendu Narain Roy* v. *Dwijendra Narain Roy*, (1905) 8 Cal L Jour 289 (291); *Raman Choubey* v. *Bacha Misir*, 1921 Pat 326 (328): 2 Pat L Tim 285: 60 Ind Cas 393; *Sakharam* v. *Soma*, (1909) 4 Ind Cas 801 (803): 5 Nag L R 189; *Basantrao* v. *Narayan*, 1924 Nag 401 (403): 78 Ind Cas 127 [Alternative relief against non-mortgagor] *Mohendra Nath* v. *Kali Parshad*, (1903) 30 Cal 265 (278): 7 Cal W N 229; *Keamuddi* v. *Hara Mohan*, (1903) 7 Cal W N 294 (296); *Muhammad Ibrahim* v. *Umattullah Jan*, (1917) 39 Ind Cas 798 (800): 72 Pun W R 1917: 90 Pun Re 1917 [Pleas of fraud and undue influence in no way inconsistent]. See also *Berdan* v. *Greenwood*, (1878) 3 Ex D 251 (251, 255); *Ould* v. *Stenning*, (1877) 5 C D 695; *Phillips* v. *Phillips*, (1878) 4 Q B D 127 (134); *Evans* v. *Buck*, (1876) 4 C D 432: 46 L J Ch 157: 25 W R 392; *Durgamani* v. *Ambica*, (1906) 4 Cal L Jour 367 (368) [Proprietary right and prescriptive rights]; *Goluck Chunder* v. *Nundo Coma*, (1878) 4 Cal 699 (703): 3 Cal L Rep 450, (Do.); *Uma Churun* v. *Bishun Nath*, (1899) 3 Cal W N CXLIII (CXLIV); *Dinamony* v. *Doorga*, (1874) 21 Suth W R 70 (74): 12 Beng L R 274; *Tekaitni Goura Kumara* v. *Bengal Coal Company*, (1870) 13 Suth W R 129 (130): 12 Beng L R 282 (N), (Do.); *Ruttonmonee* v. *Kumala Kant*, (1869) 12 Suth W R 364 (365), (Do.); *Budesab* v. *Hanmanta*, (1897) 21 Bom 509 (516), (Do.); *Maidin Saiba* v. *Nagapa*, (1883) 7 Bom 96 (99), (Do.); *Manick Chunder* v. *Raj Luckhee*, (1873) 19 Suth W R 252 (254), (Do.); *Icharan* v. *Nimony*, (1908) 35 Cal 470 (476): 7 Cal L Jour 499: 12 Cal W N 636 [Tenancy or in the alternative a limited interest]; *Ishan* v. *Ramranjan*, (1905) 2 Cal L Jour 125 (136), (Do.); *Thakore Fatesinghji* v. *Bamanji*, (1903) 27 Bom 515 (539, 550): 5 Bom L R 274, (Do.); *Moosa Adam* v. *Ismail Moosa*, (1910) 5 Ind Cas 946 (947): 12 Bom L R 169 [Gift and adverse possession]. See however in following cases:—*Khalas* v. *Kalyan Singh*, 1887 Pun Re No 109; *Ningappa* v. *Shivappa*, (1894) 19 Bom 323 (327, 328); *Denobundho* v. *Kristomonee*, (1876-78) 2 Cal 152 (173); *Ma Ngwe U* v. *Sit Paw*, 1893-1900 L B R 387; *Bijoy Keshub* v. *Obhoy Churan*, (1871) 16 Suth W R 198 (199); *Abdul* v. *Maikhan*, (1911) 10 Ind Cas 890 (891): 35 Bom 297: 13 Bom L R 268; *Jino* v. *Manon*, (1896) 18 All 125 (127): 1896 All W N 1; See also *Ramprasad* v. *Hazarimull*, 1931 Cal 458 (461): 58 Cal 418: 134 Ind Cas 536; *Muhammad Ashan-ullah* v. *Shams-un-nissa Bibi*, (1914) 24 Ind Cas 425 (426): 36 All 456: 12 All L J 681 [Pre-emption based on custom, contract or

R. 3 (joinder of defendants), O. 2, R. 3 (joinder of causes of action), and O. 7, Rr. 7 and 8 (reliefs that may be stated by the plaintiff) will clearly show that inconsistent sets of facts may be pleaded and relief claimed in the alternative. The object of permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation, to dispose of the same controversy or the subject-matter of the same relief though the ground upon which the relief is claimed may be different.[4-a] In *Bhutan Mohini Dasi* v. *Kumud Bala Dasi*[5] their Lordships of the Calcutta High Court observed as follows:—"It may be conceded that the Code of Civil Procedure does not prohibit inconsistent pleadings and that there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative. A plaintiff may rely upon several different rights alternatively, although they may be inconsistent; so a defendant may raise by his statement of defence, without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper." The following inconsistent pleas have accordingly been held not to be prohibited by the code:—

1. A plea of forgery and a plea of execution under undue influence, or fraud or a plea of want of consideration.[6]
2. A claim of ownership and right of easement.[7]
3. Claim as a *shebait* or in the alternative as an *owner*.[8]
4. Denial of contract of Fire Insurance and if there was a contract the unfulfilment of the conditions precedent to the attaching of liability in the alternative.[9]
5. Plea of grant of perpetual tenancy or in the alternative acquisition of such tenancy by adverse possession.[10]

Mahomedan Law—First two not established—Can succeed in last]: *Bhagwati Saran* v. *Parameshar Das*, (1914) 25 Ind Cas 283 (284): 36 All 476: 12 Al L J 798 [Ownership or pre-emption in the alternative]. But see *The Ahmedabad Advance Spinning and Weaving Co* v. *Lakshmishankar*, (1904) 6 Bom L R 790 (794, 795): 30 Bom 173 [Party having taken advantage under one set of facts—Not to set up inconsistent facts—This rule inapplicable if it due to fraud of the other side].

(4-a) *Muhammad Abul Hassan Khan* v. *Muhammad Ali Muhammad Khan*, (1917) 41 Ind Cas 903 (904): 20 Oudh Cas 192: 4 Oudh L J 499.

(5) *Bhuban Mohini Dasi* v. *Kumud Bala Dasi*, 1924 Cal 467 (472): 28 Cal W N 131: 39 Cal L Jour 140: 82 Ind Cas 934. The same view has been expressed in the following cases:—*Vava Rowther* v. *Sulaiman Rowther*, 1930 Mad 814 (816): 32 Mad L W 61: 127 Ind Cas 292: *Berdan* v. *Greenwood*, (1878) 3 Ex D 251.

(6) *Alikjan Bibi* v. *Ramharan*, (1910) 7 Ind Cas 166 (168, 169): 12 Cal L Jour 357; *Thippa Ramasami* v. *Krishnaswami*, (1910) 8 Ind Cas 845 (845): 9 Mad L Tim 206 [13 Mad 549 not approved]; *Venkatachalam Chetty* v. *Maung Kyauk Lon*, (1911) 9 Ind Cas 469 (470): 4 Bur L Tim 24: 5 L B R 251; *Mahomed Baksh* v. *Hosseini Bibi*, (1888) 15 Cal 684 (692): 15 Ind App 81: 5 Sar 175: 12 Ind Jur 291 P C; *Ismail Mussajee Mukerdam* v. *Hafiz Boo*, (1903) 33 Cal 773 (783): 10 Cal W N 570: 3 All L Jour 353: 3 Cal L Jour 484: 8 Bom L R 379: 16 Mad L Jour 166: 1 Mad L Tim 137: 33 Ind App 186 P C [Execution while insane and also undue influence]: *Amarasai Goundan*, In re, (1910) 8 Ind Cas 845 (845): 9 Mad L Tim 210: 1910 Mad W N 821; *Farid-un-nissa* v. *Mukhtar Ahmed*, (1917) 40 Ind Cas 488 (489): 4 Oudh L J 230; *Alikjan Bibi* v. *Ramabaran*, (1910) 7 Ind Cas 166 (169): 12 Cal L Jour 357.

(7) *Sri Ram* v. *Mani Ram*, 1924 All 97 (97): 74 Ind Cas 922: 21 All L J 569: L R 5 All 24 (Civ); *Bhulu* v. *Assam Bibi*, (1910) 8 Ind Cas 886 (886) Cal: *Amritanath Biswas* v. *Jogendra Chandra*, 1924 Cal 369 (369): 69 Ind Cas 183; *Dharam Das* v. *Ranchhodji*, 1922 Bom 199 (200): 46 Bom 200: 64 Ind Cas 517: 23 Bom L R 1009; *Narendra Nath* v. *Abhoy Charan*, (1907) 34 Cal 51 (53, 56) F B: 4 Cal L Jour 437: 11 Cal W N 20: 1 Mad L Tim 364 [Overruling 16 Suth W R 198]. See also *Surendra Nath Singh* v. *Girdhari Singh*, (1921) 62 Ind Cas 633 (634) Cal [First suit as owner —Second suit for easement—Not fatal as inconsistent—Facts proved establishing easement —Decreed].

(8) *Nripendra Nath* v. *Birendra Nath*, (1917) 41 Ind Cas 615 (626): 21 Cal W N 939.

(9) *Hameed & Co* v. *Universal Fire Insurance Co*, 1924 Rang 317 (318): 2 Rang 144: 83 Ind Cas 593.

(10) *Ram Rachya Singh* v. *Kumar Kamakya Narayan Singh*, 1925 Pat 216 (221, 227): 1924 Pat H C C 313: 6 Pat L Tim 12: 4 Pat 139: 84 Ind Cas 585.

O. 6, R. 2, Notes 5—6.

6. Plea of discharge of mortgage debt or in the alternative plea of right to redeem it.[11]

7. Plea that land is not *service inam* and, if it is found against, that the party is willing to perform the service.[12]

But the right to plead inconsistent sets of facts is subject to the provision in Rule 16 *infra* which provides that the Court may strike out any matter which may tend to *prejudice* or *embarass the fair trial* of the suit. If, therefore, the inconsistent pleas will lead to the prejudice and embarrassment of the trial, they cannot be allowed.[13] Mere inconsistency of the pleas, however, will not necessarily lead to the embarrassment of the trial.[14] In order to avoid embarrassment in cases where inconsistent pleas are set up, the facts ought not to be mixed up leaving the other party to pick out the facts applicable to each case; they should be distinctly stated so as to show on what alternative facts each of the reliefs sought is founded.[15]

It may, however, be observed that the litigant who avails himself of the right to press inconsistent cases before the Court and endeavours to establish both by contradictory oral testimony, plainly places himself in peril and may find himself entangled in inextricable difficulty, for evidence adduced in support of two absolutely inconsistent cases which are mutually destructive can hardly be expected to secure confidence.[16]

6. Matters affecting damages.—It has already been observed in Note 3 above that all facts which the party pleading is entitled to *prove at the trial* must be stated in the pleadings. Thus it has been held in England that matters in aggravation of damages (*i.e.*, facts which tend to *increase* the damages) are material facts which must be pleaded.[1] In *Wood* v. *Durham*[2] however, it was held that facts relied upon by the defendant, not as constituting his defence, but in *mitigation* of damages are not material. The view seems to have turned upon the construction of O. 21, R. 4 of the English Rules which has not been reproduced in this Code. It is submitted that, under the present code, there is no room for any difference in the materiality of facts in aggravation and facts in mitigation of damages, as that rule has not been reproduced in the Code. In collision cases the plaint should be so framed as to set out the circumstances

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(11) *Butchanna* v. *Varahalu*, (1901) 24 Mad 408 (411).

(12) *Janaganti China Venkata* v. *Kappojee Linganna*, (1912) 15 Ind Cas 382 (382): 1912 Mad W N 418.

(13) *Berdon* v. *Greenwood*, (1878) 8 Ex D 251 (255); *Suraj Bikram Singh* v. *Chandrabhan Singh*, (1912) 17 Ind Cas 334 (337) (Oudh) [Inconsistent pleas are not barred unless they cause confusion and embarrassment]; *Gokhai Padhan* v. *Gones Lal Pandit*, (1912) 17 Ind Cas 936 (940): 16 Cal L Jour 404: 17 Cal W N 565; *Parameswar Singh* v. *Ramnanda Prasad Narayan Singh*, (1917) 42 Ind Cas 620 (621): 2 Pat L W 226.

(14) In re, *Morgan*, (1887) 35 Ch D 496; *Child* v. *Stenning*, (1877) 5 Ch D 695.

(15) *Bagot* v. *Easton*, (1878) 7 Ch D 1; *Berdan* v. *Greenwood*, (1878) 3 Ex D 251 (255); *Official Assignee* v. *Bidya Sundari*, (1920) 54 Ind Cas 700 (703): 30 Cal L Jour 428: 24 Cal W N 145; *Nripendra Nath* v. *Birendra Nath*, (1917) 41 Ind Cas 615 (624 and 625): 21 Cal W N 939; *Raman* v. *Bacha*, 1921 Pat 326: 60 Ind Cas 393 (394): 2 Pat L Tim 285; *Mati Lal Poddar* v. *Judhistir Das*, (1915) 31 Ind Cas 181 (182): 22 Cal L Jour 254: 20 Cal W N 310.

(16) *Bhuban Mohini Dasi* v. *Kumud Bala Dasi*, 1924 Cal 467 (472): 28 Cal W N 131: 39 Cal L Jour 140: 82 Ind Cas 934; *Joharmal* v. *Chetram*, (1915) 28 Ind Cas 538 (543): 39 Bom 715: 17 Bom L R 293.

Note 6.

(1) *Millington* v. *Loring*, (1880) 6 Q B D 190 (194): 50 L J Q B 214: 43 L T 657: 29 W R 207: 45 J P 268; *Whitney* v. *Moignard*, (1890) 24 Q B D 630: 59 L J Q B 324.

(2) *Wood* v. *Durham (Earl)*, (1888) 21 Q B D 501: 57 L J Q B 547: 59 L T 142: 37 W R 222.

of the collision with clearness and accuracy in order to enable the adversary to know the case he has to meet.[3] Similarly where special damages are claimed, the plaint should give full particulars showing its nature and extent, and showing with dates and items how the amount claimed is made up.[4]

7. **Pleadings should not state the evidence by which the facts are to be proved.**—As has been seen in Note 1 above, a pleading should not contain facts which are merely *evidence* to prove the material facts.[1] Thus when the plaintiff alleged that certain of his windows were ancient, the defendant should not plead that in a previous suit the plaintiff had admitted that the windows were not ancient, in as much as that fact is only *evidence* disproving the plaintiff's case.[2]

An offer without prejudice should not be pleaded in the pleadings.[3]

8. **The facts should be stated in a concise form.**—Pleadings must be drafted with sufficient definiteness to enable the opposite party to understand the case he is called upon to meet.[1] The material facts must be stated precisely and co-herently[2] and as briefly as is consistent with clearness.[3] When the pleadings are vague and unsatisfactory, the Court should endeavour to have them clearly specified.[4]

The forms of pleadings appended to the Code might as specified in the next rule, be adopted, with advantage, whenever possible to avoid objections on the score of prolixity.

See also rule 4, *infra* as to certainty in pleadings.

9. **Variance between pleading and proof.**—A party's case may be disclosed

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(3) *Rees* v. *Young*, 1921 Cal 543 (544, 545): 34 Cal L Jour 178: 25 Cal W N 519: 66 Ind Cas 745.

(4) *Ratcliffe* v. *Evans*, (1892) 2 Q B 524 (528): 61 L J Q B 535: 66 L T 794: 40 W R 578: 56 J P 837.

Note 7.

(1) *Thakur Prasad* v. *Mohammad Musa*, 1925 Pat 410 (412): 3 Pat L R Civ 36: 86 Ind Cas 629; *Mati Lal Poddar* v. *Judhistir Das*, (1915) 31 Ind Cas 181 (182): 22 Cal L Jour 254: 20 Cal W N 310; *Blake* v. *Albion Life Assurance Society*, (1876) 45 L J C P 663: 35 L T 269: 24 W R 677: (1879) 4 C P D 94: 48 L J C P 109: 40 L T 211: 27 W R 321: 14 Cox c c 246; *Wilkinson* v. *L & N W Ry. Co.* (1879) 12 Ch D 787 (793); *Phillips* v. *Phillips*, (1878) 4 Q B D 127 (133): 48 L J Q B 135: 39 L T 556: 27 W R 436 Fol: 20 All 299 Ref: 11 All 438: 7 Bom L R 670: 22 Cal L Jour 254: 20 Cal W N 310: 31 Ind Cas 181 [Facts divided into two classes—*Facta Probanda* or facts in issue and *Facta Probantia* or the evidentiary facts]: *Banumal* v. *Newandmal*, 1921 Sind 159 (162): 16 Sind L R 207: 83 Ind Cas 360 [Estoppel cannot be properly set out in plaint as it is rule of evidence]. But see *Kandan Ashtamoorthi* v. *Rama Mudali*, 1926 Mad 1052 (1052): 96 Ind Cas 915 [Plea of estoppel]. See also *Ramprasad* v. *Hazarimull*, 1931 Cal 458 (460, 461): 58 Cal 418: 134 Ind Cas 538.

(2) *Lumb* v. *Beaumont*, (1884) 49 L T 772. See also *Davy* v. *Garrett*, (1878) 7 Ch D 473.

(3) *Halford* v. *The East Indian Railway Company*, (1874) 12 Beng L R App 19.

Note 8.

(1) *Indur Chunder* v. *Radha Kishore*, (1892) 19 Cal 507 (512): 19 Ind App 90: 6 Sar 185 P C; *Har Gobind Ray* v. *Keshwa Prasad*, 1925 Pat 168 (172): 1924 Pat H C C 297: 84 Ind Cas 386: 6 Pat L Tim 465. See also *Ram Dayal* v. v. *Ram Doolal*, (1869) 11 Suth W R 273 (275): 2 Beng L R (A C) 341 [Vague allegations of collusion or fraud insufficient]; *Mahomed* v. *Patun*, (1873) 20 Suth W R 147 (148) [Plaint intentionally indistinct and obscure—Rightly dismissed]; *Jagdish Narain* v. *Hazari Lal*, 1932 All 467 (467): 1932 All L J 309 [General and vague charge of immorality—Struck out with costs].

(2) *Bisheshur* v. *Ram Churun*, (1872) 5 N W P H C R 25 (29).

(3) *Askew* v. *N E Ry Co.* 1875 W N 238; *Marsh* v. *Pontefract Corporation*, 1876 W N 7; *Davy* v. *Garett*, (1878) 7 Ch D 473. See also *The Court of Wards* v. *Rajah Leelanund Singh*, (1870) 13 Suth W R 48 (49): 4 Beng L R App 30; *Anund Chander* v. *Woomes Chunder*, (1862-3) 1 Hyde 147; *Ramprasad* v. *Hazarimull*, 1931 Cal 458 (460): 58 Cal 418: 134 Ind Cas 538 [Particulars too voluminous—Procedure].

(4) *Mir Syed Hasan* v. *Mt Thayaba Begam*, (1915) 26 Ind Cas 547 (588): 1 Oudh L J 591; *Gadidasu Suryanarayana* v. *Gadidasu Raja Lakshmamma*, (1910) 7 Ind Cas 800 (800): 8 Mad L Tim 202.

O. 6, R. 2, Note 9.

1. by his allegations in his pleading,
2. by his answers to interrogatories delivered to him by the opposite party in the suit,
3. by allegations made on oath by him or by any persons present on his behalf, or made by his pleaders,
4. By the contents of documents produced by him.[1]

Issues are framed on the cases of the parties so disclosed, and evidence is directed, at the trial, to the proof of the case so set up, and covered by the issues framed thereon. A party is expected and is bound to prove the case *as alleged by him and as covered by the issues framed.* This is in accordance with the main principle of practice that a party can only succeed according to what was alleged and proved *secundum allegata et probata.*[2] He will not be allowed to succeed on a case not so set up by him[3] and cannot be allowed, at the trial, to *change* his case, or set up a case *inconsistent* with what he has alleged in his pleading, except by way of amendment of the pleading under O. 6, R. 17.[4] In

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Note 9.

(1) See Order 14, Rule 3.

(2) *Wongmun Khee* v. *Teong Shain*, (1916) 36 Ind Cas 464 (464): 10 Bur L Tim 119; *Gajadhar Bux* v. *Milan Singh*, (1903) 6 Oudh Cas 247 (250); *Nathu Piraji Marvadi* v. *Umedmal Gadumal*, (1909) 10 Bom L R 768 (769): 33 Bom 35: 1 Ind Cas 456; *Sheo Prasad* v. *Lalit Kuar*, (1896) 18 All 403 (405 and 410): 1896 All W N 132; *Nathu* v. *Umedmal*, (1909) 1 Ind Cas 456 (457): 33 Bom 35: 10 Bom L R 768; *Gossain Das* v. *Issur Chunder*, (1877-78) 3 Cal 224 (226); *Varuswami* v. *Ayyasami*, (1863) 1 Mad H C R 471 (477).

(3) *Sital Das Babaji* v. *Pertap Chunder Sarma*, (1909) 3 Ind Cas 408 (414): 11 Cal L Jour 2; *Joad Ali* v. *Raikishore Saha*, 1925 Cal 949 (950): 85 Ind Cas 753; *Jhandu* v. *Tariff*, 1914 P C 34 (35): 37 All 45: 17 Bom L R 44: 21 Cal L Jour 26: 19 Cal W N 197: 28 Mad L Jour 453: 17 Mad L Tim 10: 2 Mad L W 113: 1915 Mad W N 394: 27 Ind Cas 892 P C; *Rachea* v. *Upendra Chandra*, (1900) 27 Cal 239 (242); *Khaja Mahomed Asghur* v. *Manija Khanum*, (1887) 14 Cal 420 (423); *Gour Beharee* v. *Sheo Ruttan Koonwar*, (1868) 10 Suth W R 243 (244); *Ram Comul Chuckerbutty* v. *Nund Ram Coolal*, (1868) 10 Suth W R 261 (263) [Joint claim by two—Title in one alone—Not to be decreed]; *Sheo Nandun* v. *Mukdoom Buksh*, (1873) 20 Suth W R 364 (365), (Do.); *Umbika Churn* v. *Nadir Hossein*, (1869) 11 Suth W R 133 (133): 2 Beng L R (A C) 258; *Monktakeshee* v. *The Collector of Burdwan*, (1869) 12 Suth W R 204 (206); *Beejoynath Chatterjee* v. *Lukhee Monee*, (1869) 12 Suth W R 248 (249): 5 Beng L R 514 (N); *Rance Shurut Soondaree* v. *Koomar Puresh Narain Roy*, (1870) 13 Suth W R 464 (465); *Sri Prasad* v. *Rai Guru Trumbuck*, (1871) 14 Suth W R 386 (387); *Sree Narain* v. *Miller*, (1871) 15 Suth W R O C 7 (15); *Radha Binode* v. *Koolabode Mundul*, (1871) 15 Suth W R 863 (864); *Tara Chand* v. *Nobin Chunder*, (1874) 21 Suth W R 132 (133); *Protap Chunder* v. *The Collector of Gowalparah on behalf of the Government*, (1874) 22 Suth W R 216 (219); *Raja Ram Banerjee* v. *Sonatun Roy*, (1875) 23 Suth W R 404 (406); *Bisheshar Das* v. *Ram Jaiseri Das*, 1881 All W N 158 (158); *Kasim Ali Khan* v. *Birj Kishore*, (1870) 2 N W P 182; *Kundan Lal* v. *Makundi Kunwar*, 1924 All 150 (152): 46 All 571: 77 Ind Cas 609; *Baya Bai* v. *Noor Mahomed*, (1909) 2 Ind Cas 146 (148): 34 Bom 244: 11 Bom L R 237; *Laljee Ratanji* v. *Gangaram Tuljaram*, (1864-66) 2 Bom H C R 176; *Dwarikanath Chatterji* v. *Jiban Ali*, (1909) 1 Ind Cas 657 (659) Cal; *Shera* v. *Gahna*, 1927 Lah 802 (804): 28 Pun L R 303: 106 Ind Cas 474; *Asa Nand* v. *Mahmud*, 1927 Lah 96 (96): 7 Lah L Jour 542: 26 Pun L R 840: 92 Ind Cas 241; *Mahomed Shah* v. *Fatta*, (1920) 54 Ind Cas 43 (43-44): 4 Pun W R 1920: 2 U P L R (Lah) 17: 15 Pun L R 1920: 2 Lah L Jour 56; *Fota* v. *Jowahira*, 1879 Pun Re No 36; *Immudipattam Vijaya Gandippa* v. *Annasamy Iyer*, (1912) 17 Ind Cas 106 (110-111) Mad; *Sonasundaram Chetty* v. *Vadivelu Pillai*, (1908) 31 Mad 581 (532): 4 Mad L Tim 344; *Mt Bani Bai* v. *Mahadeo*, 1927 Nag 410 (411): 106 Ind Cas 659; *Balkrishna Das* v. *Govind*, (1909) 2 Ind Cas 241 (242): 5 Nag L R 67; *Ragho Pershad* v. *Secretary of State*, 1923 Oudh 114 (115): 9 Oudh L J 629: 74 Ind Cas 369: 27 Oudh Cas 64; *Sitapa Begam* v. *Muhammad Ishaq Khan*, (1916) 32 Ind Cas 365 (367): 2 Oudh L J 584; *Munshi Babu Ram* v. *Babu Ram*, 1921 Oudh 259 (259): 8 Oudh L Jour 343: 66 Ind Cas 620; *Stewart* v. *Simon Gonsalves*, (1912) 17 Ind Cas 900 (901): 5 Bur L Tim 167: 6 L B R 74; *Ohit* v. *Kyaw*, (1920) 57 Ind Cas 873 (874): (1920) 3 U B R 201; *Christensen* v. *Suthi*, (1909) 3 Ind Cas 719 (719): 5 L B R 76; *Ratan Singh* v. *Nanikram*, 1927 Sind 219 (220): 20 Sind L R 220; *Nawab Khan* v. *Yatam*, (1911) 9 Ind Cas 36 (36): 1911 Pun L R 15: 1911 Pun W R 2 [Pre-emption on town basis—Not claimable on village basis in second appeal].

(4) *Sultan Miya* v. *Ajibakhatoon Bibi*, 1932 Cal 497 (500): 59 Cal 557; *Kalimohun Tripura* v. *Birendra Kisore*, (1915) 31 Ind Cas 391 (392): 22 Cal L Jour 309; *Binode Behari* v. *Raj Narain*, (1904) 8 Cal W N 171 (172) [Ground of limitation—Not changeable subsequently]; *Rup Narayan* v. *Gopal Debi*, (1909) 3 Ind Cas 382 (384): 36 Cal 780: 36 Ind App 103: 6 All L J 567: 10 Cal L Jour 58: 13 Cal W N 920: 5 Mad L Tim 423: 11 Bom L R 833: 19 Mad L Jour 548: 98 Pun Re 1909: 146 Pun W R 1909: 68 Pun L R 1910 P C [New issue—Raising of, before argument—Issue depending on evidence]; *Sri Radha Krishna* v. *Ram Bahadur*, 1917 P C 197 (200): 16 All L J 33: 20 Bom L R 502: 27 Cal L Jour 191: 22 Cal W N 330: 34 Mad L Jour 97: 28 Mad L Tim 26: 7 Mad L W 149: 1918 Mad W N 163: 4 Pat L W 9: 43 Ind Cas

Eshenchunder Singh v. *Shamacharan*,[5] Lord Westbury in delivering the judgment of the Board observed as follows:— **O. 6, R. 2, Note 9.**

"The case is one of considerable importance, and their Lordships desire

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268 P C [New pleas not allowed before the Privy Council for first time. See also S 112, N 7]; *Mt Afzal-un-nissa* v. *Abdul Karim*, 1919 P C 11 (12): 47 Cal 1: 46 Ind App 131: 1919 Pun Re 81: 17 All L J 608: 21 Bom L R 891: 30 Cal L Jour 152: 23 Cal W N 966: 1919 Pun L R 65: 1919 Pun W R 26: 36 Mad L Jour 580: 26 Mad L Tim 55: 11 Mad L W 176: 1919 Mad W N 494: 13 Bur L Tim 1: 1 U P L R 47: 50 Ind Cas 749 P C, (Do.); *Kristnayya* v. *Lakshmipathi*, 1920 P C 4 (7): 43 Mad 650: 47 Ind App 99: 18 All L J 601: 24 Cal W N 905: 39 Mad L Jour 70: 28 Mad L Tim 70: 1920 Mad W N 385: 12 Mad L W 625: 56 Ind Cas 391 P C, (Do.); *Venkayamma Rao* v. *Appa Rao*, 1921 P C 27 (28, 29): 19 All L J 97: 23 Bom L R 713: 33 Cal L Jour 171: 25 Cal W N 654: 40 Mad L Jour 144: 13 Mad L W 256: 1921 Mad W N 77: 59 Ind Cas 767: 29 Mad L Tim 164 P C, (Do.); *Baliram Singh* v. *Seth Narasingh Das*, 1923 P C 93 (94): 18 Mad L W 137: 45 Mad L Jour 403: 28 Cal W N 593: 33 Mad L Tim 275: 1923 Mad W N 714: 4 L R P C 197: 75 Ind Cas 546 P C, (Do.); *Annada Mohan Roy* v. *Gour Mohan Mullick*, 1923 P C 189 (191): 21 All L J 718: 4 Pat L Tim 609: 50 Ind App 239: 50 Cal 929: 25 Bom L R 1269: 45 Mad L Jour 617: 33 Mad L Tim 365: 1923 Mad W N 803: 4 L R P C 164: 74 Ind Cas 499: 40 Cal L Jour 10: 28 Cal W N 713 P C, (Do.) [Issues abandoned in Lower Court]; *Ramkissen Singh* v. *Md Abdul Sattar*, 1928 P C 165 (171): 30 Bom L R 852: 55 Mad L Jour 292: 28 Mad L W 248: 109 Ind Cas 574: 32 Cal W N 1149: 24 Nag L R 186: 48 Cal L Jour 570 P C, (Do.): *Narottam Das* v. *Kedar Nath*, (1917) 41 Ind Cas 957 (958): 1916 P C 245: 21 Cal W N 665: 6 Mad L W 61 P C, (Do.); *Maung Po* v. *Ma Lon Ma Gale*, (1911) 11 Ind Cas 497 (498) P C: 38 Cal 629: 38 Ind App 140: 15 Cal W N 766: 14 Cal L Jour 15: 8 All L J 739: 13 Bom L R 464: (1911) 2 Mad W N 397: 4 Bur L Tim 153: 6 L B R 18: 10 Mad L Tim 479 P C, (Do.) [Not allowed except on terms]; *Prosunno Chunder* v. *Gouree*, (1867) 7 Suth W R 478 (479); *Angullia & Co* v. *Sassoon*, (1912) 13 Ind Cas 705 (706): 39 Cal 568: 16 Cal W N 593; *S M S Gopala Iyer* v. *Secretary of State*, 1927 Mad 1116 (1116): 38 Mad L Tim 205: 101 Ind Cas 346; *Nalladavalu Achutan* v. *Veerina Surappa*, (1924) Mad 845 (845): 1924 Mad W N 485: 79 Ind Cas 902; *Suppuswami Aiyar* v. *Corporation of Madras*, 1926 Mad 281 (281): 22 Mad L W 877: 91 Ind Cas 7; *Hamilton* v. *Land Mortgage Bank of India*, (1883) 5 All 456 (459): 1883 All W N 99; *Krishnaswamy* v. *Jayalakshmi*, 1931 Mad 300 (301): 60 Mad L Jour 315: 33 Mad L W 307: 130 Ind Cas 766: 1931 Mad W N 497: 54 Mad 671; *Pethsari* v. *Sendamarai Ayi*, (1910) 8 Ind Cas 385 (385): 8 Mad L Tim 284; *Sheo Prasad* v. *Lalit Kuar*, (1896) 18 All 403 (405): 1896 All W N 132; *Paras Narain* v. *Chadra Chatia*, 10 Bom L R 494 (496); *Moti Lal* v. *Judhistir*, (1915) 31 Ind Cas 181 (183): 22 Cal L Jour 254: 20 Cal W N 310; *Shuhochuree Dossee* v. *Showdamince Dassee*, (1867) 7 Suth W R 306 (307); *Ram Das Mondal* v. *Indromoni Dasi*, (1899) 3 Cal W N 325 (328) [Fraud set up by plaintiff not proved—He cannot seek to redeem defendant]; *Joytara Dassee* v. *Mahomed Mobaruck*, (1882) 8 Cal 975 (980): 11 Cal L Rep 399: 5 Shom L R 13; *Ananda Hari* v. *Secretary of State*, (1906) 3 Cal L Jour 316 (331); *Nur Ilahi* v. *Mawaz Khan*, 1925 Lah 345 (346): 26 Pun L R 76: 7 Lah L Jour 86: 86 Ind Cas 683 [New plea raised at the time of arguments]; *Bishna* v. *Phuli*, (1909) 1 Ind Cas 478 (478): 43 Pun W R 1909 [New point not allowed in arguments]; *Ram Diwaya Ram* v. *Mukhi Ram*, (1913) 18 Ind Cas 553 (554): 8 Pun L R 1913: 220 Pun W R 1913; *Rajindar Singh* v. *Tekchand*, 1923 Lah 628 (629): 80 Ind Cas 266 [No decree on point not raised, without amendment]; *Ram Singh* v. *Sitaram*, 1931 Nag 57 (60): 26 Nag L R 367: 130 Ind Cas 108; *Tika Ram* v. *The Deputy Commissioner of Barabanki*, (1899) 2 Oudh Cas 209 (213); *Kalka Singh* v. *Sheoraj Singh*, (1901) 4 Oudh Cas 347 (351) [Want of consideration pleaded—Want of necessity cannot be set up in arguments]; *Uma Shankar* v. *Mt Sukraj*, 1931 Oudh 400 (401): 8 Oudh W N 878, (Do.); *Sheo Narain* v. *Bhugwan Dutt*, (1869) 11 Suth W R 10 (11): 2 Beng L R App 15; *Bhagirathi Dass* v. *Baleswar Bagarti*, (1913) 19 Ind Cas 686 (688): 41 Cal 69: 17 Cal W N 877: 19 Cal L Jour 155; *Dwijendra Narain Roy* v. *Jogesh Chandra*, 1924 Cal 600 (606): 39 Cal L Jour 40: 79 Ind Cas 520 [Doctrine that a party cannot be permitted to assume inconsistent positions applies not only to the successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided that the second suit grows out of the judgment in the first]; *Pritam Singh* v. *Mubark Singh*, (1911) 9 Ind Cas 591 (593): 78 Pun L R 1911: 74 Pun W R 1911 [Where the plaintiff is unable to prove his assertions his suit should be dismissed]; *Bulo Ram Sircar* v. *Ram Narain Banerjee*, (1868) 10 Suth W R 242 (242), (Do.). But see *Nanda Kumar* v. *Emdad Ali*, 1927 Cal 49 (50): 44 Cal L Jour 265: 98 Ind Cas 849 [Court is entitled to draw inference inconsistent with the case of either party]; *Gulak Chandra* v. *Nishi Chandra*, 1925 Cal 521 (521): 78 Ind Cas 162 [Case in plaint disbelieved—New case in evidence—Dismissal or amendment]; *Bhawan Das* v. *Sheikh Mahomed Hosein*, (1871) 13 Moo Ind App 346 (352): 13 Suth W R P C 38: 2 Sar 560 P C [Plaint case not proved —New case—Not allowed]; *Dal Bahadur Singh* v. *Sarabjit Tewari*, 1931 Oudh 378 (380): 132 Ind Cas 793: 8 Oudh W N 732. See also *Perumal* v. *Kaveri*, (1893) 16 Mad 121 (125): 2 Mad L Jour 281 [Suit for *declaration* of right to redeem—Redemption not to be decreed].

(5) *Eshenchunder Singh* v. *Shamacharan Bhutto*, (1866) 11 Moo Ind App 7 (20, 23, 24): 6 Suth W R P C 57: 2 Ind Jur N S 87: 2 Sar 209 P C. See also the following cases:— *Hari Ravji* v. *Shapurji Harmasji Shet*, (1885-86) 10 Bom 461 (467, 468): 13 Ind App 66: 4 Sar 719: 10 Ind Jur 310; *Ameeroonnissa* v. *Abedoonnissa*, (1875) 2 Ind App 87 (107): 23 Suth W R 208: 15 Beng L R 67: 3 Sar 423: 3 Suther 87: *Hamilton* v. *Land Mortgage Bank of India*, (1883) 5 All 456 (459): 1883 All W N 99; *Rampear Rai* v. *Bhagia*, (1910) 8 Ind Cas 713 (714) Cal; *Christian Sen* v. *Suthi*, (1909) 3 Ind Cas 719 (719): 5 L B R 76; *Ishan Chandra Dupi* v. *Nishi Chandra Dubi*, (1917) 41 Ind Cas 378 (380): 22 Cal W N 853: 29 Cal L Jour 1; *Mylapore Iyasamy* v. *Yeo Kay*, (1887) 14 Cal 801 (806): 14 Ind App 168: 5 Sar 50: 11 Ind Jur 397; *Mukhoda* v. *Ram Churn*, (1882) 8 Cal 871 (875): 11 Cal L Rep 194: 7 Ind Jur 32; *Annadacharan Sil* v. *Hargobind Sil*, 1923 Cal 570 (572): 27 Cal W N 496: 37 Cal L Jour 552: 75 Ind Cas 557; *Mu Nge Ma* v. *Maung Po Yin*, 1931 Rang 177 (177): 133 Ind Cas 95; *Sital Das Babaji* v. *Pertab Chunder Sarma*, (1909) 3 Ind Cas 408 (414): 11 Cal L Jour 2; *Chora Kara* v. *Isa Bin*, (1875-77) 1 Bom 209 (214); *Joytara* v. *Mahomed*, (1882) 8 Cal 975 (980): 11 Cal L Rep 399: 5 Shom L R 13; *Hira* v. *Giribala*, (1916) 34 Ind Cas 444 (445): 29 Cal L Jour 429.

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to take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made .....It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove.....They desire to have the rule observed that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from".

Illustrations.

1. *A*, a riparian proprietor, sues the Government, for the proprietary possession of an area of dry land in midstream on the allegation that it is a gradual accretion upon an already existing *lanka* or alluvial land which belonged to him. Failing to prove this case, he cannot urge at the hearing that he is the owner of the whole bed of the river and therefore of every formation including the area in suit. *Bulusu Ramalakshmamma* v. *The Collector of Godavery District*, I. L. R. 22 Mad 464 P. C.
2. *A* sues *B* for the cancellation of a mortgage document executed by *A's* father to *B*, on the ground that *A's* father was *insane* and that *B* fraudulently obtained the document from him. Failing to prove this case, he cannot be allowed to succeed on the ground that *A's* father, though not insane, was helpless and weak in mind, when the type of insanity connoted in the evidence was something quite different. *Durga Baksh* v. *Muhammad Ali*, I. L. R. 27 All. 1 P C; *Ismail Mussajee Mookerdam* v. *Hafiz Boo*, I. L. R. 33 Cal 773 P. C.

For other instances in which a party was not allowed to change his case and get relief on that basis, *see* the cases cited in the footnote below.[6]

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(6) Suit on basis of document not being binding on plaintiff—On failure thereof, claim for benefit of the terms of the document. *Ramashwar Dayal* v. *Sikhdar Singh*, (1913) 21 Ind Cas 64 (65) All; *Lakshmi* v. *Ramchendra*, (1906) 16 Mad L Jour 5 (6); *Nitya Gopal Tewary* v. *Ramsani Roy*, 1923 Cal 296 (296): 67 Ind Cas 394; *Durgan Sahoo* v. *Pryag Ram*, (1878) 2 Cal L Rep 538 (541) [Suit on basis of plaintiff being in possession cannot be changed into one for possession]; *Mirsusnari Kaer* v. *Ram Pratap Singh*, (1909) 4 Ind Cas 547 (549): 4 Cal W N 366; *Fatima* v. *Ahmad Baksh*, (1904) 31 Cal 319 (331) [Suit for rent on basis of tenancy—Tenancy not proved—Damages for use and occupation cannot be decreed]; *Jang Bahadur Singh* v. *Ehsan Ali*, (1902) 5 Oudh Cas 222 (224); *Rachhea Singh* v. *Upendra Chandra Singh*, (1900) 27 Cal 239 (242); *Surendra Narain* v. *Bhai Lal*, (1895) 22 Cal 752 (756); *Lachmeepat Das* v. *Shaikh Emaet Ali*, (1874) 22 Suth W R 346 (347); *Lukee Kanto Das Chaudhury* v. *Sumeeruddi Luskur*, (1874) 13 Beng L R 243: 21 Suth W R 208 (209) F B [Suit based on tenancy—On failure to prove tenancy, plaintiff cannot succeed on his general title and *vice versa*]; *Lakshmibai* v. *Hari Bin Raoji*, (1872) 9 Bom H C R 1; *Ramchandra* v. *Vasudev*, (1886) 10 Bom 451 (452) [Suit on lease—Not to be changed for partition]; *Gobind Chunder Lahury* v. *Jardine Skinner & Co*, (1867) 7 Suth W R 163 (163); *Laljee Singh* v. *Banwari Lal Roy*, (1876) 25 Suth W R 448 (448), *Jeetoo* v. *Beetun*, Marsh 47: 1 Ind Jur O S 85: 1 Hay 112; *Kareegur* v. *Anund Chunder Roy*, Marsh 57: 1 Hay 130; *Nurrohurry Mohunto* v. *Naraince Dossee*, Marsh 70: Suth W R F B 23: 1 Ind Jur O S 9: 1 Hay 234; *Fatima Bibee* v. *Arif Sookanee*, Marsh 263: 2 Hay 105; *Bhoyrub Chunder Chowdhry* v. *Haradhan Ghose*, Marsh 561: 2 Hay 666; *Chennaraswamy* v. *Chinna Satyanarayana Murthy*, (1913) 21 Ind Cas 560 (560) Mad [Suit for rent at an alleged rate—Rates not proved—Court cannot decide what the fair rates were]. *Uther Hossein* v. *Ramphal Roy*, (1873) 20 Suth W R 75 (76); *Doorga Mahtoon* v. *Kanhye Lall Ajha*, Marsh 371: 2 Hay 422; *Rash Dhary Gope* v. *Khakon Singh*, (1897) 24 Cal 433 (435). But see *Punnoo Singh* v. *Nirghin Singh*, (1881) 7 Cal 298 (302): 8 Cal L Rep 310 [Plaintiff asking for one relief—cannot be granted quite a different one]; *Kallianiamma* v. *Narayana Nambiar*, (1915) 28 Ind Cas 69 (78): 28 Mad L Jour 266: 17 Mad L Tim 170: 1915 Mad W N 105 [Suit on one mortgage—Decree on another]; *Nabin Chandra Mitter* v. *Mahes Chandra Mitter*, (1869) 3 Beng L R 111: 12 Suth W R 69 (69); *Major S B Goad* v. *David Colyer*, 1876 Pun Re No 32; *Palli Kandi Lathapurath Mammad* v. *Matanchera Mammad*, (1917) 43 Ind Cas 28 (28): 1917 Mad W N 789: 35 Mad L Jour 315; *Sreenarain Chuckerbutty* v. *A B Müller*, (1871) 15 Suth W R P C 7 (15); *Badaruddin* v. *Herajtulla*, (1920) 54 Ind Cas 797 (797) Cal; *Asad Ali* v. *Anand Sarup*, (1915) 27 Ind Cas 35 (36): 12 All L J 1233; *The London and Mediterranean Bank* v. *Bhanji Zutani*, (1878) 2 Bom 116 (119) [Suit against a firm cannot be converted into a suit against a partner of the firm]; *Ratanji* v. *Puljaram*, (1864-65) 2 B H C 184; 2nd Ed 176 [Suit on basis of ownership—Decree on basis of easement or of tenancy cannot be given]; *Kidar Nath* v. *Hari Singh*, (1916) 36 Ind Cas 55 (55): 75 Pun L R 1916; *Narendra*

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The rule of *Secundum allegate et probata* is based mainly on the principle that no party should be taken by *surprise* by the change of case introduced

Nath v. *Abhoychurn*, (1907) 34 Cal 51 (55): 4 Cal L Jour 437: 11 Cal W N 20: 1 Mad L Tim 364 F B. See also *Palaniappa* v. *Appavu*, 1928 Mad 1139 (1140): 110 Ind Cas 411 [Suit on basis of defendant being trespasser—Decree on basis of tenancy cannot be given; *Ramgolam* v. *Heetnarain*, (1878) 2 Cal L Rep 292 (293); *Phillips* v. *Nand Coomar*, (1867) 8 Suth W R 385 (386); *Nathu Rai* v. *Manram Rai*, (1882) All W N 57 (57, 58) [Suit for fair and equitable rent cannot be converted in suit for enhancement of rent]; *Gobind Lal* v. *Ram Saran Lal*, 1921 Pat 435 (436): 2 Pat L Tim 642: 68 Ind Cas 433; *Dayal Kundu* v. *Mabhu Pathak*, (1920) 57 Ind Cas 558 (559): 5 Pat L Jour 406 [Suit solely based on fraud—Fraud alleged not proved—Plaintiff cannot succeed on other grounds]; *Ghulam Hazrat Khan* v. *Rahimdad Khan*, (1911) 9 Ind Cas 429 (430) Oudh; *Madhub Ali* v. *Hossein Reza*, (1879) 4 Cal L Rep 52 (54); *Narendra Chandra Lahiri* v. *Saroda Kanta Moitra*, (1910) 6 Ind Cas 829 (830) Cal; *Sahebrao* v. *Gajadhar*, (1874) 22 Suth W R 221 (222); *Madho Pershad* v. *Lalla Jeetun Lall*, (1872) 17 Suth W R 98 (99) [Suit based on title to exclusive possession cannot be converted into suit for joint possession or for partition]; *Kishen Chunder* v. *Kaleenath*, (1872) 18 Suth W R 507 (507) [Claim to khas possession cannot be changed into claim for proprietary right to portion]; *Muthusami* v. *Rama Krishna*, (1889) 12 Mad 292 (293); *Antu Singh* v. *Mandil*, (1893) 15 All 412 (413): 1893 All W N 177; *Kundan* v. *Mohani Cunwar*, 3 U P L R All 69. See also *Nobin Chunder* v. *Mohesh Chunder*, (1869) 12 Suth W R 69 (69): 3 Beng L R App 111 [Suit on one title—Cannot be converted into suit on another title]; *Appayya* v. *Ramireddi*, (1888) 11 Mad 367 (371): 13 Ind Jur 12; *Shib Chand* v. *Joymalu*, (1881) 7 Cal L Rep 103 (106); *Inhan Chunder* v. *Sharoda*, (1869) 12 Suth W R 487 (488); *Acharath* v. *Mathummal*, (1908) 4 Mad L Tim 327 (328); *Ram Das* v. *Daulat Ram*, (1913) 18 Ind Cas 807 (809): 114 Pun W R 1913: 225 Pun L R 1913; *Jhanda Mal* v. *Gopal Das*, 1925 Lah 571 (572): 7 Lah L Jour 405: 26 Pun L R 778; *Gopalakrishna* v. *Abdul*, 1921 Cal 569 (571): 34 Cal L Jour 319: 66 Ind Cas 640 [Suit on prescriptive right—No decree to be given on a customary right]; *Kumaraswami Chetty* v. *Poosari Saka*, (1909) 4 Ind Cas 37 (37): 20 Mad L Jour 141; *Central Trust and Safe Deposit Co* v. *Snider*, 1915 P C 168 (169) P C; *Dalpheroo Mian* v. *Bangali Mali*, 1923 Pat 481(483): 4 Pat L Tim 397: 71 Ind Cas 897 [Claim under gift cannot be changed into one under inheritance—Suit on plea of non-execution of document cannot be turned into a suit based on the invalidity of the document on other grounds], *Mahomed Buksh* v. *Hosseini*, (1887) L R 15 Ind App 81 (86) [Claim to set aside document as forgery—Claim to set it aside on ground of undue influence]; *Parag Narain* v. *Chodra Chhatia Jakhto*, (1908) 10 Bom L R 494 (495, 496); *Wali-ul-lah Khan* v. *Muhammad Issar-ul-lah Khan*, (1888) 10 All 627 (629): 1882 All W N 242; *Ma Hnin Get* v. *S V A Satappa Chetti*, 14 Bur L R 65 [Suit on the basis of custom or agreement—Cannot be converted into a caim under law or under a different custom, and *vice versa*]; *Desai Ranchoddas* v. *Raidal Nathubhai*, (1897) 21 Bom 110 (115) [Different custom set up]; *Malliah* v. *Ganganna*, 1926 Mad 830 (831): 94 Ind Cas 226 [Suit based upon customary right—Plaintiff cannot be given relief on common law right]; *Tufel Muhammad* v. *Shahab Din*, (1915) 31 Ind Cas 85 (86): 1915 Pun W R 148: 1915 Pun L R 67 [Custom v. Muhammadan law]; *Chadami Lal* v. *Muhammad Baksh*, (1875-78) 1 All 563 (564) [Suit on agreement—Custom set up]; *Maratib Ali* v. *Abdul Hakim*, (1875-78) 1 All 567 (568), (Do.); *Sheu Sahai Mullick* v. *Lala Hari Sahua Singh*, (1869) 3 Beng L R App 142 (a) [Right of pre-emption claimed as co-partner—New case on ground of vicinage]; *Kunjabehari Lal* v. *Girdhari Lal*, (1868) 1 Beng L R S N 12: 10 Suth W R 189, (Do.); *Mahadeo* v. *Zeenutoonissa*, (1869) 11 Suth W R 169 (170): 7 Beng L R 45 Note, (Do.). But see *Abdul Hamid* v. *Maseetullah*, (1915) 26 Ind Cas 70 (70): 36 All 673: 12 All L J 966; Miscellaneous; *Pitambar Parshad* v. *Must Parbati*, (1905) 8 Oudh Cas 116 (117) [One consideration pleaded—Another consideration cannot be set up at the trial]; *Ramanandan* v. *Pulikutti*, (1898) 21 Mad 288 (291): 8 Mad L Jour 121 [Suit for ejectment—Not to be turned into one for a declaration of reversionary title]; *Moshuq Ali* v. *Harunissa*, 1929 Oudh 204 (208): 114 Ind Cas 113 [Suit based on one custom—Different custom cannot be set up at the trial]; *Sadanand Tewari* v. *Deb Nath Manjhi*, 1922 Pat 184 (186): 1922 Pat H C C 154 [Execution of document admitted and fraud, etc, not set up—Court cannot find that party was not aware of the contents]; *Kureemooddeen Biswas* v. *Huro Chunder Gooho*, (1864) 1 Suth W R 305 (306) [Document which is the basis of the suit disbelieved—Court should dismiss the suit]; *Ketu Das* v. *Surendra Nath Sinha*, (1903) 7 Cal W N 596 (597, 598); *Shah Kimdun Lal* v. *Susta Kooer*, (1867) 8 Suth W R 369 (369) [Suit for possession on the ground that mortgage was paid up—Decree for redemption cannot be given on failure to establish discharge]; *Ilahi Khan* v. *Sher Ali Khan*, (1904) 26 All 331 (334); *Munshi Lal* v. *Mangal Rai*, (1915) 31 Ind Cas 706 (707) All [Suit on mortgage executed by father—Personal decree against son—Not proper as it will be a new case]; *Illa Somanna* v. *Maddala Seetamma*, (1913) 13 Ind Cas 636 (636): 13 Mad L Tim 102; *Sirasubramania* v. *Gnanasambhanda*, (1911) 10 Ind Cas 98 (103): 21 Mad L Jour 359: 10 Mad L Tim 71 [Suit for vendor's lien not to be treated as a suit for an account on the basis of agency]; *Saheb Roy* v. *Gujadhar Pershad Narain Singh*, (1874) 22 Suth W R 221 (223); *Ram Adin* v. *Munshi Ram*, (1915) 31 Ind Cas 209 (210): 76 Pun Re No 1915: 154 Pun W R 1915 [Suit against persons in their individual capacity—Plaintiff cannot on failure to prove his case ask for a decree on the basis of their being partners]; *Ananda Hari Basak* v. *Secretary of State for India in Council*, (1906) 3 Cal L Jour 316 (330); *Gossain Ram Kissen Puri* v. *Miah Jan Sheik*, (1897) 1 Cal W N 710 (711); *Bhagwan Bakhsh* v. *Kanta Parshad*, (1903) 6 Oudh Cas 119 (125) [Variance as to date of tenancy not allowed]; *De Silva* v. *De Silva*, (1903) 27 Bom 103 (112): 4 Bom L R 849; *Haji Saboo Sidick* v. *Ayeshbabai*, (1903) 27 Bom 485 (491): 5 Bom L R 475: 7 Cal W N 665: 30 Ind App 127: 8 Sar 477 P C; *Bhagwand Das* v. *Hari Ram*, (1910) 5 Ind Cas 350 (351) All; *Gobind Rao* v. *Girdharee Sahoo*, (1875) 24 Suth W R 355 (355); *Irangowda* v. *Seshapa*, (1893) 17 Bom 772 (774); *Krishna Pillai* v. *Ramasawmy Pillai*, (1895) 18 Mad 462 (463) [Suit to redeem a specified mortgage, the plaintiff was not allowed to redeem a different one]; *Gobindrao Deshmukh* v. *Ragho Deshmukh*, (1884) 8 Bom 543 (546), (Do.); *Ram Das* v. *Daulat Ram*, (1913) 18 Ind Cas 807 (809): 114 Pun W R 1914: 225 Pun L R 1913; *San Kauk* v. *Maung Po Kyan*, 1927 Rang 118 (118, 119): 5 Bur L Jour 233: 101 Ind Cas 367 [Suit for share in partnership—Claim based on plaintiff's being a partner]; *Venkata Samba* v. *Papayya*, (1913) 21 Ind Cas 737 (739): 1913 Mad W N 828 [Suit for adoption cannot be treated as a suit for partition]; *Gouesh Ram* v. *Ganpat Rai*, 1924 Cal 461 (462): 72 Ind Cas 651 [Suit based on a completed contract; on failure of proof, plaintiff will not be allowed to

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by the opposite party.[7] "The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to appraise the defendant. distinctly and specifically, of the case he is called upon to answer, so that, he may properly make his defence and may not be taken by surprise; and, *secondly*, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations."[8] Therefore, the test, when an objection of this kind is taken, is to see whether the party aggrieved *has really been taken by surprise, or is prejudiced* by the action of the opposite party.[9] In applying this test, the whole of the circumstances must be taken into account, and carefully scrutinised to find out whether there has been such surprise or prejudice as will disentitle a party to relief.[10] Every variance, therefore, between pleading and proof, is not necessarily fatal to the suit or defence[11] and the rule of *secundum allegata et probata* will not be strictly applied where there could be no surprise and the opposite party is not prejudiced thereby.[12] Thus where a ground though not raised in the pleadings is expressly *put in issue*[13] or where the new claims set up is *not inconsistent* with

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spell out a contract from the correspondence]; *Kedar Nath* v. *Rajnath*, (1899) 3 Cal W N 497 (499) [Suit on title—Decree on basis of long possession]; *Shama Churn* v. *Abdul Kabeer*, (1879) 3 Cal W N 158 (160), (Do.). But see *Ismail Ariff* v. *Mahomed Ghouse*, (1893) 20 Cal 834 (843): 20 Ind App 99: 6 Sar 305: 17 Ind Jur 321; *Jang Bahadur* v. *Chandrej Singh*, (1917) 41 Ind Cas 171 (174): 4 Oudh L J 365 [Ejectment suit—Redemption not allowable].

(7) *Sital Das Babaji* v. *Pertab Chunder Sarma*, (1909) 3 Ind Cas 408 (414, 415): 11 Cal L Jour 2.

(8) *Nabadipendra* v. *Madhusudan*, (1912) 16 Ind Cas 741 (742): 18 Cal W N 473. See also *Anandachandra Chakrabarti* v. *Broja Lal Singh*, 1923 Cal 142 (145): 36 Cal L Jour 356: 50 Cal 292; *Jalim Singh* v. *Choonee Lal*, (1911) 11 Ind Cas 540 (541): 15 Cal W N 882; *Kumar Satish Kanta Rai* v. *Satish Chandra Chattopadhyaya*, (1920) 55 Ind Cas 689 (695): 24 Cal W N 662: 30 Cal L Jour 475.

(9) *Gendli Bibi* v. *Jounal Abdin Sarkar*, 1922 Cal 254 (255): 26 Cal W N 294: 64 Ind Cas 565: 35 Cal L Jour 103; *Neepen Bala Debi* v. *Siti Kanta Bannerji*, (1910) 8 Ind Cas 41 (43, 44): 12 Cal L Jour 459: 15 Cal W N 158.

(10) *Umar Abdul* v. *Gustadji*, 1915 P C 89 (91, 92): 20 Cal W N 297: 30 Mad L Jour 444: 3 Mad L W 308: (1916) 1 Mad W N 137: 34 Ind Cas 268 P C; *Muli Bai* v. *Vassibai*, 1927 Sind 248 (250): 104 Ind Cas 412; *Saifu Khan* v. *Deputy Commissioner, Fyzabad*, (1917) 40 Ind Cas 456 (459): 4 Oudh L J 305; *Loke Nath Sahun* v. *Achuthanand Das*, (1909) 2 Ind Cas 85 (88): 15 Cal L Jour 391; *Umar Abdul Rahiman* v. *Gustadi Muncherji Co-operation*, (1916) 34 Ind Cas 268 (271): 3 Mad L W 308: 20 Cal W N 297: (1916) 1 Mad W N 137: 30 Mad L Jour 444 P C; *Jorawur Singh* v. *Hakeem Khyrat Ali*, (1868) 10 Suth W R 360 (361) [Defendant's plea of mokuraree lease—Found against—Nature of tenancy ought to be decided, since possession is established]. See also *Jankidas* v. *Ahmad Husain Khan*, (1902) 25 All 159 (161): 1902 All W N 218 [Defendant putting plaintiffs to proof of consideration—Only a portion found binding—Mortgagor defendant, though estopped by previous statements, can get benefit of the said finding].

(11) *Satish Kanta Roy* v. *Satis Chendra*, (1920) 55 Ind Cas 689 (695): 30 Cal L Jour 475: 24 Cal W N 662; *Anandachandra Chakrabarti* v. *Broja Lal Singh*, 1923 Cal 142 (145): 36 Cal L Jour 356: 50 Cal 292: 74 Ind Cas 793; *Nabadwipendra Mookerjee* v. *Madhu Sudan Mandal*, (1912) 16 Ind Cas 741 (742): 18 Cal W N 473; *Jalin Singh* v. *Choonee Lal*, (1911) 11 Ind Cas 540 (541): 15 Cal W N 882; *Gaya Kunwar* v. *Dal Singh*, (1912) 17 Ind Cas 296 (301) Oudh; *Sultan Hussain* v. *Jwala*, 1924 All 831 (831): 78 Ind Cas 480.

(12) *Sundaree Dassee* v. *Mudhoo Chunder Sircar*, (1887) 14 Cal 592 (597, 598); *Ramanath Chatterjee* v. *Kusum Kamini Debi*, (1906) 4 Cal L Jour 56 (60-61); *Abdul Ghani* v. *Mussamut Babni*, (1903) 25 All 256 (260): 1903 All W N 18; *Balmukund* v. *Dalu*, (1903) 25 All 498 (506): 1903 All W N 112 F B [Overruling 15 All 186]; *Karim Bakhsh Khan* v. *Medhi Hasan Khan*, (1907) 10 Oudh Cas 17 (20); *Mohun Lall* v. *Nur Khan*, (1868) 3 Agra 218 [Obvious mistake in the plaint]; *Maharaja of Vizianagaram* v. *Meduri Surpanarayana*, (1911) 9 Ind Cas 32 (33): 21 Mad L Jour 451: 9 Mad L Tim 268 [Discrepancies between the terms of the pro-notes and their description in the plaint]; *Ranchordass* v. *Manekial*, (1893) 17 Bom 648 (656).

(13) *Muhammad Umar* v. *Kirpal Singh*, 1904 Pun Re No 78; *Andi Thevan* v. *Narayanasami*, 1928 Mad 703 (704): 28 Mad L W 213: 55 Mad L Jour 369: 111 Ind Cas 266 [Plea not specifically raised but trial and First Appellate Court discussing it as if raised]; *Alfred Wilkinson* v. *Wilkinson*, 1923 Bom 321 (331, 332): 47 Bom 843: 25 Bom L R 945; *Parashram Valad Bapu* v. *Miraji*, (1896) 20 Bom 569 (570); *Sagarmull Nathmy* v. *J O Galstaun*, 1930 P C 205 (208): 124 Ind Cas 887: 32 Bom L R 1166: 52 Cal L Jour 1: 59 Mad L Jour 328: 32 Mad L W 467; *Khiaram Parional* v. *Chhatomal Tirthmal*, (1913) 20 Ind Cas 570 (571): 7 Sind L R 23 [Suit for rent based on title—Title denied—Issue as to title raised and tried—No prejudice]; *Jugal Kishore* v. *Gomti Kuar*, (1914) 25 Ind Cas 280 (281-282) All; *Motabhoy Mulla* v. *Mulji Haridas*, (1915) 29 Ind Cas 223 (227): 39 Bom 399: 17 Mad L Tim 402: 28 Mad L Jour 589: 13 All L J 529: 19 Cal W N 713: 21 Cal L Jour 507: 17 Bom L R 460: 2 Mad L W 524: 1915 Mad W N 522: 42 Ind App 103 P C; *Sheo Singh* v. *Raghubans Kunwar*, (1905) 27 All 634 (650): 32 Ind App 203: 27 All 634: 8 Oudh Cas 317: 2

the allegations made in the pleadings and is based on facts alleged therein,[14] there is no question of surprise to the opposite party. Similarly where the defendant makes an *admission*, a finding in favour of the plaintiff based on such admission, is not incompetent even though it is at variance with the case set up by the plaintiff in his pleading, in as much as there could be no surprise or prejudice to the defendant in such a case.[15] But a party cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing where the latter is prejudiced by such a course.[16] O. 6, R. 2, Note 9.

Illustrations.

1. *A* and *B* jointly execute a bond in favour of *C* for a certain sum of money. *A* is compelled to pay off the whole amount to *C* and after so paying it, he brings a suit against *B* for the recovery of the *whole* amount on the ground that he (*A*) was only a surety for *B*. It is established that *A* was not a surety but that he and *B* were equally liable under the bond. In such a case a decree can be given for *A* for *contribution* of the amount paid by *A* for *B* also. Their Lordships said, "the plaintiff . . . . ought not by reason of his having claimed too much, to be precluded from recovering the proportionate amount of what he actually paid, to which he is undoubtedly entitled, a claim which the pleadings are wide enough to cover."[17]
2. *A* sues *B* for rent on the basis of lease-deed. It is found that the lease-deed is, for some reason, not admissible in evidence; in such a case a decree can be given on the basis of use and occupation by the defendant.[18]

For other instances in which relief could be given to the parties on grounds different from those set up in the pleadings, *see*.[19]

Cal L Jour 194, 9 Cal W N 1009; 15 Mad L 319; 43 Cal 103. Jour 352; 8 Sar 791 P C [Issues wide enough to cover the case newly set up before Privy Council].

(14) *Yakub Ebrahim Sayani* v. *Bai Rahimatbai*, (1873) 10 Bom L R 346 (348); *Nobin Chunder Koondo* v. *Sreedhur Buttacharjee*, (1871) 15 Suth W R 24 (25); *Shib Chund Lahri* v. *Joymala Dasi*, (1881) 7 Cal L Rep 103 (106); *Muzafar Ali* v. *Bhagwati Prasad Singh*, 1921 Oudh 176 (186): 8 Oudh L Jour 358: 66 Ind Cas 642; *Gulab Gir* v. *Nathmal*, 1932 Nag 23 (26): 27 Nag L R 327: 137 Ind Cas 33; *Kumidini Dassya* v. *Mukta Sundari Dassya*, 1925 Cal 257 (258-259): 80 Ind Cas 432; *U Thondaya* by his agent *Nga Po Chok* v. *Nga Ni*, (1912) 2nd Qr U B R 141; *Sheocharan* v. *Channulal*, 1931 Nag 63 (65): 27 Nag L R 19: 132 Ind Cas 452; *Abdul Ghafoor* v. *Ram Sewak*, 1925 Oudh 617 (618): 2 Oudh W N 364: 12 Oudh L J 342: 87 Ind Cas 822: 28 Oudh Cas 397.

(15) *Appayya* v. *Ramireddi*, (1888) 11 Mad 367 (370): 13 Ind Jur 12; *Kasturbhai Manibhai* v. *Hiralal Dahyabhai*, 1921 Bom 307 (309): 45 Bom 535: 58 Ind Cas 69: 22 Bom L R 926; *Ratanshani Kasban* v. *Bannuji*, 1925 Nag 434 (434): 89 Ind Cas 486; *Lutf Ali* v. *Fikira*, (1880) 6 Cal L Rep 208 (209); *Kunhi Kutti Nair* v. *Kutti Maraccar*, (1868-69) 4 Mad H C R 359 (366); *Lakshman Bhimji* v. *Hari Dinkar*, (1880) 4 Bom 584 (588); *Bonomalee Churn* v. *Hafezuddin*, (1873) 12 Suth W R 317 (317): 13 Beng L R 247 Note; *Rooknee Kant Roy* v. *Shurikatunissa Bibee*, (1874) 20 Suth W R 64 (64): 13 Beng L R 246 Note; *Nangali* v. *Raman*, (1884) 7 Mad 226 (232): 8 Ind Jur 75.

(16) *Shibkristo Sircar* v. *Abdul Hakeem*, (1880) 5 Cal 602 (605): 5 Cal L Rep 455; *Balmakund Kesurdas* v. *Bhagwandas Kesurdas*, (1913) 19 Ind Cas 401 (403): 15 Bom L R 209; *Nogendra Mohan Roy* v. *Pyari Mohun Saha*, (1915) 30 Ind Cas 420 (422): 21 Cal L Jour 605: 20 Cal W N

(17) *Ahmad Wali Khan* v. *Shams-ul-Jahan Begam*, (1906) 28 All 482 (487): 10 Cal W N 626: 3 All L J 360: 3 Cal L Jour 481: 1 Mad L Tim 143: 8 Bom L R 397: 16 Mad L Jour 269: 33 Ind App 61: 8 Sar 918 P C. See also *Durgan Singh* v. *Durbee Joy Singh*, (1909) 1 Ind Cas 530 (533): 9 Cal L Jour 623 [Larger relief claimed—Smaller relief can be given]; *Putamada* v. *Ravuthu*, (1888) 11 Mad 94 (97), (Do.); *Jayawickrema* v. *Amarasuriya*, 1918 P C 287 (291), (Do.); *Viswanathasamy Naicker* v. *Kamulu Ammal*, (1915) 31 Ind Cas 833 (840): 1915 Mad W N 968: 2 Mad L W 1214: 19 Mad L Tim 296: 30 Mad L Jour 451 [Decree for one share may be granted in a suit for the possession of whole estate]; *Hira Lal* v. *Giri Bala Debi*, (1916) 34 Ind Cas 444 (445): 23 Cal L Jour 429; *Bhugwan Chunder Roy* v. *Jegur Khan*, (1874) 22 Suth W R 456 (456); *Puruvala Perumal Chetty*, In re, (1912) 15 Ind Cas 665 (666): 1912 Mad W N 1116 [Suit for exclusive possession of property—Plaintiff found to be entitled only to joint possession—Court may give plaintiff a decree for joint possession]; *Wahid Alam* v. *Safat Alam*, (1890) 12 All 556 (558): 1890 All W N 130, (Do.).

(18) *Ajudhia Singh* v. *Khusra Begum*, 1924 Oudh 97 (98): 71 Ind Cas 582.

(19) **Suit—Based on custom—General law may be relied upon.**—*Kasumunnissa* v. *Nilratna*, (1881) 8 Cal 79 (88): 10 Cal L Rep 113: 9 Cal L R 173 [Suit for direct possession—Changed into a suit for possession conditional on the defendant's failure to redeem]; *Roushan Bibee* v. *Hurray Kristo Nath*, (1882) 8 Cal 926 (930); *Secretary of State* v. *Dipchand*, (1897) 24 Cal 306 (309); *Ganapat Ram* v. *Shivprasad*, (1902) 4 Bom L R 355 (357) [Plaint alleging that widow is entitled to right of residence by custom, the provision of Hindu Law recognising it may be relied on]; *Naranbhai* v. *Ranchod*, (1902) 26 Bom 141 (145): 3 Bom L R 598; *Kishen Mohun* v.

O. 6, R. 2. Note 9.

The rule of *secundum allegata et probata* is applicable only to the questions of *fact* and not to pure questions of law arising out of the facts alleged and proved.[20] A question of law based on such facts can be taken at any time[21]

Rajoo Dey, (1874) 19 Suth W R 233 (234): 13 Beng L R 245 note [Suit for rent—Plaintiff failing to prove amount of jumma claimed in plaint—Decree at the rate fixed by a former decree].

Suit alleging dispossession on a particular date—Date found to be wrong—It is not sufficient ground for dismissing suit.—*Hurro Chunder Chowdhry* v. *Gobind Chunder Moitro*, (1872) 15 Suth W R 178 (179); *Torab Ali* v. *Mahomad Ameer*, (1879) 3 Cal L Rep 105 (110); *Boga Kolitur* v. *Thoolessur Kayasta*, (1875) 24 Suth W R 357 (358).

Suit for ejectment allowed to be changed into suit for redemption.—*Palu* v. *Rasilu*, 1923 Lah 675 (677): 75 Ind Cas 740; *Mahomed Ibrahim* v. *Sheikh Hamja*, (1911) 12 Ind Cas 387 (389): 35 Bom 507: 13 Bom L R 895; *Bisram Singh* v. *Sanwal Singh*, (1920) 57 Ind Cas 541 (544): 7 Oudh L J 342: 2 U P L R (Oudh) 123: 23 Oudh Cas 238; *Parshotam Bhaish Shankar* v. *Rumalzunjar*, (1896) 20 Bom 196 (197). But see *Tassadduq Husain* v. *Chaturbhuj*, 1927 All 63 (66): 97 Ind Cas 483.

Claim for easement on ground of preseription —Decree on basis of lost grant.—*Punjaa Kuvarji* v. *Bai Kuvar*, (1881) 6 Bom 20 (23) [A claim for easement based on preseription may be decreed on the basis of lost grant]; *Rajrupkar* v. *Abdul Hossein*, (1880) 6 Cal 394 (404): 7 Ind App 240: 4 Sar 199: 7 Cal L Rep 529: 4 Ind Jur 530: 3 Suther 816: 4 Shom L R 7; *Koylash Chunder* v. *Sonatun Chung*, (1881) 7 Cal 132 (136): 8 Cal L Rep 281: 5 Ind Jur 642: 4 Shom L R 144; *Gulam Muhammed* v. *Mt Begum*, 1926 Lah 551 (551): 95 Ind Cas 123: *Becharji* v. *Pujaji*, (1890) 14 Bom 31 (38) [Suit for partition as co-parcener, can be amended by adding a claim on the basis of a compromise].

"**Miscellaneous.**"—*Satyendra Narain Bagchi* v. *Sashi Bhusan Chowdhari*, (1918) 48 Ind Cas 448 (450) Cal [Suit on title—Prescriptive title relief on]; *Tirumalachariar* v. *Andal Ammal*, (1907) 30 Mad 406 (407): 2 Mad L Tim 357: 17 Mad L Jour 285 [Gift, relief on in plaint—Right by inheritance can be set up]; *Ganapathi Bhatta* v. *Beeru Bhandary*, 1927 Mad 1039 (1041): 106 Ind Cas 196: 27 Mad L W 206 [Relief asked for by plaintiff likely to lead to unnecessary litigation—Court can consider equities without prejudicing rights of parties]; *Lakshmi Narayan* v. *Subhadri*, (1903) 13 Mad L Jour 7 (9): *Venkata Setti* v. *Ranga Nayak*, (1896) 10 Mad 160 (161) [Suit to redeem one mortgage—Plaintiff was allowed to redeem earlier mortgage which was the consideration for the suit mortgage]; *Kadukamvalli* v. *Mokkath Ussain Haji*, (1907) 30 Mad 388 (390): 17 Mad L Jour 329: 2 Mad L Tim 354 [Plaint mortgage not proved—Decreed on mortgage admitted by defendant]; *Surjoo Pershad* v. *Kashee Rawut*, (1874) 21 Suth W R 121 (122) [Ryots suing for possession on the ground that zamindar granted them pattahs; when this failed the Court allowed them to prove their occupancy rights]; *Bydnath Shaha* v. *Jadib Chunder Shaha*, (1865) 3 Suth W R 208 209), (Do.). But see *Brindabun Chunder* v. *Dhananjoy Nashkur*, (1880) 5 Cal 246 (250): 4 Cal L Rep 443; *Mahesh Singh* v. *Chauharja Singh*, (1882) 4 All 245 (247): 1882 All W N 31; *Ma Kin* v. *Maung Gale*, (1893-1900) L B R 130; *Radha Mohun Mundal* v. *Jadoomonee Dassee*, (1875) 23 Suth W R 369 (371): 3 Sar 482 P C; *Raj Kishore Bhuddur* v. *Huree Mohun Bhuddur*, (1873) 19 Suth W R 195 (196); *Kylash Kaminee Dossia* v. *Judoo Bashinee Dassia*, (1874) 22 Suth W R 390 (391); *Ramanath* v. *Kusum Kamini*, (1906) 4 Cal L Jour 56 (61); *Mt Durga Kunwar* v. *Mt Chunna Kunwar*, 1924 All 862 (864): 5 L R All 276 (Civ): 78 Ind Cas 633; *Narain Das*, v. *Bansidhar*, 1887 All W N 43 (44); *Rasul Jehan Begam* v. *Ram Sarun Singh*, (1895) 22 Cal 589 (596); *Peoples Bank of India* v. *Abdul Karim*, (1912) 14 Ind Cas 512 (512): 18 Pun Re No 1912: 75 Pun L R 1912: 65 Pun W R 1912 [Suit on hundi—Hundi inadmissible in evidence for non-cancellation of stamp—Suit may be decreed on the basis of original consideration]; *Mamin Khan* v. *Moizuddin Khan*, 1926 Cal 647 (647-648): 91 Ind Cas 348 [Plaintiff alleging right of easement in himself and others and proving easement in his favour alone is entitled to succeed]; *Ramaswami Chetty* v. *Palaniappa Chetty*, 1924 Mad 354 (355): 18 Mad L W 656: 1923 Mad W N 841: 76 Ind Cas 798 [Partible property other than that included in the plaint can be partitioned]; *Mahalinga Pathan* v. *Tirumalai Pillai*, (1910) 8 Ind Cas 64 (64): 8 Mad L Tim 433 [Suit for cancellation of sale-deed for failure of consideration—Court may grant decree for the amount of purchase money not paid]. But where the execution is not proved he cannot get relief on original cause of action, see *Maung Lee Gale* v. *Prohtado*, 1925 Rang 37 (38): 3 Bur L Jour 127: 84 Ind Cas 199; *Biswanath Prasad* v. *Chandra Narain*, 1921 P C 8 (10): 48 Cal 509: 19 All L J 385: 23 Bom L R 629: 33 Cal L Jour 440: 25 Cal W N 985: 40 Mad L Jour 489: 14 Mad L W 1: 1921 Mad W N 370: 2 Pat L Tim 397: 48 Ind App 127: 60 Ind Cas 833: 63 Ind Cas 770 P C [Mortgage suit—Mortgage found invalid—Alternative claim for personal decree—Allowed to be established, though not claimed specifically]; *Krishnaji* v. *Rooji*, (1918) 44 Ind Cas 921 (921) Nag [Ejectment suit—Decree for redemption allowed]; *Dharamdas* v. *Ranchhodji*, 1922 Bom 199 (200): 46 Bom 200: 64 Ind Cas 517: 23 Bom L R 1009 [Title—Easement allowable after amendment]; *Nurul Hossein* v. *Sheoshahai Lal*, (1893) 20 Cal 1 (6): 19 Ind App 221: 6 Sar 205 P C [Suit by reversioner—Status of reversionership denied at late stage—Agreement with real heir by plaintiff allowed].

(20) *Nepen Bala Debi* v. *Sati Kanta Banerjee*, (1910) 8 Ind Cas 41 (43, 44): 12 Cal L Jour 459: 15 Cal W N 158; *Doman Lal* v. *Prokash Lal*, (1913) 18 Ind Cas 866 (866) Cal [Suit for partial partition—Apparent from the plaint—Objection allowed].

(21) *Govind Chandra Pal* v. *Kailash Chandra*, (1917) 40 Ind Cas 230 (231): 25 Cal L Jour 354; *Sheorutton Singh* v. *Net Lall Sahu*, (1903) 30 Cal 1 (12): 6 Cal W N 688; *Alice Mary Hill* v. *William Clarke*, (1904) 27 All 266 (270): 1 All L J 632: 1904 All W N 238 [Illegality of consideration]; *Venkataratnam* v. *Sitaramayya*, 1926 Mad 305 (306): 92 Ind Cas 314 [Omission to specify provision of law in an application is not a serious objection]; *Westralian Powell Wood Process, Lim* v. *Regem*, 1921 P C 228 (229) P C [Interpretation of statute]; *Ram Chhar Baksh* v. *Ram Surat*, 1925 Oudh 182 (183): 80 Ind Cas 582 [Plea of adverse possession—Court bound to raise *suo motu*]; *Basant Singh* v. *Mahabir Prasad*, (1913) 19 Ind Cas 340 (343): 35 All 273: 40 Ind App 86: 25 Mad L Jour 301: 16 Oudh Cas 136: 15 Bom L R 525: 17 Cal L Jour 566: 11 All L J 469: 1913 Mad W N 481: 17 Cal W N 669: 14 Mad L Tim 64 P C [Defect in plaintiff's title apparent from deeds filed—Duty of Privy Council to dismiss, though point not clearly raised]. See also *Pattarachariar* v. *Alamelumangaiammal*, 1927 Mad 273 (274): 25 Mad L W 11: 100 Ind Cas 40 [Pleas of limita-

except where the plea necessitates the taking of *further evidence* or depends upon *new facts* not alleged and proved.[22] O. 6, R. 2, Notes 9—10.

It has been held by the High Court of Bombay in the undermentioned cases[23] that suits relating to agreements entered into by persons who stand to each other in the relationship of mortgagor and mortgagee or trustee and *cestui que trust*, are exceptions to the applicability of the rule that parties ought to be kept to their pleadings. In such cases the Court was held to be bound to examine the nature of such agreements where, on the face of them, or having regard to surrounding circumstances, the Court finds *prima facie* grounds to suspect that the transaction is oppressive or unconscionable.

10. Construction of pleadings.—It has been uniformly held that pleadings in India[1] especially those in the moffusil[2] should not be construed very strictly. Courts in India have no power to non-suit the plaintiff merely because the pleadings are not in proper form[2-a] or the claim is wrongly described[3] or the section wrongly given.[4] The *substance* of the case should be kept in view and not merely the words used in the pleading.[5] For this purpose the pleadings must be read as a whole.[6]

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tion and *res judicata* are raisable though abandoned previously].

(22) *Nur Mahomed* v. *Kessumal*, (1913) 20 Ind Cas 523 (525): 7 Sind L R 11; *Bhagwanti* v. *Jagarnath*, (1909) 3 Ind Cas 510 (511): 6 All L J 636; *Jogeshwar Roy* v. *Raj Narain Mitter*, (1904) 31 Cal 195 (201): 8 Cal W N 168; *Kandasami Naidu* v. *Gokuldas Madhowji & Co*, (1924) 20 Mad L W 564 (565); *Safar Ali* v. *Mohesh Lal*, (1916) 34 Ind Cas 956 (957): 23 Cal L Jour 122; *Haroon Haji Vahelina* v. *Haji Adam*, (1909) 4 Ind Cas 569 (570, 571): 11 Bom L R 1267 [Plea of jurisdiction, though a question of law, not allowed after close of plaintiff's side].

(23) *Jayannath* v. *Bhaskar Gopal*, (1910) 7 Ind Cas 977 (978): 12 Bom L R 795.

Note 10.

(1) *Ghirdharee* v. *Koolahul*, (1866) 2 Moo Ind App 344 (350): 6 Suth W R P C 1: 1 Sar 200: 1 Suther 98 P C; *The Mokuddims of Mouza Kunkunwadi v. The Enamdar Brahmins of Mouza Soorpal*, (1867) 7 Suth W R 8 (9): 3 Moo Ind App 383: 1 Suther 164: 1 Sar 292 P C; *Natha-Singh* v. *Jodha Singh*, (1884) 6 All 406 (413): 1884 All W N 140; *Pitamber Pyne* v. *Toolsee Dossee*, (1867) 7 Suth W R 39 (40); *Mohesh Chander Mookerjee* v. *Ramdhun Pal*, (1870) 13 Suth W R 248 (249); *The Nawab Nazim of Bengal* v. *Amrao Begam*, (1874) 21 Suth W R 59 (60); *Chandramoni Saha* v. *Haligennissa Bibi*, (1909) 4 Ind Cas 168 (169): 9 Cal L Jour 464; *Azhimanittil Veettil Kannu Pillai* v. *Kayinari Gopalan Nair*, (1914) 26 Ind Cas 337 (339): 1914 Mad W N 883; *Krishna Chandra Mandal* v. *Ram Sahai Katari*, (1917) 41 Ind Cas 577 (578): 2 Pat L W 46.

(2) *Narayan Sastrulu* v. *Kanakamuna*, (1909) 3 Ind Cas 723 (724): 6 Mad L Tim 346; *Arabar* v. *Ismail*, (1915) 27 Ind Cas 373 (375) Cal; *Vishwanath* v. *Shankar Lal*, (1916) 34 Ind Cas 704 (706): 12 Nag L R 90; *Kunj Behari* v. *Keshavlal Hiralal*, (1904) 28 Bom 567 (572): 6 Bom L R 475; *M Kyi Oh* v. *Ma Thet Pon*, 1926 P C 29 (29): 94 Ind Cas 916: 1926 Mad W N 489: 3 Oudh W N 735: 4 Rang 513.

(2-a) *Bunwari Das* v. *Muhammad*, (1887) 9 All 690 (697): 1887 All W N 254; *Venkatarama Iyer* v. *Rajagopal Iyer*, (1915) 31 Ind Cas 704 (705): 29 Mad L Jour 786; *U Thondaya* v. *Ngo Ni*, (1913) 18 Ind Cas 568 (570): (1912) 1 U B R 141; *Meenakshi* v. *Cherya Parvati*, 1924 Mad 174 (174): 1923 Mad W N 657: 74 Ind Cas 1012 [Allegations not specific—No prejudice caused however—No reason to interfere with judgment].

(3) *Her Pal* v. *Ram Sarup*, (1916) 34 Ind Cas 173 (175) All; *Fatesh Ali Shah* v. *Mahomed Bakhsh*, 1928 Lah 516 (523): 9 Lah 428 [The plaintiff cannot be tied down to the date of the accrual of the cause of action mentioned in the plaint].

(4) *Harihar* v. *Rama Pandu Shetty*, (1909) 4 Ind Cas 253 (254): 33 Bom 698: 11 Bom L R 1113.

(5) *Moulvie Abdoollah* v. *Shaha Mujeesonddeen*, (1871) 16 Suth W R 27 (28, 29) [Suit for confirmation of possession stating circumstances of dispossession, should be treated really as one for recovery of possession]; *Rup Singh* v. *Baisni*, (1885) 7 All 1 (11): 11 Ind App 149: 1884 All W N 246: 4 Sar 33: 1 Ind Jur 300 [When plaintiff sued to succeed to an impartible estate under custom and failed to prove it he was allowed to succeed on the general law]; *Indur Chunder* v. *Radha Kishore*, (1892) 19 Ind App 90 (93): 19 Cal 507: 6 Sar 185; *Amir Hossein* v. *Imambandi*, (1882) 11 Cal L Rep 443 (450); *Champu Dai* v. *Uma Dai*, (1882) 11 Cal L Rep 451 (453); *Balbhadar* v. *Barkat Ali*, (1907) 11 Cal W N 85 (92): 4 Cal L Jour 370; *Arbuthnot* v. *Betts*, (1870) 14 Suth W R 181 (182): 6 Beng L R 273; *Pryaga Doss Jee Varu* v. *Venkama Naidu*, (1918) 44 Ind Cas 641 (643): 23 Mad L Tim 137: 7 Mad L W 77: 1918 Mad W N 346; *Miran Baksh* v. *Atra*, 1900 Pun Re No 111; *Viswanathaswami Naicker* v. *Kamulu Ammal*, (1915) 31 Ind Cas 833 (834): 1915 Mad W N 968: 2 Mad L W 1214: 19 Mad L Tim 296: 30 Mad L Jour 451 [It is not desirable to pin down both the parties to the precise form of the pleadings, though they should allege a custom with distinctness and certainty]; *Atal Behary Acharya* v. *Barada Prasad Banerji*, 1931 Pat 179 (181): 131 Ind Cas 529: 12 Pat L Tim 636.

(6) *Trimbak* v. *Shri Sitaram Maharaja Sansthan*, 1926 Nag 60 (60): 89 Ind Cas 1016.

O. 6, R. 3, Note 1.

R. 3. [New.] *The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.*

Forms of pleading.

[R. S. C., O. 19, R. 5.]

Synopsis.

1. **Appendix A.**—As regards the imperfect character of the forms in Appendix A, *see* the observations in *Ramprasad* v. *Hazarimull.*[1]

O. 6, R. 4, Note 1.

R. 4. [New.] *In all cases in which the party pleading relies on any misrepresentation,[4] fraud,[2] breach of trust,[3] wilful default, or undue influence,[5] and in all other cases in which particulars may be necessary[6] beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.*

Particulars to be given where necessary.

[R. S. C., O. 19, R. 6.]

Synopsis.

1. Scope and object of the rule.
2. Fraud.
3. Breach of trust.
4. Misrepresentation.
5. Undue influence and coercion.
6. "Other cases in which particulars may be necessary."
7. Accounts.
8. Contract.
9. Defamation.
10. Claim for a lump sum.
11. Malicious prosecution.
12. Misconduct.
13. Negligence—Nuisance.
14. Recovery of land.
15. Public high way and private rights of way.
16. Particulars of defence.

Acknowledgment for saving limitation. See Note 2, Pt. (7); Note 7, Pts. (2) and (4); Note 10, Pt. (2); see also O. 7, R. 6, Notes.
Bonds. See Note 7, Pt. (4); also Note 8, Pt. (1).
Custom. See Note 6, Pt. (2).
Infringement of trade-mark. See Note 4, Pt. (2).
Omission or insufficiency of particulars. See Note 1, Pts. (8) and (9).
Plea of estoppel. See O. 6, R. 2; Note 7, F.-N. (1).

1. **Scope and object of the rule.**—O. 6, R. 2 requires, as has been seen already, that a pleading should contain *material facts* on which the party relies for his claim or defence. This rule requires that, wherever necessary, *particulars* of such material facts shall also be given. "*Particulars*" may be described as the *details of the case set up.*[1] The object of particulars is two-fold:—

Order 6, Rule 3—Note 1.
(1) 1931 Cal 458 (459): 58 Cal 418: 134 Ind Cas 538.

Order 6, Rule 4—Note 1.
(1) *The Rory,* (1882) 7 P D 117 (121).

(1) To enable the opposite party to know *what case he has to meet* and thus to *prevent a surprise* at the trial,[2] O. 6, R. 4, Note 1.

(2) to limit the generality of the pleadings and so to *define and limit the issues* to be tried and thus save unnecessary expense.[3]

It must depend upon the facts of each case as to what *degree* of particularity is required.[4] It may, however, be stated as a general rule that such certainty and particularity will be insisted upon as is reasonable having regard to the circumstances and the nature of the acts themselves.[5] "To insist on less" as was said in *Ratcliffe* v. *Evans*, "would be to relax old and intelligible principles. To insist on more would be the vainest pedantry." Particulars must be distinguished from *evidence* and no party need state anything for the purpose of enabling the opposite party to ascertain the *evidence* by which he proposes to prove his case.[6] The Courts have uniformly endeavoured to prevent the plaintiff or the defendant as the case may be from prying into the brief of his opponent for finding out what is to be the evidence which is to be produced at the trial. On the other hand the Courts have uniformly said that the plaintiff or the defendant is entitled to be told any and every particular which will enable him properly to prepare his case for the trial so that he may not be taken by surprise.[6-a] Thus one party is not entitled to know the names of the witnesses of the other party for that will be knowing the particulars of evidence. But where the names of witnesses constitute a material fact in a party's case, he is bound to state them. Thus where plaintiff sues for infringement of his trade mark by the defendant, and alleges that on account of the infringement "diverse persons" were induced to buy defendant's goods as plaintiff's, the names of "diverse persons" constitute a material fact in the statement of the plaintiff's case and must be revealed though such "diverse persons" might be coming as witnesses for the plaintiff.[7]

Where a party omits to give particulars, or the particulars furnished are insufficient, the opposite party may apply under the next rule for a further and better statement of particulars,[8] and, if an order under that rule for particulars is disobeyed, then, if the plaintiff is in default, the action should be

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(2) *Young & Co* v. *Scottish Union and National Insurance Co*, (1907) 24 T L R 73 (74) C A [Per Buckley, L J]; *Spedding* v. *Fitzpatrick*, 38 Ch D 410 (413) C A [Per Cotton, L J]; *Newport Shipway Dry Dock Co* v. *Paynter*, (1886) 34 Ch D 88 (93): 56 L J Ch 1021: 55 L T 711 (C A) [Per Cotton, L J]; *Hennessy* v. *Wright*, (1888) 57 L J (Q B) 594 C A: 59 L T 795: 36 W R 878: 4 T L R 651; *The Rory*, (1882) 7 P D 117: 51 L J P 73: 46 L T 757; *Duke & Sons* v. *Winden & Co*, 77 L T 67 (68): 13 T L R 481 [Per Lindley, L J].

(3) *Yorkshire Provident Life Assurance Co* v. *Gilbert and Rivington*, (1895) 2 Q B 148 C A; *Saunders* v. *Jones*, (1877) 7 C D 435 C A: 47 L J Ch 440: 37 L T 769: 26 W R 226 [Per Thesiger, L J]; *Spedding* v. *Fitzpatrick*, (1888) 38 C D 410 (413): 58 L J Ch 139: 59 L T 492: 37 W R 20.

(4) *Phillips* v. *Phillips*, (1878) 4 Q B D 127 (139): 48 L J Q B 135: 39 L T 556: 27 W R 436.

(5) *Ratcliffe* v. *Evans*, (1892) 2 Q B 524 (532): 67 L J Q B 535: 66 L T 794: 40 W R 178: 56 J P 537.

(6) *Humphries & Co* v. *The Taylor Drug Co*, (1888) 39 C D 693 (695): 59 L T 177: 37 W R 192; *Marriott* v. *Chamberlain*, (1886) 17 Q B D 154 (161): 55 L J Q B 448: 54 L T 714: 34 W R 783 [Cited in 12 Cal L Jour 505].

(6-a) *Humphries & Co* v. *The Taylor Drug Co*, (1888) 39 C D 693.

(7) *Zierenberg* v. *Labouchere*, (1893) 2 Q B 183 (188, 189). See also *Humphries & Co* v. *The Taylor Drug Co*, (1888) 39 C D 693; *Milbank* v. *Milbank*, (1900) 1 Ch 376.

(8) See also *Marriott* v. *Chamberlain*, (1886) 17 Q B D 154: 55 L J Q B 448: 54 L T 714: 34 W R 783 [Cited in 12 Cal L Jour 505]. See also *Milbank* v. *Milbank*, (1900) 1 Ch D 376 C A: 69 L J Ch 287: 82 L T 62: 48 W R 339.

O. 6, R. 4, Notes 1—2.

stayed, and, if the defendant is in default, his defence should be struck out.[9] When a party fails to ask for particulars at the proper time he cannot afterwards be heard to say that he was taken by surprise.[10]

Where a plaint contains averments indicating with reasonable definiteness what the nature of the claim is, it will not be defeated by a small error in one particular. Thus where *A*, as receiver of the properties of *B*, sues *C* on a promissory note executed by *C* to *B*, and the plaint correctly states the names of the promisor and the promissee and the date of the promissory note, but the amount is mentioned as Rs. 6,000 instead of Rs. 5,892 and this was due to the fact that *A* was not in possession of the promissory note, it cannot be said that the defendant is taken by surprise or that he was not aware of what the plaintiff was suing on and therefore, the plaintiff should not fail by reason of such error.[11]

2. Fraud.—In suits on the basis of fraud, the allegation of fraud must be clear, definite, and specific.[1] General allegations of fraud, however strong the words may be in which they are stated, if unaccompanied by particulars, are insufficient to amount to an averment of fraud of which any Court ought to take notice.[1-a] A plaint seeking relief on the ground of fraud but omitting

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(9) *Gauri Shanker* v. *Mt Manki Kunwar*, 1924 All 17 (19): 21 All L J 571: 4 L R A (Civ) 464: 74 Ind Cas 466: 45 All 624.

(10) *Ananta Lal* v. *Soudamini Guha*, 1930 Cal 621 (622): 34 Cal W N 809: 129 Ind Cas 401 [Fraud]. See also *Beni Madho* v. *Basant Kunbi*, (1916) 35 Ind Cas 252 (253) All [Acquiescence that pleading is right].

(11) *Namagiri Ammal* v. *Muthuvelappa*, 1928 Mad 940 (941): 1928 Mad W N 466: 28 Mad L W 565: 56 Mad L Jour 70: 111 Ind Cas 887.

Note 2.

(1) *Lachmi Narain* v. *Kishan Kishore*, (1916) 33 Ind Cas 913 (914): 14 All L J 25: 38 All 126; *Sankar Prosad Misra* v. *Brajamohan Deb*, 1930 Pat 357 (361, 366): 125 Ind Cas 145; *Barrett* v. *African Products & Co*, 1928 P C 261 (263): 29 Mad L W 72: 110 Ind Cas 299 P C; *Husain Baksh* v. *Hafiz Musahib Khan*, (1910) 5 Ind Cas 179 (180) All [Cannot be presumed from inadequacy of consideration]; *Ramji* v. *Koman Das*, (1916) 35 Ind Cas 603 (605) All [Plaintiff not alleging fraud in suit for accounts will not be entitled to lot in evidence of fraud]; *Radha Krishen Shukul* v. *Nokh Lal Shukul*, 1923 All 566 (567): 21 All L J 488: 4 L R A (Civ) 481: 74 Ind Cas 964 [Suit to set aside a compromise decree]; *Jivan Singh* v. *Kuar Reoti Singh*, 1930 All 427 (428): 1930 All L J 469: 11 L R A (Rev) 121: 123 Ind Cas 759 [Suit to set aside decree]; *Promoda Nath* v. *Kinoo Mollah*, (1909) 4 Ind Cas 495 (499): 8 Cal L Jour 135: 13 Cal W N 167; *Ananda Chandra Roy* v. *Abdulla Hossein*, (1913) 20 Ind Cas 679 (682): 41 Cal 148; *Khirode Chandra Ghosh* v. *Janki Das*, (1913) 20 Ind Cas 753 (754) Cal; *Weston* v. *Peary Mohun Das*, (1914) 23 Ind Cas 25 (30): 40 Cal 898: 18 Cal W N 185 [Suit for damages for malicious arrest, prosecution and pretended search]; *Bibi Saliman* v. *Udhoran Sahi*, (1915) 27 Ind Cas 890 (891) Cal; *Bansiram* v. *Secretary of State*, (1916) 35 Ind Cas 284 (286, 287): 20 Cal W N 638; *Lalit Mohun Nandy* v. *Haridas Mookerjee*, (1917) 37 Ind Cas 707 (712, 714): 24 Cal L Jour 335; *Annoda Charan Mondal* v. *Atul Chandra Malik*, (1919) 54 Ind Cas 197 (200): 23 Cal W N 1045: 31 Cal L Jour 3; *Satis Chandra Ghosh* v. *Kalidasi*, 1922 Cal 203 (215): 26 Cal W N 177: 68 Ind Cas 577: 34 Cal L Jour 529; *Imdad* v. *Azizunnissa*, (1886) 23 Cal 483 (492): 23 Ind App 8: 6 Sar 669: 6 Mad L Jour 43 P C; *Kalamjan Bibi* v. *Sahajana Bibi*, 1929 Cal 77 (78): 111 Ind Cas 746; *Ghaman* v. *Kanhaya Mal*, (1915) 26 Ind Cas 426 (426): 15 Pun W R 1915: 121 Pun L R 1915; *Punjab Commercial Syndicate* v. *Punjab Co-operative Bank*, 1926 Lah 96 (98): 6 Lah 512: 92 Ind Cas 322; *Govindaswami Naidu* v. *Ethirajammal*, (1916) 34 Ind Cas 1 (1): (1916) 1 Mad W N 180; *N Muniswami* v. *R Rajagopala*, 1928 Mad 759 (760): 54 Mad L Jour 644: 28 Mad L W 367: 110 Ind Cas 763; *Rathanasabapathy* v. *Ammakannammal*, 1930 Mad 78 (79): 57 Mad L Jour 609: 30 Mad L W 914: 123 Ind Cas 15; *Raja Muneshar Bakhsh Singh* v. *Shadi Lal*, (1905) 8 Oudh Cas 210 (222); *Mir Azimuddin* v. *Ziaulnisa*, (1881) 6 Bom 309 (314, 315) [When there is sufficient evidence to support the allegation of fraud Court may in a proper case act upon it without directing the plaintiff to amend his plaint]; *Lal Mahomed* v. *Mra Tha Aung*, (1915) 30 Ind Cas 20 (20): 8 Bur L Tim 269: 8 L B R 185; *Manikchand* v. *Giridhari Lal*, (1918) 46 Ind Cas 342 (343): (1918) 3 U B R 69; *Maung Sein Htin* v. *Chee Pan Naw*, 1925 Rang 275 (277): 3 Rang 275: 92 Ind Cas 270; *Shinhomal* v. *Manager, Encumbered Estate*, (1914) 25 Ind Cas 789 (791): 8 Sind L R 3; *Ghullamally and Sons* v. *Gammeter*, 1930 Sind 298 (298): 24 Sind L R 232: 128 Ind Cas 682; *Lloyds Bank* v. *Guzdar & Co*, 1930 Cal 22 (28): 56 Cal 868: 121 Ind Cas 625; *Babu Das Narayan Singh* v. *Muhammad Yusuf* alias *Bhekho*, 1921 Pat 145 (147): 1921 Pat H C C 181: 6 Pat L Jour 319: 2 Pat L Tim 401: 61 Ind Cas 823: 3 U P L R (Pat) 33; *Gajadhar Prasad* v. *Abdul Majid*, 1921 All 327 (331): 19 All L J 530: 63 Ind Cas 425; *Abdul Hossein* v. *Turner*, (1887) 11 Bom 620 (648): 14 Ind App 111: 5 Sar 25: 11 Ind Jur 352 P C; *Gopalar* v. *Abdul Aziz*, 1931 Rang 212 (213): 9 Rang 135: 133 Ind Cas 487.

(1-a) *Wallingford* v. *Mutual Society*, 5 App Cas 685 (697); *Gunga Narain* v. *Tiluk Ram*, (1888) 15 Cal 533 (537, 538): 15 Ind App 119: 5 Sar 168: 12 Ind Jur 254 P C; *Bal Gangadhar Tilak* v. *Shrinivas Pandit*, 1915 P C 7 (13): 39 Bom 441: 42 Ind App 135: 13 All L J 570: 17

to give particulars does not disclose a cause of action[2] and should be rejected or returned for amendment but the suit should not be dismissed.[3] Fraud may be inferred from the surrounding circumstances,[4] but neither the fact that there are allegations in the written statement from which a plea of this kind can be spun out[5] nor the fact that the defendant himself has told an untrue story[6] is enough to relieve a plaintiff from his obligation to give particulars of the fraud pleaded by him. O. 6, R. 4, Note 2.

A plaintiff seeking to avoid the statute of limitation on the ground of fraud must specifically state the particulars as to how he was *kept out of knowledge* of his rights by the fraudulent acts of the defendant, and the *time when he discovered it*.[7]

Allegations of fraud must be *substantially proved* by the party making the same, though it does not mean that every puzzling artifice or contrivance resorted to by the opposite party, should be unravelled.[8] When one kind of fraud is alleged, another kind of fraud cannot, on failure of proof of the fraud alleged, be substituted for it.[9] And even if the Court finds that fraud was practised, if such fraud is other than that alleged by the plaintiff, the defen-

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Bom L R 527: 22 Cal L Jour 1: 19 Cal W N 729: 29 Mad L Jour 34: 18 Mad L Tim 1: 2 Mad L W 611: 1915 Mad W N 454: 29 Ind Cas 639 P C; *Balaji* v. *Gangadhar*, (1910) 32 Bom 255 (257, 258): 10 Bom L R 276; *Joomna Pershad* v. *Joyramlall*, (1878) 2 Cal L Rep 26 (30); *Ram Komal* v. *Bank of Bengal*, (1901) 5 Cal W N 91 (103); *Raj Mohan Pal* v. *Gobinda Chandra Pal*, (1912) 14 Ind Cas 53 (54): 17 Cal W N 524; *Nagendra Nath Basu* v. *Parbati Charan Koyal*, (1916) 35 Ind Cas 339 (340): 20 Cal W N 819 [Suit to set aside an *ex parte* decree and a sale thereunder on the ground of fraud]; *Janki Kuer* v. *Mahabir Singh*, (1920) 58 Ind Cas 317 (318) Pat [Suit to set aside an *ex parte* decree on the ground of fraud].

(2) *Chanrirapa* v. *Danava*, (1895) 19 Bom 593 (601).

(3) *Gunga Narain* v. *Tiluckram*, (1888) 15 Cal 533 (537): 15 Ind App 119: 5 Sar 168: 12 Ind Jur 254 P C; *Krishnaji* v. *Wamnaji*, (1894) 18 Bom 144 (146); *Rajmal Motiram* v. *Krishna*, (1896) 20 Bom 208 (210); *Hare Krishna Sen* v. *Umesh Chandra Dutt*, 1921 Pat 193 (200): 6 Pat L Jour 373: 1921 Pat H C C 209: 2 Pat L Tim 528: 62 Ind Cas 962: 3 U P L R (Pat) 57; *Jyoti Prokash* v. *Jhowmull*, (1909) 1 Ind Cas 784 (785): 36 Cal 134: 13 Cal W N 87; *Mg Lu Gale* v. *Venkatachalam Chetty*, (1911) 10 Ind Cas 922 (923): 4 Bur L Tim 118; *Sankar Prasad Misra* v. *Brajamohan Deb*, 1930 Pat 357 (366): 125 Ind Cas 145; *Rajnarain Mahton* v. *Majlis Sahay*, 1928 Pat 112 (113): 104 Ind Cas 821: 9 Pat L Tim 476; *Kuppuswami* v. *Bavasami*, 1927 Mad 538 (542): 50 Mad 357: 38 Mad L Tim 197: 101 Ind Cas 399. But see *Amritabai* v. *Jabbanbi*, (1918) 46 Ind Cas 676 (677) Nag [Court is bound to consider a plea of fraud distinctly raised, though the allegations on which it is based are not set out in detail]; *Dayabhai Tribhoovandas* v. *L Panachand*, (1885) 9 Bom 358 (361, 364). See also *Eliza F T Higgs Vatcher* v. *Henry Paull*, 1914 P C 184 (188, 189) [Ingredients of Fraud indicated—Particulars to be given in pleadings].

(4) *Baldeo Singh* v. *Puttu Lal*, (1913) 21 Ind Cas 69 (70) Oudh.

(5) *Sankunni Menon* v. *Nallappah Ramunni Menon*, (1915) 29 Ind Cas 482 (483) Mad; *Thathu Naik* v. *Kondu Reddi*, (1909) 1 Ind Cas 221 (224): 5 Mad L Tim 248: 32 Mad 242.

(6) *Mohammad Golab* v. *Mohammad Sulliman*, (1894) 21 Cal 612 (621) [Suit to set aside a decree on ground of fraud].

(7) *Bansiram* v. *Secretary of State*, (1916) 35 Ind Cas 284 (287): 20 Cal W N 638; *Gulab Rai* v. *Tulsi Ram*, 1927 All 437 (439): 101 Ind Cas 322; *Riddell* v. *Earl of Strathmore*, 3 Times Law Rep 329; *Lawrence* v. *Lord Norreys*, (1890) 15 App Cas 210; *Betjemann* v. *Betjemann*, (1895) 2 Ch 474 C A; *Bulli Coal Mining Co* v. *Osborne*, (1899) App Cas 351; *Willis* v. *Earl Howe*, (1895) 2 Ch 545 C A.

(8) *Satish Chandra Chatterjee* v. *Kumar Satish Kanta Roy*, 1923 P C 73 (76): 73 Ind Cas 391: 45 Mad L Jour 363: 28 Cal W N 327: 39 Cal L Jour 165: 33 Mad L Tim 325; *Rahimboy* v. *Turner*, 1893 L R 20 Ind App 1 (5): 17 Bom 341: 6 Sar 256: 17 Ind Jur 40; *Akil Chandra Saha* v. *Girish Chandra Saha*, (1917) 41 Ind Cas 302 (304): 21 Cal W N 864. See also *Damodhar Prasad* v. *Ram Sarup Kumar*, 1923 Pat 327 (329): 4 Pat L Tim 102: 1923 Pat H C C 137: 1 Pat L R 252: 71 Ind Cas 843 [Evidence consistent with the case of both sides—Fraud not established].

(9) *Mantesquin* v. *Sandys*, 18 Ves Jun 302 (314); *Abdul Hossein* v. *Turner*, (1887) 11 Bom 620 (643): 14 Ind App 111: 5 Sar 25 P C; *Ghurpheku* v. *Purmeshar*, (1907) 5 Cal L Jour 653 (661); *Kondi Ravji* v. *Chuni Lal*, 1929 Bom 1 (5): 30 Bom L R 1539: 113 Ind Cas 229: 53 Bom 75; *Rajendra Kumar* v. *Gangaram*, (1910) 6 Ind Cas 472 (472): 37 Cal 856: 12 Cal L Jour 70 [Unless he has asked relief alternatively on the other kind of fraud]; *Satish Kantha Roy* v. *Satish Chandra Chatterjee*, (1920) 55 Ind Cas 689 (695): 30 Cal L Jour 475: 24 Cal W N 662; *Mahomed Mira* v. *Savvasi Vijaya*, (1900) 23 Mad 227 (235): 27 Ind App 17: 4 Cal W N 228: 10 Mad L Jour 1: 2 Bom L R 640: 7 Sar 661 P C [Appellate Court not to entertain a case of fraud other than the one specifically alleged]; *Mg Lu Gale* v. *Venkatachalam Chetty*, (1911) 10 Ind Cas 922 (923): 4 Bur L Tim 118.

O. 6, R. 4, Notes 2—5.

dant is entitled to have the suit dismissed.[10] This general rule, however, is not applicable where a *purdanishin* lady is concerned. The obtaining of property, or of any benefit, from such a lady, through the undue and unconscionable abuse of influence by a person in whom trust and confidence are placed, has always been treated as fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit.[11]

A person cannot be allowed to plead the fraud of his own predecessors in order to avoid the legal consequences of their transactions.[12]

A party who is not aware that a fraud has been committed and does not set up the plea in his pleadings is not estopped from doing so as soon as he becomes aware of the fraud.[13]

3. **Breach of Trust.**—Particulars of the *specific acts constituting* the breach of trust must be given to entitle a plaintiff to get relief.[1]

4. **Misrepresentation.**—When misrepresentations are alleged, the party pleading them should state as to each misrepresentation, its date, and whether it was made in writing or verbally, and as to each verbal misrepresentations, the occasion thereof.[1] Where a suit is brought for damages for infringement of a trade-mark particulars of the persons alleged to have been deceived by the inducement of the defendant should be given.[2]

5. **Undue influence and coercion.**—Undue influence being a species of fraud must be pleaded with precision and unless it is supported by particulars it will not be investigated by Courts.[1] Thus where a particular transfer of property was challenged on the ground of unsoundness of mind of the transferor, but no case of undue influence was raised in the pleadings it was held that the question could not be properly discussed.[2] The person alleging it must prove, that another person was in a position to dominate his will and exercise

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(10) *Satis* v. *Kalidasi*, 1922 Cal 203 (216): 26 Cal W N 177: 68 Ind Cas 577: 34 Cal L Jour 529.

(11) *Satis* v. *Kalidasi*, 1922 Cal 203 (216, 217): 26 Cal W N 177: 68 Ind Cas 577: 34 Cal L Jour 529 [Note the several cases referred to in this case].

(12) *Nahannu* v. *Sabinibibi*, (1911) 12 Ind Cas 583 (584): 37 Bom 217: 13 Bom L R 1011.

(13) *Radha Kishen* v. *Wajid Ali*, (1916) 36 Ind Cas 746 (748): 3 Oudh L J 501: 19 Oudh Cas 334; *Sheodarshan Lal* v. *Anscar Singh*, (1918) 46 Ind Cas 52 (53): 5 Oudh L J 179.

Note 3.

(1) Re *Wrightson*: *Wrightson* v. *Cooke*, (1908) 1 Ch 789: 77 L J Ch 422: 98 L T 799 cited at 18 Mad L Tim 48: 29 Ind Cas 849; Re *Austice*, 33 W R 557.

Note 4.

(1) *Newport Shipway Dry Dock & Co* v. *Paynter*, 34 C D 88; *Seligmann* v. *Young*, 1884 Eng W N 93: Bittleston C C 154; *Dodbasappa Dharmappa* v. *Pradhanappa Venkatappa*, 1926 Bom 33 (34): 27 Bom L R 1318: 91 Ind Cas 426. See also *Mahoom* v. *Khandu*, 1924 P C 186 (187): 47 Mad L Jour 128: 20 Mad L W 107: 26 Bom L R 742: 35 Mad L Tim 139: 1924 Mad W N 645: 5 L R P C 132: 80 Ind Cas 822 P C [Misrepresentation—Allegation and proof of representation essential—Mere proof of statement before Sub-Registrar by executant as to his execution of previous deed under a certain belief is no evidence of representation to that effect].

(2) *Humphries* v. *Taylor Drug Co*, (1888) 39 C D 693: 59 L T 177: 37 W R 192.

Note 5.

(1) *Inder Chand* v. *Bidyadhar Pandey*, 1921 Pat 48 (49): 1921 Pat H C C 107: 2 Pat L Tim 111: 60 Ind Cas 282: 5 Pat L Jour 744 [Suit on a mortgage where it was contended that compound interest was stipulated by undue influence]; *Suraj Bakhsh Singh* v. *Ajudhiya Singh*, 1928 Oudh 330 (332): 5 Oudh W N 435: 110 Ind Cas 91; *Kachhi Rannessa Chowdhurani* v. *Hem Charan Kasya*, (1918) 47 Ind Cas 11 (12) Cal [Provision for capitalising interest in arrear with annual rests was pleaded to be undue influence]; *Purushottam Daji Mandlik* v. *Pandurang Chintaman*, (1915) 28 Ind Cas 921 (923): 17 Bom L R 157: 39 Bom 149.

(2) *Ismail Mussajee* v. *Hafiz Boo*, (1906) 33 Cal 773 (784): 33 Ind App 86: 8 Bom L R 379: 3 All L J 353: 3 Cal L Jour 484: 16 Mad L Jour 166: 10 Cal W N 570: 1 Mad L Tim 137 P C.

influence and that he actually exercised such influence.[3] A mere suspicion or probability will be insufficient to prove coercion.[4] But a specific allegation of undue influence may not be necessary if there is already an allegation of fraud in the plaint.[5] Similarly if there are facts on the record to justify the inference of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff being entitled to relief on that ground; all that the Court has to see is that there is no surprise to the defendant.[6]

6. "Other cases in which particulars may be necessary".—As a general rule where the *onus* of establishing a positive or negative allegation lies on the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation.[1] In other cases, the necessity for particulars depends upon the facts and circumstances of each case. Thus where a custom is set up, the particulars of the custom with the essential requisites to its validity and binding effect must be stated.[2] Similarly where in a suit on a bond the illegality of the consideration is raised as a defence, it must be definitely pleaded and particulars given.[3]

7. Accounts.—Where a claim is for a *general account* particulars as to the items need not be given. But when a *definite sum* made up of several items is claimed, particulars of the items will be necessary.[1]

When there is a continuous course of dealing, and the debtor signs in the account book of his creditor for the balance due to his creditor, the cause of action for the suit, is not the acknowledgment itself, as it only evidences the transaction preventing the operation of limitation. It must, therefore, be alleged that there was a promise to pay and that the relationship of the debtor and creditor subsists between the parties.[2] Where the plaintiff impeaches accounts which have been settled on the ground of errors, the errors must be specifically set out. But where no objection was taken to the frame of the suit on the ground that no particulars were given and no prejudice was caused to the defendants, the omission to give particulars becomes immaterial.[3]

In the case of suits on instalment-bonds, particulars as to the payments must be alleged and the precise words of the bond should also be stated to show

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(3) *Shiddubai* v. *Nilapagauda*, 1924 Bom 457 (458): 26 Bom L R 622: 83 Ind Cas 616.

(4) *Purushottam Daji Mandlik* v. *Pandurang Chitaman*, (1915) 28 Ind Cas 921 (923, 924): 39 Bom 149: 17 Bom L R 157.

(5) *Narayanbhat Bhimbhat Joshi* v. *Akkubai Manoharbhat Joshi*, (1916) 33 Ind Cas 576 (577): 18 Bom L R 27.

(6) *Sheo Charan* v. *Chanmilal*, 1931 Nag 63 (64): 27 Nag L R 19: 132 Ind Cas 452.

Note 6.

(1) *Collins* v. *Charles Booth & Co.* 1921 Sind 106 (108): 17 Sind L R 9: 80 Ind Cas 958.

(2) *Vishwanatha Swami* v. *Kamulu Ammal*, (1915) 31 Ind Cas 833 (835): 1915 Mad W N 968: 2 Mad L W 1214: 19 Mad L Tim 296: 30 Mad L Jour 451; *Gopal Krishna* v. *Abdul Samad*, 1921 Cal 569 (571): 34 Cal L Jour 319: 66 Ind Cas 640.

(3) *Nur Ilahi* v. *Nawaz Khan*, 1925 Lah 345 (346): 7 Lah L Jour 86: 86 Ind Cas 683: 26 Pun L R 76. See also *Jagdish Narain* v. *Hazari Lal*, 1932 All 467 (467): 1932 All L J 309 [General charge of immorality not sufficient].

Note 7.

(1) *Blackie* v. *Osmaston*, (1884) 28 C D 119: 54 L J Ch 473: 52 L T 6: 33 W R 158; *Kemp* v. *Goldberg*, 36 Ch D 505: 56 L T 736: 36 W R 278; *Augustinus* v. *Nerinckx*, 16 Ch D 13: 43 L T 458: 29 W R 225 cited at 14 Cal W N 147 [Even where an approximate sum is mentioned]; *Carr* v. *Anderson*, (1901) 18 T L R 206 C A: 112 L T Jo 214.

(2) *Benode Behary* v. *Rajnarain*, (1903) 30 Cal 699 (707): 7 Cal W N 651; *Hirada* v. *Gadigi*, (1870-71) 6 Mad H C R 197 (201); *Periavenkan* v. *Subramanian*, (1897) 20 Mad 239 (243): 6 Mad L Jour 266; *Appa Rao* v. *Suryaprakasa*, (1900) 23 Mad 94 (98): 9 Mad L Jour 330; *Ganga Prasad* v. *Ram Dayal*, (1901) 23 All 502 (504): 1901 All W N 150; *Bholanath* v. *Netram*, (1906) 3 All L J 800 (801, 802): 26 All W N 185; *Shankar* v. *Mukta*, (1898) 22 Bom 513 (518); *Chunilal Ratanchand* v. *Laxman Govind*, 1922 Bom 183 (184): 46 Bom 24: 23 Bom L R 606: 63 Ind Cas 923.

(3) *Bhowani Prosad* v. *Juggernath Shaha*, (1909) 3 Ind Cas 241 (245, 246): 9 Cal L Jour 133: 13 Cal W N 309.

O. 6, R. 4, Notes 7—9.

how the bar of limitation is got over.[4]

8. **Contract.**—Where a contract or agreement is relied upon, particulars should be given, stating its date and showing whether it is in writing, or is verbal, or implied, or partly one and partly the other. If it is in writing the document or documents must be identified and described, and if it is implied, the circumstances from which the implication arises must be stated.[1]

9. **Defamation.**—In an action for defamation the plaintiff should give particulars of as to when and where the libel or slander, as the case may be, was published, and the persons to whom it was published.[1] If, however, all the persons to whom the publication was made were not known to the plaintiff he may plead that he is unable to give particulars until after discovery.[2] Such particulars will naturally be unnecessary if the defamation or slander is published in a newspaper.[3]

As the defendant is entitled to know the precise charge against him the *exact words* constituting the libel must be set out.[4] If they are contained in letters or articles in newspapers all the letters and articles should be produced.[5] If the letter containing the libel is destroyed, that fact must be mentioned in order to provide for the letting in of secondary evidence.[6] A plea of *innuendo* must be clearly brought out, and it must be shown how the words were capable of bearing a libellous meaning.[7]

A defendant relying on the *plea of justification* must similarly give particulars of the specific instances on which he intends to rely.[8] The defence should show whether the justification is as to the whole or part of the matter published.[9] Where the libellous words are capable of two meanings the defendant must state whether he justifies for both meanings or only as to one only and which one.[10]

A defendant who pleads *fair comment* is bound to give particulars of the fact on which he commented and that they are true and fair and made in the

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(4) *Baburam* v. *Jodh Singh*, (1913) 18 Ind Cas 690 (691): 11 All L J 89. See also *Amolakchand* v. *Baijnath*, (1913) 20 Ind Cas 933 (934): 11 All L J 664: 35 All 455.

Note 8.

(1) *Turquand* v. *Fearon*, (1879) 48 L J (Q B) 703: 40 L T 543; *Abbs* v. *Mathewson & Co*, (1898) 104 L T Jo 268; *Smith* v. *West*, 1876 W N 55; *Temperton* v. *Russel*, 9 T L R 319.

(4) *Zenobia* v. *Axtell*, (1795) 6 T R 162: 3 R R 142; *Harris* v. *Warre*, (1879) 4 C P D 125; *Wright* v. *Clements*, (1870) 8 B & Al 503 (506): 22 R R 465.

(5) *Soloman* v. *Lawson*, (1846) 8 Q B 823: 10 Jur 796: 15 L J Q B 253; *Cartright* v. *Wright*, (1822) 5 B & Al 615.

(6) *Atkinson* v. *Fosbroke*, L R 1 Q B 628.

Note 9.

(1) *Nannu Mall* v. *Ram Prasad*, 1926 All 672 (673): 96 Ind Cas 89; *Jehangir* v. *Secretary of State*, (1903) 6 Bom L R 131 (151); *Roselle* v. *Buchanan*, 16 Q B D 656: 55 L J Q B 376: 34 W R 488; *Bradbury* v. *Cooper*, 12 Q B D 94: 53 L J Q B 558: 32 W R 32; *Davey* v. *Bentick*, (1893) 1 Q B 185: 62 L J Q B 114: 67 L T 742: 41 W R 181: 4 R 144; *Roche* v. *Meyler*, (1896) 2 I R 35 [Action for slander of title]; *Williams* v. *Ramsdale*, (1887) 36 W R 125 [Words spoken in public room—Names of those present must be given].

(2) *Russell* v. *Stubbs*, (1908) 52 Sol Jo 580 H L: (1913) 2 K B 200 N.

(3) See *Wingard* v. *Cox*, 1876 W N 106.

(7) *Capital & County Bank* v. *Henty*, 7 A C 741: 52 L J Q B 232: 47 L T 662: 31 W R 157: 47 J P 214.

(8) *Zierenberg* v. *Labouchere*, (1893) 2 Q B 183; *Godman* v. *Times Publishing Co*, (1926) 2 K B 273: 95 L J K B 747: 135 L T 291: 70 Sol J 606; *Gordon Cumming* v. *Green*, (1891) 7 T L R 408: 90 L T Jo 409 [But not if the libel consists of only one specific charge]; *Devereux* v. *Clarke & Co*, (1891) 2 Q B 582: 60 L J Q B 773.

(9) *Fleming* v. *Dollar*, 23 Q B D 388: 58 L J Q B 548: 61 L T 230: 37 W R 684.

(10) *Hennessey* v. *Wright*, (1888) 57 L J Q B 594: 59 L T 795: 36 W R 878: 4 T L R 651.

interests of the public.[11] Where the plea of justification is made in the form of a *rolled up plea*[12] and the plea indicates the materials on which the comment is based, particulars of those materials will not be ordered. If the materials are not indicated such particulars may be ordered.[13]

10. Claim for a lump sum.—Where a lump sum is claimed for money paid on several occasions, particulars as to when and to whom it was paid and the items composing such sum must be given,[1] so that defendant may see whether he may or may not plead a set off or limitation.[2]

11. Malicious prosecution.—A defendant simply denying the want of reasonable and probable cause will not be asked to furnish particulars thereof inasmuch as the *onus* lies on the plaintiff to show want of reasonable and probable cause.[1] Where, however, reasonable and probable cause is *affirmatively* pleaded particulars thereof may be ordered.[2]

12. Misconduct.—General allegations of misconduct are not sufficient. Where the defendant justifies his action on the ground of misconduct of the plaintiff, the specific acts of misconduct should be given.[1] The particulars must give full information as to what facts are relied on and the nature of the charge with sufficient detail to prevent the defendant being taken by surprise at the trial.[2] Where, however, specific evidence on the point in dispute is exclusively in the hands of one party, it is not reasonable to insist upon the other party giving definite particulars of misconduct which an examination of that evidence alone would disclose.[3]

13. Negligence—Nuisance.—In an action for negligence, the plaintiff must give full particulars of the negligence complained of, and of the damage he has sustained.[1] Thus in a case of collision the plaintiff must state when and where the accident took place and the particular act of negligence and give details of the loss and expenses incurred.[2] The plaint must clearly allege the

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(11) See *Penrhyn* v. *Licensed Victuallers Mirror*, (1890) 7 T L R 1.

(12) *I.e.*, a plea as follows:—"In so far as the said words consist of allegations of fact the said words are in their nature and ordinary meaning true in substance and in fact, and in so far as the said words consist of expression of opinion they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest."

(13) *Aga Khan* v. *Times Publishing Co*, (1924) 1 K B 675: 93 L J K B 361: 130 L T 746: 40 T L R 299.

Note 10.

(1) *Phillipps* v. *Phillipps*, (1878) 4 Q B D 127 (131): 48 L J Q B 135: 27 W R 436: 39 L T 556; *Gunn* v. *Tucker*, (1891) 7 T L R 280; *Godden* v. *Corsten*, 5 C P D 17: 49 L J C P 112: 28 W R 305: 41 L T 527 [Also when credit is given to a certain amount and balance claimed]; *Hall* v. *Symons*, 92 L T J 337, (Do.).

(2) *Kemp* v. *Goldberg*, 36 Ch D 505: 56 L T 736: 36 W R 278.

Note 11.

(1) *Weingerger* v. *Inglis*, (1918) 1 Ch P 133 (140). See *Raghavendra* v. *Kashinathbhat*, (1895) 19 Bom 717 (721) [Onus on plaintiff]; *Jadubar* v. *Sheo Saran*, (1899) 21 All 26 (28, 29): 1898 All W N 161 [Onus on plaintiff].

(2) *Green* v. *Garbutt*, (1912) 28 T R 573.

Note 12.

(1) *Saunders* v. *Jones*, (1877) 7 C D 435 C A: 47 L J Ch 440: 37 L T 769: 26 W R 226 [Dismissal of a servant].

(2) *Gordon Cumming* v. *Green*, (1891) 7 T L R 408: 90 L T Jo 409. See also *Damodhar Das* v. *Utamaram*, (1873) 10 Bom H C R 414 [Suit under S 19 of Act 20 of 1864—Acts of misconduct to be specified].

(3) *Ramakrishniah* v. *Satyanadhan*, 1932 Mad 284 (285): 1932 Mad W N 93: 62 Mad L Jour 226: 35 Mad L W 302: 137 Ind Cas 636.

Note 13.

(1) *West Rand Co* v. *Rex*, (1905) 2 K B 391 (400); *G I P Ry Co* v. *Jitam Ram*, 1922 Pat 17 (18): 3 Pat L Tim 222: 67 Ind Cas 664 [Suit against a railway company for damages for loss of goods lost by neglect].

(2) *Watson* v. *North Metropolitan Tramways Co*, (1886) 3 T L R 273; *Rees* v. *Young*, 1921 Cal 543 (544): 34 Cal L Jour 178: 25 Cal W N 519: 66 Ind Cas 745.

O. 6, R. 4, Notes 13—16.

duty enjoined on the defendant with the breach of which he is charged.[3] The same principles apply to cases of contributory negligence.[4]

Where in an action for public nuisance special damages are necessary to be proved, the plaint should state the full particulars of such damages.[5]

14. Recovery of land.—In an action for recovery of land, the plaintiff must give the nature and particulars of his title[1] and must show that he has got a right to immediate possession.[1-a] If he claims as heir, he must show how he claims to be heir, and must set out the links of relationship through which he claims,[2] and if he claims as an assignee, the steps by which the estate became assigned to him.[3] A general statement that by virtue of certain deeds he got title will be struck out as being embarrassing.[4] He must state the effect of the deeds and documents[5] though the *precise words* are unnecessary.[6]

In a suit by a lessor against a lessee for possession, the lessor need not allege anything more than the lease.[7] A *defendant* in an action for the recovery of land, who is in possession of the land is not compelled to give particulars, but a defendant in an action to establish title to land who sets up a plea of purchase *bona fide* should give particulars.[8]

15. Public High way and private rights of way.—Where a *public right of way* is pleaded, the *termini* need not be set out because the public have a right to use the way for all purposes at all times. In the case of private rights of way the *termini* or the way and the course which it takes must be shown with reasonable precision.[1]

16. Particulars of defence.—Any party to a suit, be he the plaintiff or defendant, will have to give particulars of the circumstances on which he relies as the basis of his plea. The defendant is also subject to this rule.[1]

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(3) *Gautret* v. *Egerton*, (1867) L R 2 C P 371; *West Rand & Co* v. *Rex*, (1905) 2 K B 391 (400).

(4) *Martin* v. *M'Taggart*, (1906) 2 I R 120; *Toppin* v. *Belfast Corporation*, (1909) 2 I R 181 C A.

(5) *Watson* v. *North Metropolitan Tramway*, 3 T L R 273; *Raj Chandra Haldar* v. *Mahim Chandra Mullick*, 1926 Cal 549 (550): 91 Ind Cas 728.

Note 14.

(1) *Phillips* v. *Phillips*, (1878) 4 Q B D 127 C A: 48 L J Q B 135: 27 W R 436: 39 L T 556; *Somasundaram Chetty* v. *Vadivelu Pillai*, (1908) 31 Mad 531 (531-532): 4 Mad L Tim 344 [A plaintiff who comes into Court alleging title without more, cannot be allowed to succeed on the basis of title by adverse possession not pleaded]; *Parmanand* v. *Sahib Ali*, (1889) 11 All 438 (443, 444): 1889 All W N 155 [Suit for redemption and possession]. See also *Syud Khadim Ali* v. *Mt Nazeer Begam*, (1871) 3 N W P H C 262 [Declaratory suit].

(1-a) *Ramanadan* v. *Pulikutti*, (1898) 21 Mad 288 (289-290): 8 Mad L Jour 221. See also *Ganoo* v. *Sidheswar*, (1902) 26 Bom 360 (362, 363): 4 Bom L R 58 [Suit in ejectment—Particulars as to notice to quit essential].

(2) *Blackidge* v. *Anderton*, 1893 Eng W N 112; *Palmer* v. *Palmer*, (1892) 1 Q B 319: 61 L J Q B 236

(3) *Davis* v. *James*, (1884) 26 Ch D 778: 53 L J Ch 523: 50 L T 115: 32 W R 406.

(4) *Phillips* v. *Phillips*, (1878) 4 Q B D 127: 48 L J Q B 135: 27 W R 436: 39 L T 556.

(5) *Riddel* v. *Strathmore*, (1887) 3 T L R 329 (330) [Per Cotton, L J].

(6) *Darbyshire* v. *Leigh*, (1896) 1 Q B 554: 65 L J Q B 360: 74 L T 241: 44 W R 452 [The mere mention that title was obtained by a will was held enough]. See also *Pledge* v. *Pomfret*, (1905) 74 L J Ch 357: 92 L T 560.

(7) *Cuthbertson* v. *Irving*, (1860) 6 H & N 135: 29 L J Ex 135: 3 L T 335: 8 W R 704: 6 Jur (N S) 1211.

(8) *Milbank* v. *Milbank*, (1900) 1 Ch 376.

Note 15.

(1) *Rammanohar Sahi* v. *Mithila Prasad Sahi*, (1920) 57 Ind Cas 151 (152) Pat; *Harris* v. *Jenkins*, (1882) 22 C D 481: 52 L J Ch 437: 47 L T 570: 31 W R 137.

Note 16.

(1) *Nasiruddin* v. *Ahmed Hossain*, 1926 P C 109 (109): 1926 Mad W N 812: 3 Oudh W N 731: 25 All L J 20: 38 Mad L Tim 3: 97 Ind Cas 543 [A contract of sale was challenged on the ground of forgery and fraud]; *Thathu Naik* v. *Kandu Reddi*, (1909) 1 Ind Cas 221 (224): 5 Mad L Tim 248: 32 Mad 242: *Promoda* v. *Kinoo*, (1909) 4 Ind Cas 495 (499): 8 Cal L Jour 135: 13 Cal W N 167.

But ordinarily if a defendant merely denies the plaint allegations, the defendant will not be required to give particulars as the plaintiff will have to establish his case.[2] Particulars may be however ordered in regard to positive allegations[3] as where justification is pleaded in an action for libel.[4]

O. 6, R. 4, Note 16.

O. 6, R. 5, Notes 1—2.

R. 5. [New.] *A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.*

Further and better statement, or particulars.

[R. S. C., O. 19, R. 7.]

Synopsis.

1. Scope and object of the rule.
2. Application for particulars —When to apply.
3. Discovery before particulars.
4. When particulars need not be given.
5. "Upon such terms as to costs and otherwise as may be just."
6. Failure to give particulars after order.
7. Amendment of further particulars.

No application for particulars—Effect. See Note 2, Pt. (6).

1. **Scope and object of the rule.**—If a party omits to give in his pleading any particulars which he ought to have given according to Rule 4, the other party may apply under this rule for further and better particulars of any matter stated in the pleading. The object of obtaining particulars is, as has been seen in Note 1 to Rule 4 above, to enable the opposite party to know what case he has to meet and to prevent a surprise at the trial and so that he may not have to go to trial embarrassed by the obscurity or the incompleteness of the case which he has to meet.[1] Furnishing particulars of what has been pleaded insufficiently or vaguely is not a discretionary matter at all. It is ordering one of the parties to give the other his dues.[2] It is the duty of the Court as well to see that parties plead their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met. If the pleadings are not definite, the Court will have difficulty in excluding much irrelevant evidence and consequently much public time may be wasted.[3]

2. **Application for particulars—when to apply.**—An application under this rule should specify the particulars or the further and better particulars

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(2) *Weinberger* v. *Inglis*, (1918) 1 Ch 133; *Roberts* v. *Owen*, 6 T L R 172: 54 J P 295 [Where defendant in an action for malicious prosecution simply denied want of reasonable and probable cause particulars were refused]; *Mure* v. *Kaye*, (1811) 4 Taunt 34 [See however that want of reasonable and probable cause was pleaded affirmatively by defendant].

(3) *Mclulich* v. *Mclulich*, 1920 P 439.

(4) *Gordon Cumming* v. *Green*, 7 T L R 408; *Zierenberg* v. *Labouchere*, (1893) 2 Q B 183; *Woothon* v. *Sievier*, (1913) 3 K B 499: 109 L T 28; *Digby* v. *Financial News, Ltd*, (1907) 1 K B 502 [On the ground of fair comment].

Order 6, Rule 5—Note 1.

(1) *Nedungadi Bank Ltd* v. *Official Assignee of Madras*, 1930 Mad 473 (476): 31 Mad L W 387: 59 Mad L Jour 22: 53 Mad 645: 126 Ind Cas 629.

(2) *Narayanaswami Aiyar* v. *Krishnamurthi Aiyar*, (1915) 26 Ind Cas 927 (932): 1915 Mad W N 122: 17 Mad L Tim 48.

(3) *Gauri Shankar* v. *Manki*, 1924 All 17 (18, 19): 21 All L J 571: 4 L R A (Civ) 464: 74 Ind Cas 466: 45 All 624. See *Ranchod Lal* v. *Secretary of State*, (1911) 9 Ind Cas 765 (766): 13 Bom L R 92: 35 Bom 182. See also *Jagdish Narain* v. *Hazari Lal*, 1932 All 467 (467): 1932 All L J 309 [General and vague charge of immorality in pleading should be struck out with costs].

O. 6, R. 5, Notes 2—4.

required and should ask for the costs of the application also.[1] Though there is no time-limit for applying for particulars,[2] it should, as a rule be applied for, within a reasonable time after the necessity arises; otherwise if there is undue delay, the application may be refused.[3] But a defendant does not waive his right to apply for particulars by delivering a defence.[4] There will however be no necessity for amendment by giving particulars when the Court has already come to a definite finding on a point.[5] If a party having a right to apply for particulars, does not do so in the trial Court, he cannot complain of want of particulars in the appellate Court, for his failure to apply operates as an estoppel.[6]

3. Discovery before particulars.—In some cases like suits by a principal against his agent, when the defendant applies for particulars and the plaintiff does not know the facts necessary to enable him to give particulars and the defendant knows them, the practice is to order the defendant to give discovery and to postpone the application for particulars till then.[1] "It is good practice and good sense, that when the defendant knows the facts and the plaintiffs do not, the defendant should give discovery, before the plaintiffs deliver particulars".[2] But no hard and fast rule can be laid down to determine when particulars should precede discovery, or discovery should precede particulars. Each case will depend upon its own circumstances.[3] In a suit for libel characterising the plaintiff as an "imposter" and "a charity swindler" the defence was of justification. Plaintiff asked for particulars of the charge, but the defendant wanted inspection of the plaintiffs' account books. The Court refused to allow the defendant inspection of plaintiffs' accounts and Kay, L. J., said "To apply this practice to the case of a libel would be to sanction the publication of a libel, when the libellor knew no facts justifying the libellous statement, because he believed he could by the process of discovery, elicit such facts."[4] From this case it is clear that discovery before particulars will not be ordered, where the particulars are within the knowledge or ought to be within the knowledge of the person applying for particulars.

4. When particulars need not be given.—All particulars delivered should be the *best* that the party delivering them can give. In some cases

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Note 2.

(1) 1930 Annual Practice, p 288.

(2) *Thompson* v. *Birkley*, (1882) 47 L T 700: 31 W R 230.

(3) *Gourand* v. *Fitzgerald*, (1888) 37 W R 265 (C A).

(4) *Sachs* v. *Spillman*, (1887) 37 Ch D 295: 57 L J Ch 658: 58 L T 102: 36 W R 498; *Watson* v. *North Metropolitan Tramway Co*, (1886) 3 T L R 273.

(5) *Veerappan Servai* v. *Mennappan*, 1923 Mad 245 (246): 31 Mad L Tim 449: 70 Ind Cas 335.

(6) *Premsukh Das* v. *Ram Bujhawan*, (1919) 52 Ind Cas 964 (966): 1919 Pat H C C 451: 1 Pat L Tim 34.

Note 3.

(1) *Whyte* v. *Ahrens*, (1884) 26 Ch D 717: 54 L J Ch 145: 50 L T 344: 32 W R 649 (C A) cited in 12 Cal L Jour 505; *Leitch* v. *Abbott*, (1886) 31 Ch D 374: 55 L J Ch 460: 54 L T 258; 34 W R 506: 50 J P 441 (C A).

(2) *Miller* v. *Harper*, (1888) 38 Ch D 110 (112): 57 L J Ch 1091: 58 L T 698: 36 W R 454 (C A) (Per Bowen, L J) [Suit by wife's executor against husband for recovery of furniture purchased with wife's income and included in an inventory of all the furniture in husband's house—Husband not entitled to particulars till he declares by affidavit which of the furnitures in the inventory belonged to his wife].

(3) *Waynes Merthyr Co* v. *Radford*, (1896) 1 Ch 29: 65 L J Ch 140: 73 L T 624: 44 W R 103 [Suit by colliery company against coal merchant for passing off some other coal as the coal of the plaintiff's mines—Plaintiffs gave one instance of such fraudulent sale and complained of such fraud "on divers other occasions"—Defendant not entitled to particulars of occasions till he gives inspection of his books to the plaintiff].

(4) *Zurenberg* v. *Labonchere*, (1893) 2 Q B 183.

where the party is, or states he is, unable at the time, to give the particulars required, an order is made for the best particulars he can give, reserving him leave to deliver amended particulars (not less than a fixed time before trial of the suit.) A party will not, as a rule, be ordered to give particulars of facts or matters which the other party has to prove or as to which he merely traverses the allegations of his opponent.[1]

O. 6, R. 5, Notes 5—7.

5. **"Upon such terms as to costs and otherwise as may be just".**—When ordering delivery of particulars, the Court may order the party in default to pay a specified sum to the other side for the costs occasioned by the application, such payment to be made on or before the delivery of particulars.[1]

6. **Failure to give particulars after order.**—When an order for delivery of particulars under this rule is not obeyed, if the plaintiff is in default the suit may be stayed, or, the defence may be struck out under Rule 16, *infra* if the defendant is in default.[1] It has also been held that the Court has even got the power to dismiss a suit in the case of default of a plaintiff to obey the order of the Court.[2] The Court has got the power to stay a suit or to strike out a defence even if such a condition is not added to the original order for delivery of particulars, and this power is a discretionary one.[3]

7. **Amendment of further particulars.**—A party having delivered particulars in an action cannot withdraw, add to, or amend, them without leave of Court.[1] As a rule, however, leave will be granted when the amendment will cause no injury to the opposite party, but the applicant will be ordered to pay the costs of his opponent in any event.[2]

R. 6. [New.] *Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.*

Condition precedent.

[R. S. C., O. 19, R. 14.]

O. 6, R. 6.

Note 4.

(1) *Weinberger* v. *Inglis*, (1918) 1 Ch 133: 87 L J Ch 148: 118 L T 208: 34 T L R 104: 62 Sol J 160.

Note 5.

(1) *Gauri Shankar* v. *Manki*, 1924 All 17 (18, 19): 21 All L J 571: 4 L R A (Civ) 464: 74 Ind Cas 466: 45 All 624.

Note 6.

(1) *Gauri Shankar* v. *Manki*, 1924 All 17 (19): 21 All L J 571: 4 L R A (Civ) 464: 74 Ind Cas 466: 45 All 624.

(2) *Kesho Prasad Singh* v. *Ramdhar Rai*, 1931 Pat 135 (136): 11 Pat L Tim 617: 128 Ind Cas 785; *Davey* v. *Bentinck*, (1893) 1 Q B 185: 62 L J Q B 114: 67 L T 742: 41 W R 181: 4 R 144 (C A) [Cited in 1930 Mad 473 (475); *Vasudevan* v. *Nedungathiripad*, 1932 Mad 316 (318): 1932 Mad W N 301 [Order in substance under this rule and not O 11, R 21—Not appealable].

(3) *The Nedungadi Bank Ltd* v. *Official Assignee of Madras*, 1930 Mad 473 (475 and 476): 31 Mad L W 387: 59 Mad L Jour 22: 53 Mad 645: 126 Ind Cas 629; *Chamru Saha* v. *Kanak Singh*, 1931 Pat 135 (136).

Note 7.

(1) *Yorkshire Provident Assurance Co* v. *Gilbert*, (1895) 2 Q B 148 C A: 64 L J Q B 578: 72 L T 445: 14 R 411 (C A).

(2) *Charapede and Co* v. *Commercial Union Association*, (1884) 32 W R 262 C A [Leave may be granted at any stage].

O. 6, R. 6, Notes 1—2.

Synopsis.

1. Scope of the rule.
2. Specification, where necessary, must be distinct.

Allegation of non-performance of condition precedent, not needed. See Note 1, Pts. (1) to (3).

1. **Scope of the rule.**—This rule is new and is identical with O. 19, R. 14 of the Rules of the Supreme Court of England.

It is not necessary for a party to plead expressly the performance of a condition precedent. It will, under this rule, be implied in his pleading. It is for the other party, if he contends that there was a condition precedent, and that it has not been duly performed, to say what that condition is and to plead its non-performance. Otherwise its due performance will be presumed.[1] Thus, where a demand for payment to be made at Lloyd's Bank was a condition precedent, and it was not pleaded that such demand has been made, it was held that this rule applied.[2] Where there was a question of service on a lessee of the notice required by S. 14 of the Conveyancing Act (1881), it was held that the statement of claim must be read as if it contained an allegation that the plaintiffs had given the necessary notice before the commencement of the action.[3] If any party contests the performance of a condition precedent, then the other party must prove the performance of the condition.[4]

A condition precedent does not form *part* of the cause of action. It is some formality attached to the cause of action, until the performance of which, the right of action is suspended. But, whenever a condition precedent goes to the root of the matter it is proper and safer to allege performance of it in the plaint. For instance in the case of a claim on a cheque, an allegation of notice of dishonour or of facts excusing such notice, was held essential.[5]

The allegation contesting the performance of a condition precedent must not be vague or general but must be specific.[6]

2. **Specification, where necessary, must be distinct.**—Under the present rule an averment of the due performance of all conditions precedent is *implied* in every pleading and the opposite party must specify *distinctly* any conditions the performance or occurrence of which he intends to contest.

Order 6, Rule 6—Note 1.

(1) *Murli Manohar* v. *Nand Singh*, 1924 Pat 205 (206): 72 Ind Cas 1.

(2) *Harris Calculating Machine Co*, In Re, (1914) 1 Ch 920: 83 L J Ch 545: 110 L T 997: 58 S J 455.

(3) *Gates* v. *Jacobs*, (1920) 1 Ch 567: 89 L J Ch 319: 123 L T 238: 64 Sol J 425 [Cited in 1924 Pat 205].

(4) *Firm Kanwar Bhan* v. *Firm Ganpat Rai*, 1926 Lah 318 (319): 94 Ind Cas 304: 7 Lah 442. See also *Udit Upadhia* v. *Imam Bandi Bibi*, (1902) 24 All 402 (416, 419): 1902 All W N 99.

(5) *Fruhauf* v. *Groovenor*, (1892) 61 L J Q B 717: 67 L T 350; *Roberts* v. *Plant*, (1894) 1 Q B 597 C A: 64 L J Q B 347: 72 L T 181: 43 W R 308: 14 R 222 (C A).

(6) *Harris Calculating Machine Co*, In re, (1914) 1 Ch 920 (925): 83 L J Ch 545: 110 L T 997: 58 Sol J 455.

R. 7. [New.] *No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same,*

Departure.

[R. S. C., O. 19, R. 16.] [*See* Ss. 33-100 ; O. 3, Rr. 8 & 9; O. 41, R. 2.]

O. 6, R. 7, Notes 1—3.

Synopsis.

1. Scope and object of the rule.
2. New ground of claim.
3. Inconsistent allegations.

"Departure in pleading." See Note 1.

1. Scope and object of the Rule.—It has been seen in Note 1 to Rule 1 *ante*, that the parties may, subsequent to the written statement of the defendant, file subsequent pleadings with the leave of the Court, under the provisions of O. 8, R. 9, *infra*. It is at the stage of such subsequent pleadings that the provisions enacted in this rule against what is called "a departure in pleading" applies for the first time. A departure takes place when in any pleading the party deserts the ground that he took up in his preceding pleading, and resorts to another and different ground. The object of this rule is to prevent such a "departure". A statement made by a party to the Court is in the nature of a supplementary pleading for the purposes of this rule.[1]

2. New ground of claim.—Where a plaint is defective, it cannot be supplemented by a subsequent statement.[1] *A* claimed one-half of £500 alleging that *B*, the defendant, had received it as trustee for himself and the plaintiff *A* in equal shares. *B* pleaded that he received only £311, half of which he paid into Court. *A* thereupon replied, that *B ought to have* received the full £500, and that having wrongfully compromised with the debtor, is liable for half of £500. It was held that this was a new ground of claim which could not be allowed.[2]

3. Inconsistent allegations.—A party cannot in subsequent pleading make any allegation inconsistent with what he has alleged originally.[1] Thus if a statement of claim (*i.e.*, plaint) alleges merely a negligent breach of trust, the reply must not assert that such breach of trust was fraudulent.[2] If such inconsistent allegations are made in a subsequent pleading without obtain-

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Order 6, Rule 7—Note 1.

(1) *Mahomed Yahya* v. *Raheem Ali*, 1929 Lah 165 (166): 117 Ind Cas 813; *Mashuq Ali* v. *Hurunissa*, 1929 Oudh 204 (206, 207): 114 Ind Cas 113; *Firm Rahimbux* v. *Firm Topandas*, 1928 Sind 103 (104): 107 Ind Cas 440 [Change of case at last moment without amendment—Disallowed]; *Sankarama Iyer* v. *Ponnuswami Pillai*, (1919) 49 Ind Cas 273 (274): 9 Mad L W 198: 25 Mad L Tim 257: 1919 Mad W N 23 [New case in evidence of defendant]; *Poosapathi Ramachandra* v. *Venkatasubbayamma*, (1915) 30 Ind Cas 41 (43): 29 Mad L Jour 53.

Note 2.

(1) *Kashi Nath Biswas* v. *Ram Niranjan Chanbe*, (1902) All W N 35 (38).

(2) *Earp* v. *Henderson*, (1876) 3 Ch D 254: 45 L J Ch 738.

Note 3.

(1) *Douglas* v. *Collector of Benares*, (1851) 5 Moo Ind App 271 (290): 1 Sar 434: 1 Suther 231; *Ram Dicaya Ram* v. *Mukhi Ram*, (1913) 18 Ind Cas 553 (554): 8 Pun L R 1913: 220 Pun W R 1913; *Nanu* v. *Moti*, (1918) 46 Ind Cas 471 (472): 119 Pun W R 1918; *Md Altaf Ali Khan* v. *Hamiduddin*, (1913) 21 Ind Cas 81 (82): 11 All L J 731 [Inconsistency in the defence not considered].

(2) *Kingston* v. *Corker*, (1892) 29 L R Jr 364.

O. 6, R. 7. Note 3. ing leave to amend, the Court will be justified in ignoring it, and the fact that a formal order rejecting it is not passed will not be a ground for remanding the case for retrial.[3] But where both parties understand the real point in issue and give evidence, the fact that a pleading subsequent to the plaint and the evidence is at variance with the original pleading, is immaterial.[4]

O. 6, R. 8, Note 1.

R. 8. [New.] *Where a contract is alleged in any pleading,*

Denial of contract.

a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

[R. S. C., O. 19, R. 20.]

Synopsis.

1. Denial of contract.

1. Denial of contract.—Where the defendant disputes the legality or sufficiency in point of law of the contract set up by the plaintiff, he must plead specifically the grounds of his objection; it is not sufficient to merely traverse any allegation, the plaintiff may have made.[1] Thus, where in a suit on a contract of mortgage, the defendant denied the consideration for the mortgage it was held that he cannot at the trial contend that the mortgage was not *duly attested*, and was therefore invalid.[2] But no Court will enforce an *illegal contract*, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality; it matters not whether the defendant has or has not pleaded the illegality.[3] The reason is that a Court will not assist a plaintiff where his own case discloses the illegality of the transaction.

O. 6, R. 9.

R. 9. [New.] *Wherever the contents of any document are material, it shall be sufficient in any pleading to*

Effect of document to be stated.

state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

[R. S. C., O. 19, R. 21.]

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(3) *Govind Singh* v. *Mungaji*, (1920) 57 Ind Cas 684 (685) Nag.

(4) *Jugal Kishore* v. *Gomti Kuar*, (1914) 25 Ind Cas 280 (281, 282) All.

Order 6, Rule 8—Note 1.

(1) *Abdul Rafiq* v. *Bhajan*, 1932 All 199 (202, 203): 1932 All L J 77: 137 Ind Cas 243: 53 All 963 [Suit on unconditional acknowledgment—Limitation must be specifically pleaded].

(2) *Jagannath Narasindas Marwadi* v. *Raoji Tulsiram Pansare*, 1923 Bom 90 (92): 47 Bom 137: 24 Bom L R 1296: 76 Ind Cas 73.

(3) *Gedge* v. *Royal Exchange Assurance Co*, (1900) 2 Q B 214: 69 L J Q B 506: 82 L T 463: 9 Asp M C 57: 5 Com Cas 229; *Scott* v. *Brown*, (1892) 2 Q B 724: 61 L J Q B 738: 41 W R 116 (C A); *Alice Mary Hill* v. *Clarke*, (1904) 27 All 266 (270, 271): 1 All L J 632: 1904 All W N 238 [Facts showing illegality elicited in cross-examination of defendant by plaintiff's pleader].

Synopsis.

1. Scope of the rule. 2. Precise words when necessary.

O. 6, R. 9, Notes 1—2.

1. Scope of the Rule.—Rule 2 of this order provides that every pleading shall contain a statement in a concise form of the material facts on which the party pleading relies. Where such a material fact is mentioned in a *document*, it is sufficient under this rule to state the *effect* of the document as briefly as possible without setting out the whole or any part thereof. Thus, in an action brought by the devisee of land under a will, for the recovery of the land devised, it was held that it was not necessary to set out the precise words of the will.[1] A party is, however, bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims.[2] It is not enough for him to say simply that by virtue of a certain deed he is entitled to the property claimed by him.[3]

2. Precise words when necessary.—In an action for libel or slander the precise words complained of are material, and should always be set out *verbatim*.[1]

R. 10. [New.] *Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.*

O. 6, R. 10. Notes 1—2.

Malice, knowledge, etc.

[R. S. C., O. 19, R. 22. *See* Rr. 2 and 4 above.]

Synopsis.

1. Scope of the rule.
2. Malice.
3. Fraudulent intention. See O. 6, R. 4; Note 2, ante.
4. Knowledge.

1. Scope of the Rule.—The circumstances from which malice, fraudulent intention or other condition of the mind is to be inferred, constitute really the *evidence* in proof of such condition of mind, and need not therefore be pleaded, in accordance with the rule enacted in R. 2, *ante*, that only the *material facts* should be pleaded, but not the *evidence* by which they are to be proved.

2. Malice.—Where malice is a material ingredient of the plaintiff's case, as being a necessary part of his cause of action, as in suit for damages for slander or malicious prosecution, it should be alleged specifically in the

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Order 6, Rule 9—Note 1.

(1) *Darbyshire* v. *Leigh*, (1896) 1 Q B 554: 65 L J Q B 360: 74 L T 241: 44 W R 452 (C A).

(2) *Moti Lal* v. *Judishir*, (1916) 31 Ind Cas 181 (182): 22 Cal L Jour 254: 20 Cal W N 310.

(3) *Philipps* v. *Philipps*, (1878) 4 Q B D 127: 48 L J Q B 135: 39 L T 556: 27 W R 436 (C A).

Note 2.

(1) *Harris* v. *Warre*, (1879) 4 C P D 125: 48 L J C P 310: 40 L T 429: 27 W R 461: *Capital and Counties Bank* v. *Henty*, (1882) 7 App Cas 741 and 772: 52 L J Q B 232: 47 L T 662: 31 W R 157: 47 J P 214.

O. 6, R.10, Notes 2--4.

plaint.[1] Similarly where a mistaken *bona fide* belief and good faith are the grounds for applying the rule of equitable subrogation, they must be distinctly alleged in the pleadings and proved.[2]

3. **Fraudulent intention.**—*See* O. 6, R. 4 Note 2, *ante*.

4. **Knowledge.**—If knowledge or the absence of it, is a material factor in the case, it should be expressly alleged.[1] Thus, where insanity is set up as a defence to an action for breach of contract, it must be alleged and proved that, at the time of the contract, the plaintiff had knowledge of such insanity.[2]

O. 6, R.11, Note 1.

R. 11. [New.] *Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.*

Notice.

[R. S. C., O. 19, R. 23. *See* S. 80.]

Synopsis.

1. Notice.

1. **Notice.**—Wherever the giving of a notice is a condition precedent to the exercise of the right of suit, the plaintiff must plead and prove that the notice had been given and the condition precedent fulfilled.[1]

O. 6, R.12.

R. 12. [New.] *Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts*

Implied contract or relation.

Order 6, Rule 10—Note 2.

(1) *Abrath* v. *N E Ry Co*, (1886) 11 App Cas 247: 50 J P 659: 5 L J Q B 457: 55 L T 63; *Hicks* v. *Faulkner*, (1881) 8 Q B D 167: 51 L J Q B 268: 46 L T 127: 30 W R 545; *Mitchell* v. *Jenkins*, (1833) 5 B & Ad 588; *Harish Chandra* v. *Nashikanta*, (1901) 28 Cal 591 (593); *Syama Charan* v. *Jhattoo*, (1902) 6 Cal W N 289 (299); *Surajmal* v. *Manekchand*, (1904) 6 Bom L R 704 (720, 721). See also *Chunnilal* v. *Kirpashankar*, (1907) 31 Bom 37 (45): 8 Bom L R 838 [Suit for damages against Election Officer for refusal to receive nomination paper—Malice necessary to be alleged].

(2) *Pichaiyappa Chetti* v. *Govindaraju Mudaly*, 1931 Mad 110 (113): 1930 Mad W N 1190: 33 Mad L W 78: 130 Ind Cas 506.

Note 4.

(1) *Griffiths* v. *London and St Katharine Dock & Co*, (1884) 13 Q B D 259: 49 J P 100: 53 L J Q B 504: 51 L T 533: 33 W R 85 (C A) [Suit by workman against employer for injuries on account of neglect to maintain scaffolding in good condition—Workman's ignorance of the condition of the scaffolding must be alleged]; *Osborne* v. *Chocqueel*, (1896) 2 Q B 109: 65 L J Q B 534: 74 L T 786: 44 W R 575 [In a suit for damages on account of the biting of a dog, the owner's knowledge of its ferocious nature must be alleged].

(2) *Imperial Loan Co* v. *Stone*, (1892) 1 Q B 599: 61 L J Q B 449: 66 L T 556: 56 J P 436 (C A).

Order 6, Rule 11—Note 1.

(1) *Naraindas* v. *Kunjilal*, 1924 Nag 162 (163): 78 Ind Cas 1026.

or relations than one as to be implied from such circumstances, he may state the same in the alternative. O. 6, R.12, Note 1.

[R. S. C., O. 19, R. 24.]

Synopsis.

1. Implied contract or relation.

1. **Implied contract or relation.**—In an action brought on a contract, the contract and the breach thereof must be alleged and proved.[1] If the contract is an implied contract, the facts should be stated from which the plaintiff contends that a contract is to be implied. This rule enacts that where the contract is to be implied from a series of letters, or conversation or from a number of circumstances, such letters, conversations or circumstances need be referred generally and not in detail.

R. 13. [New.] *Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied* (e. g., *consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim*). O. 6, R.13, Note 1.

Presumptions of law.

[R. S. C., O. 19, R. 25.]

Synopsis.

1. Presumptions of Law.

1. **Presumptions of Law.**—As to the presumption in the case of a bill of exchange, *see* S. 118 of the Negotiable Instruments Act (XXVI of 1881).

Where the plaintiff is or was in possession of any land, it is sufficient as against a wrong-doer, to aver possession only; he need not set out his title as the same will be presumed, in accordance with the maxim, *Omnia Præsumuntur contra spoliatorem*—every presumption is made against a wrong-doer.[1]

R. 14. [Ss. 51, 115.] *Every pleading* shall be signed by the *party* and his pleader (if any): Provided that *where a party pleading is*, by reason of absence or for other good cause, unable to sign the *pleading*, it may be signed by any person duly authorised by him to *sign the same or to sue or defend on his behalf*. O. 6, R.14.

Pleading to be signed.

[1877—51; 1859—21.] [*See* S. 2, Cl. 20.]

Order 6, Rule 12—Note 1.
(1) *Sheo Prasad Dube* v. *Sarju Mahto*, 1924 All 449 (450): 46 All 35: 78 Ind Cas 519.

Order 6, Rule 13—Note 1.
(1) *Armory* v. *Delamirie*, 1 Sm L C (12th Edn). 396.

O. 6, R. 14, Notes 1—2.

Local Amendment.

BENGAL.—

Insert the following *after* Rule 14 as Rule 14-A:—

"14-A.—Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in Rule 14 of this Order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat."

Synopsis.

1 Pleading to be signed.
2. Signature by persons duly authorised.
3. Omission to sign pleading—Effect.

"Absence or other good cause." See Note 2, Pt. (2).
Duty of Court to see to signature of parties. See Note 1, Pt. (2).
Signature by mukhtear. See Note 2, F.-N. (4).

1. Pleading to be signed.—The object of requiring every pleading to be signed by the party is to prevent, as far as possible, disputes as to whether a suit was instituted with the plaintiff's knowledge and authority.[1] Judges are bound to see that the pleadings are signed properly.[2] In cases where the plaint contains allegations of fraud which must be false or true to the knowledge of the plaintiff, the defendant can insist on the plaintiff himself signing the plaint.[3] There is no difference between vakalaths, affidavits and pleadings as to the procedure by which they can be signed.[4]

This rule is made applicable to proceedings under the undermentioned Local Acts.[5]

2. Signature by persons duly authorised.—Under the corresponding sections of the Codes of 1859 and 1877, there were no provisions for the signing and verification of the pleading by the authorised agent of the party, but it was held, by applying S. 36 of the Code of 1877, (now O. 3, R. 1), that an authorised agent could validly sign the pleading on behalf of the party.[1] In view of these decisions the legislature expressly added a proviso in S. 51 of the Code of 1882, (now O. 6, R. 14), under which an authorised agent may validly sign a pleading under certain circumstances, namely, where the party pleading, is by reason of *absence* or for *other good cause* unable to

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Order 6, Rule 14—Note 1.

(1) *Secretary of State* v. *Dinshaw Navroji*, 1925 Sind 275 (278): 87 Ind Cas 1002.

(2) *Ma Tha* v. *P L M M Chetty*, (1915) 26 Ind Cas 240 (240): 7 Bur L Tim 310.

(3) *The Rajah of Tomkuhi* v. *Braidwood*, (1887) 9 All 505 (508).

(4) *Muthu Ramalinga Sethupathy Avl* v. *Shanmugha Nadan*, 1928 Mad 175 (176): 54 Mad L Jour 65: 1927 Mad W N 885: 27 Mad L W 237: 51 Mad 242: 107 Ind Cas 804.

(5) *The Bengal Tenancy Act* VIII of 1885, S 143, Cl (2); *The Bengal Settled Estates Act* III of 1904, S 4, Cl (1); *The Bengal Drainage Act* VI of 1880, S 51-B, sub-S (3), Cl (g); *The Orissa Tenancy Act*, II of 1913, Ss 70 (2), 156 (2) and 211 (4); *The Puri Lodging House Act (Bengal Act)* IV of 1871), S 4.

Note 2.

(1) *Roy Dhunput Singh* v. *Jhoomuk Khawas*, (1879) 3 Cal L Rep 579 (580); *Kastolino* v. *Rustomj Dadabhai*, (1879-80) 4 Bom 468 (470); *Surnomoye* v. *Poolin Behary*, (1879) 3 Cal L Rep 15 (16).

sign the pleading.[1-a] The absence must be of such a kind as makes it impossible for the party to sign the pleading, *e.g.*, absence on a sea cruise or a journey into unknown regions where communication is impracticable; the words "other good cause" are, however, of wider significance and leave the matter entirely in the discretion of the Court.[2] O. 6, R. 14, Notes 2—3.

The question as to when a person can be said to be duly authorised by the party, depends upon the circumstances of each case.[3] A pleading signed by an unauthorised person is not valid,[4] but, in such a case, the Court may permit the party himself to sign it later,[5] or, if the person signing it is subsequently authorised, treat the original plaint itself as valid, provided there is no question of limitation.[6]

As to the signing and verification of pleadings in suits by or against corporations, *see* Note 8 of O. 29, R. 1, and as to the signing and verification of pleadings in suits by or against firms, *see* O. 30, R. 1, Note 13.

3. Omission to sign pleadings—Effect.—An irregularity in the signature or verification of a plaint is a mere defect of *procedure*[1] and does not affect the *jurisdiction* of the Court.[2] An omission or mistake in the signature is not fatal to the suit but is capable of being cured by appropriate amendments.[3] In fact the proper course in such cases is not to dismiss the suit or reject it but to get the same amended.[4] The defect may also be waived by

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(1-a) *Keenoo Singh Roy* v. *Ishan Chunder Roy*, (1866) 6 Suth W R 213 (215); *Raja Gokul Das* v. *Mullu*, (1908) 16 C P L R 103 (105, 106); *Maharajah Mohessur Buksh* v. *Sheo Narain Singh*, (1866) 6 Suth W R Mis 59 (60); *Rammohun Mookerjee* v. *Nursing Deb*, (1862-64) Suth W R 54 (55): 1 Ind Jur O S 63: 1 Hay 379 F B; *Mahabir Prasad* v. *Shah Wahid Alam*, (1891) 11 All W N 152 (152); *Palaniappa Chetty* v. *P M R M Firm*, (1914) 25 Ind Cas 136 (137): 7 Bur L Tim 199; *Manohar Das* v. *Ram Autar*, (1903) 25 All 431 (435): 1903 All W N 92; *Amir-un-nissa* v. *Ram Charan Das*, (1915) 31 Ind Cas 859 (859) (U P) [In so far as this decision holds that this rule is subject to O 3, R 1 it cannot be accepted as correct. O 3, R 1 enacts that it applies only where there is no other provision to the contrary. This rule is a provision to the contrary in so far as the authorised agent can sign only under specified circumstances].

(2) *Chandramal* v. *Ganpat Rao*, (1891) 4 Nag L R 117 (118). See also In Re *Rajan Leelanand*, (1867) 7 Suth W R 168 (169).

(3) *Ali Ahmad* v. *Abdul Ghani*, 1925 Lah 144 (144): 75 Ind Cas 880 [Plaint signed by person instructed by plaintiff to sign]; *Singer Manufacturing Company, Delhi* v. *Yar Mahomed Khan*, (1911) 10 Ind Cas 141 (142): 8 Pun Re 1912: 150 Pun L R 1911: 251 Pun W R 1911 [Company in foreign territory, a party—Person specially authorised can sign]; *The Maharaja of Kashmir* v. *Mt Karum Bhari*, 1902 Pun Re No 41: 54 Pun L R 1902 [Agent specially appointed on behalf of an independent Prince]; *Rakhal Chandra* v. *Secretary of State*, (1906) 10 Cal W N 841 (844): 8 Cal L Jour 34 [Plaint signed by pleader generally acting for Government is valid]; *Sayad Saifulla* v. *Sayad Hajimiya*, (1900) 24 Bom 238 (239): 1 Bom L R 664 [Pleader duly appointed by the guardian of an infant may sign and verify on behalf of his client].

(4) *Leakat Hoosein* v. *Bisessur Sanyal*, (1912) 16 Ind Cas 255 (256): 16 Cal L Jour 578 [Mukhtear cannot sign for the party]; *Yusuf Beg* v. *The Board of Foreign Missions*, (1894) 16 All 420 (423): 1894 All W N 154; *Mootala & Co* v. *Ponnuswami*, (1903-1904) 2 L B R 41 (42); *Masta* v. *Radha Kishen*, 1899 Pun Re No 5 [Principal residing within jurisdiction—Agent can't sue unless specially authorised].

(5) *Palaneappa Chetty* v. *Arunachallam Chetty*, (1914) 25 Ind Cas 140 (140, 141): 7 Bur L Tim 202; *Uttamram* v. *Thakur Das*, 1922 Bom 113 (113): 46 Bom 150: 68 Ind Cas 217: 23 Bom L R 911.

(6) *Maharajah of Rewah* v. *Swami Saran*, (1903) 25 All 635 (637): 1903 All W N 189.

Note 3.

(1) *Bombay Baroda and Central India Railway Company, Ltd* v. *Shivaji Mills Co, Ltd, Baroda*, 1927 All 514 (514-515): 101 Ind Cas 698; *Johnston* v. *Rameshwar*, 1928 Pat 51 (53, 54): 104 Ind Cas 747; *Bisheshar Nath* v. *Emperor*, (1918) 44 Ind Cas 28 (29): 16 All L J 64: 40 All 147: 19 Cr L Jour 865; *Motharam Dowlatram* v. *Pahlajrai Gopaldas*, 1925 Sind 159 (163): 80 Ind Cas 141: 19 Sind L R 286; *Tha Zan* v. *Tha Dun*, 4 L B R 284 (286, 287).

(2) *Wali Mahomed Khan* v. *Ishak Ali Khan*, 1931 All 507 (512): 1931 All L J 777: 134 Ind Cas 26 S B.

(3) *Raman* v. *Gokul*, (1917) 39 Ind Cas 462 (462): 15 All L J 309: 39 All 343; *Arunachellam* v. *Prabhayya*, (1912) 17 Ind Cas 580 (581, 582): 1912 Mad W N 1207: 25 Mad L Jour 174: *Thyagaraja Aiyar* v. *Sankara Aiyar*, (1896) 6 Mad L Jour 213 (213); *Lodd Govindoss Krishnadas* v. *Muthiah Chetty*, 1925 Mad 660 (668, 669): 48 Mad L Jour 721.

(4) *Fatehchand* v. *Mansab Rai*, (1898) 20 All 442 (445): 1898 All W N 110; *Ranjit Ram* v. *Kateear Nath*, (1896) 18 All 396 (399, 400): 1896 All W N 102 F B; *Nand Lal* v. *Shanker*, (1911) 11 Ind Cas 842 (843): 165 Pun W R 1911: 254

O. 6, R.14, Note 3.

the defendant not objecting thereto at the earliest possible opportunity, in which case it cannot be allowed to be raised for the first time in appeal.[5] Where several persons institute a suit it is not necessary that all should sign the plaint. It is sufficient that one of them signs the plaint with the other plaintiff's *knowledge and authority*.[6] In *Mohini Mohan Das* v. *Bungsi Buddan Saha Das*, I. L. R. 17 Cal. 580, their Lordships of the Privy Council said—"there is no rule providing that a person named as co-plaintiff is not to be treated as plaintiff unless he signs and verifies the plaint." Where, however, the authority and knowledge of the plaintiffs not signing the plaint, are not established, the institution of the plaint will not be valid.[7]

O. 6, R.15.

R. 15. [Ss. 51, 52, 115.] (1) *Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading* or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

Verification *of pleadings.*

(2) *The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.*

(3) The verification shall be signed by the person making it *and shall state the date on which and the place at which it was signed.*

[1877—Ss. 51, 52; 1859—S. 27.]

Synopsis.

1. Scope and object of the rule.
2. Who can verify pleadings.
3. Mode of verification.
4. Effect of defective verification.
5. Omission to verify.
6. Objection to verification.
7. Effect of false verification.

Courts' duty to see to verification. See Note 1, Pt. (2).

Pleadings of purdanishin ladies. See Note 1, Pt. (3).

Verification in presence of Court. See Note 2, Pt. (5).

Verification is no evidence. See Note 1, Pt. (4).

Pun L R 1911. *See* also *Girdhari* v. *Kanhaiya Lal*, (1892) 15 All 59 (60): 1892 All W N 235 [Signature in blank paper, not sufficient—Must be amended]. But see *Kaleear Nath* v. *Aggyan*, 1894 All W N 95 (95, 96) [Decision under S 53 of old Code—Not good law after 18 All 396].

(5) *Basdeo* v. *Smidt*, (1900) 22 All 55 (61, 65): 1899 All W N 172; *Chandi Mal* v. *Deva Singh*, 1896 Pun Re No 48; *Rustum Gazi* v. *Tara Prosanna Chowdhuri*, (1907) 11 Cal W N 871 (872); *Braja Sunder Deb* v. *Sivaranjan*, (1921) 59 Ind Cas 282 (284): 1 Pat L Tim 647; *Ma Ngwe Kin* v. *Ma Hme*, 1923 Rang 206 (206): 1 Rang 42: 74 Ind Cas 100; *Durgagir* v. *Kallu*, (1911) 10 Ind Cas 731 (732): 7 Nag L R 33; In re *Mahomed Kasim Sahib*, 1929 Mad 790 (791): 30 Mad L W 499; *Mohiuddin* v. *Pirthi Chand*, (1915) 31 Ind Cas 664 (667): 19 Cal W N 1159.

(6) *E A Zippel* v. *K D Kapur & Co*, 1932 Sind 9 (10): 26 Sind L R 167; *Hazari Lal* v. *Ambika Gir*, 1924 Pat 104 (106): 3 Pat 67: 1923 Pat H C C 273: 2 Pat L R 169: 79 Ind Cas 5: 5 Pat L Tim 591.

(7) *Valliappa Chetty* v. *Subramanian Chetty*, (1914) 23 Ind Cas 431 (433): 26 Mad L Jour 494: 15 Mad L Tim 342.

O. 6, R. 15, Notes 1--2.

1. Scope and object of the rule.—The object of verifying a pleading is to fix, on the party verifying, the responsibility for the statement that it contains.[1] The Court is bound to see in every case that the pleadings are verified in the manner prescribed and are not treated as mere formalities.[2] In the case of *pardanishin* ladies, their pleadings will not be accepted as satisfactory proof of the contents thereof unless it is strictly proved that the pleadings was read out and explained to them.[3]

The verification of a pleading is not evidence of the facts contained in the pleading, and cannot form the basis for a decree in an undefended suit.[4]

A contentious probate proceeding should, under S. 295 of the Succession Act, (XXXIX of 1925) take the form of a suit, and should be verified by the parties.[5] But a petition presented by the Administrator-General under the Administrator-General's Act (III of 1913) need not, under the provisions of S. 29 of that Act, be verified by the Administrator-General.[6]

This rule is made applicable to proceedings under the undermentioned Local Acts.[7]

2. Who can verify pleadings.—Under S. 28 of the Code of 1859, it was necessary, to show in order to enable a third person to verify the pleading, that the party himself was, by reason of absence or other good cause, unable to sign the pleading.[1] Under this rule a pleading can be verified,

(1) by the party, where there is only one party,

(2) by one of the parties where there are several parties, and

(3) by a third person who is proved to the satisfaction of the Court to be acquainted with the facts of the case.[2]

Order 6, Rule 15—Note 1.

(1) *Basdeo* v. *John Smidt*, (1899) 22 All 55 (59, 60): 1899 All W N 172; *Ross* v. *Scriven*, (1916) 34 Ind Cas 235 (240, 242): 20 Cal W N 1192: 43 Cal 1001; *Basavayya* v. *Govindaraju*, 1931 Mad 679 (680): 34 Mad L W 69: 1931 Mad W N 1016: 133 Ind Cas 769.

(2) *Ma Tha* v. *P L M M Chetty*, (1915) 26 Ind Cas 240 (240): 7 Bur L Tim 310; *Keenoo Singh Roy* v. *Ishan Chunder Roy*, (1866) 6 Suth W R 213 (215).

(3) *Sadik Husain Khan* v. *Hashim Ali Khan*, (1916) 36 Ind Cas 104 (111, 112): 43 Ind App 212: 31 Mad L Jour 607: 14 All L J 1248: 19 Oudh Cas 192: 18 Bom L R 1037: 21 Cal W N 130: (1916) 2 Mad W N 577: 21 Mad L Tim 40: 38 All 627: 1 Pat L W 157: 4 Oudh L J 22: 25 Cal L Jour 363: 6 Mad L W 378: 10 Bur L Tim 140 P C.

(4) *Ross* v. *Scriven*, (1916) 34 Ind Cas 235 (240, 242): 20 Cal W N 1192: 43 Cal 1001.

(5) *U Shwe Min* v. *Maung Maung Gyi*, 1924 Rang 273 (274): 3 Bur L Jour 68: 82 Ind Cas 973 [Case under corresponding S 83 of the Probate and Administration Act, 1881].

(6) *McComiskey*, In the Goods of, (1893) 20 Cal 879 (880) [Case under S 12 of Act II of 1874]; *Avdall*, In re, (1899) 26 Cal 404 (406): 3 Cal W N 298, (Do.).

(7) S 51-B, sub-S (3), cl (g) of the Bengal Drainage Act (VI of 1880); S 4, cl (1) of the Bengal Settled Estates Act (III of 1904); S 143, cl (2) of the Bengal Tenancy Act (VIII of 1885); S 70, sub-S (2), S 156, sub-S (2) and S 211, Sub-S. (4) of the Orissa Tenancy Act (II of 1913); S 4 of the Puri Lodging-House Act (Bengal Act IV of 1871); S 15 (2), Oudh Laws Act (XXII of 1886).

Note 2.

(1) *Maharajah Mohessur* v. *Sheo Narain*, (1866) 6 Suth W R Mis 59 (60); In re *Rajah Leelanand Singh*, (1867) 7 Suth W R 168 (169); In re *Mouhessur Buksh*, (1866) 5 Suth W R Mis 33 (34); *Barrow* v. *Stewart*, (1862) 1 Ind Jur N S 226 [When third party verifies notice should be given to the opposite party]; *Overend Gurney & Co* v. *Steele*, (1865) 1 Ind Jur N S 39, (Do.); *Ram Mohan* v. *Nursing Deb*, (1862-64) Suth W R F B 54 (55): 1 Ind Jur (O S) 63: 1 Hay 379.

(2) *Manindra Chandra* v. *Velji Mulji*, 1927 Cal 773 (774): 31 Cal W N 1031 (N): 105 Ind Cas 564; *Mootala & Co* v. *Ponnuswamy*, (1908) 2 L B R 41 (42); *Braja Sundar* v. *Sivaranjan*, (1921) 59 Ind Cas 282 (284): 1 Pat L Tim 647 [By Karpardaz of decree-holder]; *Bakar Sajjad* v. *Udit Narain*, (1904) 26 All 154 (155): 1903 All W N 209 [General attorney of the decree-holder]; *Saifulla* v. *Haji Miya*, (1900) 24 Bom 238 (239): 1 Bom L R 664 [Pleader of party]; *Pandit Rakhal Chandra* v. *Secretary of State*, (1908) 8 Cal L Jour 34 (37): 10 Cal W N 841 [By the Collector and the Government Pleader].

O. 6, R.15, Notes 2—5.

It is, however, open to the opposite party to insist on the party himself verifying the pleading in important cases, *e.g.*, where there are allegations of fraud or circumstances tending to affect any possible question of limitation, if particularly within the knowledge of the party,[3] or where there are allegations of a scandalous nature.[4]

The rule does not require that the verification of a plaint by a third person should be made in the presence of the Court; but having regard to the necessity of satisfying the Court that the person, other than the plaintiff, who verifies the plaint, is acquainted with the facts of the case, it is desirable that it should be made in the presence of the Court.[5]

3. **Mode of verification.**—Where a plaint contains averments of fact some of which are within the knowledge of the plaintiff and others which are made upon information which he believes to be true, as, where, for example, the averments in first three paragraphs are made on his own knowledge, and the averments in paragraphs 4, 5 and 6 are made upon on information and not on the knowledge of the plaintiff, the verification should to be as to averments of paragraphs 1, 2 and 3, that they are true to his knowledge, and as to paragraphs 4, 5 and 6, that they are made on information which he believes to be true. A verification in the form—''the contents of the plaint are true to the best of my knowledge and belief'' is not in strict compliance with the Code though it substantially complies with it.[1]

4. **Effect of defective verification.**—A defect in verification is only an irregularity in procedure and will not be a ground for rejecting the plaint.[1] It can be cured by amendment at any stage of the suit.[2] It is not a ground of interference in appeal under the provisions of Section 99 of the Code.[3] In the case of an application in *forma pauperis*, however, the rule is stricter. Under the provisions of Order 33, Rule 5 of the Code it is provided that, where the application is not framed and verified properly, the Court *shall* reject the application.[4]

5. **Omission to verify.**—The want of verification does not have the effect of making the plaint void. It merely amounts to an irregularity. It

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(3) *The Raja of Tamkuhi* v. *Braidwood*, (1887) 9 All 505 (508): 1887 All W N 137; *Jardine Skinner & Co* v. *Shurnomoyee*, (1875) 24 Suth W R 215 (215, 216); *Protap Chunder* v. *Krishtokishore*, (1882) 8 Cal 885 (887).

(4) *Brajeshwari* v. *Budhanuddi*, (1881) 6 Cal 268 (270): 7 Cal L Rep 6.

(5) *Kastolino* v. *Rustomji*, (1880) 4 Bom 468 (471).

Note 3.

(1) *Rajit Ram* v. *Katesar Nath*, (1896) 18 All 396 (399, 400): 1896 All W N 102 F B [15 All 59 and (1896) 16 All W N 75 considered].

Note 4.

(1) *Maharajah of Rewah* v. *Swami Saran*, (1903) 25 All 635 (637): 1903 All W N 189; *Boy Mohun* v. *Bishnu Chandra*, (1868) 1 Beng L R (A C) 100: 10 Suth W R 145 (147); *Gokal Chunder* v. *Burreek Begum*, 1864 Marsh 344: 2 Hay 325; *Tulsi Ram* v. *Munshi Ram*, 1904 Pun Re No 57; *The Port Canning and Land Improvement Co, Ltd* v. *Dharanidar Sardar*, (1905) 9 Cal W N 608 (610).

(2) *Ramgopal Ghose* v. *Dhirendra Nath Sen*, 1927 Cal 376 (377): 31 Cal W N 397: 54 Cal 380: 101 Ind Cas 573; *Chandi Mall* v. *Dewa Singh*, 1896 Pun Re No 48; *Mohini Mohun* v. *Bungsi Buddan*, (1890) 17 Cal 580 (582): 5 Sar 498 P C; *Fateh Chand* v. *Mansab Rai*, (1898) 20 All 442 (445): 1898 All W N 110; *Baroda Prosad Bose* v. *Giriyanath Roy Chowdhury*, (1905) 2 Cal L Jour 11 (14); *Syed Mohiuddin* v. *Pirthichand*, (1915) 31 Ind Cas 664 (667): 19 Cal W N 1159.

(3) *Rajit Ram* v. *Katesar Nath*, (1896) 18 All 396 (399, 400): 1896 All W N 102; *Ram Komal* v. *Bank of Bengal*, (1901) 5 Cal W N 91 (98).

(4) *Narsiah* v. *Vaithlingam*, (1912) 16 Ind Cas 83 (88): 5 Bur L Tim 123: 6 L B R 117. See also *Praphull Dev* v. *Sham Lal*, 1932 Lah 328 (329): 138 Ind Cas 335 [Verification as to points of law not needed].

does not affect the merits of the case, and can be rectified by permitting the party concerned to make good the deficiency by amending the pleadings under O. 6, R. 17 of the Code.[1] The amendment may be made even though the period of limitation may have expired on the date of verification.[2] O. 6. R.15, Notes 5—7.

6. Objection to verification.—Objection to verification should be taken at the earliest possible opportunity and if not so taken, will be deemed to have been waived[1] and cannot be raised after judgment and decree.[2]

7. Effect of false verification.—Pleadings far from being mere formalities are required by law to be true.[1] Verifications being made under the sanction of a solemn declaration, a false verification will render the party verifying, liable to a prosecution for an offence under Section 191, Indian Penal Code.[2] But a petition not *required by law* to be verified cannot, if verified falsely, be made the basis of a criminal prosecution.[3] A false verification will, not however, entail the dismissal of the suit, especially, if the defendant takes no objection thereto at the proper time.[4]

R. 16. [New.] *The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.* O. 6, R.16.

Striking out pleadings.

[R. S. C., O. 19, R. 27;-1882, cf. S. 116. *See* O. 6, Rr. 2 & 17.]

Synopsis.

1. Scope and object of the rule.
2. Unnecessary.
3. Scandalous.
4. "Or which may tend to prejudice, embarrass or delay the trial."
5. Matter may be struck out or amended at any stage of the proceeding.
6. Power of the appellate Court to expunge such matters.
7. Appeal.

Note 5.

(1) *Ram Labhaya Mal Devi Ditta Mal* v. *Chanchal Singh Jaswant Singh*, (1931) 133 Ind Cas 626: 1932 Lah 28 (29); *Wali Mahomed Khan* v. *Ishak Ali Khan*, 1931 All 507 (511): 1931 All L J 777: 134 Ind Cas 26 [Absence of verification does not affect jurisdiction]; *Arunachalam* v. *Prabhayya*, (1912) 17 Ind Cas 580 (581): 1912 Mad W N 1207: 25 Mad L Jour 174; *Rustum Gazi* v. *Tara Prasanna Chowdhri*, (1907) 11 Cal W N 871 (872); *Radha Churn Roy* v. *Moran & Co*, (1870) 13 Suth W R 342 (342); *Shib Deo Misra* v. *Ram Prasad*, 1925 All 79 (80): 46 All 637: 22 All L J 690: 87 Ind Cas 938; *Roy Mohun Lal* v. *Bhoo Soondaree*, (1868) 10 Suth W R 145 (147): 1 Beng L R (A C) 100; *Dalela* v. *Mt Chinti*, 1930 Lah 735 (735): 128 Ind Cas 308 [Remanded on appeal for return for amendment].

(2) *Fatechand* v. *Mansab Rai*, (1898) 20 All 442 (445): 1898 All W N 110. See also *Amritsaria* v. *Gamun*, 1926 Lah 82 (82): 89 Ind Cas 363.

Note 6.

(1) *Rajah Sutto* v. *Suroop Chunder*, (1869) 12 Suth W R 465 (466); *Shama Soonduree* v. *Rohimuddin*, (1875) 24 Suth W R 71 (71).

(2) *Nathu Ram* v. *Lyallpur Bank*, (1922) 69 Ind Cas 422 (422) Peshawar Judicial Commr's Court.

Note 7.

(1) *British India Steam Navigation Co, Ltd* v. *Fakir Mohomed*, (1914) 25 Ind Cas 805 (806): 7 L B R 257.

(2) In re *An Attorney*, (1913) 19 Ind Cas 993 (1001): 14 Cr L Jour 305: 41 Cal 113; *Ram Mohun* v. *Nursing Deb*, (1862-64) Suth W R F B 54 (55); *Queen-Empress* v. *Mehrban Singh*, (1884) 6 All 626 (629): 1884 All W N 253. See *Rash Behary Ray* v. *Emperor*, 1930 Cal 639 (640): 129 Ind Cas 111: 1930 Cr C 975: 32 Cr L J 238 [Omission to raise pleas in written Statement—Not necessarily an offence].

(3) *Queen* v. *Kartick Chander*, (1868) 9 Suth W R Cr 58 (61); *Jugut Chunder* v. *Kasi Chunder*, (1881) 6 Cal 440 (444): 7 Cal L Rep 330.

(4) *Shama Soonduree* v. *Rahimooddeen*, (1875) 24 Suth W R 71 (71).

O. 6, R. 16, Notes 1—2.

At the instance of stranger. See Note 3, F.-N. (2).
Court's power to strike out or amend pleadings. See Note 1, Pts. (3) to (9) and Notes 4 and 5.
Dismissal of a suit—Appeal. See Note 4, F.-N. (2).
Party's right to apply for order under the rule. See Note 1, Pts. (1) and (2).
Power of the High Court to expunge objectionable remarks in judgment of lower Courts. See Note 6, Pt. (2).
Revision. See Note 5, F.-N. (1).
Striking out, whole or part of the pleadings. See Note 1, Pts. (8) and (9) and Note 4, Pt. (8).

1. Scope and object of the rule.—Every party is entitled, *ex debito justitiæ*, to have the case against him presented in an intelligible form, so that he may not be embarrassed in meeting it.[1] This rule has been enacted to give effect to this principle. It enables a party to apply to strike out, or compel the amendment of, the whole or any part of his *opponent's* pleadings which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action.[2] The Court may also *suo motu* strike out or amend such matters in such manner and on such terms as it thinks just.[3] The power to strike out or compel amendment under this rule is a *discretionary* one,[4] but should be exercised with great care and caution.[5] It will be exercised only when some substantial objection to the pleading complained of, or some real embarrassment is shown.[6] Thus a written statement ought not to be struck out unless it is clear beyond all reasonable doubt, that the allegations in it are such as cannot afford a defence to the action, and which, if not struck out, would unnecessarily delay the suit.[7]

Where part only of the pleading is objectionable, that part will, as a rule, be struck out if it is severable from the rest,[8] but if it is not so severable, the whole pleading may be struck out.[9] The principle underlying this rule with its limitation is given expression to in *Knowles* v. *Roberts*, (1888) 38 C.D. 263 where it is said by Bowen, L.J.,—"It seems to me that the rule that the Court is not to dictate to parties, how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleadings which have been laid down by the law; and if a party introduces a pleading which is unnecessary and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading, which is beyond his right."

2. Unnecessary.—As a rule a pleading or allegation will not be struck out under this rule merely because it is unnecessary, unless it is also *scandalous* or *embarrassing*.[1] Merely unnecessary pleading without its being

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Order 6, Rule 16—Note 1.

(1) *Davy* v. *Garret*, (1878) 7 Ch D 473 (486).

(2) *Mt Maluka* v. *Pateshur Singh*, 1925 Oudh 604 (604): 85 Ind Cas 703: 1 Oudh W N 754.

(3) *Rangayya Reddi* v. *Subramania Ayyar*, (1917) 40 Ind Cas 429 (434): 32 Mad L Jour 575: 40 Mad 365: 5 Mad L W 797: 21 Mad L Tim 385.

(4) *Golding* v. *Wharton Salt Works*, (1876) 1 Q B D 374.

(5) *Anderson Kirkwood Tennent* v. *Mitchel*, 1925 Cal 860 (861): 29 Cal W N 670: 88 Ind Cas 435.

(6) *Thornhill* v. *Weeks*, (No 2), (1913) 2 Ch 464 C A.

(7) *Anderson Kirkwood Tennent* v. *Walter Mitchel*, 1925 Cal 860 (861): 29 Cal W N 870: 88 Ind Cas 435.

(8) *Cashin* v. *Cradock*, (1876) 3 Ch D 376; *Ranee Roshun Jehan* v. *Syed Enayut Hossein*, (1862-64) Suth W R F B 41 (45): 1 Hay 269 [Plaint including already decided matters—Those matters alone to be struck out].

(9) *Davy* v. *Garrett*, (1878) 7 Ch D 473; *Williamson* v. *L & N W Ry Co*, (1879) 12 Ch D 787.

Note 2.

(1) *Knowles* v. *Roberts*, (1888) 38 Ch D 263 (270) C A; *Rock* v. *Purcell*, (1887) 84 L T Jo. 45. See also *Kesharji Naik* v. *Nasarvanji*, 10 Bom H C R 425.

O. 6, R.16, Notes 2—3.

scandalous, or otherwise objectionable, will only affect the cost of the pleading.[1-a] But where the pleading in addition to its being unnecessary also attributes improper motives to the defendant[1-b] or charges the defendant with dishonest conduct[1-c] or makes it embarrassing for the defendant,[1-d] it will be ordered to be struck out. Where, however, a plaint[2] or a written statement[3] is unnecessarily prolix and verbose, or argumentative, or is full of matter which is wholly irrelevant or un-understandable it can be dealt with under this rule.

3. **Scandalous.**—A Court has a general jurisdiction to prevent any of its processes being used for the purpose of disseminating scandalous and irrelevant matter.[1] Where such matter is introduced in the pleadings, the Court may order the same to be expunged.[2]

Allegations made in a pleading for the mere purpose of abusing or prejudicing the opposite party and any indecent or offensive matters are scandalous.[3] Very often, if allegations made are *unnecessary*, they will likewise be scandalous.[4] Thus where a plaintiff alleges in his plaint, dishonest conduct against the defendant, but no relief is sought on that ground, the allegations will be struck out as scandalous and embarrassing.[5] Where, in an action by a wife against her husband for rectification of her marriage-settlement, a statement was made in the plaint, that the plaintiff declined to live with the defendant on account of his having committed an assault on a young girl, the allegation was held to be scandalous and was ordered to be struck out.[6] Allegations as to partiality against the judge, made in a memorandum of appeal, were expunged by the High Court in the undermentioned case.[7]

But a pleading or allegation which is alleged to be scandalous, cannot be struck out, if it is *necessary* or *relevant* to the issue or one of the issues in the action.[8] Indeed a matter cannot be considered as scandalous at all, if it is *material* to the issue (*i.e.*, will affect the result of the action if proved to be true), however grave the imputations may be, whether of immorality or otherwise.[9] The Court will not, in an application to expunge or strike out allega-

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(1-a) *Weymouth* v. *Rich*, (1885) 1 Times Rep 609.

(1-b) *Murray* v. *Epsom Local Board*, (1897) 1 Ch 35 [Suit against member of a public institution that he used his personal influence with the institution to the detriment of the plaintiff].

(1-c) *Brooking* v. *Maudslay*, (1886) 55 L T 343.

(1-d) *Davy* v. *Garrett*, (1878) 7 C D 473.

(2) *Bishen Sahaye* v. *Beer Kishore*, (1867) 8 Suth W R 295 (297, 298); *Banerjea* v. *Manzar*, (1929) 27 All L J 496: 1929 Notes 13 (b): 114 Ind Cas 906.

(3) *Boobee Singh* v. *Hurobuns Narain Singh*, (1867) 7 Suth W R 212 (213); *Kasubtal Day* v. *Trenearne*, (1869) 3 Beng L R App 12; *Halford* v. *E I Ry Co*, (1874) 12 Beng L R App 19 [Plea of offer "without prejudice" irrelevant].

Note 3.

(1) Re *Miller*, (1884) 54 L J Ch 905: 51 L T 853: 33 W R 210 [Certain parts of the bill of costs were ordered to be expunged]; *Clive Durant*, In re, (1891) 15 Bom 488 (490, 491) [Application for bail—Defamatory allegations against the trying Magistrate were ordered to be struck out].

(2) *Gorinda Mohan* v. *Kunjabihari*, (1909) 4 Ind Cas 380 (381): 10 Cal L Jour 414: 14 Cal W N 153; *Cracknall* v. *Janson*, (1879) 11 C D 1 (13): 40 L T 640: 27 W R 851; Story's Equity Pleadings, 10th Ed, S 270 [Even though the point is raised by a stranger].

(3) *Christie* v. *Christie*, 1873 L R 8 Ch 499: 42 L J Ch 544: 28 L T 607: 21 W R 493 C A cited in 14 Cal W N 153; *Coyle* v. *Cuming*, (1879) 40 L T 455: 27 W R 529.

(4) *Brooking* v. *Maudslay*, (1886) 55 L T 343: 6 Asp M C 13 cited in 14 Cal W N 153.

(5) *Brooking* v. *Maudslay*, (1886) 55 L T 343: 6 Asp M C 13, cited in 14 Cal W N 153.

(6) *Coyle* v. *Cuming*, (1879) 40 L T 455: 27 W R 529.

(7) *Zamindar of Tuni* v. *Bennayya*, (1899) 22 Mad 155 (160): 8 Mad L Jour 304.

(8) *Christie* v. *Christie*, (1873) L R 8 Ch 499 C A: 42 L J Ch 544: 28 L T 607: 21 W R 493 cited in 14 Cal W N 153.

(9) *Millington* v. *Loring*, (1880) 6 Q B D 190: 50 L J Q B 214: 43 L T 657: 29 W R 207: 43 J P 268; *Fisher* v. *Owen*, (1878) 8 C D 645 (653) cited in 14 Cal W N 153 ["Nothing can be

O. 6, R. 16, Notes 3—4.

tions alleged to be scandalous, go into the question of their truth or falsehood. The only question is: Are they *relevant* to the issues in the suit? If they are, they cannot be expunged.[10]

4. "Or which may tend to prejudice, embarrass or delay the trial". The question whether a pleading is embarrassing is, in each case, a question for the judge to decide in view of the facts and circumstances of the particular case.[1] "The rule that the Court is not to dictate to the parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to the modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and it tends to *prejudice, embarrass* and delay the trial of the action, it then becomes a pleading which is beyond his right."[2] A claim or defence which a party is not entitled to make use of,[3] or a pleading which is ambiguous or unintelligible,[4] or a pleading which contains unnecessary or irrelevant allegations[5] are all embarrassing and may be struck out. But a pleading cannot be struck out as irrelevant unless the irrelevancy is quite clear.[6] Nor is a pleading necessarily embarrassing by the reason merely of the fact that it states *inconsistent* or *alternative allegations*.[7] Where the plaint was verbose, extremely long, involved and impossible to understand, and did not raise any fact which would show that the judge had jurisdiction to hear the case, it was held by the High Court of Allahabad that the proper course was to strike out the plaint under this rule.[8] Similarly where particulars are called for from a defendant under O. 6, R. 5 and he fails to comply with the order, the defence may be struck out under this rule, if without the particulars, his pleading is obscure, incomplete and embarrassing.[8-a]

This rule applies to a pleading which tends to prejudice or embarrass a party at the *actual trial* of the suit as well as one which tends to embarrass him at *any stage* of the action.[9]

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scandalous which is relevant"—Per Cotton L J]; *Knowles* v. *Roberts*, (1888) 38 C D 263: 58 L T 259 cited in 22 Mad 155.

(10) *Christie* v. *Christie*, (1878) L R 8 Ch 449: 42 L J Ch 544: 28 L T 607: 21 W R 493 cited in 14 Cal W N 153; *Govinda Mohan* v. *Kunjabihari*, (1909) 4 Ind Cas 380 (381): 10 Cal L Jour 414: 14 Cal W N 153.

Note 4.

(1) *Russel* v. *Stubbs*, (1908) 52 Sol J 580: (1913) 2 K B 200 (N) [Per Lord Halsbury].

(2) *Knowles* v. *Roberts*, (1888) 38 Ch D 263 (269): 58 L T 259, cited in 22 Mad 155 [Per Bowen L J]. See also *Md Abdul Hasan Khan* v. *Md Ali Mohammad Khan*, (1917) 41 Ind Cas 903 (903): 20 Oudh Cas 192: 4 Oudh L J 499 [Appeal against dismissal of suit under this rule —Allowed].

(3) *Heugh* v. *Chamberlain*, (1877) 25 W R 742; *Knowles* v. *Roberts*, (1888) 38 Ch D 263: 58 L T 259, cited in 22 Mad 155; *Preston* v. *Lamont*, (1876) 1 Ex D 361: 45 L J Q B 797: 35 L T 341: 24 W R 928 [Per Jessel M R].

(4) *Davy* v. *Garrett*, (1878) 7 Ch D 473 (486): 47 L J Ch 218: 38 L T 77: 26 W R 225 C A, cited in 7 Ind Cas 166; *Lumb* v. *Beaumont*, (1884) 49 L T 772.

(5) *Rassam* v. *Budge*, (1893) 1 Q B D 571: 62 L J Q B 312: 68 L T 717: 41 W R 377: 57 J P 361; *Keshavji Naik* v. *Nasarvanji*, (1873) 10 Bom H C R 425.

(6) *London Corporation* v. *Horner*, (1914) 111 L T 512 (514) C A; *Tomkinson* v. *S E Ry Co*, (1887) 57 L T 858.

(7) In re, *Morgan; Owen* v. *Morgan*, (1887) 35 C D 492 (500): 56 L J Ch 603: 56 L T 503: 35 W R 705, cited in 6 Ind Cas 166; *Davy* v. *Garrett*, (1878) 7 C D 473: 47 L J Ch 218: 38 L T 77: 26 W R 225, cited at 7 Ind Cas 166; *Child* v. *Stenning*, (1877) 5 Ch D 695: 46 L J Ch 523: 36 L T 426: 25 W R 519 C A, followed in 8 Cal 170.

(8) *Banerjea* v. *Manzar Ali*, (1929) 114 Ind Cas 906: 1929 Notes 13 (b): 27 All L J 496.

(8-a) *Nedungadi Bank* v. *Official Assignee*, 1930 Mad 473 (475, 476): 31 Mad L W 387: 59 Mad L Jour 22: 53 Mad 645: 126 Ind Cas 629. See also *Jagdish Narain* v. *Hazari Lal*, 1932 All 467 (467): 1932 All L J 309 [General charge of immorality against Hindu father in an alienation suit—Struck off].

(9) *Berdan* v. *Greenwood*, (1878) 3 Ex D 251 (256).

O. 6, R. 16, Notes 5—7.

5. Matter may be struck out or amended at any stage of the proceeding.—The rule empowers the Court to strike out or compel the amendment of any pleading *at any stage* of the proceeding.[1] But the rule being discretionary, the Court may refuse to exercise its power unless the application is made at the earliest opportunity.[2] An objection under this rule is no ground for interference when the point is taken for the first time, in appeal.[3]

6. Power of the appellate Court to expunge such matters.—The appellate Court has power to return the memorandum of appeal where it contains allegations of partiality against the judge whose decree is in question, and order the objectionable portion to be expunged.[1]

The High Court has power to expunge remarks appearing in the judgment of the lower Court, but the power will be exercised only in extraordinary cases such as when the observations are pointedly seditious, blasphemous or irrelevantly scandalous.[2] Where a Subordinate Judge, while allowing amendment of a Devasthanam Scheme, remarked against a trustee that he "did not care a brass farthing for Devasthanam," it was held that it was not a fit case for the High Court to exercise the power of expunging the remarks.[3]

7. Appeal.—An order under this rule is not appealable either under Section 104 or O. 43, R. 1. Nor is the order a "Judgment" within the meaning of cl. 15 of the Letters Patent so as to be appealable thereunder.[1]

O. 6, R. 17

R. 17. [Cf. S. 53.] *The Court may at any stage of the proceedings*[13] *allow either party*[17] *to alter or amend*[2] *his pleadings in such manner*[18] *and on such terms as may be just,*[15] *and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy*[11] *between the parties.*

Amendment of pleadings.

Cf. 1877—S. 53 : 1859—S. 29 ;

[R. S. C., O. 28, R. 1. *See* Ss. 152, 153, O. 1, R. 10, O. 6, Rr. 2, 7, 16 and 18.].

Note 5.

(1) *Muhammad Abdul Husan Khan* v. *Muhammad Ali Muhammad Khan,* (1917) 41 Ind Cas 903 (903, 904): 20 Oudh Cas 192: 4 Oudh L J 499; *Faridunnissa* v. *Mukhtar Ahmad,* (1917) 40 Ind Cas 488 (489): 4 Oudh L J 230 [Revision against order to elect out of two inconsistent allegations—Allowed].

(2) *New Fleming Spinning and Weaving Company* v. *Kessowji,* (1885) 9 Bom 373 (381).

(3) *Audimula* v. *Alamelammal,* (1916) 36 Ind Cas 365 (366): (1916) 2 Mad W N 115: 4 Mad L W 126; *Golding* v. *Wharton Salt Works,* (1876) 1 Q B D 374: 34 L T 474: 24 W R 423 C A cited in 19 Bom 790; Ref 39 Mad 235; *T P Vava Rowther* v. *Sulaiman,* 1930 Mad 814 (815, 816): 32 Mad L W 61: 127 Ind Cas 292 [Raised in second appeal].

Note 6.

(1) *Zamindar of Tuni* v. *Bennayya* (1899) 22 Mad 155 (158, 161): 8 Mad L Jour 304.

(2) *Ramabadra Naidu* v. *Subramania Ayyar,* (1916) 33 Ind Cas 608 (610): 3 Mad L W 283.

(3) *Ramabadra Naidu* v. *Subramania Ayyar,* (1916) 33 Ind Cas 608 (608): 3 Mad L W 283.

Note 7.

(1) *Durga Bai* v. *Ramanatha,* 1926 Mad 64 (64): 49 Mad L Jour 632: 1925 Mad W N 725: 22 Mad L W 868: 91 Ind Cas 566.

O. 6, R.17, Note 1.

Synopsis.

1. Scope of the rule.
2. "The Court may allow either party to alter or amend"—Discretion of Court.
3. Amendment of plaint introducing new case.
4. Amendment introducing new case in written statement.
5. Amendment taking away right accrued to a party by lapse of time.
6. Amendment not to be allowed when it places the opposite party in a position which cannot be compensated by costs.
7. Amendment to be refused when the application is not in good faith.
8. Amendment by adding or substituting a new plea of fraud.
9. Amendment by adding new reliefs.
10. Amendment by adding a new ground of relief.
11. "As may be necessary for the purpose of determining the real questions in controversy."
12. Amendment by introducing new cause of action.
13. "At any stage of the proceedings."
14. Opportunity to be given to the opposite party to amend his pleading.
15. "On such terms as may be just."
16. How amendments should be made.
17. Who can apply for amendment.
18. Extent of amendment.
19. Effect of amendment and limitation.
20. Appeal.
21. Revision.

Amendment based on barred claim. See Note 5, Pt. (2).
Amendment by fresh plaint. See Note 3, Pt. (30).
Amendment by proper Court. See Note 13, F.-N. (8).
Amendment of execution petition. See O 21, R. 17.
Amendment—When in the discretion of Court. See Note 1, Pt. (1) and Note 2.
Amendment wholly non-suiting plaintiff. See Note 4, Pts. (2) and (2-a).
Amendment based on subsequent cause of action. See Note 9, Pt. (4) and Note 12, Pt. (17-a).
Amendment by appellate Courts. See Note 13, Pts. (4), (5) and (7).
Amendment on costs. See Note 15.
Amendment to verification of plaints. See O. 6, R. 15, Notes.
Failure to amend—Procedure. See O. 6, R. 18, Notes.
General principles relating to amendments. See Notes 1, 2 and 3, Pts. (27) to (30).
Merely technical amendments. See Note 11, Pt. (12).
Suits for specific performance or damages. See Note 3, Pt. (20) and Note 9, Pt. 11, F.-N. (8).
Useless and immaterial amendments. See Note 11, Pts. (10) and (11).
Variation between pleading and proof. See O. 6, R. 2, Note 9.

1. Scope of the rule.—S. 53 of the old Code which dealt with amendment, return and rejection of the plaint ran as follows:—

"The plaint may, at the discretion of the Court,—

(*a*) at, or any time before, the settlement of issues be rejected, if it does not disclose a cause of action;

(*b*) at, or any time before, the settlement of issues be returned for amendment within a time to be fixed by the Court, and upon terms as to the payment of costs occasioned by such amendment as the Court thinks fit, if it—

(*i*) is not signed and verified as hereinbefore required,

(*ii*) does not state correctly and without prolixity the several particulars hereinbefore required, or contains, particulars other than those so required.

(*iii*) is wrongly framed by reason of non-joinder or mis-joinder of parties, or joins causes of action which ought not to be joined in the same suit, or

O. 6, R. 17, Note 1.

(*iv*) is not framed in accordance with the provisions of Section 42;

(*c*) at any time before judgment, be amended by the Court upon such terms as to the payment of costs as the Courts thinks fit:

Provided that a plaint shall not be amended either by the party to whom it is returned for amendment, or by the Court, so as to convert a suit of one character into a suit of another and inconsistent character.

When a plaint is amended under this section, the amendment shall be attested by the signature of the Judge.''

The amendment of proceedings in Courts have been dealt with under this Code in various parts thereof:—

1. S. 152 deals with amendments of *judgments, decrees and orders.*
2. S. 153 confers a general power on the Court to amend any defect or error in *any proceeding in a suit.*
3. O. 1, R. 10 provides for the amendment of a plaint by striking off or adding *parties* to a suit.
4. O. 6, R. 16 deals with the compulsory amendment of the *opponent's* pleading.
5. The present rule deals with the amendment, with the leave of the Court, by a party of his *own* pleading.
6. O. 14, R. 5 deals with the amendment of the issues framed in the case.

It will be seen from a comparison of S. 53 of the Old Code with the present rule, that the latter is very much wider in terms than the old section. It consists of two parts:—

(*a*) The Court *may*, at any stage of the proceedings, allow either party to alter or amend his pleading in such manner and on such terms as may be just; and

(*b*) All such amendments as may be necessary for the purpose of determining the real questions in controversy between the parties, *shall* be made.

The first portion leaves the matter of amendment of pleadings entirely to the discretion of the Court, while the second portion makes it imperative on the Judge to make all such amendments as may be necessary for the purpose of determining the real questions in controversy between the parties.[1] This duty has, however, been interpreted to be only a *rule of conduct*, which is subject to the inherent power of the Court to prevent injustice and abuse of process of

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Order 6, Rule 17—Note 1.

(1) *Shamu Pattar* v. *Abdul Kadir*, (1912) 16 Ind Cas 250 (252): 16 Cal W N 1009: 23 Mad L Jour 321: 12 Mad L Tim 338: 1912 Mad W N 935: 10 All L J 259: 14 Bom L R 1034: 35 Mad 607: 16 Cal L Jour 596 P C.

O. 6, R. 17, Notes 1—2.

the Court.[2] Under the corresponding English Rule (R. 1, O. 28), Lord Esher said "A rule has been enunciated by the Court which is rather a rule of conduct, than a rule of rigid law such as can never be departed from; because I take it that the Court might depart from it, if there were very exceptional circumstances in any particular case leading the Court to think that it would not be right to apply it. It is nevertheless, a rule of conduct, which must generally be followed".[2-a]

The object of the Rule is, that Court should get at and try the *merits* of the cases that come before them, and should, consequently, allow all amendments that may be necessary for the purpose of determining the real question in controversy between the parties provided it can be done without causing *injustice* to the other side. In *Cropper* v. *Smith*,[3] Bowen L. J. observed as follows:—

"It is a well-established principle that the object of the Courts is to decide the rights of the parties and not punish them for the mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their right . . . . I know of no kind of error or mistake, which if not fraudulent or intended to overreach, a Court ought not to correct if it can be done without injustice to the other party. The Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendments as a matter of favour or grace.....It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, *if it can be done without injustice*, as anything else in a case is a matter of right."

The provisions of this rule also apply to the trial of cases before the Sikh Gurdwara Tribunal under the Sikh Gurdwara Act, (VIII of 1925),[4] to cases before a Subordinate Judge deciding a dispute under the Madras District Municipal Rules,[5] and to all suits, appeals and proceedings before the Dy. Commissioner and to all appeals from decisions therein, under the Chota Nagpur Tenancy Act.[6]

2. "The Court may allow either party to alter or amend"—Discretion of Court.—As has been noticed in the above note, the amendment of pleadings is in the discretion of the Court. Under S. 53 of old Code, the discretion was somewhat limited as to the time and the extent of the amendment allowable. But this rule confers a very wide discretion on the Courts in the matter of amendment of pleadings.[1] The discretion must, however, be exercised on *judicial principles* and not in an arbitrary, vague or fanciful manner[2] or

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(2) *Turabalisha* v. *Bibi Naju*, (1914) 25 Ind Cas 863 (864): 8 Sind L R 28.

(2-a) Lord Esher's Report, page 558, cited in 25 Ind Cas 863 at 864.

(3) *Cropper* v. *Smith*, (1884) 26 Ch D 700 C A.

(4) *Dial Singh* v. *Gurdwara Sri Akal Takht*, 1928 Lah 325 (327): 9 Lah 649: 29 Pun L R 733: 110 Ind Cas 164.

(5) *Appaswami Padayachi* v. *V A Ethirajulu Naidu*, 1926 Mad 1043 (1043): 91 Ind Cas 450.

(6) See S 265 (3), Bengal Act VI of 1908.

Note 2.

(1) *Raghuraj Singh* v. *Mt Majid-un-nissa*, 1925 Oudh 692 (693): 87 Ind Cas 950; *Gregory* v. *Albert Puech*, (1919) 49 Ind Cas 441 (442): 21 Pun W R 1919; *Gobind* v. *Baliram*, 1930 Nag 295 (296): 128 Ind Cas 407; *Nauk To* v. *Ma Hnin*, (1916) 36 Ind Cas 5 (5): 9 Bur L Tim 150: 8 L B R 418; *Nannumal* v. *Ram Prasad*, 1926 All 672 (672): 96 Ind Cas 89; *Chhayunnessa Bibi* v. *Kazi Basirar Rahman*, (1910) 5 Ind Cas 532 (535): 11 Cal L Jour 285: 37 Cal 399; In re, *Jothy Mahalinga Aiyar*, (1911) 12 Ind Cas 104 (105): 10 Mad L Tim 188.

(2) See Note 6 to Preamble. *Ramji* v. *Shaligram*, (1911) 11 Ind Cas 481 (491): 14 Cal L

so as to cause *injustice* to the opposite side. The main considerations to be borne in mind in exercising the discretion, are that the rules of procedure have no other aim than to facilitate the task of justice,[3] that multiplicity of suits should be avoided[4] and that the interests of substantial justice should be advanced.[5] Thus a Court should allow the amendment of a pleading where there has been a clerical error, or a *bona fide* wrong description of property or where there has been a mistake of law or fact,[6] provided there is no injustice to the other side which cannot be compensated by the award of costs.[7] O. 6, R. 17, Notes 2—3.

3. Amendment of plaint introducing new case.—Under Section 53 of the old Code, the rule as to amendments was more rigid and restricted than it is under the present Code. It was specifically provided by the proviso to that section that no amendment could be allowed which converted a suit of *one character* into *a suit of another and inconsistent character*.[1] Thus in the following classes of cases it was held that the amendment prayed for altered the character of the suit and was consequently disallowed:

Suit against the defendant on the basis of his being a trespasser; amendment into a suit for rent based on a subsisting tenancy.[2] Suit for rent on the basis of tenancy; amendment into a suit for damages for use and occupation.[3] Suit based on one ground of claim; amendment into a suit based on

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Jour 188; *Damodar Das* v. *Gopal Das Chand*, (1884) 7 All 79 (83): 1884 All W N 303.

(3) *Bhawani Prasad Singh* v. *Mahabal Singh*, 1928 Oudh 305 (306): 5 Oudh W N 459: 111 Ind Cas 360.

(4) *Ramasami Reddy* v. *Genga Reddi*, (1918) 45 Ind Cas 649 (649) Mad; *Upendra Narain* v. *Janaki Nath*, (1918) 47 Ind Cas 129 (132): 22 Cal W N 611: 45 Cal 805; *Annapa* v. *Ganapati*, (1881) 5 Bom 181 (183); *Modhe* v. *Dongre*, (1881) 5 Bom 609 (613, 614); *Lakshmibai* v. *Hari*, (1872) 9 Bom H C R 1; *Muhammad Niamat* v. *Ghaffar Muhammad*, (1899) 21 All 272 (273, 274): 1899 All W N 62; *Saral Chand* v. *Mohun Bibi*, (1898) 25 Cal 371 (390): 2 Cal W N 201; *Mohummed Zahoor* v. *Rutta Kooer*, (1866) 11 Moo Ind App 468 (486): 9 Suth W R P C 9: 2 Suth 107: 2 Sar 320 [Money bond executed by *A*—Suit against *A* and *B* for combining to get *A's* estate illegally transferred—Plaint was amended to recover money against *A* alone].

(5) *Ramaswami Reddi* v. *Genga Reddi*, 45 Ind Cas 649 (649, 650) Mad; *Satis Chandra* v. *Kalidasi*, 1922 Cal 208 (215): 26 Cal W N 177: 68 Ind Cas 577: 34 Cal L Jour 529; *Hunooman Pershad Pandey* v. *Mt Babooca Munraj*, (1854-57) 6 Moo Ind App 393 (411): 18 Suth W R 81 (P N): 2 Suther 29: 1 Sar 552: Sev 253 Note [Substance, and not the mere wording of the issues, should be regarded].

(6) *Maharashtraya Jnan Kosh* v. *Bijjulal*, 1923 Nag 182 (186): 19 Nag L R 36: 6 Nag L J 100: 71 Ind Cas 436 [Vakalatnama not bearing pleader's name]; *Bulaqi Das* v. *Jugal Kishore*, 1925 Oudh 718 (719): 87 Ind Cas 1055 [Omission of word due to inadvertence]; *Gulabrao* v. *Mt Manjoolabai*, 1928 Nag 203 (205): 109 Ind Cas 293 [*Bona fide* mistake whether of law or fact]; *Chuharbai* v. *Ramanand*, (1918) 48 Ind Cas 114 (116): 113 Pun W R 1918 [Admission by pleader in ignorance of the true facts]; *Shankar Lal* v. *Arjmand Khan*, 51 Ind Cas 757 (758): 56 Pun W R 1919; *Sheoraj Singh* v. *Kaulhan Singh*, (1916) 32 Ind Cas 512 (512) (U P B R); *Neogi Ghose & Co* v. *Sardar Nehal Singh*, 1931 Cal 770 (771): 35 Cal W N 432: 134 Ind Cas 1200 [Sole proprietor filing suit in firm name—Objection to form of suit]; *Shankar Lal* v. *Dallu*, (1914) 25 Ind Cas 68 (71): 132 Pun W R 1914: 230 Pun L R 1914: 13 Pun Re 1915 [Non-inclusion of certain property in the plaint]; *Steel Brothers & Co* v. *Cassimji Ahmad Madha*, (1911) 11 Ind Cas 827 (828): 4 Bur L Tim 177; *Lukhee Kant* v. *Sumeeruddi*, (1874) 21 Suth W R 208 (209); *Rama Nath* v. *Kusum Kamini*, (1906) 4 Cal L Jour 56 (61); *Chander Sen* v. *Mohar Singh*, 1925 All 538 (539): 85 Ind Cas 700 [Wrong provision of law quoted in the plaint]; *Nanjibhai* v. *Popatlal*, 1932 Bom 367 (370): 34 Bom L R 628: 138 Ind Cas 797 [Unauthorised munim signing paint—Plaintiff allowed to sign later].

(7) *See* Note 5 below.

Note 3.

(1) *Gopee Lall* v. *Mt Sree Chundraolee*, (1872) 19 Suth W R 12 (14): 11 Beng L R 391: Ind App Sup Vol 131: 3 Sar 217; *Ma Kin Gyi* v. *Catchick*, (1893-1900) Low Bur Rul 518; *Narainee Dassee* v. *Narrohury Mohonto*, (1864) Marsh 70: Followed in *Girdhar Manordas* v. *Dayabhai Kalabhai*, (1882) 8 Bom 174 (179); *Gopal* v. *Budree*, (1906) 33 Cal 657 (661): 10 Cal W N 652; *Shyama Charan Nundy* v. *Abhiram Goswami*, (1906) 33 Cal 511 (530): 3 Cal L Jour 306: 10 Cal W N 738; *Bayabai* v. *Haji Noor Muhammad*, (1909) 2 Ind Cas 146 (148): 11 Bom L R 237: 34 Bom 244 [After arguments in appeal]; *Damodar* v. *Purmanundas*, (1883) 7 Bom 155 (160): 7 Ind Jur 367; *Bizjie Bibee* v. *Manohar*, (1863) 2 Ind Jur N S 118; *Mussoorie Bank* v. *Barlow*, (1887) 9 All 188 (191): 1887 All W N 17.

(2) *Narayan* v. *Hari*, (1889) 13 Bom 664 (668).

(3) *Gobinda Sundar Sinha Chowdhury* v. *Sri Krishna Chakravarti*, (1909) 3 Ind Cas 346 (349): 6 Mad L Tim 255: 10 Cal L Jour 538; *Rachhea* v. *Upendra*, (1900) 27 Cal 239 (242); *Surendra Narain Singh* v. *Bhai Lal Thakur*, (1895) 22 Cal 752 (756) [Suit for use and occupation—Suit for rent]. But see *Udit Narayan Singh* v. *Rampal Singh*, (1909) 2 Ind Cas 920 (921): 12 Oudh Cas 140.

O. 6, R.17, Note 3.

another ground of claim.[4] Suit to establish right of ownership; amendment into claim for an easement.[5] Suit based on one title; amendment into claim based on another title.[6] Suit alleging one kind of fraud; amendment into a claim based on another kind of fraud.[7] Suit for rent; amendment into suit for ejectment[8] or for a declaration of title.[9] Suit based on letting and hiring; amendment into suit based on the relationship of principal and agent.[10] Suit based on the invalidity of a transaction; amendment into one based on the validity thereof.[11] Suit for share of property on the basis of non-division; amendment into claim for partition.[12] Suit for possession; amendment into claim for resumption.[13] Suit for ejectment on the ground of tenant holding over; amendment into claim for partition.[14] Suit on the basis of a contract; amendment of claim on the basis of tort.[15] Suit based on a plea of transfer of property; amendment into a plea of contract to transfer property.[16] And *see also* the following cases.[17]

As has been seen in Note 2 above the powers of amendment under the present Code are much wider than they were under the old Code. The proviso

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(4) *Jankee* v. *Jhanjo*, (1870) 2 N W P H C 407 [Claim based on gift by will; claim based on inheritance]; *Nritto Lall* v. *Rajendro Narain*, (1895) 22 Cal 562 (565) [Suit on basis of plaintiff being in permissive possession—Amendment on basis of his being full owner]; *Hamilton* v. *Land Mortgage Bank*, (1883) 5 All 456 (459): 1883 A W N 99; *Balkrishnadas* v. *Govind*, (1909) 2 Ind Cas 241 (242): 5 Nag L R 67 [Suit on the basis that the property belonged to the plaintiffs—Change into a suit on the allegation that the property was found to be public property]; *Narayanarav* v. *Jarhervahu*, (1887) 12 Bom 431 (434).

(5) *Lalji Ratanji* v. *Gangaram*, (1864) 2 B H C R A C J 176 [Claim to establish right of ownership over land; claim to easement over same]; *Narendra Nath* v. *Abhoy Charan Chattopadhya*, (1906) 34 Cal 51 (53): 4 Cal L Jour 437: 11 Cal W N 20: 1 Mad L Tim 364, (Do.) [There is no harm in claiming the relief in the alternative]; *Farzand Ali* v. *Yusuf Ali*, (1875-78) 2 All 669 (670): 5 Ind Jur 268.

(6) *Doss Ram* v. *Mohendro Roy*, (1872) 18 Suth W R 274 (274) [Claim as whole owner by purchase from *A*; claim as heir of joint purchaser with him]; *Ishan Chunder* v. *Sharoda*, (1870) 12 Suth W R 487 (488) [Claim as heir of *N*; claim as heir of *J*]; *Gopee Lal* v. *Chundraolee*, (1872) 19 Suth W R 12 (14): Ind App Sup Vol 131: 11 Beng L R 391: 3 Sar 217 P C.

(7) *Abdool Hossein* v. *Charles Agnew Turner*, (1887) 11 Bom 620 (638): 14 Ind App 111: 5 Sar 25: 1 Ind Jur 352; *Kunhamed* v. *Kutti*, (1891) 14 Mad 167 (168): 1 Mad L Jour 338; *Bansi Ram* v. *Secy of St for India*, (1916) 35 Ind Cas 284 (286, 287): 20 Cal W N 638.

(8) *Bai Shri Majirajba* v. *Maganlal Bhaishankar*, (1895) 19 Bom 303.

(9) *Bai Shri Majirajba* v. *Maganlal*, (1895) 19 Bom 303 (307).

(10) *Shibkrista* v. *Abdool*, (1880) 5 Cal 602 (605): 5 Cal L Rep 455.

(11) *Bholanath* v. *Kartick*, (1907) 34 Cal 372 (379): 11 Cal W N 462 [Suit for setting aside mortgage-deed into one for redemption]; *Damodar* v. *Purmanandas*, (1883) 7 Bom 155 (161): 7 Ind Jur 367 [Invalidity of will]; *Punjab National Bank* v. *Mercantile Bank of India*, (1910) 8 Ind Cas 98 (101) Bom.

(12) *Gavrishankar* v. *Atmaram*, (1894) 18 Bom 611 (618).

(13) *Gobind Mohapattur* v. *Madhub Pershad*, (1866) 6 Suth W R 211 (212): Beng L R Sup Vol 581.

(14) *Ramchandra Bapuji* v. *Vasudev Norbhat*, (1886) 10 Bom 451 (452).

(15) *Kashinath Das* v. *Sadasiv Patnaik*, (1893) 20 Cal 805 (808); *Mohendranath Mookerjee Overseer*, in re, (1868) 9 Suth W R 206 (209).

(16) *Kondama Naick* v. *Peria Doraiswami*, (1901) 24 Mad 377 (385): 5 Cal W N 217: 7 Sar 811: 28 Ind App 46 P C.

(17) *Durga Prasad* v. *Nawazish Ali*, (1875-78) 1 All 591 (592) [Suit for pre-emption—Plaintiff not alleging in plaint he was ready and willing to pay the price found to be true by the Court—On date of final disposal seeking to so amend his plaint—Court not bound to allow the amendment]; *Mal Karjun* v. *Narhari*, (1901) 25 Bom 337 (349, (350): 27 Ind App 216: 5 Cal W N 10: 2 Bom L R 927: 10 Mad L Jour 368: 7 Sar 739 [Suit for redemption cannot be amended into a suit for setting aside sale in execution]; *Ahmed Sooleman* v. *Bhagvan Das*, (1909) 4 Ind Cas 837 (839): 11 Bom L R 1354: 34 Bom 515 [Suit for dissolution—Suit for specific item]; *Musst Doolhun* v. *Lall Beharee*, (1872) 19 Suth W R 32 (33) [Claim to set aside zurpeshgi; claim for declaratory decree]; *Lala Ram* v. *Nem Narain*, (1902) 6 Cal W N 326 (328) [Suit for share of rent—Amendment into suit for full rent]; *Mohesh Chander* v. *Radha Kishen*, (1908) 6 Cal L Jour 580 (591): 12 Cal W N 28 [Suit on the ground that no accounts were rendered, into one to re-open settled accounts for errors]; *Bala Singh* v. *Khushal Singh*, (1910) 8 Ind Cas 558 (563): 151 Pun L R 1910 [Suit by reversioners for possession on the allegation that the alleged widow was not the widow of the proprietor—Amendment into a suit for declaration that the alienation by the alleged widow was without necessity]; *Ma Hla* v. *Maung Pyin*, (1900-07) 1 Low Bur Rul 193 (195) [Application for Letters of Administration cannot be converted into one under the Guardians and Wards Act]; *Mohammad* v. *Krishnan*, (1888) 11 Mad 106 (114).

in the old section that no amendment could be allowed which changed the character of the suit has been omitted[18] and a new provision has been introduced by O. 6, R. 7 which implies that even an amendment introducing a new ground of claim or an allegation of fact inconsistent with the original pleading may be allowed in proper cases. O. 6, R. 17, Note 3.

Illustrations.

1. *A* sues *B* for the recovery of the sum of money due on settlement of accounts of a dissolved partnership. He subsequently applies to amend his plaint by substituting a claim *for accounts*, of a dissolved partnership. Here the amendment clearly effects a change in the character of the suit, but the Court is not powerless, as it was under the old Code, to allow the amendment.[19]

2. *A* sues *B* for the specific performance of a contract alleged to have been entered into by *B* with *A*. Subsequently he applies for the amendment of the plaint so as to convert it into a suit for damages for breach of the said contract. The Court has power to allow the amendment if it does not cause injustice to the other side.[20]

3. *A* files a suit against *B* for possession of lands on the basis of a compromise entered into by the parties and filed by them in a previous suit. The compromise was neither registered nor embodied in the decree. *A* subsequently applies for amendment of the plaint by converting it into a suit for the specific performance of the contract embodied in the compromise. The amendment could be allowed.[21]

4. *A* and *B* entered into an agreement for sale of goods by *A* to *B*, the goods to be taken delivery of by *B* on a certain date. *B* failed to take such delivery and *A* re-sold the goods more than two months after the date of the breach of the contract by *B* and then filed a suit for damages against *B* on the basis of such re-sale. Finding that, owing to the delay in making the re-sale he may not get damages on the basis of re-sale, he applied for an amendment of the plaint by claiming damages on the basis of breach of contract itself. *Held* that such amendment should be allowed.[22]

But though under the present Code there is no such rigid rule, as was enacted in the old Code against the allowing of the amendment converting a suit of one character into a suit of an another and inconsistent character,[22-a] and the whole matter is entirely in the discretion of the Court, still as a general rule, the Court will not, in the exercise of such discretion, allow an amendment converting a suit of one character into a suit of another character.[23]

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(18) *Sheonarain* v. *Ram Prasad*, 1923 Nag 241 (242): 74 Ind Cas 317: 8 Nag L J 76; *Gokul Prasad* v. *Ali Baksh*, (1910) 6 Ind Cas 1015 (1016): 13 Oudh Cas 152.

(19) *Sheo Narain* v. *Ram Prasad*, 1923 Nag 241 (242): 74 Ind Cas 317: 8 Nag L J 76.

(20) *Ardeshir H Mama* v. *Flora Sassoon*, (1928) P C 208 (219): 30 Bom L R 1242: 28 Mad L W 257: 55 Mad L Jour 523: 111 Ind Cas 413: 52 Bom 597: 26 All L J 1220: 48 Cal L Jour 451: 1928 Mad W N 893: 55 Ind App 360: 32 Cal W N 953 P C.

(21) *Palavalasa Appalaswami* v. *Dantaluri Narayana*, (1916) 34 Ind Cas 446 (447): (1916) 1 Mad W N 276.

(22) *Firm of Gangaram* v. *Kodoomal*, 1925 Sind 222 (223): 88 Ind Cas 571; *Narsinggirji Manufacturing Co* v. *Budansaheb*, 1924 Bom 390 (391): 80 Ind Cas 430: 26 Bom L R 523. *See* also *Steel Brothers and Company* v. *Cassimji Ahmed Madha*, (1911) 11 Ind Cas 827 (828): 4 Bur L Tim 177 [A converse case].

(22-a) See the illustrations given above. *See* also *Sheonarayan* v. *Ramprasad*, 1923 Nag 241 (242): 74 Ind Cas 317: 8 Nag L J 76; *Nana* v. *Jogilal*, 1923 Nag 151 (152): 6 Nag L J 81: 71 Ind Cas 566: 19 Nag L R 69 [Claim for a share was allowed to be changed into claim for maintenance]; *Sultan Abdul Kader* v. *Muhammad Esuf Rowther*, 1926 Mad 909 (910): 23 Mad L W 468: 92 Ind Cas 396 [Suit based on exclusive ownership—Plaint allowed to be amended into one for partition by co-sharer]; *Morton* v. *Woodfall*, 1927 Lah 103 (104): 9 Lah L Jour 25: 28 Pun L R 15: 99 Ind Cas 770: 8 Lah 257 [Suit for recovery of purchase money on the basis of vendor's lien—Amendment into a suit for damages for breach of contract allowable].

(23) *Ram Saran Mandar* v. *Mahabir Sahu*, 1927 P C 18 (20): 54 Ind App 55: 52 Mad L Jour 402: 6 Pat 323: 45 Cal L Jour 313: 100 Ind Cas 56: 29 Bom L R 796: 25 Mad L W 635: 1927 Mad W N 69: 25 All L J 74: 8 Pat L Tim 98: 38 Mad L Tim 74: 31 Cal W N 469 P C; *Ram*

O. 6, R. 17, Note 3.

There is one limitation however, on the wide powers of amendment that can be exercised by the Court under this Code and that is, that the Court cannot, by way of amendment, substitute one distinct cause of action for another, or change the subject-matter of the suit.[24] In *Ma Shwe Mya* v. *Maung Po Hnaung*[25] their Lordships of the Privy Council observed as follows:—

"All Rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised; but none the less, no power has yet been given to enable *one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit.*"

The reason of the above rule is that the substitution of a totally new case in place of the original one cannot be said, in any sense to be an *amendment* of the *original claim*. Nor can it be said that a totally new case is "necessary for the purpose of determining the real questions in controversy between the parties" that is, the controversy disclosed in the suit as originally framed.

It follows from the principles set forth above that under the present Code:—

(1) An amendment will generally be allowed where the nature of the suit is not altered, provided it does not cause prejudice or surprise to the opposite party.[26] Such amendments were allowed under the old Code also.[27]

Das v. *Daulat Ram*, (1913) 18 Ind Cas 807 (809): 114 Pun W R 1913: 225 Pun L R 1913 [Suit in individual capacity—Change into suit on behalf of wakf]; *Abdul Ali* v. *Miakhan*, (1911) 10 Ind Cas 890 (891): 13 Bom L R 268: 35 Bom 297 [From a claim as heir to father into one as heir to daughter]; *Vaithilinga* v. *Munigan*, (1912) 15 Ind Cas 299 (301): 23 Mad L Jour 189: 1912 Mad W N 1127: 37 Mad 529 [Suit in ejectment cannot be converted into one for partition]; *Jiwan Mal* v. *Allah Jawaya*, 1932 Pun L R 278 [Suit for declaration of title cannot be permitted to be amended so as to convert the suit into one for specific performance].

(24) *Ma Shwe Mya* v. *Maung Mo Hnaung*, 1922 P C 249 (250, 251): 24 Bom L R 682: 30 Mad L Tim 23: 48 Ind App 214: 30 Mad L Tim 28: 48 Cal 832: 4 U B R 30: 1921 Mad W N 396: 63 Ind Cas 914; *Upendra Narain* v. *Janaki Nath*, (1918) 47 Ind Cas 129 (131): 22 Cal W N 611: 45 Cal 305; *Palaneappa Chetty* v. *Ma Shwe Me*, (1911) 9 Ind Cas 774 (775): 4 Bur L Tim 47.

(25) 1922 P C 249 (250, 251): 24 Bom L R 682: 30 Mad L Tim 23: 48 Ind App 214: 30 Mad L Tim 28: 48 Cal 832: 4 U B R 30: 1921 Mad W N 396: 63 Ind Cas 914 P C.

(26) *Manji Dutt* v. *Kalanand*, (1912) 16 Ind Cas 785 (786) Cal [Only test under the new Code is whether the amendment can be allowed without injustice]; *Anwar Khan* v. *Yakub Khan*, 1925 Nag 62 (63): 79 Ind Cas 911; *Mt Jaggi* v. *Sheo Partab Singh*, 1927 Oudh 505 (505): 4 Oudh W N 945: 105 Ind Cas 87; *Gobind Ram* v. *Chunni Lal*, 1930 Lah 221 (222): 119 Ind Cas 330: 30 Pun L R 645; *Bomma Devara Satyanarayana Vara Prasada Row* v. *Venkata Tirumala Manavalaswamy*, 1925 Mad 794 (794): 48 Mad L Jour 489: 88 Ind Cas 65: 22 Mad L W 818; *Sadda Khan* v. *Sultan Khan*, (1920) 58 Ind Cas 965 (966) Lah: *Iswardas* v. *Hira Lal*, 1931 Nag 20 (22): 26 Nag L R 359: 130 Ind Cas 105; *Jalla Ram* v. *Labhu*, 1926 Lah 472 (472): 27 Pun L R 317: 97 Ind Cas 800 [Plaint slightly defective—Amendment should be allowed]; *Moti Ram* v. *Narain Das*, (1932) 33 Pun L R 694 (695).

(27) *Gunnaji Bhavaji* v. *Makanji Khushalchand*, (1909) 3 Ind Cas 159 (160): 10 Bom L R 969: 11 Bom L R 498: 6 Mad L Tim 234: 34 Bom 250 [Amendment by referring to a document not included in the list of documents annexed]; *Kesoram* v. *Ram Chandra*, 1895 Bom P J 551 [Suit by the purchaser of a Hundi alleging it to be negotiable was allowed to be amended into one on a non-negotiable instrument]; *Jugdeo Singh* v. *Habibullah Khan*, (1907) 6 Cal L Jour 612 (618, 619): 12 Cal W N 107; *Sukhdeo Prasad* v. *Lachman Singh*, (1902) 24 All 456 (457): 1902 All W N 114 [Suit on mortgage—Conversion into a suit for a simple money decree]; *Karimbhai* v. *Conservator of Forests*, (1879-80) 4 Bom 222 (226): 5 Ind Jur 86 [Suit to establish plaintiff's exclusive right to the partnership property—Amendment into one for dissolution of partnership and account]; *Chuni Lal* v. *Suraj Ram*, (1909) 3 Ind Cas 765 (766): 33 Bom 433: 11 Bom L R 708 [One construction of a will may be abandoned and another substituted for it]; *Mian Jan* v. *Abdul*, 1907 All W N 203 (203) [Claim to a share as heir of *A*—Claim to whole as his own]; *Habibullah* v. *Dhuman Khan*, (1887) All W N 28 (31) [Claim for pre-emption on ground of custom—Amendment into claim on ground of Muhammadan Law]; *Krishnaji Lakshman* v. *Murarrav*, (1882) 5 Bom 496 (499) [Suit for possession—Share of joint property—Amendment into claim for partition]; *Mul Mal* v. *Besant Mal*, 1893 Pun Re No 106, (Do.); *Radha Bai* v. *Shamrav Vinayak*, (1884) 8 Bom 168 (173) [Suit for ejectment—Conversion into suit for redemption]; *Sankana Kolana* v. *Virupakshapa*, (1883) 7 Bom 146 (149): 7 Ind Jur 317, (Do.); *Kokilasari Dasi* v. *Mohunt Rud-*

(2) An amendment may be allowed even if it introduces a new ground of claim or an allegation of fact inconsistent with the original pleading, where the Court thinks it just and necessary.[28] O. 6, R. 17, Note 3.

(3) An amendment which changes the character of the suit will not, as a general rule, be allowed by the Court in the exercise of its discretion.[29]

(4) The Court has no power to allow an amendment which substitutes one *distinct* cause of action for another, or which changes the *subject-matter* of the suit.[30]

In the following cases the amendments applied for were not allowed on the ground that their introduction would totally change the character of the suit:—

(1) Suit for possession; amendment into a suit for redemption[31] or into a suit to enforce a mortgage.[32]

(2) Suit for rent; amendment into one for use and occupation.[33]

(3) Suit for declaration that a partnership was dissolved and for accounts; amendments so as to convert it into one for remuneration for services.[34]

(4) Claim laid on the footing that defendant was carrier; amendment into one based on his liability as bailee.[35]

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ranand Goswami, (1907) 5 Cal L Jour 527 (537), (Do.); *Rupchand* v. *Davlatrav*, (1882) 6 Bom 495 (497) [Suit for possession by mortgagee—Amendment into suit for foreclosure]; *Shyam Chand* v. *Land Mortgage Bank*, (1883) 9 Cal 695 (698): 12 Cal L Rep 440; *Ragho Parashram* v. *Vishnu Gobind*, (1903) 5 Bom L R 329 (330); *Lakshmakka* v. *Nagi Reddi*, (1905) 28 Mad 500 (502).

(28) *Steel Brothers & Co* v. *Cassimji Ahmed*, (1911) 11 Ind Cas 827 (828): 4 Bur L Tim 177; *Chandraika Prasad* v. *Hira Lal*, 1924 Pat 280 (282): 5 Pat L Tim 49: 1923 P H C C 357: 2 Pat L R 82: 75 Ind Cas 433; *Gaura* v. *Shriram*, 1926 Nag 265 (265, 266): 92 Ind Cas 926; *Gulzari Mal* v. *Duman*, 1926 Lah 460 (460): 27 Pun L R 164: 97 Ind Cas 796; *Pinnamaneni Gopalakrishnayya* v. *Veeramachunnemi Ramaswami*, 1931 Mad 369 (370): 122 Ind Cas 174; *Inder Deo Rai* v. *Ram Charitter Rai*, 1923 All 560 (562): 5 L R A (Rev) 28: 74 Ind Cas 971.

(29) See F N (23). See also *Fattu* v. *Mussl Bhayo*, 1926 Jour 95 (2): 27 Pun L R 29: 99 Ind Cas 979; *Bishamberdas* v. *Brijlal*, 1931 Bom 590 (592): 33 Bom L R 1385; *Kokamal Madhoram* v. *Gulabsingh Gurudat Singh*, 1925 Bom 248 (251): 27 Bom L R 277: 87 Ind Cas 481; *Mukand Lal* v. *Abdul Majid*, (1913) 20 Ind Cas 501 (502): 180 Pun W R 1913: 292 Pun L R 1913; *Ibramsa Rowther* v. *Mahomed Esuf Rowther*, 1930 Mad 322 (325): 120 Ind Cas 887: 30 Mad L W 557 [Suit for redemption by purchaser—Defendant setting up title under another sale—Plaintiff cannot be allowed to show that his vendor has no title and that he got title from others]; *Wadhawa* v. *Partap*, 1928 Lah 933 (934): 10 Lah L Jour 534; *Chandrasdat* v. *Ghulam Mohammad*, 1926 Lah 453 (454): 27 Pun L R 168: 93 Ind Cas 871; *Koli Mohan Tripura* v. *Birendra Kishore*, (1915) 31 Ind Cas 391 (392): 22 Cal L Jour 309; *Padma Lochan Patar* v. *Giris Chandra Kil*, (1918) 45 Ind Cas 241 (242): 27 Cal L Jour 392: 46 Cal 168; *Gendli Bibi* v. *Joynal Abdin*, 1922 Cal 254 (255): 35 Cal L Jour 103: 26 Cal W N 294: 64 Ind Cas 565; *Gyanendra Nath* v. *Paresh Nath*, 1922 Cal 255 (257): 35 Cal L Jour 25: 65 Ind Cas 39: 26 Cal W N 73.

(30) See F N (25) and (26); *Ghulam Mahomed* v. *Mehta Chandra Dat*, 1927 Lah 771 (771-772): 101 Ind Cas 280; *Jugal Kishore* v. *Chari & Co*, 1927 All 451 (453): 25 All L J 385: 101 Ind Cas 643: 49 All 599 [Suit premature—Amendment of plaint after accrual of cause of action cannot be allowed]. *See*, however, 37 Ind Cas 962 and 1929 Mad W N 167.

(31) *Laxmishankar Devshankar* v. *Hanjabhai Usufally*, (1920) 57 Ind Cas 426 (428): 22 Bom L R 735: 44 Bom 515; *Kalu* v. *Lachhmni*, (1911) 12 Ind Cas 576 (576): 167 Pun W R 1911: 1 Pun L R 1912.

(32) *Mohendra Lal Biswas* v. *Jagat Chandra Dey*, (1921) 59 Ind Cas 63 (64) Cal.

(33) *Bhukhi* v. *Ramkhelawan*, (1912) 17 Ind Cas 646 (647): 17 Cal W N 311; *Leary* v. *Maung On Gaing*, (1911) 11 Ind Cas 863 (864): 4 Bur L Tim 197; *Maung Po Shin* v. *Mahomed Thambi*, (1915) 30 Ind Cas 753 (755): 8 Bur L Tim 234: 8 L B R 270; *Tribeni Prasad* v. *Ramdass*, 1928 Nag 27 (29): 23 Nag L R 152: 10 Nag L J 169: 105 Ind Cas 43; *Veerabhadra Theran* v. *Sri Vythinathaswamy Koil Devasthanam*, 1927 Mad 182 (183): 99 Ind Cas 977: 52 Mad L Jour 399. See also *Jhari Singh* v. *Pirthi Nath* (1917) 38 Ind Cas 191 (193): 1 Pat L W 85: 2 Pat L Jour 69 [Which was a converse case]; *Karam Chand* v. *Hurdial*, (1911) 11 Ind Cas 849 (850): 4 Bur L Tim 181 [Suit for rent—Damages for breach of agreement to take on lease]. See however *Khiaram* v. *Chhatomal*, (1913) 20 Ind Cas 570 (571): 7 Sind L R 23 [Suit for rent and ejectment based also on title—Title in issue—Decree passed for damages for use and occupation].

(34) *Kalidas Chaudhuri* v. *Sri Dampadi Sundari Dasi*, (1918) 43 Ind Cas 893 (899): 22 Cal W N 104: 27 Cal L Jour 403.

(35) *Louis Drefus & Co* v. *Secretary of State*

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(5) Suit based on the defendant being a tenant; conversion into a claim to eject the defendant as a trespasser.[36]

(6) Suit for redemption; amendment so as to make it a suit for avoidance of a sale on payment of a portion of consideration money.[37]

(7) Suit to set aside a decree on the ground of fraud; amendment into one for rectification on the ground of mistake.[38]

(8) Suit for declaration of right to easement; amendment into one for declaration of title to the property in respect of which the easement was claimed.[39]

(9) Suit framed against manager of an idol; amendment so as to implead idol as a party.[40]

See also the cases noted below.[41]

4. Amendment introducing new case in written statement.—The principles applicable to the amendments of plaints will equally be applicable to amendments of written statements. Thus an amendment of a written statement setting up a case which is totally inconsistent with the original case set up will not be allowed if it is unjust to the opposite side to allow it.[1] Similarly where the proposed amendment of the written statement will have the effect of displacing plaintiff's suit, a Court will refuse the application to amend.[2] *A* sued *B*, a Tramway Company for damages caused by their negligence in keeping their tramway in bad repair. *B* simply denied negligence and did not plead that the liability to keep the tramway in repair did not belong to them

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for India, (1918) 45 Ind Cas 173 (175): 11 Sind L R 103.

(36) *Shib Ram* v. *Faqira*, 1925 All 705 (706): 6 L R A (Civ) 348: 89 Ind Cas 103.

(37) *Ram Bilas* v. *Brij Narain*, (1912) 14 Ind Cas 743 (744) All.

(38) *Shyama Sundar Ghose* v. *Aswini Kumar Chakravarthi*, (1916) 35 Ind Cas 91 (92) Cal.

(39) *Mukkoona Nair Veetil* v. *Secretary of State*, (1916) 34 Ind Cas 541 (541) Mad.

(40) *Avadh Behari* v. *Parmeshur Din*, 1930 Oudh 43 (45): 123 Ind Cas 894: 6 Oudh W N 1036.

(41) *Radharani* v. *Purna Chandra*, 1930 Cal 721 (721): 129 Ind Cas 319 [Suit on accounts against a Receiver into another for damages for conversion]; *Avula Guruvayya* v. *Avula Venkanna*, (1913) 18 Ind Cas 212 (213): 1913 Mad W N 383 [Suit by a plaintiff alleging himself to be the next reversioner to avoid an adoption was not allowed to be amended at a late stage of the case into a suit by a remote reversioner]; *Govinda* v. *Baliram*, 1930 Nag 295 (296): 128 Ind Cas 407 [Plaintiff claiming under the obligee of a promissory note and subsequently on finding that such a claim was not tenable seeking amendment by which he claimed *against* the obligee]; *Shyam Sundar* v. *Jagannath*, 1923 Pat 590 (592): 2 Pat 925: 1923 Pat H C C 263: 1 Pat L R 273: 5 Pat L R 193: 74 Ind Cas 758; *Erassan Nair* v. *Rao Bahadur Vasuva Menon*, (1910) 6 Ind Cas 288 (288): 7 Mad L Tim 225 [Suit on oral agreement cannot be converted so as to bring it on a contract written]; *Narain Prasad* v. *Rameshwar Adya*, (1919) 51 Ind Cas 435 (436) Cal [From a small cause to a regular suit]; *Kasi Prasad Singh* v. *Akileshwari Prasad*, 1921 Pat 336 (336): 2 Pat L Tim 35 [Suit on a hand note by guardian cannot be allowed to be changed into one under S 68, Contract Act]; *Masuma Khatun* v. *Tahira*, (1913) 19 Ind Cas 661 (662): 11 All L J 580; *Beragi Ram* v. *Raja Ram*, (1911) 10 Ind Cas 250 (258): 163 Pun L R 1911: 214 Pun W R 1911; *Inaganti Venkatarama Row* v. *Venkatalingama Nayanim Bahadur Varu*, 1922 Mad 49 (51): 1923 Mad W N 42: 42 Mad L Jour 43: 15 Mad L W 72: 30 Mad L Tim 204: 68 Ind Cas 703 [Suit for redemption of mortgage—Legal representative seeking to amend plaint for declaring mortgage not binding]; *Sahdeo Narain* v. *Kusum Kumari*, 1923 P C 21 (24): 32 Mad L Tim 121: 71 Ind Cas 769: 44 Mad L Jour 476: 2 Pat 230: 4 Pat L Tim 217: 50 Ind App 58: 37 Cal L Jour 369: 25 Bom L R 560: 1923 Mad W N 877: 27 Cal W N 901: 18 Mad L W 597 [Withdrawing several important allegations in the plaint]; *Kunhammad Arakkal Muttuklel* v. *Erambathi Kunhammad*, (1910) 7 Ind Cas 801 (801): 8 Mad L Tim 200: 1910 Mad W N 417 [Suit for exclusive possession by a trustee—Amendment into one for joint possession where plaintiff and defendant are in possession of other trust properties which are not the subject of suit]; *Moti Ram* v. *Narain Das*, (1932) 33 Pun L R 694 (695).

Note 4.

(1) *Nandlal* v. *Bank of Bombay*, (1909) 4 Ind Cas 652 (658): 11 Bom L R 926.

(2) *Fazal Nur* v. *Bibi Rani*, 1930 Lah 278 (279): 11 Lah L Jour 550: 120 Ind Cas 492: 31 Pun L R 340.

but to the local authority. At a subsequent stage of the case *B* applied for amendment of the written statement to raise the said plea. At the time of the application, *A's* remedy against the local authority was time-barred. It was held that the proposed amendment displaced the plaintiff's suit and should not be allowed.[2-a]

Where, in a suit for libel, the defendant applied at the time of trial to amend the written statement so as to include a plea of privilege, the application was disallowed on the ground that it would be unfair at that stage to allow the amendment.[3] An amendment of the written statement should, as a general rule, be refused when the plaintiff has called all his evidence on the issues of fact raised by the written statement and has closed his case,[4] unless the plaintiff is given an opportunity to call further evidence to rebut the new case set up.[5] A defendant, who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement, cannot be allowed at a later stage to change his front and make out a new case by denying that fact.[6] But where in an ejectment suit the defendant pleaded exclusive possession and denied the plaintiff's title as landlord, and also set up a claim to be in possession under a mourasi lease granted by the plaintiff's predecessor-in-title, it was held that the effect of the alternative plea was merely to put the plaintiff to the proof of a title which would justify his prayer for ejectment and could, therefore, be allowed to be raised.[7] Again where on the facts appearing in the plaintiff's evidence a new defence of *law* arises, there is no reason why it should not be taken by way of amendment, even after the plaintiff has closed his case on the facts. Thus a plea that the suit is barred by virtue of S. 23 of the Contract Act was allowed to be raised in so far as it arose out of the plaintiff's evidence.[8]

5. Amendment taking away right accrued to a party by lapse of time. The object of the rule being to get at and try the merits of the case and to do substantial justice between the parties, no amendment will be allowed which will work *injustice* to one of the parties. The rule of conduct of the Court is, that "however, negligent or careless the first omission may have been, and however late the proposed amendment, the amendment should be allowed if *it can be made without injustice to the other side.*"[1] One of the classes of cases in which an amendment will work injustice to the opposite party is where it takes away from a party a right accrued to him by lapse of time. As a rule, therefore, a

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(2-a) *Steward* v. *The North Metropolitan Tramways Co*, (1886) 16 Q B D 556: 55 L J Q B 157: 54 L T 35: 34 W R 316: 50 J P 324 C A.

(3) *Lala Lajpat Rai* v. *Englishman*, (1909) 3 Ind Cas 224 (228): 13 Cal W N 895: 6 Mad L Tim 73: 36 Cal 883.

(4) *Sulaiman* v. *Tan Hwi Ya*, 1930 Rang 140 (142): 7 Rang 800: 121 Ind Cas 803.

(5) *Tadiparti Hanumanula* v. *Maddukuri Golayya*, (1914) 24 Ind Cas 822 (823) Mad.

(6) *Subramania Aiyar* v. *Hitchcock*, 1925 Mad 950 (960): 22 Mad L W 26: 85 Ind Cas 900.

(7) *Jnananjan Banerji* v. *Adoremoney Dassee*, (1909) 3 Ind Cas 93 (95): 13 Cal W N 805.

(8) *Sulaiman* v. *Tan Hwi Ya*, 1930 Rang 140 (142): 7 Rang 800: 121 Ind Cas 803.

Note 5.

(1) Per Brett M R in *Clarapede* v. *Commercial Union Association*, (1883) 32 W R 262 (263) C A. See also *Dhali Rama* v. *Bhagirath*, (1895) 22 Cal 692 (712); *Bhuwanlal* v. *Sumranlal*, 1927 Nag 310 (311): 103 Ind Cas 455: 23 Nag L R 81; *Nistarini Debi* v. *Chandi Dasi Debi*, (1910) 8 Ind Cas 788 (790): 12 Cal L Jour 423 [Putting in a document of acknowledgment to save limitation when there is a well founded claim]; *Md Zafar* v. *Mt Kaniz Saiyada*, 1926 Oudh 508 (509): 94 Ind Cas 875; *Ganga Sait* v. *Ahmad Hussain*, (1914) 22 Ind Cas 241 (242) Mad; *Bhavanji Narsi* v. *Assan Pitambar Das*, 1925 Sind 241 (241): 86 Ind Cas 357: 19 Sind L R 12 [Amendment of plaint should be allowed so as to include a new plea, where, even had the plea been raised earlier, defendant could not have disproved it].

O. 6, R.17, Note 5.

plaintiff will not be allowed to amend his plaint by introducing a new cause of action, which, since the date of the plaint, has become barred by the statute of limitation.[2] In other words no amendment should be allowed as will take away a valid defence under the law of limitation.[3] Thus where a plaintiff, though entitled to various alternative reliefs sued only for one of the reliefs within the period of limitation, it was held that he should not be allowed to amend the plaint in such a way as to enforce his other reliefs which had become time barred at the date of the amendment.[4]

The rule, however, is not a universal one, and, under peculiar or special circumstances, an amendment may be allowed even where it has the effect of depriving the defendant of his right to plead limitation.[5] "That there was full

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(2) *Weldon* v. *Neal*, (1887) 19 Q B D 394 (396): 56 L J Q B 621: 35 W R 820; *Bisheshar Prasad* v. *Gobind Ram*, (1915) 26 Ind Cas 42 (43): 12 All L J 833; *Nand Lal Thakersay* v. *Bank of Bombay*, (1909) 4 Ind Cas 652 (657): 11 Bom L R 926; *Kalidas Chaudhuri* v. *Sri Danpadi Sundari Dasi*, (1918) 43 Ind Cas 893 (899): 22 Cal W N 104: 27 Cal L Jour 403; *Macleod & Co* v. *Ivans Jones & Co*, 1926 Cal 189 (189): 87 Ind Cas 218; *Malikarjuna* v. *Pullaya*, (1893) 16 Mad 319 (320); *Venkataperumal* v. *Velayuda Reddi*, (1914) 24 Ind Cas 195 (198): 27 Mad L Jour 25; *Narayanan* v. *Ratnasabapathy*, (1915) 28 Ind Cas 828 (829): 29 Mad L Jour 464; *Venkatasubbaramana* v. *Pulipulla Reddy*, 1925 Mad 917 (918): 85 Ind Cas 961 [Application to bring new plaintiff on record on date when suit would be barred]; *Seshacharlu* v. *Venkata Subba Rao*, 1928 Mad 828 (829): 1927 Mad W N 784: 110 Ind Cas 775; *Chandramma* v. *Seethan Naidu*, 1931 Mad 542 (549): 33 Mad L W 648: 61 Mad L Jour 316: 133 Ind Cas 497 [Addition of prayer for a relief barred by limitation]: *Vaithilingam Pillai* v. *Kandaswami Pillai*, 1931 Mad 1 (2): 33 Mad L W 210: 60 Mad L Jour 713: 132 Ind Cas 311 [Suit for possession as reversioner to last male owner—Amendment that properties were stridhanam of the wife of the last male owner and that plaintiff was heir]: *Raghunath Singh* v. *Gabdeo*, 1925 Nag 127 (128): 80 Ind Cas 355 [Admission showing that suit was barred—Amendment with a view to get out of the bar of limitation—Amendment not to be allowed]; *Gulab Rao* v. *Manjoolabai*, 1928 Nag 203 (205): 109 Ind Cas 293; *Ma E Gyaee* v. *Ma Le Wa*, (1921) 64 Ind Cas 29 (31): 13 Bur L Tim 201; *Hirjee Devraj & Co* v. *Maung Nyun Shein*, 1925 Rang 49 (54): 2 Rang 414: 84 Ind Cas 295; *Gulraj Mal* v. *Paman Mal*, (1915) 27 Ind Cas 344 (347): 8 Sind L R 69 [Fraud cannot be added to extend the period of limitation]: *Bindeshwari Prasad Singh* v. *Bisheswar Singh*, (1915) 30 Ind Cas 499 (500): 2 Oudh L J 383.

(3) *Lakshmanacharyulu* v. *Venkataramanujacharyulu*, 1926 Mad 827 (828): 23 Mad L W 771: 1926 Mad W N 392: 96 Ind Cas 700: 51 Mad L Jour 414 [Original claim was for recovery of money on a loan dated 28—11—16—Amendment into a claim as on 28—11—19 not allowed]: *Veerabadhra* v. *Vythinathaswami Koil*, 1927 Mad 182 (183): 99 Ind Cas 977: 52 Mad L Jour 399; *Muthiah Chettiar* v. *Chidambaram Chetty*, (1917) 38 Ind Cas 720 (720): 31 Mad L Jour 688: 4 Mad L W 456: (1916) 2 Mad W N 362; *Bpush Chandra Roy* v. *Ajodhyanath Deb*, 1932 Rang 26 (26): 10 Rang 74: 137 Ind Cas 39; *Ebrahim Saib Khateeh* v. *Maung Ba Gyaw*, (1914) 24 Ind Cas 482 (483): 7 Bur L Tim 69; *Alla Bakhsh* v. *Hamid Khan*, 1931 All 160 (162): 1931 All L J 56: 130 Ind Cas 702; *Bishembardas* v. *Brijlal*, 1931 Bom 590 (591): 33 Bom L R 1385 [Suit against joint family—Claim in the alternative against defendants as partners]; *Sasthicharan De Dass* v. *Sarojini Debya*, (1909) 2 Ind Cas 492 (493): 10 Cal L Jour 218; *Surendra Narain Sinha* v. *Hafijur Rahman*, (1915) 30 Ind Cas 379 (380) Cal; *Janardhan* v. *Shib Prashad*, (1918) 36 Ind Cas 179 (180): 20 Cal W N 725: 43 Cal 95; *Gyanendra Nath Chakravarti* v. *Paresh Nath Pal*, 1922 Cal 255 (257): 35 Cal L Jour 25: 65 Ind Cas 39: 26 Cal W N 73 [Suit for declaration of title—Amendment for recovery of possession not allowed]; *Nalinaksha Sinha* v. *Ram Taran Pal*, 1927 Cal 733 (736): 46 Cal L Jour 51: 104 Ind Cas 151; *Alagappa Chetty* v. *Vellian Chetty*, (1895) 18 Mad 33 (38): 4 Mad L Jour 283 [Suit by an undivided member cannot be amended by bringing in other members of joint family]; *Gatiganti Subbarayadu* v. *Arumilli Surayya*, (1917) 37 Ind Cas 914 (915) Mad; *Thiagarayan* v. *Kannuswami Pillai*, (1918) 43 Ind Cas 122 (123) Mad; *Sreedharan* v. *Kunhunni*, 1921 Jour 20 (1): 41 Mad L Jour 525: 1921 Mad W N 639: 71 Ind Cas 270; *Santhanakrishna Naidu* v. *Chellappa Aiyar*, 1927 Mad 650 (652): 25 Mad L W 506: 101 Ind Cas 390: 38 Mad L Tim 345; *Mangal Prasad* v. *Chandra Mall*, (1905) 1 Nag L R 117 (120-121); *Govinda* v. *Baliram*, 1930 Nag 295 (296): 128 Ind Cas 407; *Bhimrao* v. *Mt Gangabai*, 1931 Nag 74 (79): 131 Ind Cas 417: 27 Nag L R 291; *Sinchi Ram Bihari Lall* v. *Agent, E I Ry*, 1921 Pat 485 (486): 2 Pat L Tim 679: 64 Ind Cas 125; *Maung Than Daing* v. *U The*, (1910) 8 Ind Cas 600 (601): 3 Bur L Tim 16; *Mi Ein Zi* v. *Mi Ni*, (1913) 21 Ind Cas 306 (307): 1913 U B R 175, Vol I; *S K Nagoor Meera* v. *H N Nainar Meera Ali*, 1925 Rang 264 (265): 4 Bur L Jour 110: 90 Ind Cas 639; *Ludhomal* v. *Secretary of State*, (1919) 51 Ind Cas 570 (572): 13 Sind L R 1.

(4) *Balkaran Upadhya* v. *Gaya Din Kalwar*, (1914) 24 Ind Cas 255 (257): 12 All L J 635: 36 All 370.

(5) *Weldon* v. *Neal*, (1887) 19 Q B D 394: 56 L J Q B 621: 35 W R 820; *Charan Dass* v. *Amir Khan*, 1921 P C 50 (51, 52): 48 Cal 110: 17 Ind App 255: 18 All L J 1095: 22 Bom L R 1370: 3 Pun W R 1921: 39 Mad L Jour 195: 28 Mad L Tim 149: 2 U P L R 124: 57 Ind Cas 606: 25 Cal W N 289: 13 Mad L W 49; *Satchidananda* v. *Nritya Nath*, 1924 Cal 517 (520): 50 Cal 878: 27 Cal W N 1007: 79 Ind Cas 287; *Firm of Jessaram Bhagwan Das* v. *Ratanchand Fatlehchand*, 1925 Sind 173 (175): 78 Ind Cas 846; *Mahomed Ismail Khan* v. *Saiduddin Khan*, 1927 Lah 819 (821): 101 Ind Cas 700; *Kandaswami* v. *G F F Foulkes*, 1926 Mad 396 (397): 92 Ind Cas 100: 24 Mad L W 213; *Sheo Prasad* v. *Nawal Kishore*, 1929 Notes 9 (f): 1929 All L J 487: 116 Ind Cas 871; *Niranka Chandra* v. *Atul Krishna*, 1925 Cal 67 (74): 28 Cal W N 1009: 83 Ind Cas 110: 41 Cal L Jour 149 [It was held in this case that there were no special

power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of the case."[6] O. 6, R.17, Notes 5—6.

Illustrations.

1. *X* sold several parcels of land to several persons, who did not however get possession. The title to the property was in some confusion and the plaintiff who was entitled to a right of pre-emption in respect of that sale, sued the vendees for a *declaration* of his right of pre-emption without asking for the consequential relief of pre-emption and possession as he was bound to do under S. 42 of the Specific Relief Act, 1877. It was held by their Lordships of the Privy Council, that the plaintiff was attempting to assert rights which he undoubtedly possessed, but through some clumsy blundering, in a form which the statute did not permit, and that the plaint should, under the peculiar circumstances of the case, be allowed to be amended by adding the relief of pre-emption, even though, at the time of the amendment, a fresh suit for pre-emption would be barred by limitation.[7]

2 *S* purchased certain property from *P*, the latter, however, remaining in possession and wrongfully receiving rents and mesne profits. *S* then sold the property to *Y* who sued *P* for possession and mesne profits adding *S* as a *pro-forma* plaintiff. In the plaint no relief was claimed in favour of *S*, the prayer being that a decree should be passed in favour of *Y* alone. An amendment of plaint for relief in favour of *S* for profits up to the date of the sale in favour of *Y*, was applied for, after the claim had been time barred. The High Court of Bombay held that there was no ground for suspecting that the plaintiffs had not acted in good faith and that under the peculiar circumstances of the case the amendment should be allowed.[8]

Where the plaintiff had used due diligence and care in framing his plaint but had made a mistake as to the appropriate remedy, he would be entitled to under the law, and the mistake was due to a conflict of judicial opinion on the point or to a subsequent change in the law, it was held in the undermentioned cases that the circumstances justified the allowing of an amendment even where a fresh suit would have been barred on the date of the amendment.[9]

6. Amendment not to be allowed when it places the opposite party in a position which cannot be compensated by costs.—As has been seen already the main principle guiding the discretion of the Court in granting or refusing

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circumstances]; *Pathath Veeran Kutti* v. *Veethil Appu*, (1911) 9 Ind Cas 760 (760): (1911) 1 Mad W N 181: 9 Mad L Tim 347, (Do.); *Parbhu Das* v. *Lallubhai*, 1932 Bom 117 (118, 119): 34 Bom L R 35: 137 Ind Cas 710, (Do.).

(6) *Charan Dass* v. *Amir Khan*, 1921 P C 50 (51, 52): 48 Cal 110: 47 Ind App 255: 18 All L J 1095: 22 Bom L R 1370: 3 Pun W R 1921: 39 Mad L Jour 195: 28 Mad L Tim 149: 2 U P L R 124: 57 Ind Cas 606: 25 Cal W N 289: 13 Mad L W 49 P C.

(7) *Charan Dass* v. *Amir Khan*, 1921 P C 50 (51, 52): 48 Cal 110: 47 Ind App 255: 18 All L J 1095: 22 Bom L R 1370: 3 Pun W R 1921: 39 Mad L Jour 195: 28 Mad L Tim 149: 2 U P L R 124: 57 Ind Cas 606: 25 Cal W N 289: 13 Mad L W 49 P C.

(8) *Bhogilal* v. *Jethalal*, 1929 Bom 51 (54, 55): 30 Bom L R 1588: 114 Ind Cas 262. See also *Bansidhar* v. *Raghubir*, (1911) 10 Ind Cas 737 (738): 7 Nag L R 43 [Amendment not to be refused merely because a new defendant has to be added against whom claim will be barred].

(9) *Mullveetil* v. *Achutan Nair*, (1911) 10 Ind Cas 218 (219): 21 Mad L Jour 475: 9 Mad L Tim 499; *Visvanathiyar* v. *Aiyavaiyer*, (1915) 26 Ind Cas 383 (384) Mad [Erroneous view of law, suit framed on—Subsequent alteration of law]; *Suttappa Chetti* v. *Jogi Soorappa*, (1894) 17 Mad 67 (68) [Complicated proceedings—Plaintiff committing error in framing execution petition—Error not unnatural—Amendment allowed]; *Seeragan Chetty* v. *Krishna Aiyangar*, (1912) 13 Ind Cas 268 (268): 10 Mad L Tim 557: 22 Mad L Jour 139: 36 Mad 378; *Kisandas Rupchand* v. *Rachappa Vithoba*, (1909) 4 Ind Cas 726 (728): 11 Bom L R 1042: 33 Bom 644 [Suit for dissolution of partnership and accounts—Amendment into suit for recovery of the amount given by the plaintiff].

O. 6, R. 17, Notes 6—7.

amendments is, that no amendment should be allowed if it causes injustice to the other side.[1] It is also a cardinal rule that "there is no injustice if the other side can be compensated with costs".[2] Two criteria must be kept in mind; does the amendment put the other party to a disadvantage or cause injury? And if so, can the disadvantage or injury be compensated by costs?[3] If it can be, then an amendment may be allowed.[3-a] If it cannot, the amendment should be refused.[3-b] Thus, for example, where the only inconvenience caused by the proposed amendment is to prolong the proceedings or to necessitate fresh evidence, the award of costs will be a sufficient compensation for the inconvenience caused.[4] *A* sued *B* for an injunction restraining him from executing his mortgage decree against certain properties on the ground, that the mortgage decree was obtained by fraud; subsequently he applied to amend the plaint by adding a new ground of claim, namely, that in any view his title was preferential to that of the defendant even apart from fraud. It was held that the amendment could be allowed on payment of costs.[5]

7. **Amendment to be refused when the application is not in good faith.** It is one of the necessary conditions for the exercise of the Court's discretion in allowing an amendment, that the applicant has acted in good faith.[1] While, therefore, as a general rule, leave to amend ought not to be refused if the applicant has acted *bona fide*,[2] it will be refused where he has been acting *mala fide*.[3] Courts will infer want of *bona fides* from *great delay* in applying for leave to amend.[4]

Note 6.

(1) *Rebati Raman Basak* v. *Harish Chandra Basak*, (1920) 58 Ind Cas 665 (666): 24 Cal W N 749; *Robert Fischer* v. *Nagappa Mudali*, (1910) 6 Ind Cas 288 (288): 7 Mad L Tim 226: 33 Mad 258 [It should not be allowed if it deprives the opposite party of the defences which it would be open to him if separate suits are brought].

(2) *In Clarapede* v. *Commercial Union Association*, (1883) 32 W R 262 (263) C A.

(3) *Veerabadra* v. *Vythinathaswami Koil*, 1927 Mad 182 (183): 99 Ind Cas 977: 52 Mad L Jour 399; *Manji Dutt Misser* v. *Kalanand Singh*, (1912) 16 Ind Cas 786) Cal.

(3-a) *Sri Rang Behari Lal* v. *Ranchaya Lal*, (1912) 13 Ind Cas 128 (130): 15 Cal L Jour 439; *Sheikh Akub Ali* v. *Askar Ali Behari*, (1921) 64 Ind Cas 305 (306) Cal [Amendment allowing correction in boundaries of property]: *Kisandas* v. *Rachappa*, (1909) 4 Ind Cas 726 (727): 11 Bom L R 1042: 33 Bom 644; *Devi Dayal* v. *Wazir Chand*, (1921) 61 Ind Cas 328 (329): 3 U P L R (Lah) 44; *Narendra Bahadur* v. *Oudh Commercial Bank*, (1915) 30 Ind Cas 323 (348): 2 Oudh L Jour 402 [Technical defect —No prejudice to defendant]; *Jharia Coal Company* v. *Diwan Chand & Co*, 1921 Lah 367 (368): 85 Pun L R 1922: 67 Ind Cas 335 [Plea of jurisdiction was allowed as it did not prejudice the opposite party].

(3-b) *Bhawani Prasad* v. *Mahabal Singh*, 1928 Oudh 305 (306): 5 Oudh W N 459: 111 Ind Cas 360; *Shamsuddin* v. *Devi Das*, 1923 Lah 505 (505): 77 Ind Cas 471; *Harkison Das* v. *Ohahagan Lal*, (1916) 33 Ind Cas 264 (266): 18 Bom L R 1: 40 Bom 158; *Fateh Kean* v. *Mohammad Isa*, (1919) 52 Ind Cas 464 (465): 6 Pun L R 1919: 84 Pun Re 1919.

(4) *Veerabadhra* v. *Vythinathaswami Koil*, 1927 Mad 182 (183): 99 Ind Cas 977: 52 Mad L Jour 399.

(5) *Mani Lal* v. *Herandra Lal*, (1910) 8 Ind Cas 79 (81): 5 Cal L Jour 556.

Note 7.

(1) *Gyanendra Nath* v. *Paresh Nath*, 1922 Cal 255 (257): 35 Cal L Jour 25: 65 Ind Cas 39: 26 Cal W N 73; *Upendra Narain* v. *Janaki Nath*, (1918) 47 Ind Cas 129 (131): 29 Cal W N 611: 45 Cal 305; *Gobind* v. *Baliram*, 1930 Nag 295 (296): 128 Ind Cas 407; *Ghasi* v. *Manga*, 1932 Lah 322 (323): 33 Pun L R 263: 136 Ind Cas 710 [Major suing as minor—Amendment of plaint—Permissible if mistake is *bona fide*]; *Inderdeo Narain Singh* v. *Gaurishanker*, 1930 Pat 321 (321): 11 Pat L Tim 231: 125 Ind Cas 576 [Suit for possession whether can be converted into one for redemption]; *Bhyro Dutt* v. *Mussamut Lekhranee Kooer*, (1871) 16 Suth W R 123 (125).

(2) *Tildesley* v. *Harper*, (1878) 10 Ch D 393: 48 L J Ch 495 [cited in 4 Ind Cas 652 (657)]: *Muhammad Husain Barocha* v. *Ko Maung Gale*, 1929 Rang 33 (34): 117 Ind Cas 563; *Ramji Ram* v. *Salig Ram*, (1911) 11 Ind Cas 481 (492): 14 Cal L Jour 188.

(3) *Mg Than* v. *Uthe*, (1910) 8 Ind Cas 600 (601): 3 Bur L Tim 16; *Jharia Coal Co* v. *Diwan Chand*, 1921 Lah 367 (368): 85 Pun L R 1922: 67 Ind Cas 335.

(4) *Krishna* v. *Pachaiappa*, 1924 Mad 883 (885): 47 Mad L Jour 540: 1924 Mad W N 522: 82 Ind Cas 492: *Firm of Ladumal Purtomal* v. *Secretary of State*, (1919) 51 Ind Cas 570 (572): 13 Sind L R 1 [To get an advantage over the other side in the course of arguments on a preliminary issue and raising a plea which clearly is an afterthought].

O. 6, R. 17, Notes 8—9.

8. **Amendment by adding or substituting a new plea of fraud.**—Where fraud of one kind has been pleaded, an amendment introducing a new and distinct kind of fraud in substitution of the fraud pleaded, will not be allowed especially after all the evidence has been given.[1] "It is a well-known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind of fraud cannot, upon the failure of proof, be substituted for it."[2] The reason is that such a substitution will as a rule entirely change the character of the suit as originally laid. On the same principle where no fraud has, at all, been alleged in the original plaint, a new plea of fraud will not, except where strong grounds exist, be allowed to be raised by way of amendment.[3] In *Bently* v. *Black*,[4] Lord Esher, M. R., said: "It has long been the universal practice, except in most exceptional circumstances not to allow amendments for the purpose of adding a plea of fraud where fraud is not pleaded in the first instance". Where the fraud is disclosed only in the pleading of the defendant, or on his cross-examination, such a circumstance may justify an amendment by adding a new plea of fraud.[5] Thus where the plaintiff sued on a mortgage executed by the defendant, and the defendant pleaded that he was a minor on the date of the mortgage and that the mortgage was, therefore, void, the plaint was allowed to be amended by raising the plea that the defendant was guilty of fraudulent misrepresentation that he had attained majority at the time of the execution of the mortgage.[6] But the Court will, in every case, require to be satisfied about the truth, and substantiality, of the proposed amendment, and why the allegations were not originally made, before it grants the amendment.[7] Where, in a "passing off" action, the omission to refer to fraud in the plaint was due to an oversight and there were circumstances to show that the plaintiff intended from the very outset to allege fraud, it was held that, in the interests of justice, the amendment should be allowed.[8] Where the plaintiff sued for the recovery of a certain sum of money on the basis of his title by inheritance, and the defendant pleaded a sale of such right to himself, the plaint was allowed to be amended, by raising the plea that the sale was invalid owing to the fraud of the defendant.[9]

9. **Amendment by adding new reliefs.**—An alteration merely in the relief claimed in the suit, does not, as a general rule change the character of the suit, and an amendment seeking such alteration will be allowed if it does not cause injustice to the other side.[1] The same principle will apply to the

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Note 8.

(1) *Abdul Husain* v. *Charles Agnew Turner*, (1887) 14 Ind App 111 (121): 11 Bom 620: 5 Sar 25: 11 Ind Jur 352.

(2) *Abdul Hossein* v. *Charles Agnew Turner*, (1887) 14 Ind App 111 (125): 11 Bom 620: 5 Sar 25: 11 Ind Jur 352; *Bansi Ram* v. *Secretary of State for India*, (1916) 35 Ind Cas 284 (286, 287): 20 Cal W N 638.

(3) *N Munisamy* v. *R Rajagopala*, 1928 Mad 759 (760): 54 Mad L Jour 644: 28 Mad L W 367: 110 Ind Cas 763.

(4) (1893) 9 T L R 580.

(5) *Riding* v. *Hawkins*, (1889) 14 P D 56: 58 L J P 48: 60 L T 869: 37 W R 575 (C A).

(6) *Seral Chand* v. *Mohun Bibi*, (1898) 25 Cal 371 (390): 2 Cal W N 201.

(7) *Krishna Aiyer* v. *Pachiappa Chetty*, 1924 Mad 883 (885): 47 Mad L Jour 540: 1924 Mad W N 522: 82 Ind Cas 492.

(8) *Munisami Mudaliar* v. *Rajagopala Mudaliar*, 1928 Mad 759 (760): 54 Mad L Jour 644: 28 Mad L W 367: 110 Ind Cas 763.

(9) *Mir Azimudin Khan* v. *Zia-ul-nisa*, (1881-82) 6 Bom 309 (315).

Note 9.

(1) *Kashinath Das* v. *Nadasir Patnaik*, (1893) 20 Cal 805 (808); *Ma Mwe Zet* v. *Maung Saung*, (1897-1901) U B R Vol II 231; *Lakshmakha* v. *Nagireddi*, (1905) 28 Mad 500 (502); *Balkrishna* v. *Gangabai*, (1896) Bom P J 617; *Sheik Abdul Kadir* v. *Bangara Swami Naiken*, (1911) 10 Ind Cas 260 (261): (1911) 1 Mad

O. 6, R. 17, Note 9.

addition of new reliefs in the plaint. Where a claim to which the plaintiff is entitled has been left out by a *bona fide* mistake, or by inadvertence, or on a misapprehension of facts, an amendment will be allowed by adding the claim so left out.[2] Where, however, the omission is a deliberate one, leave to amend will be refused.[3] Similarly where, by virtue of circumstances arising subsequent to the institution of the suit, the plaintiff becomes entitled to a larger or other relief than the one claimed, amendment may be allowed so as to add such other relief.[4] All reliefs *ancillary* to the main relief asked in the plaint, may be allowed to be added by way of amendment.[5] Thus where a mere declaration is asked for, an amendment by adding the appropriate consequential relief, may be allowed,[6] unless it appears that the suit has been deliberately framed as one for declaration for the purpose of avoiding the payment of Court-fee.[7] For instances where amendments were allowed altering the reliefs claimed, see the cases cited below.[8]

W N 270: 9 Mad L Tim 429 [Misconception of relief, dismissal of suit improper]; *Khuda Baksh* v. *Budhar Mal*, 1882 Pun Re No 186.

(2) *Upendra Narain Ray* v. *Janaki Nath Roy*, (1918) 47 Ind Cas 129 (131): 22 Cal W N 611: 45 Cal 305; *Bhukhi Koeri* v. *Ram Khelwan Prasad*, (1912) 17 Ind Cas 646 (647): 17 Cal W N 311; *Raipur Manufacturing Co, Ltd* v. *Venkatasubba Rao*, 1921 Mad 664 (666): 14 Mad L W 341: 70 Ind Cas 284 [Mistake discovered in course of suit on contract—In proper case, plaintiff may be allowed to amend his plaint so as to include a prayer for rectification]; *Dhani Ram* v. *Bhagnath*, (1895) 22 Cal 692 (710) [Misapprehension of facts]; *Narayanan Chettiar* v. *Suppiah Chettiar*, 1928 Mad 402 (404): 107 Ind Cas 637 [Plaintiff not aware of fact at the time of suit]; *Nabi Baksh* v. *Angney*, 1927 Oudh 513 (514): 4 Oudh W N 975: 105 Ind Cas 781 [Suit for injunction—Subsequent prayer for possession]; *Waris Ali* v. *Syed Abbas Ali*, 1925 Oudh 555 (556): 85 Ind Cas 344: 1 Oudh W N 757, (Do); *Mukh Ram* v. *Har Kesh*, 1928 Lah 112 (112): 9 Lah L Jour 577: 106 Ind Cas 615: 29 Pun L R 280, (Do.); *Puppouth* alias *Komanchori* v. *Vayisravanth Manakal Raman*, 1923 Mad 553 (557): 44 Mad L Jour 515: 17 Mad L W 558: 32 Mad L Tim 107: 1923 Mad W N 301: 74 Ind Cas 309.

(3) *Md Ayyub Sahib* v. *G P Gunnia & Co*, (1913) 19 Ind Cas 19 (22): 13 Mad L Tim 275: 1913 Mad W N 264: 24 Mad L Jour 562: 37 Mad 555; *Bhukhi Koeri* v. *Ram Khelwan Prasad*, (1912) 17 Ind Cas 646 (647): 17 Cal W N 311; *Upendra Narain Ray* v. *Janaki Nath Ray*, (1918) 47 Ind Cas 129 at 132: 45 Cal 305: 22 Cal W N 611.

(4) *Hari Charan* v. *Kalipada*, 1929 Cal 519 (520): 33 Cal W N 359: 58 Cal 622: 119 Ind Cas 814; *Hem Chandra* v. *Srimanta Chattopadaya*, 1925 Cal 944 (944): 86 Ind Cas 615; *Ram Ratan Sahu* v. *Mohant Sahu*, (1907) 6 Cal L Jour 74 (80-81): 11 Cal W N 732; *Bindu Basini* v. *Jahnabi Chowdhrani*, (1897) 24 Cal 260 (265): *Magan Lal* v. *Chota Lal*, (1902) 26 Bom 136 (139): 3 Bom L R 542; *G Wamanrao* v. *Rastomji*, (1896) 21 Bom 701 (703); *Sreeramulu* v. *Hanumanya*, 1930 Mad 47 (48): 30 Mad L W 507: 124 Ind Cas 208 [Suit by reversioners for declaration that adoption is invalid—Death of widow pending appeal—Amendment of plaint including prayer for possession—Permissible].

(5) *Raja Peary Mohan* v. *Narendra Krishna*, (1901) 5 Cal W N 273 (279); *Rayho Parashram* v. *Vishnu Govind*, (1903) 5 Bom L R 329 (330); *Purna Chandra Sutradhar* v. *Sabari Bewa*, (1931) 35 Cal W N 620: 1932 Cal 87 [Prayer for confirmation of possession—Amendment into one for recovery of possession].

(6) *Gurlingappa Shivappa* v. *Saburamappa*, 1931 Bom 218 (221): 33 Bom L R 141: 131 Ind Cas 886; *Shankar Narayan* v. *Puttu Bhatta*, 1932 Bom 175 (176): 34 Bom L R 125; *Bai Anope* v. *Mul Chand*, (1885) 9 Bom 355 (357); *Limba Bin Krishna* v. *Rama Bin Pimlu*, (1889) 13 Bom 548 (551); *Sardarsingji* v. *Ganpatsingji*, (1885) 14 Bom 395 (401); *Ragho* v. *Vishnu*, (1903) 5 Bom L R 329 (330); *Kalabhai Bapuji* v. *Secretary of State*, (1905) 29 Bom 19 (29): 6 Bom L R 648; *Sundar Lall* v. *Bunyad Ali*, (1882) All W N 129 (130); *Sheonarain* v. *Nago*, (1884) All W N 28 (26); *Dharup Nath* v. *Govind Saran*, (1886) All W N 248 (248); *Ananda Kishore* v. *Daiji Thakorini*, (1909) 1 Ind Cas 549 (552): 36 Cal 726: 10 Cal L Jour 189; *Swarnamoyi Debya* v. *Navadurga Debya*, (1909) 3 Ind Cas 161 (162) Cal; *Mahamad Jalis* v. *Secretary of State*, (1918) 44 Ind Cas 996 (997) Cal; *Harji Mal* v. *Pokhar Das*, 1906 Pun Re No 135: 117 Pun L R 1908 160 Pun W R 1906; *Karam Dad* v. *Hussain Bakhsh*, (1920) 56 Ind Cas 458 (459) Lah; *Bishop Mellus* v. *Vicar Apostolic Malabar*, (1879) 2 Mad 295 (298): 3 Ind Jur 406; *Abdulkadar* v. *Mahomed*, (1892) 15 Mad 15 (18); *Shriram* v. *Balkrishna*, (1906) 2 Nag L R 79 (80); *Sheopujan Rai* v. *Kesho Prasad Singh*, 1924 Pat 310 (311): 2 Pat 919: 76 Ind Cas 347: 5 Pat L Tim 315; *Municipality of Tando Adam* v. *Khair Mahomed*, 1925 Sind 260 (261): 92 Ind Cas 1019. But see *Shiv Ram Dass* v. *Bhag Devi*, (1918) 48 Ind Cas 838 (840): 118 Pun Re 1918; *Mohabharat Shaha* v. *Abdul Majid Khan*, (1905) 1 Cal L Jour 73 (84).

(7) *Hakim Rai* v. *Firm Ishar Das*, 1927 Lah 499 (500): 102 Ind Cas 46: 8 Lah 531: 9 Lah L Jour 400 [See, however, 15 Ind Cas 427].

(8) Suit for sale on mortgage—Amendment into claim for money decree. *Mohan Lal* v. *Lakhraj Singh*, (1916) 33 Ind Cas 111 (112) All; *Sukhdeo Prasad* v. *Lachman Singh*, (1902) 24 All 456 (457): 1902 All W N 114; *P M Chettyar* v. *Ma Shwe Pon*, 1927 Rang 154 (155): 5 Rang 115: 6 Bur L Jour 49: 101 Ind Cas 628; *Fatteh Singh* v. *Mian Singh*, (1883) Pun Re No 131; *Sukhdeo Prasad* v. *Lachman Singh*, (1902) 24 All 456 (457): 1902 All W N 114 [Suit for partition —Amendment into one for joint possession]; *Lokinath Singh* v. *Dhwakeshwar Prosad Narain Singh*, (1915) 27 Ind Cas 465 (469): 20 Cal L Jour 253: 20 Cal W N 51; *Rati Ram* v. *Tirkha*, 1927 Lah 723 (724): 104 Ind Cas 825 [Plaint praying for exclusive possession—Amendment so as to include relief for joint possession—Suit for legacy

O. 6, R. 17, Note 9.

Where, however, the proposed amendment is likely to cause injustice to the other side, it will not be allowed. Thus where the application for leave to amend was made at a very late stage of the proceedings and the grant of the leave would have necessitated practically a trial of the whole case over again, it was held that leave should be refused.[9] Where the relief claimed by way of amendment was totally different from, and inconsistent with, the relief originally claimed, it was held by the High Court of Lahore that leave to amend should be refused.[10] In *Ardeshir H. Mama* v. *Flora Sassoon*,[11] a suit for specific performance, or, in the alternative, for damages, was sought to be amended so as to convert it into a suit for damages only. Their Lordships of the Privy Council, observed as follows:—

"That the Court should have the power of granting such an amendment in a proper case is salutary and indeed necessary . . . . But it is one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effects upon the position both of the

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—Amendment into one for administration]; *Chanduru China* v. *Neralla Venkata Subba Rao*, (1917) 41 Ind Cas 605 (609): 6 Mad L W 85: 35 Mad L Jour 195; *Lado Rani Gurtu* v. *Sibhag Rani*, 1927 Lah 770 (771): 9 Lah L Jour 152: 102 Ind Cas 194: 28 Pun L R 220 [Suit for a particular relief—Amendment into a declaration of right]; *Gurudit Singh* v. *Musammat Parmeshri*, (1913) 19 Ind Cas 928 (930): 238 Pun L R 1913: 142 Pun W R 1913; *Narasimma* v. *Suryanarayana*, (1889) 12 Mad 481 (482, 483); *Maung Shwe Lin* v. *Ma Le*, (1903-04) 2 L B R 4 (9); *Maung Tha Chu* v. *Maung Po Kauk*, (1903-04) 2 L B R 243 (244); *Balakrishna Vasudev* v. *Madhavrao Narayan*, (1881) 5 Bom 73 (77). But see *Md Ebrahim* v. *Mg Ba*, (1914) 24 Ind Cas 482 (483): 7 Bur L Tim 69 [Suit for possession cannot be amended into one for a declaration of a charge]; Suit for specific performance of contract—Amendment asking for refund of purchase money; *Ibrahimbhai* v. *Fletcher*, (1897) 21 Bom 827 (851, 852). See the very instructive case of *Ardeshir H Mama* v. *Flora Sassoon*, 55 Mad L Jour 523, as to when damages can be got in a suit for specific performance; Suit for specific performance of an agreement to sell—Amendment adding prayer for possession; *Chokkalingam Pillai* v. *Pichappa Chettiar*, 1926 Mad 155 (156): 22 Mad L W 579: 1925 Mad W N 802: 92 Ind Cas 599; *Subramania Iyer* v. *Kalyanasundaram Iyer*, (1919) 53 Ind Cas 283 (286) Mad; See also the following cases *Shib Narain* v. *Gajadhar*, 1926 All 506 (509): 48 All 292: 24 All L J 260: 92 Ind Cas 772 [Suit for redemption—Prayer for redeeming only one of three consolidated mortgages—Leave to include prayer for redeeming the other mortgages also, was granted in appeal]; *Mulla Veetil* v. *Achutan Nair*, (1911) 10 Ind Cas 218 (220): 21 Mad L Jour 475: 9 Mad L Tim 499; *Dronan Raju Ramayya* v. *Chundri Peddayya*, (1911) 12 Ind Cas 119 (120): 10 Mad L Tim 116: (1911) 2 Mad W N 174 [Suit for declaration of the property intended to be mortgaged—Relief for rectification of deed]; *Variagattil Paksseri Raman* v *Sankaru Pattar*, (1912) 13 Ind Cas 203 (204): 1912 Mad W N 37; *Draksharpu Appalasami* v. *La Rive*, (1912) 16 Ind Cas 986 (987) Mad [Suit for partnership account—Addition of prayer for dissolution]; *Moti Ram* v. *Narain Das*, (1932) 33 Punj L R 694 (695), (Do.); *Kondapanneni Kotayya* v. *Gangaru Seshayya*, (1913) 21 Ind Cas 778 (779): 1913 Mad W N 995: 14 Mad L Tim 495; *Periasami Kone* v. *Muthia Chettiar*, (1914) 23 Ind Cas 515 (516): 38 Mad 677: 15 Mad L Tim 232; *Mani* v. *Komalan Kannan*, (1915) 26 Ind Cas 443 (443) Mad [Suit for declaration of invalidity of mortgage by manager—Consideration, valid in part—Suit can be amended into one for redemption]; *Puthusseri Maniannoor* v. *Thozukkat Pullaniyil*, (1917) 39 Ind Cas 46 (49): 1917 Mad W N 222: 21 Mad L Tim 299: 32 Mad L Jour 489 [Plaintiff can be allowed to amend his plaint which prayed for redemption of the whole mortgage by praying for recovery in the alternative of his share and for partition and possession of such share on payment of the proportionate amount of the mortgage]; *Sobhanardi Appa Rao* v. *Venkataramayya Appa Rao*, 1927 Mad 212 (213): 38 Mad L Tim 33: 98 Ind Cas 458; *Ismail Bibi Ammal* v. *Moideen Abdul Kadir Sahib*, 1929 Mad 273 (274): 113 Ind Cas 298 [Suit for rent and possession—Addition of prayer for declaration of title]; *Purna Chunder Roy* v. *Mr W Stalkart*, (1868) 10 Suth W R 362 (363) [Suit for enhancement of rent for specific share of land can be amended into one for enhancement of plaintiff's share of the rent]; *Sm Kusum Kumari Ray* v. *Satya Ranjan Das*, (1901) 5 Cal W N 162 (168); *Ghulam Husain* v. *Shahbaz Khan*, 1888 Pun Re No 161; *Chandrika Prasad* v. *Hira Lal*, 1924 Pat 280 (282): 5 Pat L Tim 49: 1923 Pat H C C 357: 2 Pat L R 82: 75 Ind Cas 433; *Nga Chit Nyo* v. *Mi Myo Tu*, (1910) 8 Ind Cas 477 (479): (1910) 1 U B R 30 [Suit for divorce between Burmese spouses was instituted without praying for partition. Amendment by adding a prayer for partition] *Ma Shwe* v. *Maung Po Lu*, (1917) 37 Ind Cas 91 (91): 9 Bur L Tim 177; *Eanchose Narae* v. *Abdul Hussain*, 1922 Sind 46 (46) [Suit for specific performance or in the alternative for damages—Amendment by giving up claim for specific performance]. But see *Satya Narayan Chakkravarti* v. *Dwarka Nath Sadhu*, (1917) 40 Ind Cas 174 (176): 2 Pat L Jour 379: 1 Pat L W 738.

(9) *Narayana* v. *Shankunni*, (1892) 15 Mad 255 (258): 2 Mad L Jour 29; *Ramanadan Chetti* v. *Pulikutti Servai*, (1898) 21 Mad 288 (291): 8 Mad L Jour 121; *Jugal Kishore* v. *Shafiuddin*, (1912) 14 Ind Cas 537 (539) All.

(10) *Purshottam Das Nathu Ram* v. *Radha Kishan*, 1929 Lah 449 (450): 11 Lah L Jour 306: 120 Ind Cas 279.

(11) *Ardeshir* v. *Flora Sassoon*, 1928 P C 208 (219): 30 Bom L R 1212: 28 Mad L W 257: 55 Mad L Jour 523: 111 Ind Cas 413: 52 Bom 597: 26 All L J 1220: 48 Cal L Jour 451: 1928 Mad W N 893: 55 Ind App 360: 32 Cal W N 953.

O. 6, R. 17, Notes 9—11.

plaintiff and the defendant . . . Indeed, so serious, in many cases is the exercise of this power, that, to their Lordships, it would appear to be a wise precaution for a Judge, before allowing any such amendment in a contested case, to require the plaint to be actually remodelled in a form appropriate to an action seeking compensation for breach of contract and nothing else."

10. Amendment by adding a new ground of relief.—The same principles as are applicable to cases of amendments by adding *new reliefs*, apply to amendments by adding new *grounds of relief*. Thus a new ground in support of the relief claimed cannot be said to alter the character of the suit and will as a general rule be allowed [1] Where the plaintiffs sued to set aside a scheme framed for them by the Hindu Religious Endowments Board, and the ground taken in the plaint was that there was no such mismanagement as would justify the Board under S. 63 of the Religious Endowments Act, 1863, in framing a scheme, it was held that an amendment giving another reason why the Board was precluded from interfering, (namely that the endowments were appropriated to uses, partly secular and partly religious and the Board had no power to interfere till the allocation was made (may be allowed.[2] Where the plaintiff stated in his plaint a certain ground upon which he intended to get over the bar of limitation, it was held that he ought not to be precluded from taking a not inconsistent ground by way of amendment, should he be later advised that the latter is the true ground.[3] In the undermentioned cases,[4] the plaintiff was allowed to amend his plaint by adding another ground even where he had adduced false evidence in support of his first ground.

11. "As may be necessary for the purpose of determining the real questions in controversy".—The main object of allowing amendments is *to get at the rights* of the parties,[1] and to avoid *multiplicity of suits*, where the dispute can be settled in the suit already instituted without unfairness or injustice to the other side.[2] "However the necessity to amend may have arisen, leave to amend should always be given and at any stage in the proceedings in order to allow the real question at issue between the parties to be raised on the

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Note 10.

(1) *Ram Awadh* v. *Bhagan*, (1905) 8 Oudh Cas 266 (270) [Suit for declaration of title on ground of survivorship—Amendment by pleading that even if partition had taken place, the plaintiff had a preferential title]; *Bishamber Das* v. *Brijlal*, (1931) Bom 590 (592): 33 Bom L R 1385 [Suit against certain persons as members of a joint Hindu family—Amendment by pleading in the alternative that the defendants were in any event liable as partners of a firm]; *Mani Lal* v. *Harendra Lal Roy*, (1910) 8 Ind Cas 79 (81): 12 Cal L Jour 556 [Alternative ground in support of claim for injunction]; *Mahommad Ghafoor Khan* v. *Mehdi Hasan Khan*, 1925 Oudh 523 (524): 12 Oudh L J 253: 87 Ind Cas 356.

(2) *Sri Mahant Bharat Das Baraji* v. *Hindu Religious Endowments Board*, 1932 Mad W N 290 (293).

(3) *Yakub Ebrahim Sayani* v. *Bai Rahimat Bai*, (1908) 10 Bom L R 346 (348).

(4) *Hari Bhajan Das Sadhu Mohanto* v. *Ganapati Das Goswami*, (1932) 36 Cal W N 112 (116).

Note 11.

(1) *Upendra Narain* v. *Janaki Nath*, (1918) 47 Ind Cas 129 (131): 45 Cal 305: 22 Cal W N 611.

(2) *Sheobaksh Singh* v. *Seth Jagannath*, 1921 Nag 161 (162): 64 Ind Cas 99; *Shankar* v. *Murarji*, 1925 Nag 195 (196): 78 Ind Cas 510: *Mumtaz Ali* v. *Kasim Ali*, (1913) 19 Ind Cas 250 (250): 11 All L J 423; *Darbari Lal* v. *Wasu Malik*, (1920) 56 Ind Cas 115 (116) Lah; *Kariya Goundan* v. *Tirukkaivelu Chetty*, 1925 Mad 585 (586): 48 Mad L Jour 349: 21 Mad L W 639: 87 Ind Cas 90: 1925 Mad W N 469; *Roy Kishore* v. *Huree Mohun*, (1873) 19 Suth W R 195 (196) [If plaintiff is substantially right he ought to have a decree, and not to be left to bring another suit]. See also *Maung Po Hun* v. *Ma So Yi*, 1923 Rang 160 (161): 2 Bur L Jour 65: 75 Ind Cas 6; *Achutanand* v. *Surajnarain*, 1926 Pat 427 (428): 1926 Pat H C C 274: 95 Ind Cas 991: 5 Pat 746: 7 Pat L Tim 719 [Question of fact to be raised by amendment, already raised and evidence adduced—Amendment should be allowed]; *Joseph* v. *Solano*, (1872) 18 Suth W R 424 (432) [Action on promissory notes—Part of the consideration illegal—The plaint amendment in appeal so as to recover so much of the consideration as was not illegal].

pleadings unless the party applying for leave has acted in bad faith or the amendment will cause some injury to the opposite party for which he cannot be fully compensated by costs or otherwise.''[3] Thus where the properties in the plaint are wrongly described[4] or some properties are omitted from the plaint by inadvertence,[5] or where there is a mistake in the statement of the cause of action[6] or a *bona fide* mistake in making the necessary averments in the plaint[6-a] or in drawing up the pleadings[7] or the suit is brought under a wrong Act,[8] an amendment will be allowed to rectify the omission or mistake. O. 6, R. 17, Note 11.

But the ''questions in controversy between the parties'' which have to be brought out clearly and decided are, save in exceptional cases, the questions in controversy between the parties *when the parties joined issue*, that is when the defendant puts in his written statement; they do not include new questions which the defendant neither wished nor intended then to dispute, but which, at a later stage in the proceedings, either because he has changed his mind, or because something has happened after he filed his written statement, he thinks it profitable to dispute.[9] An amendment which will be *useless* if made, as for instance, an amendment setting up a claim or defence which is bad in law,[10] or an amendment which, if allowed, *would still leave the claim or defence as amended unsupportable*,[11] cannot be said to be necessary for the purpose of

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(3) *Subramania* v. *Hitchcock*, 1925 Mad 950 (958): 22 Mad L W 26: 85 Ind Cas 900. See also the following cases:—*Penumarti Vasantarayudu* v. *Reddi Subbamma*, (1914) 22 Ind Cas 39 (39): 14 Mad L Tim 588: 1914 Mad W N 98; *Shankar Narayan* v. *Putta Bhatta*, 1932 Bom 175 (176): 34 Bom L R 125; *Gobind Chandra* v. *Ganga Dhye*, (1905) 29 Bom 386: 7 Bom L R 333; *Arbothnot & Co, Madras* v. *C G D Betts*, (1870) 14 Suth W R 181 (182): 6 Beng L R 273; *Gaura Telin* v. *Shriram Bhoyer*, 1926 Nag 265 (266): 92 Ind Cas 926; *Waris Ali* v. *Abbas Ali*, 1925 Oudh 555 (556): 85 Ind Cas 344: 1 Oudh W N 757; *Hamid Mirza Beg* v. *Ahmed Mirza Beg*, 1922 Oudh 266 (267): 9 Oudh L J 359: 68 Ind Cas 986; *Yusif Mahomed* v. *Abubacker Ibrahim*, 1925 Sind 26 (28): 78 Ind Cas 817; *M Doraiswami* v. *Varadarajulu*, 1928 Mad 2 (5): 53 Mad L Jour 647: 39 Mad L Tim 459: 106 Ind Cas 838 [Mortgage suit—Amendment though necessitating decision as to ownership of property was allowed]; *Venkataratnam* v. *Venkamma*, 1926 Mad 754 (755): 23 Mad L W 618: 95 Ind Cas 267 [Amendment not affecting defendant's liability to pay]; *Fukeer Dass* v. *Gopal Mookerjee*, (1869) 12 Suth W R 107 (108); *Narayanaswami Aiyar* v. *Krishnamurti Iyer*, (1915) 26 Ind Cas 927 (931): 17 Mad L Tim 48: 1915 Mad W N 122.

(4) *Narayandin* v. *Mahesh Singh*, 1926 Nag 313 (314): 93 Ind Cas 103; *Muhammad Sadiq* v. *Abdul Majid*, (1911) 10 Ind Cas 476 (477): 33 All 616: 8 All L J 636; *Jonab Ali Mollah* v. *Golam Assad Chowdhry*, (1874) 21 Suth W R 187 (187); *Syed Reza Ali* v. *Purnanund Chuckerbutty*, (1870) 14 Suth W R 474 (474): 6 Beng L R App 84.

(5) *Jalal Din* v. *Qaim, Din*, (1914) 25 Ind Cas 439 (440): 62 Pun L R 1914: 255 Pun L R 1914: 161 Pun W R 1914; *Hira Lal* v. *Kali Churn*, 1929 Oudh 162 (166): 6 Oudh W N 142: 117 Ind Cas 412; *Tukaram* v. *Govinda*, 1926 Nag 385 (386): 95 Ind Cas 294; *Mukunda Lal* v. *Jogesh Chandra*, (1916) 35 Ind Cas 370: 20 Cal W N 1276: 1 Pat L Jour 393; *K E A K A Sahib & Co* v. *K M Adamsa*, 1924 Rang 249 (251): 2 Rang 66: 81 Ind Cas 465; *Barkat-un-nissa* v. *Muhammad*, (1895) 17 All 288 (292): 1895 All W N 80.

(6) *Daboo Jha* v. *Lu Wa Jha*, (1869) 11 Suth W R 223 (223); *Inaatula* v. *Madari*, 1930 All 474 (475): 126 Ind Cas 13.

(6-a) *Banwaree Singh* v. *Ramanoogra Singh*, (1868) 10 Suth W R 14 (19): Beng L R Sup 974 F B [Date of the commencement of the kabuliyat not given]; *Mukti Gopalaudu* v. *Krishna Chandra*, (1910) 6 Ind Cas 876 (877): 8 Mad L Tim 245; *Sitaram* v. *Nandram*, 1925 Nag 9 (11): 78 Ind Cas 234; *Gobind Chandra* v. *Ganga Dhye*, (1871) 7 Beng L R 333 (334); *Lakshmibai* v. *Hari*, (1872) 9 Bom H C R 1.

(7) *Mahaboo Begam* v. *Lal Begam Sahiba*, 1921 Jour 31 (5): 14 Mad L W 445: 62 Ind Cas 652 [Clerical error made in the plaint]; *Vithoba* v. *Gyaniram*, (1909) 2 Ind Cas 243 (244): 5 Nag L R 66 [Technical mistake]; *Srish Chandra Pal* v. *Triguna Prosad Pal*, (1913) 18 Ind Cas 444 (445): 40 Cal 541 [Technical defect]; *Bhola Nath* v. *Hira Mohan*, (1910) 7 Ind Cas 251 (252) Cal [Plaint—Not properly framed]; *Sangat Singh* v. *Uttam Singh*, (1915) 29 Ind Cas 769 (769): 66 Pun W R 1915: 109 Pun L R 1915 [Technical mistake]; *Nanjibhai* v. *Popatlal*, 1932 Bom 367 (370): 34 Bom L R 628 [Signing and verification by Munim without valid authority —Amendment by plaintiff signing later—Allowed].

(8) In the matter of *Gobind Chunder Bose* v. *Bykunthnath Ghose*, (1873) 19 Suth W R 61 (62).

(9) *Subramania* v. *Hitchcock*, 1925 Mad 950 (958): 22 Mad L W 26: 85 Ind Cas 900.

(10) *Veerappan* v. *Mennappan*, 1923 Mad 245 (246): 31 Mad L Tim 449: 70 Ind Cas 335; *Krishnaji* v. *Wamanji*, (1894) 18 Bom 114 (146).

(11) *James* v. *Hughes*, (1905) 1 Ch 180: 74 L J Ch 57: 92 L T 218: 53 W R 344: 69 J P 33: 3 L G R 1: 21 T L R 59 C A; *Sinclair* v. *James*, (1894) 3 Ch 554: 63 L J Ch 873: 71 L T 483: 8 R 637, cited in 3 Bom L R 32.

O. 6, R. 17, Notes 11—12.

determining the real question in controversy in the suit. Again, a merely *technical plea*, cannot be said to be necessary for the purpose of determining the real questions in controversy between the parties, and therefore it was held that it should not be allowed to be set up by way of amendment.[12]

12. Amendment by introducing new cause of action.—It has been seen in Note 3, *ante* that there is a limitation on the wide powers of the Court to amend pleadings namely that the Court cannot, by way of amendment, substitute *one distinct cause of action for another*.[1-a] Where the plaintiff sued for specific performance of a contract alleged to have been entered into by the defendant with him in 1912, and on his failure to establish the alleged contract, sought to amend the plaint by setting up another and independent contract of 1903, it was held by their Lordships of the Privy Council that such amendment could not be allowed. Their Lordships said "when once the contract has been negatived, to permit the plaintiff to set up another and an altogether independent contract would, in their Lordships' opinion, be to go outside the provisions established by the Code of Civil Procedure, to which reference has been made. It would be a regrettable thing, if when in fact the whole of the controversy between two parties was properly open, rigid rules prevent its determination, but in this case their Lordships think that the rules do have the operation and that it was not open to the Court to permit a new case to be made."[1] In the following instances amendments were refused as introducing a new and distinct cause of action:—

(1) Claim on the basis of *Kittima* adoption; amendment into claim based on *apathitha* adoption.[2]

(2) Claim based on negligence; amendment into claim based on nuisance.[3]

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(12) *Nagendra Bala Chaudirini* v. *Secretary of State*, (1911) 10 Ind Cas 532 (534): 14 Cal L Jour 83.

Note 12.

(1-a) See also the following cases:—*Karuppanna Pillai* v. *Ethumalai Pillai*, 1927 Mad 859 (860): 103 Ind Cas 670; *Narayanan Chettiar* v. *Ratnasabapathi Aiyar*, (1915) 28 Ind Cas 828 (829): 29 Mad L Jour 464; *Gadigere Mulla Sunki Reddy* v. *Vengal Reddy*, (1915) 30 Ind Cas 391 (392) Mad; *Bajrang Lal* v. *Brahma Dat*, (1919) 52 Ind Cas 849 (850): 6 Oudh L J 322 [Starting a new trial on a cause of action, deliberately abandoned]; *Mahant Gobind Ramanuj Das* v. *Rani Debendra Bala Dasi*, (1919) 52 Ind Cas 231 (234): 4 Pat L Jour 387 [Cause of action must be antecedent and cannot arise from the institution of the suit itself]; *Rangayya Reddi* v. *Subramanya Aiyar*, (1917) 40 Ind Cas 429 (432): 32 Mad L Jour 575: 40 Mad 365: 5 Mad L W 797: 21 Mad L Tim 385 F B; *Maung Ba Thein* v. *Ma Than Myint*, 1926 Rang 49 (50): 3 Rang 483: 92 Ind Cas 253; *Ma E Gwe* v. *Ma Le Wa*, (1921) 64 Ind Cas 29 (31): 13 Bur L Tim 201; *Ma Nyun* v. *Maung Shwe Kaung*, (1919) 52 Ind Cas 961 (961): 3 U B R 171; *Maung Than* v. *U The*, (1910) 8 Ind Cas 600 (601): 3 Bur L Tim 16; *Bizjee Bibee* v. *Monohur Doss*, 2 Ind Jur N S 118; *Railoo Mull* v. *Nanuk*, (1869) 1 N W P 250; *Seth Dhunraj* v. *Major J O Hankin*, (1869) 1 N W P H C R 204; *Kour Sein* v. *Mussumat Samiro*, 1873 Pun Re No 66; *Bhairo Prashad* v. *Gajadhar Prashad*, (1914) 23 Ind Cas 587 (589): 19 Cal W N 170 [Account stated found to be forgery—Suit cannot be amended to one, on account stated in the previous year]; *Umrao Begum* v. *Irashab Hussain*, (1894) 21 Cal 997 (1004, 1005): 21 Ind App 163: 6 Sar 469: R & J 135 P C; *Rampurtab* v. *Premsukh*, (1891) 15 Bom 93 (93); *Nusserwanji Merwanji Panday* v. *Gordon*, (1882) 6 Bom 266 (275). But see *Gangi Sait* v. *Ahmed Hussain*, (1914) 22 Ind Cas 241 (242) Mad.

(1) *Ma Shwe Mya* v. *Maung Mo Hnaung*, 1922 P C 249 (251): 24 Bom L R 682: 30 Mad L Tim 28: 48 Ind App 214: 48 Cal 832: 4 U B R 30: 1921 Mad W N 396: 63 Ind Cas 914 P C. See also *Partap* v. *Ram Sewak*, 1926 Jour 160 (1): 96 Ind Cas 304 [Suit for redemption on basis of certain mortgage—Amendment into suit for redemption of different mortgage]. But see *Shunmugam Chetty* v. *Subba Reddi*, (1915) 31 Ind Cas 1 (3) Mad.

(2) *Maung Tha So* v. *Maung Lu Pe*, (1917) 41 Ind Cas 749 (750): 11 Bur L Tim 246; *Shwe Kin* v. *Maung Sin*, (1925) 87 Ind Cas 673: 10 L B R 376. See however *Maung Gyi* v. *Maung Aung Pyo*, 1925 Rang 178 (182): 2 Rang 661: 85 Ind Cas 286 [Defence raising kittima adoption —Apathittha adoption proved—Defence can be amended].

(3) *McInnerny* v. *Secretary of State*, (1912) 13 Ind Cas 370 (372): 38 Cal 797.

(3) Suit based on fraud and instigation of false claims on the part of the defendant; amendment into claim based upon an implied contract of indemnity.[4] O. 6, R. 17, Note 12.

(4) Claim for declaration of ownership; amendment into claim for specific performance of a contract.[5]

(5) Claim to establish title to an archaka office and for mesne profits of certain lands attached to the office; amendment into claim for reasonable wages for his having rendered archaka service in suit temple.[6]

(6) Suit on the basis of a contract; amendment raising plea that there was no contract at all.[7]

(7) Suit for redemption; amendment so as to convert it into one for enforcing a right as owner.[8-9]

(8) Plaintiff suing alleging right to sue on behalf of a certain committee; on failing to establish such right, amendment by adding as parties persons who had such right.[10]

Where in answer to an application for amendment, it is alleged that such amendment would change the cause of action, the Court must look to the *substantial nature* of the claim and not to the *formal* manner in which it is inserted.[11] A mere change in the *date* of the cause of action,[12] or the correction of a clerical error,[13] or amendments to disclose further details of a fact which support or amplify a cause of action already sued on,[14] cannot be said to introduce such a *distinct* cause of action as will entail a rejection of the application for amendment. Thus where the plaintiff sued to set aside a sale, on the ground that the defendants had taken advantage of his youth, he having just attained majority, and afterwards applied to amend the plaint by adding that on the

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(4) *Palakunath Kannamboth Imbichi Nair* v. *Manathanath Kotavachalil Ramar Nair*, (1913) 21 Ind Cas 935 (936): 1913 Mad W N 980.

(5) *Ram Asra* v. *Allah Jawaya*, 1931 Lah 595 (597): 32 Pun L R 278: 133 Ind Cas 646.

(6) *Seshacharlu* v. *Venkatasubba Rao*, 1928 Mad 828 (829): 1927 Mad W N 784: 110 Ind Cas 775.

(7) *Krishnamachariar* v. *Arunachala Nadar*, 1927 Mad 973 (973): 1927 Mad W N 668: 105 Ind Cas 563: 39 Mad L Tim 613.

(8-9) *Ma Thaing* v. *Maung Chit On*, 1929 Rang 179 (181): 7 Rang 140: 117 Ind Cas 577; *Nauk To* v. *Ma Hnin*, (1916) 36 Ind Cas 5 (6): 9 Bur L Tim 150: 8 L B R 418; *N Appamma* v. *S Chinna Veadu*, 1924 Mad 292 (293): 47 Mad 203: 45 Mad L Jour 667: 1923 Mad W N 825: 19 Mad L W 37: 33 Mad L Tim 146: 79 Ind Cas 510; *Tohlu Mal* v. *Buta*, 1921 Lah 53 (55): 3 Lah L Jour 184: 67 Ind Cas 132.

(10) *Samanna Iyer* v. *Ramasubramania Aiyar*, 1926 Mad 577 (577): 23 Mad L W 377: 1926 Mad W N 288: 93 Ind Cas 305.

(11) *Gordhandas* v. *Firm Gokul Khataoo*, 1926 Sind 264 (267): 96 Ind Cas 79; *Prasanna Kumar* v. *Burn & Co*, (1910) 7 Ind Cas 270 (274): 13 Cal L Jour 165.

(12) *Ramaswami* v. *Venkatanarayana*, 1926 Mad 128 (129): 1925 Mad W N 781: 92 Ind Cas 330: 24 Mad L W 136; *Bans Bahadur Singh* v. *Mt Sukhraj Kuar*, 1924 Oudh 385 (386): 11 Oudh L J 297: 81 Ind Cas 484. See also *Lalla Daibee Pershad* v. *Beharee Lall*, (1868) 3 Agra 33 [Omission to state date of cause of action]; *Robert Hodges Pierce* v. *Opendra Shetti Ganapathy*, (1871-74) 7 Mad H C R 364 (368): *Benode Behary Mookerjee* v. *Raj Narain Mitter*, (1901) 30 Cal 699 (704): 7 Cal W N 751.

(13) *Bhagirathi Shukul* v. *Chandra Harihar Patak*, 1922 All 81 (81): 20 All L J 159: 66 Ind Cas 208; *Rajah Sheoraj Singh* v. *Nur Khan*, (1875) 7 N W P 354.

(14) *Sitaram* v. *Nandram*, 1925 Nag 9 (11): 78 Ind Cas 234; *Bombay and Persia Steam Navigation Co* v. *Shepherd*, (1888) 12 Bom 237 (241): *Modhe* v. *Dongre*, (1881) 5 Bom 609 (613, 614): ***Ma E Gywe*** **v.** ***Ma Le Wa***, (1921) 64 Ind Cas 29 (31): 13 Bur L Tim 201 [Amendment seeking nothing more than original claim in another form—Can be allowed]; *Doraisami Pillai* v. *Chinnia Goundan*, (1918) 43 Ind Cas 560 (562): 22 Mad L Tim 538: 1918 Mad W N 89: 34 Mad L Jour 258: 7 Mad L W 335.

O. 6, R. 17, Note 12.

date of the sale he was a minor, it was held that the amendment was merely for the purpose of amplifying and developing the original cause of action and should be allowed.[15] Similarly a plaint could be amended by putting in the necessary ground of exemption from limitation for the suit, such as an acknowledgment of liability.[16] Where in respect of an *original liability* to pay a certain sum money, a document such as a promissory note, or a mortgage is taken and the plaintiff in a suit on such document finds that the document is inadmissible in evidence owing to some technical defect, an amendment of the plaint by claiming relief as on the basis of the original liability does not, as a general rule, amount to a substitution of a distinct cause of action, and should therefore, be allowed.[17] Again, where subsequent to the institution of the suit by the plaintiff, events happen which give the plaintiff a new cause of action for the relief claimed or the right to a new or additional relief, he will as a general rule be allowed to amend the plaint by moulding it in an appropriate manner.[17-a] Thus where the plaintiff sues to redeem a particular mort-

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(15) *Somasundara Bhattar* v. *Muthu Thevar*, 1925 Mad 188 (188): 80 Ind Cas 278.

(16) *Gunnaji Bharaji* v. *Makanji Khusal Chand*, (1909) 3 Ind Cas 159 (160): 34 Bom 250: 11 Bom L R 498: 10 Bom L R 969: 6 Mad L Tim 234: *Muthiah Chettiar* v. *Chithambaram Chetty*, (1916) 38 Ind Cas 720 (720): 31 Mad L Jour 688: 4 Mad L W 456: (1916) 2 Mad W N 362; *Ram Sukh Das* v. *Ghulam Muhammad*, (1918) 46 Ind Cas 495 (495): 116 Pun W R 1918: 102 Pun Re 1918: 120 Pun L R 1918; *Vasudeva Nayudu* v. *Venkalakshmi*, 1927 Mad 504 (505): 1927 Mad W N 175: 38 Mad L Tim 221; *Punjab National Bank* v. *Mulji Morarji*, 1928 Sind 17 (20): 105 Ind Cas 765: 22 Sind L R 222 [Equitable mortgage—Personal liability under—Saving of, by acknowledgment in fresh pro-note executed by mortgagor in favour of mortgagee—Amendment of plaint by addition of]. But see *Uttam Chand* v. *Mt Thakur Devi*, 1922 Lah 39 (40): 4 Lah L Jour 190: 3 Lah 233: 69 Ind Cas 419.

(17) *Sundar Dass* v. *Puran Singh*, 1922 Lah 394 (394): 10 Pun W R 1922 [Insufficiently stamped hundi]; *Kamakshi Ammal* v. *Subbaraya Chetty*, (1919) 52 Ind Cas 758 (759) Mad, (Do).; *Varadaraja Iyer* v. *Venkatarama Aiyar*, 1927 Mad 378 (378): 99 Ind Cas 625, (Do.); *Sundara Aiyar* v. *Arumugam Pillai*, 1924 Mad 520 (521): 44 Mad L Jour 361: 17 Mad L W 374: 32 Mad L Tim 118: 72 Ind Cas 325, (Do.); *Aijaz Husain* v. *Ram Sarup*, 1931 Oudh 54 (56): 7 Oudh W N 1195: 130 Ind Cas 347, (Do.); *Nallaperumal Pillai* v. *Ponnaya Mudaliar*, 1926 Mad 1124 (1124): 24 Mad L W 400: 97 Ind Cas 936 [Mortgage for amount due on settled accounts—Suit on mortgage—Binding character of mortgage denied—Amendment into claim on basis of running account]; *Venkatachalapathi* v. *Rama Krishnayya*, 1930 Mad 168 (170): 123 Ind Cas 358. See also the following cases:— *F M Proby* v. *R C Bell, Executor of Estate of A D Dunne*, (1873) 20 Suth W R 6 (7). See also *Ahmed Hossein* v. *Nihaluddin Khan*, (1883) 9 Cal 945 (949): 10 Ind App 45: 13 Cal L Rep 330: 4 Sar 442: 7 Ind Jur 443: R & J 72 P C; *Manchersha* v. *Govind*, 1930 Bom 424 (426): 32 Bom L R 1035: 128 Ind Cas 43; *Maung Shwe Myat* v. *Maung Po Sein*, 1925 Rang 282 (282): 3 Rang 183: 4 Bur L Jour 141: 89 Ind Cas 425; *Bishen Sahai* v. *Abdul Sattar*, 1930 Lah 559 (560): 125 Ind Cas 329. But see *Burjorji* v. *Hormusji*, 1932 Bom 394 (396): 138 Ind Cas 783: 34 Bom L R 643. As to cases where the *loan and the note* are *simultaneous* see the following cases:—*Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*, (1913) 38 Mad 660: 14 Mad L Tim 520: 1914 Mad W N 58: 21 Ind Cas 864 (865): 26 Mad L Jour 19; *Alimanu Sahiba* v. *Kolisetti Subbarayadu*, A I R 1932 Mad 693: 1932 Mad W N 793; *Somaraju* v. *Venkatasubbarayadu*, (1925) 20 Mad L W 943: 1925 Mad 351 (352): 85 Ind Cas 389. See also *Duggompudi Nagamma* v. *Tirumala*, (1921) 59 Ind Cas 363 (364): 12 Mad L W 147 [Suit on a pro-note—Amendment into suit based on pro-note as well as original consideration—Allowed].

(17-a) *Inder Deo Rai* v. *Ram Charitter Rai*, 1928 All 560 (562): 5 L R All Rev 28: 74 Ind Cas 971; *Sethrucherla Ramachandra* v. *Maharajah of Jaipore*, (1916) 1 Mad W N 354 (356): 34 Ind Cas 411: 19 Mad L Tim 360; *Tulsi Ram* v. *Dina Nath*, 1926 Lah 145 (146): 89 Ind Cas 333; *Nur Khatun* v. *Sumar*, (1915) 31 Ind Cas 7 (8): 9 Sind L R 61; *Hargobind Rai* v. *Keshwa Prasad Singh*, 1925 Pat 168 (173): 1924 Pat H C C 297: 84 Ind Cas 386: 6 Pat L Tim 465; *Sheodarshan* v. *Assessor*, (1918) 46 Ind Cas 52 (53): 5 Oudh L J 179; *Roshan Singh* v. *Durga Singh*, 1931 Nag 10 (12): 124 Ind Cas 244: 26 Nag L R 348; *Ghulam Fatima* v. *Rahman*, (1919) 50 Ind Cas 270 (271): 127 Pun Re 1919 [Decree can be given even without amendment]; *Buddala Gangayya* v. *Satyanarayana*, 1925 Mad 1021 (1023): 22 Mad L W 120: 91 Ind Cas 503; *Thimmayya* v. *P Siddappa*, 1925 Mad 63 (64): 75 Ind Cas 112 [No right of suit on date of institution—Right got later by inheritance—Can be amended]; *Subbaraya Chetty* v. *Nachiar Ammal*, (1918) 44 Ind Cas 863 (863): 1918 Mad W N 199: 7 Mad L W 403; *Hamid Mirza Beg* v. *Ahmad Mirza Beg*, 1922 Oudh 266 (267): 9 Oudh L J 359: 68 Ind Cas 986: 4 U P L R (Oudh) 89; *Mumtaz* v. *Naurang*, 1921 Lah 220 (221): 3 Lah L Jour 227: 60 Ind Cas 502 [Suit for injunction, may be changed into possession]; *Subba Naicken* v. *Rami Naicken*, (1912) 16 Ind Cas 734 (735) Mad [Suit for declaration—Securing of possession by defendant after suit—Adding of prayer for possession—Court can order amendment]. But see *Saroj Ranjan* v. *Joy Durga Dassi*, 1927 Cal 56 (57): 44 Cal L Jour 263: 98 Ind Cas 845 [Distinct cause of action—Not allowed]; *Gobinda* v. *Perumdevi*, (1889) 12 Mad 136 (138), (Do.); *Muthukumaraswamia* v. *Subbaraya*, 1931 Mad 505 (509): 1931 Mad W N 8: 133 Ind Cas 193; *Udebahan* v. *Jagannath*, (1910) 5 Ind Cas 699 (706): 6 Nag L R 17; *Lakshmi Ammal* v. *Alamelu*, 1924 Mad 309 (310): 45 Mad L Jour 811: 18 Mad L W 874: 1923 Mad W N 839: 79 Ind Cas 325. See also *The Delhi and London Bank* v. *Miller*, (1871) 7 Beng L R App

O. 6, R. 17, Notes 12—13.

gage, and the defendant denies that mortgage but sets up another mortgage, the plaintiff may be allowed to amend the plaint by claiming relief on the basis of that mortgage,[18] except where the plaintiff is guilty of *mala fides*.[19] But where the cause of action is foreign to the original cause of action on which the suit was brought, the amendment cannot be allowed. Thus where *A*, the endorsee of a promissory note sued *B* on the note, and it was found that the note was void as infringing the Paper Currency Act, and the plaintiff thereupon obtained an *assignment of the original obligation* and applied to add this cause of action, it was held that it could not be allowed inasmuch as the cause of action based on the *assignment of the original obligation* was quite distinct from the cause of action based on the assignment of the promissory note itself.[20] On the question if Courts can give relief on a cause of action accruing after the institution of the suit, *see* Note 4 to O. 7, R. 7, *infra*.

13. "At any stage of the proceedings."—Under the old Code a plaint could only be returned for amendment in certain cases specified, *at or before the settlement of issues*.[1] The Court could also *at any time before judgment* amend the plaint.[2] The present rule now makes it clear that the amendment can be made *at any stage* of the proceedings.[3] It may thus be allowed before, or at, or after the trial, or in appeal,[4] or in second appeal,[5] or in revision,[6] or

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65 [Substitution of parties due to subsequent events].

(18) *Lakshman Bhisaji* v. *Hari Dinkar*, (1880) 4 Bom 584 (588); *Brijlal Singh* v. *Bhawani Singh*, (1910) 7 Ind Cas 115 (117): 32 All 651: 7 All L J 821; *Chimnaji* v. *Sakharam*, (1893) 17 Bom 365 (368); *Bala* v. *Shiva*, (1903) 27 Bom 271 (276): 5 Bom L R 85; *Prashar* v. *Ganu*, (1903) 5 Bom L R 643 (645); *Kadakamvalli Sankaran* v. *Mokkath Ussain*, (1907) 30 Mad 388 (390): 17 Mad L Jour 329: 2 Mad L Tim 354; *Paykat Manakkal* v. *Theyyankaran*, (1916) 32 Ind Cas 624 (628): (1916) 1 Mad W N 171; *Brij Kishore* v. *Beni Pershad*, 1929 Oudh 483 (485): 6 Oudh W N 880: 121 Ind Cas 273: 5 Luck 424; *V Appalasuri* v. *S Kannamma Nayuralu*, 1926 Mad 6 (12): 49 Mad L Jour 479: 22 Mad L W 287: 1915 Mad W N 622: 90 Ind Cas 881. See also *Kinatrai* v. *Gokaldas*, 1930 Sind 98 (98): 125 Ind Cas 828 [Suit for ejectment on basis of sale—Defence that transaction was only mortgage by conditional sale—Amendment of plaint for relief on basis of defendant's plea].

(19) *Madhavan Vydiar* v. *Lakshmana Pattar*, (1918) 44 Ind Cas 447 (448): 1918 Mad W N 139: 7 Mad L W 284 [Plaintiff fabricating a document].

(20) *Pethu* v. *Chidambara*, 1931 Mad 533 (553): 1931 Mad W N 390: 131 Ind Cas 1.

Note 13.

(1) *Damodar Das* v. *Gopal Chand*, (1885) 7 All 79 (81): 1884 All W N 303; *Karan Singh* v. *Muhammad Ismail Khan*, (1885) 7 All 860 (862): 1885 All W N 247; *Hazari* v. *Chunni Lal*, 1896 All W N 75 (76): 8 All 259; *Baij Nath* v. *Chhowarao*, (1904) 26 All 218 (220): 1903 All W N 240; *Amur Narain* v. *Mt Raghoobunsee*, (1866) 5 Suth W R 234 (234); *Badr-un-nisa* v. *Muhammad*, (1880) 2 All 671 (675); *Abdul Gafoor* v. *Nur Banu*, (1868) 10 Suth W R 111 (112): 1 Beng L R (A C) 78; *Farzand Ali* v. *Yusuf Ali*, (1878-80) 2 All 669 (671): 5 Ind Jur 268. But see *Shashee Bhushan Dass* v. *Rasik Lal Roy*, (1912) 15 Ind Cas 583 (584): 17 Cal W N 989; *Meghraj* v. *Karim Baksh*, 1881 Pun Re No 126; Cases in which plaints were returned for amended correction of particulars; *Bishen Sahaye* v. *Beer Kishore*, (1867) 8 Suth W R 295 (298); *Pitambar Mookerjee* v. *Huree Narain*, 1864 Suth W R (Gap) 50; To make meaning and language of plaint clear; *Pir Mohammad* v. *Gulam Hyder*, 1874 Pun Re No 42; *Mirza Amir Kolee Khan* v. *Russick Lall Singh*, (1867) 8 Suth W R 495 (496); Defective verification; *Fateh Chand* v. *Mansab Rai*, (1898) 20 All 442 (445): 1898 All W N 110; *Shama Sundaree* v. *Rahimooddeen*, (1875) 24 Suth W R 71 (71); *Tulsi Ram* v. *Munshi Ram*, 1904 Pun Re No 57. But see *Baroda Prasad* v. *Girijanath Roy Chowdhary*, (1905) 2 Cal L Jour 11 (15); *Ramaswami Ayyan* v. *Ramu Mupan*, (1866-68) 3 Mad H C 372 (373); *Dassorathy Huri Chunder* v. *Rama Krishna Jana*, (1883) 9 Cal 526 (528): 13 Cal L Rep 114; To mention cause correctly; *Shridhar Hari* v. *Chima*, (1873) 10 Bom H C 17; *Dayabhai Tribhovandas* v. *Lakshmi Chand*, (1885) 9 Bom 358 (361); *Ma So* v. *Ma O*, (1892-1896) U B R Vol II 251; Time could be extended for amendment; *Bhagwandas Bagla* v. *Haji Abu*, (1891) 16 Bom 263 (266); *Ismail* v. *Arumuga*, (1863) 1 Mad H C R 427 (428); *Aziz-un-nissa* v. *Mukimunnissa*, (1901) 4 Oudh Cas 108 (115).

(2) *Rajit Ram* v. *Kalesar Nath*, (1896) 18 All 396 (399): 1896 All W N 102; *Zahir-Ud-Din Ahmad* v. *Mumtaz-ud-din*, 1901 All W N 140 (140): *Jivan Sahai* v. *Kalyan Mal*, 1906 All W N 220 (221); *Kishen Prasad & Co. Ltd* v. *Fullumal*, 1924 Bom 166 (166): 25 Bom L R 888: 77 Ind Cas 171 [No amendment by trial Court after judgment]: *Percival* v. *Collector of Chittagong*, (1900) 30 Cal 516 (519), (Do.); *Chandi Mal* v. *Deva Singh*, 1896 Pun Re No 48; *Cutts* v. *Brown*, (1880) 6 Cal 328 (332): 7 Cal L Rep 171; *Ma Kin* v. *Maung Gale*, (1893-1900) L B R 130.

(3) *Anwar Khan* v. *Yakub Khan*, 1925 Nag 62 (63): 79 Ind Cas 911; *Durgagir* v. *Kollu*, (1911) 10 Ind Cas 731 (732): 7 Nag L R 33 [Technical defect—Signature]; *Maung Shwe Myat* v. *Maung Po Sein*, 1925 Rang 282 (283): 3 Rang 183: 4 Bur L Jour 141: 89 Ind Cas 125.

(4) See S 107 Cl (2): *Raja Peary Mohan Mukherjee* v. *Narendra Krishna Mukerjee*, (1901) 5 Cal W N 273 (279); *Karimbhai* v. *Conservator*

O. 6, R. 17, Note 13.

even in an appeal before the Privy Council.[7] A Court of appeal may also remand the case directing the lower Court to amend the plaint and proceed with the trial.[8] Mere delay, therefore, in applying for an amendment will not be a ground for refusing an application for leave to amend.[9] But where the application is made at such a late stage that, under the circumstances, it will cause injustice or injury to the opposite party if the leave to amend is granted, it will be refused.[10] Thus in the following cases the Court will as a rule be disinclined to grant leave to amend:—

(1) Where it introduces a totally new case[10-a] or necessitates a fresh

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of Forests, (1879-80) 4 Bom 222 (226): 5 Ind Jur 86; *Shyam Chand* v. *Land Mortgage Bank*, (1883) 9 Cal 695 (696): 12 Cal L Jour 440; *Dhani Ram* v. *Bhagirath*, (1895) 22 Cal 692 (710); *Uzar Ali* v. *Sarai*, (1916) 32 Ind Cas 791 (793): 20 Cal W N 547: 43 Cal 938; *Mukunda Lal* v. *Jogesh Chandra*, (1916) 35 Ind Cas 370 (372): 20 Cal W N 1276: 1 Pat L Jour 393; *Nripendranath* v. *Hemanta Kumar*, (1921) 63 Ind Cas 701 (702) Cal; *Sadda Khan* v. *Sultan Khan*, (1920) 58 Ind Cas 965 (966) Lah; *Manji* v. *Ghulam Mohammed*, 1921 Lah 157 (159): 2 Lah 73: 3 Lah L Jour 75: 68 Pun L R 1921: 61 Ind Cas 415; *Ram Piari* v. *Sultan Baksh*, 1923 Lah 115 (116): 3 Lah 382: 77 Ind Cas 207; *Seshamma* v. *Chennappa*, (1897) 20 Mad 467 (469); *Pulavarty Venkanna* v. *Jupudy Sarayya*, (1909) 4 Ind Cas 1097 (1101): 5 Mad L Tim 117: 19 Mad L Jour 102 [Suit for dissolution of partnership and partition, plaint allowed to be amended by withdrawing claim for partition]; *Mahadev Kunwar* v. *Baku Rani*, (1919) 50 Ind Cas 180 (184): 6 Oudh L J 55 [Amendment of plaint may be allowed in appeal under exceptional circumstances]; *Secretary of State* v. *Mahant Harcharan*, 1926 Oudh 98 (99): 3 Oudh W N 45: 91 Ind Cas 927: 13 Oudh L J 115: 1 Luck 33; *Hargobind Rai* v. *Keshwa Prasad Singh*, 1925 Pat 168 (173): 1924 Pat H C C 297: 84 Ind Cas 386: 6 Pat L Tim 465; *Joseph* v. *Solano*, (1872) 18 Suth W R 424: 9 Beng L R 441; *Dinanath Sarma Kataki* v. *Gour Nath Sarma Kataki*, 1925 Cal 434 (435): 82 Ind Cas 964; *London, Bombay and Mediterranean Bank* v. *Bhanji*, (1878) 2 Bom 116 (118): 2 Ind Jur 175.

(5) See S 108 *ante*; *Raghunathji* v. *Shah Lal Chand*, (1897) 19 All 330 (331): 1897 All W N 75; *Ajudhia Prasad* v. *Man Singh*, (1903) 25 All 46 (48): 1902 All W N 176; *Hari Gopal* v. *Ramdas Gokal Das*, (1888) 12 Bom 158 (161); *Ramdayal Khan* v. *Ojoodhia Ramkhan*, (1874) 25 Suth W R 425 (428, 429): 2 Cal 1; *Gangadhar Sarkar* v. *Khaja Abdul Ajij*, (1909) 2 Ind Cas 77 (78): 14 Cal W N 128: 11 Cal L Jour 34; *Puthisseri* v. *Thozukkal*, (1917) 39 Ind Cas 46 (49): 1917 Mad W N 222: 21 Mad L Tim 299: 32 Mad L Jour 489; *Ramachandracharyulu* v. *Rangacharyulu*, 1926 Mad 1117 (1120): 51 Mad L Jour 418: 98 Ind Cas 39; *Syam Sunder* v. *Jagarnath*, 1923 Pat 590 (592): 2 Pat 925: 1923 Pat H C C 263: 1 Pat L R 373: 5 Pat L Tim 193: 74 Ind Cas 758 [Not allowed in this case]; *Manji* v. *Gulam Muhomed*, 1921 Lah 157 (159): 2 Lah 73: 3 Lah L Jour 75: 68 Pun L R 1921: 61 Ind Cas 415; *Shankar Narayan* v. *Puttu Bhatta*, 1932 Bom 175 (176): 34 Bom L R 125.

(6) *Maddumal* v. *Baggu*, (1913) 20 Ind Cas 831 (832): 160 Pun W R 1913: 280 Pun L R 1913; *Nathamuni* v. *Narayana Ayyangar and Balasubramania Iyer*, (1910) 7 Ind Cas 797 (797): 8 Mad L Tim 199.

(7) *Mahammud Zahoor Ali Khan* v. *Rutta Koer*, (1867) 11 Moo Ind App 468 (486): 9 Suth W R (P C) 9: 2 Suther 107: 2 Sar 320.

(8) *Habib Baksh* v. *Baldeo Prasad*, (1901) 23 All 167 (173): 1901 All W N 39; *Annapa* v. *Ganpati*, (1880-81) 5 Bom 181 (183); *Nilkanthapa* v. *Magistrate in charge of Sholapur*, (1881-82) 6 Bom 670 (672); *Sardarsinghji* v. *Ganpatsinghji*, (1890) 14 Bom 395 (401). See also *Mt Ram Piari* v. *Sultan Baksh*, 1923 Lah 115 (116): 3 Lah 382: 77 Ind Cas 207. See also *Madan Mohan Nath* v. *Maharaja of Chota Nagpur*, (1914) 22 Ind Cas 778 (779): 19 Cal W N 200 [Remand by High Court for amendment by First Court—Amendment by lower Appellate Court—Bad].

(9) *Mt Ejaz Rasul Khan* v. *Mubarac Husain*, 1925 Oudh 291 (292): 27 Oudh Cas 231: 11 Oudh L J 613: 79 Ind Cas 1033: 1 Oudh W N 388 [Loss to the defendant due to delay in amendment can well be compensated by an order for costs in his favour]; *James* v. *Smith*, (1891) 1 Ch 384. See *Ramsaran* v. *Ramprasanna*, (1919) 50 Ind Cas 49: 29 Cal L Jour 206 [11 1|2 months after institution amendment of the plaint by withdrawing claim against the properties outside jurisdiction].

(10) *Gajadhar Mahton* v. *Ambika Prasad*, 1925 P C 169 (170): 41 Cal L Jour 450: 27 Bom L R 853: 87 Ind Cas 292: 6 L R P C 126: 49 Mad L Jour 238: 1925 Mad W N 532: 22 Mad L W 206: 47 All 459 P C; *Devi Dayal* v. *Wazir Chand*, (1921) 61 Ind Cas 328 (329): 3 U P L R (Lah) 44; *Sri Rangbehary Lal* v. *Ranchayya Lal*, (1912) 13 Ind Cas 128 (130): 15 Cal L Jour 439; *Mrs Martha Pool* v. *Secretary of State*, 1886 Pun Re No 68; *Shankari* v. *Jodha*, 1921 Lah 156 (156): 3 Lah L Jour 437; *Nanu* v. *Moti*, (1918) 46 Ind Cas 471 (472): 119 Pun W R 1918; *Vinayaka Mudali* v. *Parthasarathy Ayyangar*, (1918) 45 Ind Cas 556 (556): 7 Mad L W 415: 23 Mad L Tim 312 [Suit for damages —Amendment increasing claim must be asked at the beginning of trial]; *Bisheshar* v. *Gobind*, (1915) 26 Ind Cas 42 (43): 12 All L J 833 [Amendment of plaint after case is reserved for judgment]; *Chainu* v. *Manbodh*, (1918) 45 Ind Cas 894 (895) Nag [Six days before judgment plaintiff was refused to amend his suit for possession into a right of way]; *Bishen Dayal* v. *Jaiseri Kuer*, (1918) 48 Ind Cas 746 (747): 1918 Pat 323 [More than a year after issues when the case was ready for hearing raising a completely new point]; *Abdul Hossein* v. *Agnew*, (1887) 11 Bom 620 (638): 14 Ind App 111: 5 Sar 25: 11 Ind Jur 352 P C; *Girdharlal* v. *Jagannath*, (1873) 10 Bom H C R 182; *Kondapaneni Kotayya* v. *Gangaru Sheshayya*, (1913) 21 Ind Cas 778: 1913 Mad W N 995: 14 Mad L Tim 495; *Rekhabchand* v. *J R D'cruz*, 1923 Cal 223 (226): 26 Cal W N 499: 69 Ind Cas 963 [Amendment defeating plea of defendant cannot be allowed].

(10-a) *Futtu* v. *Mussamat Bhago*, 1926 Jour 95 (2): 27 Pun L R 29: 99 Ind Cas 979; *Wadhawa Singh* v. *Pratap Singh*, 1928 Lah 933 (934): 10 Lah L Jour 534; *Sansar Chand* v. *Punjab Industrial Bank Ltd*, 1929 Lah 710 (711): 10 Lah 806: 119 Ind Cas 429 [After a period

trial or the letting in of fresh evidence.[11] O. 6, R. 17, Note 13.

(2) Where the amendment will lead to needless complications.[12]

(3) Where the plaintiff is negligent or has taken his stand deliberately on a certain basis.[13]

(4) Where, notwithstanding objection by the opposite party, the plaintiff insists on proceeding with the suit as framed.[14]

(5) Where the plaintiff has had several opportunities to apply for amendment but has slept over his rights for a very long time.[15]

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of 2 1|2 years]; *Tulshipat Ram* v. *Kamakhiya Dat Ram*, 1928 Oudh 135 (137): 4 Oudh W N 1219: 106 Ind Cas 823; *Tohlu Mal* v. *Buta*, 1921 Lah 53 (55): 3 Lah L Jour 184: 67 Ind Cas 132 [Plaintiff having prayed for redemption was not allowed to amend his plaint for possession of property on the footing that mortgage was unlawful when case was ready for judgment]; *Mohendra Lal* v. *Jagat Chandra*, (1921) 59 Ind Cas 63 (64) Cal; *Suraj Bali* v. *Tulok Chand*, (1916) 36 Ind Cas 66 (69): 3 Oudh L J 327 [A custom set up at a late stage of the proceedings]; *Banumal* v. *Newad Mal*, 1921 Sind 159 (165): 16 Sind L R 207: 83 Ind Cas 360; *Balaram* v. *Ganpat*, (1918) 47 Ind Cas 906 (907) Nag [Suit for declaration that sale is invalid, amendment by claiming possession of property].

(11) *Narayana* v. *Shankunni*, (1891) 15 Mad 255 (257, 258); *Srish Chandra* v. *Golap Meni Dasi*, 1921 Cal 125 (126): 33 Cal L Jour 380: 25 Cal W N 552: 63 Ind Cas 514; *Mahtab Ali Shah* v. *Imdad Ali Shah*, (1916) 30 Ind Cas 387 (388): 59 Pun L R 1916: 91 Pun W R 1915; *Punjab National Bank, Ltd, Kasur* v. *Uma Datt Hansraj*, 1928 Lah 599 (600): 9 Lah 291: 29 Pun L R 477: 112 Ind Cas 425 [When no cause of action at all was alleged and suit was dismissed, amendment not allowed to introduce the same]; *Kahn And Kahn* v. *Premsukh Das Rup Narain*, 1931 Lah 260 (262): 134 Ind Cas 1110 [Suit to recover price of goods supplied refused to be amended into a suit to recover damages for breach of contract]; *Ramanadan Chetti* v. *Puli Kutti Servai*, (1898) 21 Mad 288 (291): 8 Mad L Jour 121; *Shah Deo Narain Das* v. *Kusum Kumari*, (1918) 46 Ind Cas 929 Pat; *Nga Tan* v. *Nga Kan*, (1911) 12 Ind Cas 200 (202): 4 Bur L Tim 244; *Padama Lochan* v. *Goris Chandra*, (1918) 45 Ind Cas 241 (242): 27 Cal L Jour 392: 46 Cal 168; *Sulaiman* v. *Tan Hiviya*, 1930 Rang 140 (142): 7 Rang 800: 121 Ind Cas 803 [Where new defence of law arises from plaintiff's evidence, it may, however, be considered]; *Ukkandan Nair* v. *Uni Kumaran Nair*, (1896) 6 Mad L Jour 139 (139); *Sakal Chand* v. *Md Nasuruddin*, (1917) 40 Ind Cas 526 (527): 32 Mad L Jour 146; *Ismail Sodagar* v. *Ebrahim Abdulla Tanoo*, (1917) 42 Ind Cas 893 (895) L B [Amendment in revision, by showing another basis for damages on a breach of contract]; *Sitaram* v. *Chimandas*, 1928 Bom 516 (518): 30 Bom L R 1300: 52 Bom 640.

(12) *Thakardwara Amritsar* v. *Ishar Das*, 1928 Lah 375 (376): 9 Lah 588: 30 Pun L R 41: 110 Ind Cas 384 [Amendment changing plaintiff's name from temple to idol]; *K P P Mayankutti* v. *K P P Kathiri*, 1925 Mad 441 (442): 21 Mad L W 224: 86 Ind Cas 747 [To convert a suit for maintenance of certain members alone of a tavazi, into a suit on behalf of the whole tavazhi].

(13) *Sheriff of Bombay* v. *Hakmaji Motaji & Co*, 1927 Bom 521 (525): 29 Bom L R 1071: 104 Ind Cas 685: 51 Bom 749 [Judgment obtained against the sheriff as corporation sole, in execution, amendment will not be allowed for suing the former Sheriff in name]; *Ram Gharib Tiwari* v. *Shankar Tiwari*, 1922 All 5 (6): 20 All L J 15: 65 Ind Cas 242 [Plaintiff basing his suit on a custom of pre-emption, without even mentioning any contract of pre-emption should not be allowed to amend the plaint at appellate stage]; (1932) 86 Cal W N 112 (116); *Jowala Nath* v. *Rupa*, 1882 Pun Re No 175; *Palu* v. *Rasilu*, 1923 Lah 675 (677): 75 Ind Cas 740 [Defence on a definite plea that they were holding under a completed sale, cannot be allowed in second appeal to a case of specific performance of an agreement to sell]; *Rahella* v. *Wazira*, 1928 Lah 32 (33): 9 Lah L Jour 334: 109 Ind Cas 320 [Suit in ejectment cannot be amended in second appeal as on basis of permissive possession]; *Inderdeo Narain* v. *Gouri Shankar*, 1930 Pat 321 (321): 11 Pat L Tim 231: 125 Ind Cas 576 [Suit for possession against prior mortgagee misconceived—With full knowledge of suit plaintiff declined to withdraw it and file fresh suit for redemption—High Court declined to give permission to amend it]; *Ramanadan* v. *Annamalai*, (1915) 29 Ind Cas 132 (133) Mad [When the plaintiff failed to avail himself of the other remedies open to him].

(14) *Parvathi Achi* v. *Sundaram*, 1926 Mad 988 (989): 24 Mad L W 324: 97 Ind Cas 727 [Suit for injunction—Plaintiffs out of possession—Objection to frame of suit by defendants—Plaint yet not sought to be amended—Failure of plaintiff in trial Court—Application for amendment filed in appeal]; *Obhoy Gobind* v. *Hurychurn*, (1882) 8 Cal 277 (278); *Jogendra Nath* v. *Price*, (1897) 24 Cal 584 (588); *Chhatrapat Sinha* v. *Maharaja Bahadur Sinha*, (1917) 39 Ind Cas 861 (861) Cal; *Banarsi Das* v. *Haji Abdul Gani*, (1909) 1 Ind Cas 397 (400): 13 Pun W R 1909: 10 Pun Re 1909: 24 Pun L R 1909; *Shiv Ram* v. *Bhag Devi*, (1918) 48 Ind Cas 838 (840): 118 Pun Re 1918; *Ramanadhan Chetty* v. *Annamalai Chetty*, (1915) 29 Ind Cas 132 (133) Mad; *Badri Prasad* v. *Dila*, (1910) 6 Ind Cas 542 (543) All; *Sheopujan Rai* v. *Maharaja Bahadur Kesho Prasad Singh*, 1924 Pat 310 (311): 2 Pat 919: 76 Ind Cas 347: 5 Pat L Tim 315; *Brijmohan* v. *Ali Husain*, (1906) 9 Oudh Cas 275 (280); *Abdul Rahman* v. *Crisp & Co*, 1928 Rang 134 (135) [Declaratory suit—Consequential relief not asked though objected]; *Manohar Das* v. *Ramdas*, 1923 Sind 17 (20): 75 Ind Cas 549.

(15) *Munnalal* v. *Maiku Lal*, (1914) 24 Ind Cas 723 (724) All [Suit in ejectment into one for redemption]; *Raj Narain Das* v. *Shama Nando Dass*, (1899) 26 Cal 845 (850, 851): 4 Cal W N 162; *J Kirpa* v. *Mt Chinti*, 1928 Lah 530 (532): 77 Ind Cas 518; *Ayyasami Mudaliar* v. *Appandai Nynan*, (1920) 54 Ind Cas 912 (913): 38 Mad L Jour 145 [Suit to enforce an award—Amendment for dissolution of partnership]; *Lukhee Kant* v. *Sumeerooddin*, (1874) 21 Suth W R 208 (209) [Where, there is reason to think that an omission

O. 6, R. 17, Notes 14—15.

14. Opportunity to be given to the opposite party to amend his pleading.—Where a pleading is allowed to be amended, an opportunity should be afforded to the opposite side to meet the new case by filing any additional written statement or letting in such further evidence as may be necessary.[1] The Court cannot, however, ask the defendant to file an additional written statement without first asking the plaintiff to set forth his amendment and deciding that the amendment was necessary.[2]

15. "On such terms as may be just".—These words give the judge an unfettered discretion as to the terms to be imposed in granting an amendment of the pleadings.[1] As a general rule an amendment will only be allowed on the terms that the cost of the application for leave to amend, and of the costs occasioned by, and in consequence of, the amendment shall be paid by the party amending, in any event.[2] The terms should be such as will prevent the opposite party from being prejudiced by the amendment.[3]

It is not necessary that the Court should impose terms as to *costs* only; it may impose such terms as it deems necessary and just.[4]

An order directing a plaintiff to pay in cash the costs of amendment of the plaint after he has been found to be a *pauper* is not proper.[5] Where a party accepts costs under an order which, but for the order, would not at that time be payable, he cannot afterwards object that the order ought not to have been made.[6]

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to claim was deliberate]; *Lalitesh war Singh* v. *Rameshwar Singh*, (1909) 2 Ind Cas 290 (292): 36 Cal 481: 6 Mad L Tim 11: 13 Cal W N 838; *Maung Thau Daing* v. *U The*, (1910) 8 Ind Cas 600 (601): 3 Bur L Tim 16; *Badri Prasad* v. *Dila*, (1910) 6 Ind Cas 542 (543) All [Change of date in plaint in second appeal]. See also *Seshachalu* v. *Venkatasubbarao*, 1928 Mad 828 (830): 1927 Mad W N 784: 110 Ind Cas 775; *Gutiganti Subbarayudu* v. *Arumalli Narayya*, (1917) 37 Ind Cas 914 (915) Mad [Unreasonable delay]; *Nagendrabala* v. *Secretary of State*, (1911) 10 Ind Cas 532 (534): 14 Cal L Jour 83 [Where the application could have been made much earlier]; *Ramasami* v. *Ramu*, (1867) 3 Mad H C R 372 (373).

Note 14.

(1) *Manji* v. *Kalanand*, (1912) 16 Ind Cas 785 (786) Cal [Because the case was pending for a long time is no exception for not doing so]: *Parasram* v. *Miraji*, (1896) 20 Bom 569 (570): *Nana* v. *Appa*, (1896) 20 Bom 627 (629): *Uzir* v. *Savai*, (1916) 32 Ind Cas 791 (793): 20 Cal W N 547: 43 Cal 938 [Appellate Court has powers to remand the case for trial, independently of Rr. 23 and 25 of O 41 for the same]: *Zora Singh* v. *Jagta Singh*, (1917) 42 Ind Cas 263 (264): 83 Pun Re 1917: 142 Pun W R 1917: *Doorga Narain* v. *Broja Kishore*, (1875) 23 Suth W R 172 (173): *Sadho* v. *Golab*, (1899) 3 Cal W N 375 (377): *Tadipatri Hanumanulu* v. *Maddukuri Golayya*, (1914) 24 Ind Cas 822 (823) Mad.

(2) *Ramachandra* v. *Venkatasubbayamma*, (1915) 30 Ind Cas 41 (43): 29 Mad L Jour 53; *Banoobi* v. *Yakubkhan*, 1925 Nag 108 (109): 80 Ind Cas 375.

Note 15.

(1) *Wooley* v. *Broad*, (1892) 2 Q B 317 C A: 67 L J Q B 808: 67 L T 67: 40 W R 596: 9 Rep Pat Cas 429.

(2) *Steward* v. *North Metropolitan Tramways Company*, (1886) 16 Q B D 556: 55 L J Q B 157: 54 L T 35: 34 W R 316: 50 J P 324 C A, cited in 11 Bom L R 926 (1042); *Blackmore* v. *Edwards*, 1879 Eng W N 175; In re *Trufort*, (1885) 53 L T 498 [Causes of any evidence or pleading rendered nugatory by the amendment]; *Coptal Stones Lim* v. *Willoughby Consolidated Company*, 1915 P C 172 (173); *Dhani Ram* v. *Bhagirath*, (1895) 22 Cal 692 (713) [In appeal and in ordering a remand, a party amending has been ordered to deposit all costs upto date within a specified time]; *Chartered Bank of India* v. *Imperial Bank of India*, 1930 Cal 534 (536): 57 Cal 398: 127 Ind Cas 772; *Neogi Ghose & Co* v. *Sardar Nehal Singh*, (1931) 35 Cal W N 432: 1931 Cal 770 (771).

(3) *Kurtz* v. *Spence*, (1887) 36 Ch D 770 C A: 58 L T 320: 36 W R 438, cited in 22 Cal 692.

(4) *Gunaji* v. *Makanji*, (1909) 3 Ind Cas 159 (160): 10 Bom L R 969: 11 Bom L R 498: 6 Mad L Tim 234: 34 Bom 250.

(5) *Ambaji Balwant Rao* v. *Hanmant Rao Deshmukh*, 1922 Bom 385 (385): 24 Bom L R 924: 47 Bom 104: 69 Ind Cas 207.

(6) *Ramasami Chettiar* v. *Chidambaram Chettiar*, 1927 Mad 1009 (1009): 39 Mad L Tim 608: 26 Mad L W 527: 105 Ind Cas 630.

O. 6, R. 17, Notes 16—19.

16. How amendments should be made.—Under the old Code, the plaint could be *returned* for amendment in certain cases specified.[1] Under the present Code it would seem, that the pleading should not be *returned* for amendment, but is to be kept on the Court's file with direction to the parties to amend, if necessary.[2] Where, however, the Court has no pecuniary *jurisdiction* to entertain the suit the Court should under the provisions of O. 7, R. 10 of the Code return the plaint to the plaintiff, who may amend it by deleting certain reliefs claimed, and represent the same to the Court.[3]

It is not, however, essential that the amendment should be made on the *face of the plaint* itself; it may be made even on a separate piece of paper.[4]

17. Who can apply for amendment.—Where a suit is instituted by two plaintiffs, it is doubtful whether one of them alone can apply for amendment of the plaint.[1]

18. Extent of amendment.—A plaintiff can amend his plaint only to the extent allowed by the Court. Thus where a plaint was ordered to be amended by *addition of parties* and the plaintiff altered the *relief claimed* also, it was held that the plaint must be taken as originally framed even though the unauthorised amendment as to relief is not objected to either by the Court or by the other party.[1]

There is a difference of opinion as to whether a Court can allow an amendment which has the effect of ousting its own jurisdiction over the suit. The High Court of Madras has held that it cannot[2] while the Oudh Judicial Commissioner's Court holds a contrary view.[3]

19. Effect of amendment and limitation.—Where, in a suit against several defendants the Court could not take cognisance of the claim as against some of the defendants, and in consequence thereof the plaintiff amends his plaint by restricting his claim only as against the other defendants, the effect of the amendment is, as if the suit had never been commenced in respect of the former.[1]

Where an amendment is allowed, under this rule, such amendment relates back to the date of the suit as originally filed.[2] But where the plaint in a suit

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Note 16.

(1) *Mg Lu Gale* v. *Venkatachalam Chetty*, (1911) 10 Ind Cas 922 (923): 4 Bur L Tim 118; *Kazem Sheik* v. *Danesh Sheik*, (1897) 1 Cal W N 574 (576). See also *Muthiappa Chetty* v. *Muthupalani Chetty*, (1904) 27 Mad 80 (84, 85).

(2) *Mitani Bussan* v. *Totaram Bhawan Dass*, 1921 Sind 166 (168): 17 Sind L R 223: 85 Ind Cas 893. See however *Venkatachalam Chetti* v. *Narayana Aiyar*, (1913) 19 Ind Cas 672 (672): 24 Mad L Jour 455: 1913 Mad W N 899 [It is assumed that it could be returned].

(3) *Manikyam* v. *Sreeramulu*, 1928 Mad 559 (559): 111 Ind Cas 737.

(4) *Khayali Ram* v. *Bhup Singh*, 1893 All W N 225 (225).

Note 17.

(1) *Nalinakha Sinha* v. *Ram Taran Pal*, 1927 Cal 733 (735): 46 Cal L Jour 51: 104 Ind Cas 151.

Note 18.

(1) *Husaina* v. *Sahib Nur*, (1910) 7 Ind Cas 505 (525): 86 Pun W R 1910: 213 Pun L R 1910.

(2) *Singara Mudaliar* v. *Govindasami Chetti*, 1928 Mad 400 (400): 54 Mad L Jour 145: 27 Mad L W 609: 108 Ind Cas 413.

(3) *Khunai Tewari* v. *Dil Kunwar*, 1923 Oudh 38 (39): 79 Ind Cas 237.

Note 19.

(1) *Moolchand* v. *Po Thein*, (1919) 51 Ind Cas 376 (377): 9 L B R 275: 12 Bur L Tim 155.

(2) *Nanjibhai* v. *Papatlal*, 1932 Bom 367 (370): 34 Bom L R 628; *Mallappa* v. *Neelava Gowdra Kare Gowd*, 1926 Mad 487 (488): 50

O. 6, R.17, Notes 19—21.

for possession of certain plots of land was subsequently amended by the inclusion of certain other plots, it is not a case of amendment properly so called, but a case of an addition of *entirely new lands* and as regards such lands the suit will date only from the day when the claim was made in respect thereof.[3]

20. Appeal.—Under the old Code orders *returning plaints* for amendment were appealable under Cl. 6 of S. 588.[1] But no appeal lay from orders for amendment passed by the Court itself under Cl. (*c*) of S. 53.[2] Under the present Code no appeal lies from an order granting or refusing an amendment under this rule.[3] Nor will an appellate Court, in an appeal from the decree in the suit, interfere with the discretion of the lower Court in granting or refusing amendments.[4] Where the defendants do not take objection to the amendment, they will be deemed to have waived it and cannot raise it again at the stage of appeal.[4-a]

An order refusing leave to amend a plaint is in the nature of an interlocutory order and is not appealable under the Letters Patent as a 'Judgment.'[5] Nor is an order amending the title of a plaint by omitting the word "summary" and transferring the case to the short cause list, a "judgment" within Cl. 15 of the Letters Patent.[6]

21. Revision.—*See* notes to S. 115, *ante* generally.

O. 6, R.18.

R. 18. [Cf. S. 53.] *If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.*

Failure to amend after order.

[R. S. C. O. 28, R. 7.]

Mad L Jour 442: 1926 Mad W N 174: 93 Ind Cas 625; *Laljey Nensey* v. *Keshowji*, (1912) 17 Ind Cas 193 (196): 14 Bom L R 840: 37 Bom 340; *Narandas* v. *Bai Parvan*, (1895) 19 Bom 320 (323); *Ram Lal* v. *Harrison*, (1878-80) 2 All 832 (835); *Barkat-un-nissa* v. *Mohammad Ashad Ali*, (1895) 17 All 288 (291): 1895 All W N 80; *Jalal Din* v. *Quaim Din and Mussammat Umar Bibi*, (1914) 25 Ind Cas 439 (440): 62 Pun Re 1914: 255 Pun L R 1914: 161 Pun W R 1914; *Nemasa* v. *Ramakrishna*, (1914) 23 Ind Cas 165 (166): 10 Nag L R 32; *Durgagir* v. *Kollu*, (1911) 10 Ind Cas 731 (733): 7 Nag L R 33.

(3) *Manindra Chandra* v. *Rangalal*, (1917) 41 Ind Cas 728 (729) Cal.

Note 20.

(1) *Rameun* v. *Allahyar*, 1903 Pun L R 78.

(2) *Rajendra Kishore* v. *Radha Prasad*, (1881) 3 All 854 (855): 1881 All W N 99; *Mohammad Hussain* v. *Badri Prasad*, 1889 All W N 83 (83); *Zakir-ud-din Ahmed* v. *Mumtaz-ud-din*, 1901 All W N 140 (140); *Watson & Co* v. *Nidhoo Digwar*, (1868) 10 Suth W R 87 (88).

(3) *Kusum Kumari* v. *Surendra Krishna Ghose*, (1917) 42 Ind Cas 455 (456) Cal; *Gurdas* v. *Bhag*, (1911) 11 Ind Cas 231 (232): 143 Pun W R 1911: 216 Pun L R 1911: 96 Pun Re 1911.

(4) *Hari Krishna Das* v. *Dinor Kinla*, (1915) 29 Ind Cas 355 (355) Cal; *Satyes Chandra* v. *Monmohini Dasi*, (1914) 25 Ind Cas 567 (570): 19 Cal L Jour 518; *Abdul Gafur* v. *Mohar-un-Nissa*, (1911) 4 Ind Cas 856 (857): 101 Pun Re 1909.

(4-a) *Ganga Das Sil* v. *Secretary of State*, (1916) 32 Ind Cas 752 (752): 20 Cal W N 636; *Lal Jung Bahudar Singh* v. *Bisheshur Bakush Singh*, (1901) 4 Oudh Cas 314 (317).

(5) *Mahalingam* v. *Natesa Aiyar*, (1916) 32 Ind Cas 423 (423): 3 Mad L W 107: (1916) 1 Mad W N 146.

(6) *Manilal Chunilal* v. *Manilal Damodardas*, 1925 Bom 159 (160): 27 Bom L R 99: 86 Ind Cas 100.

Synopsis.

O. 6, R. 18, Note 1.

1. Failure to amend after order.

Amendment order otherwise than under this rule—Fourteen days rule, if applies. See Note 1, Pt. (4) and F.-N. (4).

1. Failure to amend after order.—Under Ss. 53 and 54 of the Code of 1877, the Court could reject a plaint if the party failed to comply with the order for amendment.[1] There is no such provision under this Code and the only consequence of the failure to amend within time would be, that he cannot amend his pleading afterwards, unless the time is extended by the Court.[2] This rule does not prohibit a fresh suit being brought on the same cause of action when the amendment has not been made in time.[3] Where the order of amendment is made, not under this Order, but under some other provision of law, the provision that the amendment must be made within 14 days where no time is fixed, does not apply.[4]

The Court has a discretion to extend the time even after the expiry of the period originally fixed[5] and no appeal will lie against an order admitting an amended plaint after the time fixed.[6]

ORDER VII.

PLAINT.

Particulars to be contained in plaint.

R. 1. [S. 50.] The plaint *shall* contain the following particulars: O. 7, R. 1

(*a*) the name of the Court in which the suit is brought;

(*b*) the name, description and place of residence[4] of the plaintiff;

(*c*) the name, description and place of residence of the defendant, so far as they can be ascertained;

Order 6, Rule 18—Note 1.

(1) *Tulasi Ram* v. *Munshi Ram*, 1904 Pun Re No 57.

(2) *Tomlinson* v. *Goran*, (1921) 60 Ind Cas 376 (377) Lah [The plaint cannot be rejected]; *Murlidhar Kanshi Ram* v. *Narayan Das*, (1913) 19 Ind Cas 472 (473): 169 Pun L R 1913: 107 Pun W R 1913, (Do.). See also *Rahman* v. *Ahmad Din*, 1926 Lah 571 (571): 96 Ind Cas 312 [Failure to amend and pay costs as ordered —No jurisdiction to dismiss suit]. See also *Gaj Kumar Chand* v. *Lachman Ram*, (1911) 10 Ind Cas 503 (505): 14 Cal L Jour 627 [Failure to amend as ordered—No objection at the earliest opportunity—Objection deemed waived—Amendment application treated as part of plaint]. Also *Ujagar Mal* v. *Ram Ditta Mal*, 1928 Notes 39 (b): 111 Ind Cas 787 [Court cannot compel plaintiff to amend—If suit cannot proceed without amendment, suit to be dismissed]. Also *Narayanaswami Iyer* v. *Krishnamurthi Aiyar*, (1915) 26 Ind Cas 927 (929): 1915 Mad W N 122: 17 Mad L Tim 48 [Opportunity to amend must be given—Amendment petition and dismissal of suit together—Not proper]. Also *Bulli Mal* v. *Jhabba*, 1925 Lah 504 (505): 7 Lah L Jour 280: 26 Pun L R 699: 92 Ind Cas 569 [No refusal by plaintiff to join a person as co-plaintiff—Latter refusing to join as co-plaintiff—Suit not to be dismissed but Court must add him as defendant].

(3) *Sawan Singh* v. *Surain Singh*, 1927 Lah 83 (83): 99 Ind Cas 538.

(4) *Madan Mohan* v. *Maharaja of Chotanagpur*, (1914) 22 Ind Cas 778 (779, 780): 19 Cal W N 200 [High Courts' direction of amendment apart from O 6].

(5) *Bhugwan Das* v. *Haji Abu*, (1892) 16 Bom 263 (265, 266).

(6) *Sheik Ali Husain* v. *Fazal Husain Khan*, (1909) 4 Ind Cas 492 (492) All.

O. 7, R. 1, Notes 1—2.

(*d*) *Where the plaintiff or the defendant is a minor or a person of unsound mind,*[5] *a statement to that effect*;

(*e*) *the facts* constituting the cause of action[6] and when it arose:[7]

(*f*) *the facts showing that the Court has jurisdiction*;[8]

(*g*) the relief which the plaintiff claims;[9]

(*h*) *where* the plaintiff has allowed a set off or relinquished a portion of his claim,[10] the amount so allowed or relinquished; and

(*i*) *a statement of the value*[11] *of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.*

[1877—S. 50; 1859—S. 26. *See* S. 26 and O. 6, R. 2.]

Synopsis.

1. Legislative changes.
2. Plaints in general.
3. Scope of the rule.
4. Name, description and place of residence.
5. Party—A minor or person of unsound mind. See O. 32.
6. Facts constituting the cause of action.
7. When cause of action arose.
8. "Facts showing that the Court has jurisdiction."
9. "Relief which the plaintiff claims". See O. 7, R. 7.
10. Where the plaintiff has allowed a set off or relinquished a portion of his claim.
11. Valuation of suit.

Applicability of clause (i) to suits for mesne profits. See R. 2, Note 2, Pt. (2).

Cause of action should be antecedent to suit. See Rule 7, Note 4 and S. 20; Note 14, Pt. (11).

Contents of plaint. See Note 2.

Events subsequent to suit. See Rule 7, Note 4.

Suit against dead person. See O. 22, R. 1.

"The plaint shall contain." See Note 3, Pt. (1).

1. Legislative changes.—

1. The word "shall" has been substituted for "must" in the opening sentence. *See* Note 3.

2. In clause (*e*) of this rule, the word "facts" has been substituted for the words "a plain and concise statement of the circumstances", occurring in the old section. *See* Note 6.

3. Clauses (*d*), (*f*) and (*h*) are new.

2. Plaint in General.—As has been seen in Note 3 to S. 26 *ante*, a plaint has been held to mean "a private memorial tendered to a Court in which the person sets forth his cause of action; the exhibition of an action in writing". It corresponds to the "*statement of claim*" in England and its object is to state the grounds upon which the plaintiff seeks the assistance of the Court to grant him relief.[1]

Order 7, Rule 1—Note 2.

(1) See cases cited in Note 3 to S 26.

Order 6 lays down generally, what pleadings (*i.e.*, plaint or written statement) should contain, and this order lays down in *particular*, the requirements of a *plaint*. Every plaint, therefore, should comply with the rules contained in Orders 6 and 7, so far as they are applicable. Thus:— O. 7, R. 1, Note 2.

(1) It should contain the name of the Court in which the suit is brought (O. 7, R. 1-a).

(2) It should contain the (*a*) name, (*b*) description, and (*c*) place of residence of—

(*i*) The plaintiff (O. 7, R. 1-b).

(*ii*) The defendant so far as can be ascertained (O. 7, R. 1-c).

(3) Where the plaintiff or defendant is a minor or a person of unsound mind it should contain a statement to that effect (O. 7, R. 1-d).

(4) Where the plaintiff sues in a *representative* capacity, it should show not only that he has an existing interest in the subject-matter, but that he has taken necessary steps to enable him to institute a suit, concerning it (O. 7, R. 4).

(5) It should state in a *concise* form the *material facts* on which the plaintiff relies for his claim (O. 6, R. 2).

(*i*) It should set out the facts constituting the cause of action (O. 7, R. 1-e). When necessary it should be divided into paragraphs numbered consecutively—all dates numbers and sums to be expressed in figures (O. 6, R. 2).

(*ii*) The forms given in Appendix A to the Code, or similar forms, should be used as far as possible (O. 6, R. 3).

(*iii*) If the plaintiff pleads misrepresentation, fraud, breach of trust, wilful default, undue influence, etc., and in all cases where particulars may be necessary beyond those as are exemplified in the forms aforesaid, it should contain the particulars with dates and items, if necessary (O. 6, R. 4).

(*iv*) If a party relies on illegality or insufficiency in law of any contract, that party should plead such illegality or insufficiency in law in his pleading; it is not sufficient simply to deny the contract (O. 6, R. 8).

(*v*) Whenever the contents of a document are material, it is sufficient to state the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words are material (O. 6, R. 9).

(*vi*) Whenever it is material to allege malice, fraudulent intention, knowledge or any condition of mind of any person, it is sufficient to allege it as a fact, without setting out the circumstances from which it is inferred (O. 6, R. 10).

(6) If the suit is for the recovery of money, it should state the *precise* amount claimed, and when the plaintiff has allowed a set-off or

O. 7, R. 1, Note 2.

relinquished a portion of his claim, the amount so relinquished or so allowed should be stated (O. 7, R. 1-h); but in suits for accounts or for mesne profits, it should state the *approximate* amount sued for (O. 7, R. 2).

(7) If the subject-matter of the suit is immoveable property, it should contain a description thereof sufficient to identify it, *i.e.*, boundaries or survey numbers thereof, should be specified (O. 7, R. 3).

(8) Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded on separate and distinct grounds, he should state them as far as possible separately and distinctly (O. 7, R. 8).

(9) It should state the interest of the defendant in the subject-matter and his liability to answer the plaintiff's demands (O. 7, R. 5).

(10) It should state when and where the cause of action arose.

(*i*) It should state (if necessary) the facts showing that the Court has jurisdiction (O. 7, R. 1-f).

(*ii*) If it is presented after the expiration of the period of limitation prescribed, it should show the grounds of exemption from the law of limitation (O. 7, R. 6).

(11) It should contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees, so far as the case admits (O. 7, R. 1-i).

(12) It should state specifically the relief which the plaintiff claims, either simply or in the alternative; it is not necessary to ask for general or other relief which may always be given as the Court may think just (O. 7, R. 7).

(13) It should be verified at the foot by the party or by one of the parties pleading, or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case (O. 6, R. 15).

A suit is instituted by the presentation of a plaint to the Court or to such officer at it may appoint in this behalf, (O. 4, R. 1) but cannot be said to be *duly* instituted until it is admitted and *registered* as a suit (*see* Note 2 to S. 26). The Court may return a plaint for presentation to the proper Court at any stage (O. 7, R. 10) or reject it on any of the grounds mentioned in O. 7, R. 11, (*see* O. 7, R. 11, *infra*).

The provisions of this order are made applicable to plaints presented under the provisions of the Bengal Tenancy Act,[2] The Madras Estates Land Act,[3] The Agra Tenancy Act,[4] The Oudh Rent Act,[5] The Orissa Tenancy Act[6] and the Provincial Small Causes Courts Act.[7]

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(2) Act VIII of 1885 (Bengal), S 148.

(3) Act I of 1908 (Madras), S 192.

(4) Act III of 1926 (U P), Sch 2, List II, No 9.

(5) Act XXII of 1886 (Oudh), S 137.

(6) Act II of 1913 (Bihar and Orissa), S 198.

(7) Act IX of 1887 (India), S 17.

O. 7, R. 1, Notes 3—6.

3. Scope of the Rule.—*See* Note 2 above. The provisions of this rule are *imperative.*[1] The substitution of the word "shall" in the place of "must" in the opening sentence has not affected any change in the law.

4. Name, description and place of residence.—The object of the legislature is to secure correct particulars regarding the parties so far as they can be ascertained, so that there may be no uncertainty with regard to the identity of the parties. The full description of the party and the character in which he sues or is sued should be given in the plaint. The word "description" includes the age, father's name[1] and other particulars that may be necessary to identify the person. Thus the titles by which the defendant is generally known should be also given.[2] As to the effect of misdescription of parties *see* Note 37, O. 1, R. 10, *supra.*

The place of residence of the plaintiff should be accurately given,[3] and that of the defendant should be given as accurately as can be ascertained; it is not sufficient to make vague statements as to the defendant's place of residence such as "carrying on business in Calcutta"[4] or formerly in Calcutta now residing in Kashmir".[5] If the plaintiff after enquiry is unable to ascertain these particulars fully, he should include a paragraph in the plaint to that effect.[6] It is not sufficient to give these particulars in the cause title of the plaint, as the cause title is not covered by the verification of the particulars in the plaint.[7]

5. Party—a minor or person of unsound mind.—*See* Order 32, *infra.*

6. Facts constituting the cause of action.—The words " plain and concise statement of the circumstances" occurring in the old section have been substituted by the word "facts" in view of the specific provisions of O. 6, R. 2.

As to what are material facts *see* O. 6, R. 2, *supra.* As to the meaning of the words *cause of action See* Note 14 to S. 20, *supra.*

Every suit presupposes the existence of a cause of action against the defendant for, if there is no cause of action at all, the plaint will have to be rejected under rule 11, *infra.*

Where there is no such right in law as that claimed, there can be no cause of action in respect thereof, and a suit cannot be based thereon. *See* Note 41 to S. 9 and the undermentioned cases.[1]

Note 3.

(1) *Seth Herbux* v. *Lachman,* 1925 Nag 183 (185): 82 Ind Cas 201; *Madras Steam Navigation Co, Ltd* v. *Shalimar Works Ltd,* (1915) 28 Ind Cas 463 (464, 465): 42 Cal 85; *Sheo Prosad* v. *Lalit Kuar,* (1896) 18 All 403 (406): 1896 All W N 132; *Marks* v. *Telferle and Peacock* v. *Umacharan Ghose,* 5 Cal W N lxiii.

Note 4.

(1) *Somayajalu* v. *Surayya,* (1897) 7 Mad L Jour 81 (82) [The High Court refused to interfere with the order rejecting a plaint on failure to give the particulars].

(2) *Maharajah of Vizianagaram* v. *Rajah Lakshmi Chellaya,* (1872) 18 Suth W R 301 (302, 303): 12 Beng L R 443 P C [Reversing on appeal 3 Mad H C R 31 and overruling 12 Suth W R 450 under S 29 of Code of 1859, the suit was dismissed as plaintiff refused to amend plaint even after Court's direction to amend]; *Walter Henry Marks* v. *A Telferle,* (1900-01) 5 Cal W N xiii [Christian party—Initials before actual name not sufficient—Full name must be given].

(3) *Bibee Solomon* v. *Abdul Aziz,* (1879) 4 Cal L Rep 366 (370) [To describe plaintiff as residing in Chitpore Road is not sufficient].

(4) *Ramprasad* v. *Hazarimull,* 1931 Cal 458 (462): 58 Cal 418: 134 Ind Cas 538.

(5) *Bibee Solomon* v. *Abdul Aziz,* (1879) 4 Cal L Rep 366 (370, 371).

(6) *Marks* v. *Tellarle,* (1900) 5 Cal W N lxiii.

(7) *Ramprasad* v. *Hazarimull,* 1931 Cal 458 (461): 58 Cal 418: 134 Ind Cas 538.

Note 6.

(1) *Miss Grace Prosser* v. *Nandi Lal,* (1905) 8 Oudh Cas 356 (360) [No suit for injunction

O. 7, R. 1, Note 7.

7. When cause of action arose.—It is necessary for the plaintiff to state *specifically* when the cause of action for the suit arose.[1] This is necessary for the purpose of enabling the Court or the defendant to ascertain from the plaint whether there is a cause of action, and whether it is not barred by the law of limitation.[2] But the statement need not be made in a *separate* paragraph, if it is clear from the other facts alleged in the plaint.[3]

As to when cause of action arises for the purposes of limitation in particular cases *see* the Indian Limitation Act, (Act IX of 1908), Schedule I, Column 3.

A plaintiff is not, however, absolutely bound by the statement regarding the date of the accrual of the cause of action; it may be determined or

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against erecting a building will lie, unless there was a substantial interference with light and air]; *Rani Dharmaraj Kuar* v. *Bhondu Khan*, (1905) 8 Oudh Cas 84 (85) [Defendant having never set up proprietary or under-proprietary title, plaintiff has no cause of action for declaratory decree in Civil Court]; *Subramania Thevan* v. *Arunachalla Thevan*, (1908) 18 Mad L Jour 186 (187) [Any person other than the payee or the holder of a negotiable instrument has no right to sue]; *Budh Singh* v. *Musst Dhan Kaur*, 1898 Pun Re No 57 [Remote reversioner cannot sue to set aside alienation by widow]; *Maung Shwe Oh* v. *Maung Tun Gyaw*, (1908) 32 Cal 96 (105): 31 Ind App 188: 9 Cal W N 147: 8 Sar 704 [In the absence of a completed contract no suit lies for breach of contract]; *A E Voss* v. *Secretary of State for India*, (1906) 33 Cal 669 (674) [No suit lies against the Crown for wrongful dismissal of its servant]; *Sheo Singh* v. *Roora*, 1869 Pun Re No 14 [Judgment of Court does not give new cause of action]; *Ram Deehul* v. *Chukhoo*, (1869) 1 N W P 89 [Suit lies to recover document wrongfully taken by vendor from Registrar]; *Kedar Nath* v. *Rughonath*, (1874) 6 N W P 104 [No suit lies for loss incurred by opening of adjacent market]; *Juggut Chunder Roy* v. *Mohima Chunder Paul*, (1869) 11 Suth W R 331 (332) [Unsuccessful intervention in a suit for rent against raiyats can afford plaintiff no cause of action for a declaration of title against third parties]; *Soodukhina Chowdharin* v. *Issur Chunder Mojoomdar*, (1869) 12 Suth W R 24 (25, 26) [When map was prepared in plaintiff's presence, no suit to rectify the error subsequently]; *Mooktakeshee Debea* v. *The Collector of Burdwan*, (1869) 12 Suth W R 204 (205, 206) [Government cannot sue to recover a land on behalf of a Zamindar]; *Udit Narain Singh* v. *Shib Rai*, (1898) 20 All 198 (200): 1898 All W N 21 [Trespasser has no cause of action to sue for crops sown by him]; *Lalta Prosad* v. *Sadiq Hussain*, (1902) 24 All 288 (291): 1902 All W N 47 [Decree for costs assigned to *A* and *A* realising the costs—Decree reversed in appeal by judgment-debtor—Latter has no cause of action to sue for costs]; *Rambhajan* v. *Gurcharan*, (1905) 27 All 14 (14): 1 All L J 468: 1904 All W N 150 [Suit for a cancellation of a will does not lie during the lifetime of the testator]; *Abdul Samad Khan* v. *Rahmatulla Khan*, 1889 Pun Re No 162 [A suit for damages arising out of a civil action launched maliciously does not lie]; *Budh Singh* v. *Basea Singh*, 1888 Pun Re No 178 [Pattidars, who are not the next reversioners, have no cause of action to contest adoption by widow]; *Kahan Singh* v. *Bara Singh*, 1887 Pun Re No 30 [Neglect of defendant to drain his garden does not give cause of action even though plaintiff sustains injury]; *Malik Singh* v. *Bala Singh*, 1882 Pun Re No 134 [Obstruction to public road will not give cause of action unless plaintiff sustains particular damage]; *Nurdin* v. *Alavudin*, (1889) 12 Mad 134 (136) [A suit for declaration that defendant is creating evidence does not lie]; *Roop Channessa Bibi* v. *Bejoychund Mahatap*, (1906) 3 Cal L Jour 288 (290) [Payment by plaintiff of money on behalf of defendant against his wishes will not give plaintiff any cause of action against defendant]; *Thuna* v. *Beni Ram*, (1887) 9 All 439 (440): 1887 All W N 75 [The vendor who has covenanted with the vendees that he has a good title cannot sue to set aside a mortgage decree which a third party has obtained on the same property]; *Ejid Baksh* v. *Harsukh Rai*, (1887) 9 All 59 (61): 1886 All W N 297 [Application for sanction to prosecute, does not give a cause of action for a suit for malicious prosecution]; *Parbati* v. *Sundar*, (1886) 8 All 1 (5): 1885 All W N 315 [Parties in possession cannot sue for partition unless they have a valid claim in the estate]; *Mirza Mahomed Aga Ali Khan Bahadur* v. *The widow of Balmukand*, (1875) 26 Suth W R 82 (85): 3 Ind App 241: 3 Sar 648: 3 Suth 330 P C [A decree-holder can only execute his decree and not file a suit on the decree against representatives of judgment-debtor]; *Gaya Prasad* v. *Sikhar Prasad*, 1882 All W N 144 (145) [A suit to recover money paid under legal compulsion to the defendant by the plaintiff which was not due does not lie]; *Jan Ali* v. *Khondkar Abdur Kuhma*, (1871) 14 Suth W R 420 (422): 6 Beng L R 154 [A suit in anticipation of a threatened invasion of a right will not lie]; *Suraj Bansi Kunwar* v. *Mahipat Singh*, (1871) 7 Beng L R 669: 16 Suth W R 18 (19) [Reversioner has no cause of action, if he does not allege waste or improper alienation by widow].

Note 7.

(1) *S M Kalyani* v. *Ganesh Chandra*, 1932 Cal 259 (261, 262): 35 Cal W N 990: 59 Cal 448: 137 Ind Cas 353; *M Subbarayalu Naidu* v. *Vengama Naidu*, 1930 Mad 742 (744): 123 Ind Cas 197; *Lala Reoti Ram* v. *Lachman Prosad*, 1926 All 155 (156): 23 All L J 900: 6 L R All Civ 525: 89 Ind Cas 402; *Boydanath Sama* v. *Ojan Bibee*, (1869) 11 Suth W R 238 (239); *Gano Hon Sawant* v. *Sridev Sidheswar*, (1901) 4 Bom L R 58 (59, 60); *Sheo Prosad* v. *Lalit Kuar*, (1896) 18 All 403 (406): 1896 All W N 132; *Kalikananda* v. *Biprodas*, (1915) 26 Ind Cas 436 (439, 440): 19 Cal W N 18: 21 Cal L Jour 265; *Ram Prosad* v. *Sachi Dassi*, (1901) 6 Cal W N 585 (588); *Parsoo* v. *Munna Lal*, (1917) 39 Ind Cas 21 (21, 22): 13 Nag L R 16; *Mohesh Cunder* v. *Ramdhun*, (1870) 13 Suth W R 248 (249). But see *Ram Prosad* v. *Hazarimull*, 1931 Cal 458 (460, 461): 58 Cal 418: 134 Ind Cas 538.

(2) *S M Kalyani* v. *Ganesh Chandra*, 1932 Cal 259 (261): 35 Cal W N 990: 59 Cal 448: 137 Ind Cas 358.

(3) *Fateh Ali* v. *Muhammad Bakhsh*, 1928 Lah 516 (523): 9 Lah 428.

inferred from the facts stated.[4]

O. 7, R. 1, Notes 7—11.

8. "**Facts showing that the Court has jurisdiction**".—All the *facts* showing that the Court has jurisdiction should be set out in the plaint, and if any special jurisdiction vested in the Court by law is invoked, all the facts which call for the exercise of that jurisdiction should be set out.[1] When the jurisdiction of the Court to try the suit is disputed, the Court must decide the same preliminary to the adjudication of the suit itself.[2] As to the statement of facts showing the pecuniary jurisdiction of the Court, *see* Note 11 below.

9. "**Relief which the plaintiff claims.**"—*See* Order 7, Rule 7 *infra.*

10. "**Where the plaintiff has allowed a set-off or relinquished a portion of his claim**".—The amount set-off or relinquished should be specified with precision, or at least should be stated in such a manner that the amount may be inferred from the other allegations in the plaint.[1]

11. **Valuation of Suit.**—The plaintiff should distinctly state in the plaint, the valuation of the suit for the purposes of Court-fees and of jurisdiction. As the two valuations may not be the same in several cases, they have to be stated specifically. Where the plaintiff claims reliefs arising out of the *same* cause of action, he can state the *aggregate* value of his reliefs, but if he claims reliefs in respect of two or more distinct causes of action, he should state the valuation of each cause of action separately, as the Court-fee is separately payable in respect of each.[1] Where the plaintiff claims relief in the *alternative*, he should also state his valuations in respect of the two reliefs, and the Court-fee is payable on the value of the larger relief.[2]

The valuation of the suit for the purposes of jurisdiction is necessary for the purpose of ascertaining whether the suit is within the *pecuniary jurisdiction* of the Court. The plaintiff should, however, state the true value at which the subject-matter of the suit *ought* to be valued;[3] it should not be arbitrary or fanciful.[4] *See also* Note 4 to S. 6 and Notes 7 to 10 to S. 15, *ante.*

O. 7, R. 2.

R. 2. [S. 50.] *Where* the plaintiff seeks the recovery of money, the plaint *shall* state the precise amount claimed:

In money suits.

But where the plaintiff sues for mesne profits, *or* for *an* amount which will be found due to *him* on taking unsettled

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(4) *Fuckoruddeen* v. *Mohima*, (1879) 4 Cal 529 (531).

Note 8.

(1) *Harbax* v. *Lachman*, 1923 Nag 183 (184): 82 Ind Cas 201.

(2) *Putta Kannayya* v. *Rudrabhatla*, (1917) 39 Ind Cas 439 (441): 32 Mad L Jour 221: 40 Mad 1: 5 Mad L W 580: 1917 Mad W N 367; *Ram Pargash* v. *Pratab Singh*, (1909) 2 Ind Cas 269 (269): 12 Oudh Cas 90; *Budh Singh* v. *Niradbaran*, (1905) 2 Cal L Jour 431 (437).

Note 10.

(1) *Mohamuddunnissa* v. *Ahamad Hussain*, 1900 All W N 214 (214); *Sinnathambi Rowther* v. *S M Sellam Chetti*, (1910) 8 Ind Cas 943 (943): 8 Mad L Tim 436.

Note 11.

(1) The Court Fees Act (VII of 1870), S 17.

(2) *Motigauri* v. *Pranjivandas*, (1882) 6 Bom 302 (303): 6 Ind Jur 428; *Kashinath Narayan* v. *Govinda Bin Piraji*, (1890) 15 Bom 82 (83).

(3) *Putta Kanniah Chetty* v. *Rudra Bhatla Venkatanarasayya*, (1917) 39 Ind Cas 439 (441, 442, 444): 40 Mad 1: 32 Mad L Jour 221: 5 Mad L W 580: 1917 Mad W N 367.

(4) *Pothi Annapurnayya* v. *Potti Nagaratnamma*, 1926 Mad 591 (591): 92 Ind Cas 730.

O. 7, R. 2, Notes 1—2.

accounts between him and the defendant, the plaint *shall state* approximately the amount sued for.

[1877—50; 1859—26. *See* O. 20.]

Local Amendment.

LAHORE.

In the second paragraph of Rule 2 of Order 7, *after* the word "defendant" *insert* "or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate" and *after* the word "amount" where it last occurs *insert* "or value".

Synopsis.

1. Scope of the rule.
2. Mesne profits.
3. Accounts.
4. Suit for damages.

Suit for money. See Note 1, Pt. (1).

1. **Scope of the rule.**—In a suit for the recovery of money, the plaint should, as a rule, state the amount claimed precisely.[1] But in a suit for *mesne profits* or for an amount which will be found due to the plaintiff on taking *unsettled accounts* between him and the defendant, in which the plaintiff is not, at the time of the institution of the suit, in a position to give the amount precisely, he should state it *approximately*. The value is given tentatively, as the correct value is ascertained only in the course of the suit (O. 20, Rr. 12, 16 and 17).

2. **Mesne profits.**—The expression "mesne profits" has been defined in S. 2 (12).

A plaintiff may claim in a suit, *past mesne profits*, *i.e.*, mesne profits accruing up to the date of institution of the suit, and *future mesne profits* from the date of institution up to the delivery of possession. The valuation in the plaint, should, under this rule, be only with reference to the amount of the *past mesne profits* claimed.[1]

The *future mesne profits*, need not be valued, since it is impossible to give even an approximate statement of the amount.[2] But the valuation of the *past mesne profits* given will be the valuation of the "amount *sued for*" under this rule,[3] and is the valuation for the purposes of jurisdiction (*see* S. 6 and S. 96, Note 18, *supra*).

Order 7, Rule 2—Note 1.

(1) See also *Bholanath Chatterjee* v. *Indur Chand Doogar*, (1870) 14 Suth W R 373 (374) [Suit for contribution]; *Rujaput Rai* v. *Mahomed Ali Khan*, (1873) 5 N W P H C R 215; *Bishnu* v. *Bepin*, (1914) 25 Ind Cas 729 (732): 18 Cal W N 622.

Note 2.

(1) *Raja Promode Nath Roy* v. *Secretary of State for India*, 1927 Cal 182 (183, 184): 53 Cal 992: 31 Cal W N 112: 99 Ind Cas 428; *Bhupendra Kumar* v. *Purna Chandra*, (1916) 43 Cal 650 (655): 15 Cal W N 506: 8 Ind Cas 34 (36): 13 Cal L Jour 132; *Kemgam Swamy* v. *V Subbamma*, 1930 Mad 30 (37): 57 Mad L Jour 728: 30 Mad L W 810: 124 Ind Cas 290; *Bhupendra Kumar* v. *Purna Chandra Bose*, (1914) 24 Ind Cas 232 (234) Cal; *Ijjatulla* v. *Chandra*, (1907) 34 Cal 954 (960, 961): 6 Cal L Jour 255: 11 Cal W N 1133 F B.

(2) *Ram Gulam* v. *Chintaman*, 1926 Pat 218 (228): 1926 Pat H C C 49: 7 Pat L Tim 313: 93 Ind Cas 939: 5 Pat 361 F B; *Bidyadhar Bachar* v. *Manindra Nath*, 1925 Cal 1076 (1080, 1081): 42 Cal L Jour 49: 29 Cal W N 869: 89 Ind Cas 726 F B; *Ramkrishna Bhikaji* v. *Bhimabai*, (1891) 15 Bom 416 (418): 1890 Bom P J 364; *Maung Lu Gale and three others* v. *Maung Lu Po and ten others*, 1923 Rang 110 (112, 113): 4 U B R 140: 1 Bur L Jour 267: 77 Ind Cas 53; *Bhupendra Kumar* v. *Purna Chandra*, (1916) 43 Cal 650 (655): 15 Cal W N 506: 8 Ind Cas 34 (36): 13 Cal L Jour 132.

(3) *Ram Gulam* v. *Chintaman* 1926 Pat 218 (225, 229): 1926 Pat H C C 49: 7 Pat L Tim 313: 93 Ind Cas 939: 5 Pat 361.

As to the ascertainment of mesne profits, *see* O. 20, R. 12, *infra*. *See also* S. 11 of the Court Fees Act. O. 7, R. 2, Notes 2—4.

3. **Accounts.**—A suit for money which will be found to be due on taking accounts, is instituted when the defendant is under a legal obligation to render accounts which the plaintiff is not in a position to ascertain.[1] In such cases this rule requires that the plaintiff should state *approximately* the amount which will be found due to him on taking unsettled accounts between him and the defendant.[2] The approximation required under sub-rule (2) may be a rough and ready approximation such as the plaintiff is able to give.[3] The valuation given by the plaintiff is purely tentative, and is the valuation for the purposes of jurisdiction (*see* S. 6, *supra*).

As to the ascertainment of the amount due in a suit for accounts *see* O. 20, Rr. 16 and 17, *infra* and S. 11 of the Court Fees Act.

4. **Suit for damages.**—It has been held that in a suit for damages based on fraud, the plaintiff may give an *approximate* valuation in the plaint and offer to pay additional Court fees in case a larger amount is found due, *before the decree is* passed, as S. 11 of the Court Fees Act, will not apply to such a case.[1]

R. 3. [New.] *Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.* O. 7, R. 3, Note 1.

Where the subject-matter of the suit is immoveable property.

Local Amendment.

BENGAL.—

After R. 3, O. 7, *add* the words "and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures".

Synopsis.

1. "Immoveable property." See S. 16.
2. "Description sufficient to identify it."
3. Conflict between the description by boundaries and by area.

1. "**Immoveable property**".—*See* S. 16, *supra*. This rule does not apply unless immoveable property is the *subject-matter* of the suit.[1]

Note 3.

(1) *Maroti* v. *Balaji*, (1912) 14 Ind Cas 786 (787): 8 Nag L R 86.

(2) *Khusal Chand Mulchand* v. *Nagindass*, (1888) 12 Bom 675 (677): 1888 Bom P J 1.

(3) *Bai Hiragavri* v. *Gulabdas*, (1914) 22 Ind Cas 71 (73): 15 Bom L R 1123; *Govandos Kasandas* v. *Dayabhai Savichand*, (1885) 9 Bom 22 (24).

Note 4.

(1) *Raghavaji* v. *Annamalai*, (1907) 17 Mad L Jour 625 (626). See also *London and Northern Bank, Ltd* v. *George Newnes, Ltd*, 16 Times L Rep 433.

Order 7, Rule 3—Note 1.

(1) *Praphull Dev* v. *Sham Lal*, 1932 Lah 328 (330): 138 Ind Cas 335 [Administration suit is not one for possession of immoveable property—O 7, R 3 has no application].

O. 7, R. 4, Notes 2—3.

(*v*) Suit by a Shebait on behalf of the idol.

(*vi*) Suit concerning property vested in a trustee where the contention is between beneficiaries and third persons (O. 31).

(*vii*) Suit on behalf of a partnership in the name of the firm (O. 30).

A plaintiff suing in a representative capacity should set it out clearly in the plaint and show that he is qualified to do so.[1] The plaint should show that the plaintiff has an actual *existing* interest in the subject-matter, and the representation must be based on some authority legally expressed; the plaintiffs must further, be *capable* in law of representing the persons whom they profess to bind.[2] The Court has no jurisdiction to adjudicate upon a right when there has been no *proper* representation of the interests in litigation.[3] As to who are proper representatives in particular cases *see* below.[4]

3. "Has taken the steps necessary to enable him to institute the suit". Under S. 212 of the Succession Act, (39 of 1925) it is provided that letters of administration should be obtained to establish any right to the property of a person *dying intestate*, in cases to which that section applies. The administrator, in such cases derives his title solely under the grant of the letters of administration and, until such grant is made, he has no title to the estate of the deceased; he cannot, therefore, institute an action as Administrator before he gets the grant.[1] The plaint should, therefore, state that the plaintiff has obtained the letters of administration. But where a person dies *leaving a will*, the executor derives his title and authority from the *will* of the testator and not from any *grant of probate;* he may, therefore, institute a suit as executor before obtaining a probate, though he may not be entitled to a *decree* unless he produces a probate,[2] in as much as the production of the probate is the only way in which he is allowed by law to *prove* his title.[3] Similarly it is

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Note 2.

(1) *Gansavant* v. *Narayan*, (1883) 7 Bom 467 (470, 471): 8 Ind Jur 90; *Harbax* v. *Lachman*, 1925 Nag 183 (184): 82 Ind Cas 201.

(2) *Hashmat Husain* v. *Saddiq Hasan*, 1927 All 128 (130): 98 Ind Cas 998.

(3) *Sharuddin* v. *Jijaruddin*, (1917) 42 Ind Cas 543 (544) Cal.

(4) Hindu widow cannot represent husband when sons are alive; *Ram Kanaye Gossamee* v. *Meernomoyee Dossee*, (1865) 2 Suth W R 49 (50, 51); *Jannobee Chowdhrain* v. *Dwarkanath Roy*, (1867) 7 Suth W R 455 (455); *Surja Kant Acharya* v. *Hemanta Kumari*, (1893) 20 Cal 498 (504): 20 Ind App 25: 17 Ind Jur 169: 6 Sar 279. Undivided co-parcener in joint family dying —His widow cannot represent him: *Phoolbas Koonwar* v. *Lalla Jogeshur*, (1876) 3 Ind App 7 (22, 27): 1 Cal 226: 25 Suth W R 285: 3 Sar 573: 3 Suthor 236; *Hari Saran* v. *Bhubaneswari*, (1889) 16 Cal 40 (56): 15 Ind App 195: 5 Sar 198: 12 Ind Jur 373; *Ram Kishore* v. *Kally Kanto*, (1881) 6 Cal 479 (481): 8 Cal L Rep 1. Miscellaneous: *Manilal Rewadal* v. *Bai Rewa*, (1893) 17 Bom 758 (770); *Papammal* v. *Ramaswami Chetti*, (1864-65) 2 Mad H C R 365 (366); *Brojomohun Doss* v. *Hurrololl*, (1880) 5 Cal 700 (705): 6 Cal L Rep 58.

Note 3.

(1) *Meyappa* v. *Subramanya*, (1916) 35 Ind Cas 323 (324): 20 Cal W N 833: (1916) 1 Mad W N 455: 18 Bom L R 642: 43 Ind App 113 P C.

(2) *A G of Bengal* v. *Lalit Mohan*, (1908) 12 Cal W N 738 (739). See however *Sethna* v. *Grace Edith Hemmingway*, (1915) 18 Ind Cas 114 (115): 38 Bom 618: 16 Bom L R 534 [Where it has been held that if the suit without being dismissed is allowed to proceed, and before decree the Letters are obtained, a decree passed is not contrary to S 190, Succession Act]; *Thompson* v. *Reynolds*, (1827) 3 C & P 123; *Wooley* v. *Clark*, (1822) 5 B & Ald 744: 1 Dow & Ry (K B) 409: 24 R R 546; *Meyappa* v. *Subramanya*, (1916) 35 Ind Cas 323 (324): 20 Cal W N 833: (1916) 1 Mad W N 455: 18 Bom L R 642: 43 Ind App 113 P C; *Chandra Kishore* v. *Prasanna Kumari*, (1911) 9 Ind Cas 122 (124): 38 Cal 327: 38 Ind App 7: 15 Cal W N 121: 9 Mad L Tim 71: (1911) 2 Mad W N 30: 13 Cal L Jour 58: 8 All L J 96: 13 Bom L R 67: 21 Mad L Jour 116: 4 Bur L Tim 65 P C; *Charu Chandra Pramanik* v. *Nahush Chandra Kundu*, 1923 Cal 1 (5): 50 Cal 49: 36 Cal L Jour 35: 74 Ind Cas 630; *Bala Krishnudu* v. *Narayanaswamy*, (1914) 24 Ind Cas 852 (855): 37 Mad 175; *Jamshedji* v. *Hirjibhai*, (1913) 19 Ind Cas 406 (409): 37 Bom 158: 15 Bom L R 192; *Manuel Louis Kunha* v. *Jnana Coelho*, (1908) 31 Mad 187 (205): 18 Mad L Jour 158 [Per Sankaran Nair, J].

(3) *Meyappa* v. *Subramanya*, (1916) 35 Ind Cas 323 (324): 20 Cal W N 833: (1916) 1 Mad W N 455: 18 Bom L R 642: 43 Ind App 113 P C.

O. 7, R. 4, Notes 3—5.

not necessary for a person claiming on *succession* to the effects of a deceased person, to obtain a succession certificate before instituting a suit for the recovery of a debt due to the deceased, though no *decree* will be passed before the production thereof.[4] The obtaining of a probate or of a succession certificate in such cases is not a "step necessary to enable the plaintiff to *institute* the suit" and consequently it is not necessary to allege in the plaint that the plaintiff has obtained the probate or the certificate.

This rule, however, applies only to the *institution* of suits and does not prohibit the *continuing* of the suit already filed, by the legal representatives of a plaintiff dying during the pendency of the suit, provided the representative capacity is established before decree.[5]

4. Probate and Letters of Administration.—*See* Note 3 above.

Sections 212 and 213 of the Indian Succession Act, provide that probate and Letters of Administration are necessary to establish any right to the property *in cases to which the section applies;* but the sections are expressly made inapplicable to particular cases and in those cases, a plaintiff may commence any action without a probate or letters of administration. *See* Notes 5—8 below. A probate issued from a Native Court is not sufficient for instituting a suit in British India.[1] Where a probate is not produced, the Court should grant time to the plaintiff to produce the probate, and not dismiss the suit.[2]

5. Hindus.—As regards Hindu wills, probate is necessary under S. 213 of the Indian Succession Act, only if the wills are of the class mentioned below:—

(1) If the will is made on or after the 1st September 1870, within the territories which, on that date, were subject to the Lieutenant-Governor of Bengal or were within the Local limits of ordinary Original Civil Jurisdiction of the High Courts of Judicature at Madras and Bombay.

(2) If the will is made outside those territories or limits, but relates to immoveable property situate within those territories or limits.

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(4) *Lachmi* v. *Ganga Prasad*, (1882) 4 All 485 (486): 1882 All W N 122; In re *Ramdas Brij*, (1886) 10 Bom 107 (108): *Janaki Ballav Sen* v. *Hafiz Mahomed Ali Khan*, (1886) 13 Cal 47 (50); *Ram Narain* v. *Ram Chunder*, (1891) 18 Cal 86 (90); *Yado* v. *Andrao and Smit Rai*, (1893) 6 C P L R 157 (158); *Govindappah* v. *Kondappah Sastrulu*, (1870-71) 6 Mad H C R 131 (133); *Kammathi* v. *Mangappa*, (1893) 16 Mad 454 (455); *Alice Thorp* v. *Shamat Lal*, (1918) 44 Ind Cas 733 (734): 3 Pat L Jour 160; *Zabur Main* v. *Puran Singh*, 1924 Pat 525 (526): 1924 Pat H C C 103: 78 Ind Cas 307: 5 Pat L Tim 504; *Shodone Mohaldar* v. *Halalkhore Mohaldar*, (1879) 4 Cal 645 (647): 3 Cal L Rep 462 [Decree passed without succession certificate on condition that decree should be executed only on production of the certificate—Decree bad]; *Santaji Khanderao* v. *Ravji*, (1891) 15 Bom 105 (106) [Even a compromise decree cannot be passed without succession certificate]. But see *Mulchand* v. *Motichand Hargovindas*, (1872) 9 Bom H C R 37 [Succession certificate should be produced before suit]. The same rule will apply to applications for execution of decree. See *Maugal Khan* v. *Salimulla*, (1894) 16 All 26 (28): 1894 All W N 197; *Kalian Singh* v. *Ram Charan*, (1896) 18 All 34 (35): 1895 All W N 148; *Brojonath* v. *Iswar Chandra*, (1892) 19 Cal 482 (485); *Hafizuddin* v. *Abdool*, (1893) 20 Cal 755 (757); *Balkishan* v. *Wagar Singh*, (1896) 20 Bom 76 (77, 78). But see *Chimniram Umaji* v. *Hanmanta*, (1891) 15 Bom 265 (267).

(5) *Torregrosa* v. *Pragji*, (1892) 16 Bom 519 (521).

Note 4.

(1) *Manasing* v. *Ahmad Kunhi*, (1894) 17 Mad 14 (16).

(2) *Batasi* v. *Mahesh*, (1883) 5 All 555 (556): 1883 All W N 133; *Basanta* v. *Gopal*, (1916) 26 Ind Cas 21 (22): 18 Cal W N 1136.

O. 7, R. 4, Notes 5—8.

Therefore, it is not obligatory on executors or legatees under *other wills* to take out probate or letters of administration (with copy of will annexed,) to establish their rights in a Court of law.[1]

Where a Hindu dies *intestate* it is *not necessary* to obtain letters of administration to the estate of the deceased, (*see* S. 212, sub-S. 2 of the Indian Succession Act).[2]

If the suit is to recover a *debt due* to the deceased, it is necessary that a probate, or letters of administration or a succession certificate should be produced, as otherwise no decree can be passed, (*see* S. 214 of the Indian Succession Act).

6. **Mahomedans.**—In the case of Mahomedans, it is not necessary to obtain a probate or letters of administration.[1] *See* Ss. 212 and 213 of the Indian Succession Act. But it is, however, necessary, if the suit is for the recovery of *a debt due to the deceased*, to produce a probate or letters of administration or succession certificate, (*see* S. 214 of the Indian Succession Act)[2] as above.

7. **Indian Christians.**—"Indian Christian" has been defined to mean a native of India, who is or in good faith claims to be of unmixed Asiatic descent and who professes any form of the Christian religion.[1] Till the passing of the Native Christian Administration of Estates Act, 1901,[2] the Indian Christians were governed by the Indian Succession Act, (1865) and, therefore, if the deceased died intestate, letters of administration were necessary and in case the deceased left a will, a probate of the will was necessary to establish any right to his property.[3] But the Native Christian Administration of Estates Act provided that S. 190 of the Indian Succession Act shall not apply to the property of an Indian Christian who died intestate, and though a probate was still necessary in the case of a will, no letters of administration were necessary in the case of intestacy. The law is the same since the passing of the Indian Succession Act, 1925, wherein S. 212 provides that no letters of administration are necessary to establish any right to any part of the property of the deceased. A probate, however, is necessary in the case of a will. A succession certificate is necessary in a suit to recover a debt due to deceased as above (S. 214).

8. **Europeans, Parsees, Jews and Armenians.**—These cases are governed by the provisions of S. 212 (1) and S. 213 (1) of the Indian Succes-

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Note 5.

(1) *Krishna Kinkur* v. *Rai Mohun*, (1887) 14 Cal 37 (41): 11 Ind Jur 141 [Hindu will made before 1st September, 1870—No probate necessary]; *Krishna Kinkur* v. *Panchuram*, (1890) 17 Cal 272 (275) [Will made before 1st September, 1870—No probate necessary]; *Sarat Chandra* v. *Bhupendra Nath*, (1898) 25 Cal 103 (108, 109) [Will made before 1st September, 1870—No probate necessary]; *Bhagvansang* v. *Bechardas*, (1881) 6 Bom 73 (75): 6 Ind Jur 259 [Will made in mufassil—No probate necessary]; *Kanhaiya Lal* v. *Munni*, (1896) 18 All 260 (262): 1896 All W N 44 [Will made in mufassil—No probate necessary].

(2) *Jogendra* v. *Apurna*, (1909) 3 Ind Cas 859 (860): 13 Cal W N 1190.

Note 6.

(1) *Sakina Bibee* v. *Md Ishak*, (1910) 8 Ind Cas 655 (656, 657): 37 Cal 839: 15 Cal W N 185; *Fatma* v. *Essa*, (1883) 7 Bom 266 (272).

(2) *Moosa* v. *Essa*, (1884) 8 Bom 241 (255).

Note 7.

(1) Section 2 (*d*), the Indian Succession Act, 1925 (XXXIX of 1925).

(2) Act VII of 1901.

(3) Section 190, the Indian Succession Act, 1865 (X of 1865).

sion Act, and, therefore, it is necessary to obtain, a probate or letters of administration as the case may be to establish any right in a Court of law.[1] O. 7, R. 4, Notes 8—11.

9. **Succession certificate.**—In a suit for *recovery of a debt* due to a deceased person, the person claiming on *succession* to the effects of the deceased should produce a probate, or letters of administration, or a succession certificate having the debt specified therein, as otherwise no *decree* can be passed under S. 214 of the Indian Succession Act. But if the debt is a joint family debt and the plaintiff claims by *survivorship*, no succession certificate is necessary.[1] As to the other cases where succession certificate is not necessary, *see* foot-note below.[2] As to what is a "suit for debt" for the purposes of S. 214 of the Act, *see* Notes 10 and 11, below.

10. **Suits for rent.**—The word "debt" in section 214 (1) of the Indian Succession Act does not include rent, revenue or profits in respect of land used for agricultural purposes [*see* S. 214 (2)] and, therefore, no succession certificate is necessary to recover rent for agricultural land.[1] The amount of the decree for rent, deposited by defendant in Court, is still rent and can be withdrawn without a succession certificate by the legal representatives of deceased decree-holder.[2]

11. **Suit for debt.**—Under S. 214 of the Indian Succession Act, the Court cannot pass a decree against a debtor of the deceased in favour of a person claiming on *succession* to be entitled to the effects of the deceased except on production of a succession certificate, etc. As to what is a suit for debt, *see* Note 10 above and the undermentioned cases.[1]

Note 8.

(1) *Framji* v. *Adarji*, (1893) 18 Bom 337 (342) [Letters of administration should be obtained in respect of the whole estate]; *Ratanbai* v. *Narayandas*, 1927 Bom 474 (478): 29 Bom L R 900: 104 Ind Cas 794: 51 Bom 771 [But the section is not applicable to a suit for sale by a mortgagee against the heirs of mortgagor].

Note 9.

(1) *Puteshuri* v. *Bhagwati Prasad*, (1895) 17 All 578 (580): 1895 All W N 132; *Jugmohandas* v. *Allu Maria*, (1895) 19 Bom 338 (339); *Vithal* v. *Gotya*, (1899) 1 Bom L R 197 (198); *Beejraj* v. *Bhyro Persaud*, (1896) 23 Cal 912 (912); *Mukund Balakrishna Buti* v. *Purnia*, (1896) 9 C P L R 65 (68); *Venkataramanna* v. *Venkayya*, (1891) 14 Mad 377 (379); *Vaidyanatha Ayyar* v. *Chinnaswami Naick*, (1894) 17 Mad 108 (117); *Subramanian* v. *Rakku*, (1897) 20 Mad 232 (234): 7 Mad L Jour 100; *Pallamraju* v. *Bapanna*, (1899) 22 Mad 380 (381); *Maya Ram* v. *Shib Das*, 1901 Pun Re No 20: 84 Pun L R 1901; *Pera Reddi* v. *Muhammad Abdul Hussain*, (1891) 1 Mad L Jour 679 (680) [Where there is nothing to show debt belongs to joint family, succession certificate should be produced]; *Gur Pershad* v. *Dhori*, (1910) 7 Ind Cas 806 (808): 15 Cal W N 49: 13 Cal L Jour 203: 38 Cal 182 [Impartible estate—Succession certificate not necessary to recover debt due to last holder of estate]; *Rajah of Kalahasti* v. *Achigadu*, (1907) 30 Mad 454 (457): 17 Mad L Jour 367.

(2) *Ramchandra Hari* v. *Bapu*, (1892) 16 Bom 240 (241) [To file an award—No succession certificate necessary]; *Babasab* v. *Narsappa*, (1895) 20 Bom 437 (438) [Curator suing under Act XIX of 1841 need not produce succession certificate]: *Karupaswami* v. *Pichu*, (1892) 15 Mad 419 (420): 2 Mad L Jour 116 [Suit by assignee of debt—Succession Certificate is necessary]; *Srimant Raja Mallikarjuna* v. *Makerla*, (1897) 20 Mad 162 (166): 24 Ind App 73: 7 Sar 205: 1 Cal W N 497 [Widow suing as trustee of endowment—No succession certificate necessary]; *Jones* v. *Thompson*, 1858 E B & E 63 [Rent due after death of deceased—No succession certificate necessary]; *Ranchordas* v. *Bhagubhai*, (1893) 18 Bom 394 (396) [Rent accruing after death of deceased—No certificate necessary].

Note 10.

(1) *Nagendra Nath* v. *Satadalbashini*, (1899) 26 Cal 536 (538): 3 Cal W N 294; *Andalammal* v. *Venkatacharlu*, (1907) 17 Mad L Jour 257 (257); *Zamindar of Kalahasti* v. *Venkatapa*, (1891) 1 Mad L Jour 680 (682) [But in a suit on a bond though for rent, a Succession Certificate is necessary].

(2) *Surendra* v. *Upendra*, (1913) 18 Ind Cas 495 (495) Cal.

Note 11.

(1) *Abdul Karim Khan* v. *Maqbul-un-nissa Begam*, (1908) 30 All 315 (317): 5 All L J 598: 1908 All W N 113 [Dower whether prompt or deferred is a debt]; *Sayad Ahmed Shazi* v. *Mussamut Bunyadi Begam*, (1891) Pun Re No 88, (Do.); *Bid Nath* v. *Shamanand*, (1894) 22 Cal 143 (151) [Suit on mortgage—Not a suit for debt—No succession certificate necessary]; *Kanchan Modi* v. *Baij Nath Singh*, (1892) 19 Cal 336 (339, 340), (Do.); *Ammanna* v. *Gurumurthi*, (1893) 16 Mad 64 (66): 2 Mad L Jour 155, (Do.); *Nanchand* v. *Yenawa*, (1904) 28 Bom 630 (633, 635): 6 Bom L R 582, (Do.); *Gopala* v. *Swaminathayyan*, (1889) 12 Mad 255 (257), (Do.); *Arumugam Pillai* v. *Valura Koundan*, (1901) 24 Mad 22 (24), (Do.); *Raghu Nath Saha* v. *Poresh Nath Pundari*, (1888) 15 Cal 54 (57, 58), (Do.); *Hanwant Singh* v. *Mithana Koer*, (1900) All W N 94 (95), (Do.). But see

O. 7, R. 4, Notes 12—14.

12. Suit by or against a company.—*See* O. 29, Rules 1and 2.

13. Suit by or against a club.—*See* O. 1, Rule 8, Note 4 *supra.*

14. Cause title of suit.—*See* Appendix A "Description of parties in particular cases". It is not, however, *necessary,* under this rule that the capacity in which the plaintiff sues should be stated in the *cause title* of the plaint although it is a convenient place to make such a statement. It is sufficient if the capacity in which the plaintiff sues appears in the body of the plaint.[1] The strict rules of English pleading are not applicable to India.[2]

O. 7, R. 5, Note 1.

R. 5. [S. 50, Para. 5.] The plaint *shall* show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Defendant's interest and liability to be shown.

[Cf. 1877—S. 50, Cl. 5.]

Synopsis.

1. Defendant's interest and liability.

1. Defendant's interest and liability.—This rule makes it necessary that the plaintiff should show the interest of the defendant in the subject-matter of the suit and his liability to meet the plaintiff's demand.[1] If the defendant is sued in a *representative* capacity, it is incumbent on the plaintiff to state the capacity in which the plaintiff seeks to make him liable, as otherwise any decree passed will bind no more than the defendant's individual interest.[2] As to the liability of the defendant in particular cases, *see* below.[3]

Fatehchand v. *Muhammad Buksh*, (1894) 16 All 259 (268): 1894 All W N 74; *Palniyandi* v. *Veerammal*, (1906) 29 Mad 77 (79) [Suit on mortgage. But if personal remedy sought, Succession Certificate necessary]; *Sahader Sukul* v. *Sheikh Sukhawat*, (1908) 12 Cal W N 145 (150): 7 Cal L Jour 658, (Do.); *Subbanna* v. *Munekka*, (1895) 18 Mad 457 (458): 5 Mad L Jour 61 [Suit for damages for wrongful detention not a suit for debt]; *Umesh Chandra Pramanick* v. *Mothura Mohan Haldar*, (1901) 28 Cal 246 (249): 5 Cal W N 607 [Right for personal decree being conditional not a debt]; *Jagannath Prasad* v. *Bageshwar Kunwar*, 1899 All W N 217 (218) [Arrears of annuity under a will is a debt]; *Sabju Sahib* v. *Noordin Sahib*, (1898) 22 Mad 139 (141, 144) [Suit for accounts—Not a suit for debt]; *Bisseswar Roy* v. *Durgadas*, (1905) 32 Cal 418 (420, 421), (Do.); *Treepoorasoondary* v. *Debendronath*, (1876) 2 Cal 45 (54) [Suit for immoveable property not a suit for debt]; *Bancharam* v. *Adya Nath*, (1909) 3 Ind Cas 492 (493, 494): 36 Cal 492: 10 Cal L Jour 180: 13 Cal W N 966 [Debt existing in the life of a creditor but which became payable only after his death is still a debt]; *Nemdhari Roy* v. *Mussamat Bisseswari Kumari*, (1898) 2 Cal W N 591 (593).

Note 14.

(1) *Kaurwani Singh* v. *Wasif Ali Murza*, (1915) 28 Ind Cas 818 (820): 19 Cal W N 1193; *Dinabandhu* v. *Chamiraddi*, (1916) 34 Ind Cas 548 (549) Cal; *Bidhu Sekar* v. *Kuloda Prasad*, (1919) 50 Ind Cas 525 (526): 46 Cal 877; *Deolal* v. *Tularam Ramsukh*, 1928 Nag 319 (321): 109 Ind Cas 785; *Sonachalam Pillai* v. *Kumaravelu Chettiar*, 1928 Mad 445 (446): 54 Mad L Jour 587: 27 Mad L W 769: 109 Ind Cas 199.

(2) *Sonachalam Pillai* v. *Kumaravelu Chettiar*, 1928 Mad 445 (447): 54 Mad L Jour 587: 27 Mad L W 769: 109 Ind Cas 199.

Order 7, Rule 5—Note 1.

(1) *Balaji Vinayak Buti* v. *Vithoba*, 1924 Nag 191 (193): 79 Ind Cas 614.

(2) *Sethurama Ayyar* v. *T B Varadaraja Ayyar*, 1932 Mad 185 (186, 187): 35 Mad L W 253: 1931 Mad W N 1282: 62 Mad L Jour 180: 136 Ind Cas 773; *Sankaran* v. *Parvathi*, (1889) 12 Mad 434 (437); *Lalit Mohan Pal Roy* v. *Srimati Dayamoyi*, 1927 P C 41 (41): 1927 Mad W N 95: 52 Mad L Jour 426: 29 Bom L R 759: 25 Mad L W 709: 45 Cal L Jour 404: 105 Ind Cas 469; *Nugenderchunder Ghose* v. *Sreemutty Dossee*, (1867) 11 Moo Ind App 241 (265, 266): 8 Suth W R P C 17: 2 Suther 77: 2 Sar 275; *Baijun Doobey* v. *Brij Bhooken*, (1875-76) 1 Cal 133 (140): 2 Ind App 275: 24 Suth W R 206: 3 Sar 541: 3 Suther 207; *Deen Dayal* v. *Jugdeep*, (1877-78) 3 Cal 198 (203, 204): 4 Ind App 247: 1 Cal L Rep 49: 3 Sar 730: 1 Ind Jur 604: 3 Suther 468; *Maruti* v. *Lilachand*, (1881-82) 6 Bom 564 (566); *Lokt Mahto* v. *Aghoree Ajaib Lall*, (1880) 5 Cal 144 (146, 147): 4 Cal L Rep 465: 2 Shom L R 258; *Ramphul* v. *Deo Narain*, (1882) 8 Cal 517 (527): 10 Cal L Rep 489: 6 Ind Jur 579; *Umbika Prasad* v. *Ram Sahay*, (1882) 8 Cal 898 (907): 10 Cal L Rep 505: 7 Ind Jur 79; *Matangini* v. *Chooneymoney*, (1895) 22 Cal 903 (908).

(3) *Hari Vithal* v. *Jairam*, (1890) 14 Bom 597 (603, 604) [The other members of the family are bound by a decree properly passed against

If there are more defendants than one, the plaint should disclose a cause of action against each defendant and to state the interest of each defendant in the subject-matter and to distinctly state how each defendant is liable to meet the plaintiff's demand.[4]

O. 7, R. 5, Note 1.

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the manager]; *Kanemar Venkappayya* v. *Krishnachariya*, (1908) 31 Mad 161 (162, 163): 17 Mad L Jour 613: 2 Mad L Tim 529 [Debts contracted by Manager binds minor members of family]; *Nunna Brahmayya Setti* v. *Chidaraboyina Venkitaswamy*, (1903) 26 Mad 214 (221), (Do.); *Gokal Kastur* v. *Amarchand Jasraj*, (1907) 9 Bom L R 1289 (1293), (Do.); *Pran Krishna Tewary* v. *Jadu Nath Trivedy*, (1898) 2 Cal W N 603 (605, 606) [Hindu grandson if liable to pay interest on mortgage]; *Pundit Prayrag Raj* v. *Goukaran Pershad Tewari*, (1902) 6 Cal W N 787 (793, 794), (Do.); *Lachman Das* v. *Khunni Lall*, (1897) 19 All 26 (32): (1896) 16 All W N 183, (Do.); *Govind Krishna Gujar* v. *Sakharam Narayan*, (1904) 28 Bom 383 (389): 6 Bom L R 344 [Son liable to pay father's debts whether father is dead or alive]; *McDowell & Co* v. *Ragavachetty*, (1904) 27 Mad 71 (75) [Son not liable to pay sums misappropriated by father]; *Durbar Khachar* v. *Khachar Harsur Oghad*, (1908) 32 Bom 348 (351, 352): 10 Bom L R 297, (Do.); *Debi Dut* v. *Jadu Rai*, (1902) 24 All 459 (460): 22 All W N 123 [Sons liable under mortgage bond executed by father]; *Narayanaswami Chetti* v. *Samidas Mudali*, (1883) 6 Mad 293 (294): 7 Ind Jur 357 [Father acknowledging to pay barred debt—Son liable to pay debt so acknowledged]; *Tukarambhat* v. *Gangaram Mulchand Gugar*, (1899) 23 Bom 454 (457)) [Surety debts of father bind the son]; *The Maharaja of Benares* v. *Ramkumar Misir*, (1904) 26 All 611 (614): 1 All L J 330: 1904 All W N 42, (Do.); *Chettikulam Venkitachala Reddiar* v. *Chettikulam Kumara Venkitachala Reddiar*, (1905) 28 Mad 377 (378), (Do.); *Sitaramayya* v. *Venkataramanna*, (1888) 11 Mad 373 (374), (Do.); *Raghunath Addaikka Pattar* v. *Natesa Pillai*, (1907) 17 Mad L Jour 283 (284, 285), (Do.); [Yet father cannot charge the estate as surety]; *Narayan* v. *Venkatacharya Balkrishnacharya*, (1904) 28 Bom 408 (411): 6 Bom L R 434 [The surety debts of the grandfather are not binding on the grandson]; *Muhammad Awais* v. *Har Sahai*, (1885) 7 All 716 (719): (1885) 5 All W N 172; *Hendry* v. *Mutty Lall Dhur*, (1876-77) 2 Cal 395 (398), (Do.); *Jafri Begam* v. *Amir Muhammad Khan*, (1885) 7 All 822 (825, 826) F B: (1885) 5 All W N 248, (Do.); *Hamir Singh* v. *Musammat Zakia*, (1875-78) 1 All 57 (59, 60), (Do.); *Kunhammad* v. *Kutti*, (1889) 12 Mad 90 (91, 92) [Heirs not represented being minors, suit binding since their father is a party and represents them though not formally appointed guardian]. But see *Davalava* v. *Bhimaji Dhondo*, (1896) 20 Bom 338 (344, 345, 346); *Jummal Ali* v. *Tirbhee Lall Doss*, (1869) 12 Suth W R 41 (43, 44) [Adopted son liable for adoptive father's debt only if he succeeds to his estate]; *S V Chinnathambar* v. *Alwar Ayyengar*, (1881) 3 Mad 42 (46): 5 Ind Jur 464 [Liability of Hindu son limited to the extent of father's assets received]; *Keval Bhagvan Gujar* v. *Ganpati Narayan*, (1884) 8 Bom 220 (222, 223) [Son liable to pay father's debts even if assets are in hands of third parties]; *Lallu Bhagvan* v. *Tribhuvan Motiram*, (1889) 13 Bom 653 (654); *Shah Enaet Hossein* v. *Syud Rumzan*, (1868) 10 Suth W R 216 (216, 217): 1 Beng L R A C 172 [Property alienated by Mahommadan heir-at-Law not liable to creditor of deceased]; *Raj Roop Singh* v. *Buldeo Singh*, (1865) 2 Suth W R 258 (258) [Heirs of deceased liable to the extent of assets for debts due by deceased]; *Unnopoorna Dassea* v. *Ganga Narain Paul*, (1865) 2 Suth W R 296 (297); *Mooktakeshee Debia* v. *Wooma Churn Bhattocharjee*, (1869) 12 Suth W R 233 (234) [The heirs of a deceased person are responsible for the debts due by him, to the extent of the assets in their possession]; *Girdharlal Krishnavalabh* v. *Bairshiv, widow of Haribhaibalu*, (1884) 8 Bom 309 (310) [Legal representative not in possession of assets liabe if he can become possessed of the assets]; *Nathuram Siriji* v. *Kutti Haji*, (1897) 20 Mad 446 (447) [If heirs received sufficient assets from deceased, they can be made even personally liable to the extent of the assets]; *Birja* v. *Kishen Jivan*, (1881) Pun Re No 11 [Legal representatives can be sued without proof of receipt of assets from deceased]; *Girdhari Lal* v. *Baishiv*, (1884) 8 Bom 309 (310), (Do.); *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal*, (1879) 4 Cal 342 (345, 346): 3 Cal L Rep 154 [Person in possession of estate represents estate till probate is obtained]; *Narayanaswami Pillai* v. *Esa Abbayi Sait*, (1905) 28 Mad 351 (352, 353) [Creditor in possession of assets liable as executor *de son tort*]; *Sotish Chunder Lahiry* v. *Nil Comul Lahiry*, (1885) 11 Cal 45 (51) [Decree against person in possession binds estate even if he is not the heir]; *Janaki* v. *Dhanu Lall*, (1891) 14 Mad 454 (457) [Decree against person in possession as representing estate binds the estate]; *Uma Sundari* v. *Nittyanund Shaha Rai*, (1879) 3 Cal L Rep 157 (158) [Suit against person in possession as representing estate of deceased binds the estate]; *Amir Dulphin* alias *Mohamdi Jan* v. *Baij Nath Singh* alias *Baiju Singh*, (1894) 21 Cal 311 (318) [Mahammadan widow in possession of assets liable as representative]; *Muttyjan* v. *Ahmed Ally*, (1882) 8 Cal 370 (373, 374): 10 Cal L Rep 346, (Do.); *Bussunteram Marwary* v. *Kamaluddin Ahmed*, (1885) 11 Cal 421 (429): 11 Ind Jur 29 [Mahammadan heir liable in respect of proportionate share of assets received]; *Pirthipal Singh* v. *Husaini Jan*, (1882) 4 All 361 (363, 364, 365): (1882) 2 All W N 70, (Do.); *Ambashankar Harprasad* v. *Sayad Ali Rasul*, (1895) 19 Bom 273 (275), (Do.); *Ram Dhun Dhur* v. *Mohesh Chunder Chowdhary*, (1883) 9 Cal 406 (409): 11 Cal L Rep 565 [Creditor of deceased Mahamadan cannot follow assets in hands of *bona fide* purchaser from heir at law]; *Land Mortgage Bank, Ltd* v. *Roy Luchmipat Singh*, (1881) 8 Cal L Rep 447 (448), (Do.); *Land Mortgage Bank, Ltd* v. *Bidyadhari Dasi*, (1881) 7 Cal L Rep 460 (463), (Do.); *Syud Buzyet Hossein* v. *Dooli Chund*, (1877-78) 4 Cal 402 (408): 5 Ind App 211: 3 Sar P C J 853: 3 Ind Jur 121 (Do.); *Himmut Bahadur* v. *Bhavani Kunwar*, (1908) 30 All 352 (362, 363): 5 All L J 339: 1908 All W N 143 [Estate of husband not liable for debts voluntarily incurred by wife to pay off husband's debts]; *Chandmull* v. *Ranee Soondery Dossee*, (1895) 22 Cal 259 (262, 265, 266, 267) [Insolvent dying before filing schedule but after adjudication—Widow and not Official Assignee is the legal representative of the insolvent for purposes of a suit by a creditor]; *Bai Jamna* v. *Bhaishankar*, (1891) 16 Bom 233 (237) [Residue left by Hindu widow (Bombay school) not liable for personal debts of widow].

(4) *Balaji Vinayak Buti* v. *Vithoba*, 1924 Nag 191 (194): 79 Ind Cas 614.

O. 7, R. 6, Notes 1—2.

R. 6. [S. 50, Para. 6.] *Where the suit is instituted after the expiration of the period prescribed by the law of limitation*, the plaint *shall* show the ground upon which exemption from such law is claimed.

Ground of exemption from limitation law.

[1859—S. 26. *See* Ss. 12 to 20 of the Indian Limitation Act, 1908.]

Synopsis.

1. Scope of the rule.
2. "The plaint shall show."

Exemption from limitation—Grounds of. See Note 2.

Omission to show grounds of exemption—Effect. See Note 1.

1. Scope of the rule.—Where, but for some ground of exemption from the law of limitation, a suit would *prima facie* be barred by limitation, it is necessary for the plaintiff to show in the plaint such ground of exemption.[1] If no such ground is shown in the plaint, it is liable to be rejected under O. 7, R. 11 (*d*), *infra*. The plaintiff will not be allowed to show the ground of exemption at the *trial* by putting in evidence any documents, such as acknowledgments of liability.[2] But the Court may, save in exceptional circumstances, allow the plaint to be *amended* by making the necessary allegations.[3]

2. "The plaint shall show."—It is sufficient that the ground of exemption is apparent on the face of the plaint. It is not necessary that the plaint should specifically, and in so many words, claim the ground of exemption. Thus where the fact of minority is apparent on the face of the record it is not necessary that the ground of exemption under S. 8 of the Limitation Act should be specifically pleaded.[1] Similarly, where a plaint is presented on the re-opening date after Court-holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4 of the Limitation Act was not specifically mentioned in the plaint will not entail the dismissal of the suit, inasmuch as the Court is bound to take judicial notice of the holidays.[2] On the same principle it has been held that where a plaint, presented to a wrong Court, is returned for presentation to the

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Order 7, Rule 6—Note 1.

(1) *Girdhari Lal* v. *Firm Bishnu Chand*, 1932 All 461 (464): 1932 All L J 279 [Acknowledgment relied on—Plaintiff must show it was within period of limitation]; *Panchu Mandal* v. *Isaf*, (1913) 18 Ind Cas 391 (392): 17 Cal W N 667; *Sawairam* v. *Ganesh Lal*, 1923 Nag 30 (31): 69 Ind Cas 521; *Gulam Hussain Tyaballi* v. *Mahamadally Ibrahimji*, (1910) 7 Ind Cas 455 (457): 34 Bom 540: 12 Bom L R 531; *Secretary of State* v. *Vira Rayan*, (1886) 9 Mad 175 (182); *Brooke* v. *Gibbon*, (1874) 21 Suth W R 47 (48); *Marudai Muthirian* v. *Chinnakannu Muthirian*, (1919) 52 Ind Cas 243 (244): 25 Mad Muthirian, (1919) 52 Ind Cas 243 (244): 25 Mad L Tim 295: 1919 Mad W N 429: 9 Mad L W 82; *Vithoba Yadeo* v. *Suryabhan*, 1924 Nag 80 (80): 69 Ind Cas 554; *Jago* v. *Mahadeo*, (1921) 59 Ind Cas 709 (710) Nag.

(2) *Jogeshwar Roy* v. *Raj Narayan Mitter*, (1902) 31 Cal 195 (201): 8 Cal W N 168 [Confirming 30 Cal 699]; *Nanakchand* v. *Mahomed Khan*, 1924 Lah 702 (706): 75 Ind Cas 1048; *Uttam Chand* v. *Thakur Devi*, 1922 Lah 39 (40): 3 Lah 233: 4 Lah L Jour 190: 69 Ind Cas 419; *Gobinda Mal* v. *Santa*, (1915) 26 Ind Cas 441 (442): 83 Pun Re 1914: 232 Pun L R 1915; *Chhaterdhari Mahto* v. *Nasib Singh*, 1924 Pat 806 (806): 5 Pat L Tim 551: 78 Ind Cas 919.

(3) *Nathamuni Narayana Ayyangar* v. *T K Balasubramaniya Iyer*, (1910) 7 Ind Cas 797 (797): 8 Mad L Tim 199; *Gunnaji* v. *Makanji*, (1909) 3 Ind Cas 159 (160): 34 Bom 250: 10 Beng L R 969: 11 Bom L R 498: 6 Mad L Tim 234; *Ram Sukh Das* v. *Ghulam Muhammad*, (1918) 46 Ind Cas 495 (495): 1918 Pun Re 105: 1918 Pun L R 120: 1918 Pun W R 116.

Note 2.

(1) *Gangadhar* v. *Abdul Ajij*, (1909) 2 Ind Cas 77 (78): 11 Cal L Jour 34: 14 Cal W N 128.

(2) *Tekochand* v. *Patto*, (1920) 56 Ind Cas 926 (927): 16 Nag L R 198.

proper Court, the endorsements on the plaint will show the applicability of S. 14 of the Limitation Act, and that therefore it is not necessary to specifically allege that ground of exemption.[3] All that the rule requires is that the plaints should show a ground of exemption from limitation where the suit is instituted after the expiration of the period of limitation. But once that is shown, the rule does not preclude the plaintiff from relying upon a *new ground* of exemption at the trial. According to the High Court of Bombay, however, the new ground taken should be *not inconsistent* with that taken originally,[4] while, according to the Calcutta,[5] and Lahore,[6] High Courts and the Judicial Commissioner's Court of Nagpur,[7] the new ground may *even be inconsistent* with the original one. But where the plaintiff once amends his plaint by relying upon a new ground of exemption, it has been held by their Lordships of the Privy Council, that he will not, thereafter, be allowed to rely upon the original allegation in the unamended plaint.[8] O. 7, R. 6, Note 2.

A plaintiff will not be allowed to rely upon a ground of exemption from limitation for the first time in appeal.[9] The appellate Court has the same powers of rejection of plaint as the trial Court, under O. 7, R. 11 (*d*).[10] Similarly a defendant will not be allowed to raise objections on the ground of failure to set out the grounds of exemption, for the first time in appeal or revision.[11]

This rule applies only to cases where the plaint is barred *prima facie*[12] and, therefore, a plaintiff is not precluded from relying upon a ground of exemption from limitation, if, on the facts found, the plaintiff's claim appears to be barred.[13] The plaintiff has to show that his cause of action accrued within the period of limitation.[14]

R. 7. [New.] *Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which* O. 7, R. 7.

Relief to be specially stated.

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(3) *Sukhbir Singh* v. *Piare Lal*, 1923 Lah 591 (592): 82 Ind Cas 866; *Yereni* v. *Vappulapati*, (1911) 9 Ind Cas 157 (158): 9 Mad L Tim 374; *Raghunath* v. *Samad Shah*, (1908) 7 Cal L Jour 560 (562): 12 Cal W N 617. See however *Bhupendra Kumar Chakravarthy* v. *Purna Chandra Bose*, (1914) 24 Ind Cas 232 (233, 234) Cal.

(4) *Yakub Ebrahim Sayani* v. *Bai Rahimatbai*, (1908) 10 Bom L R 346 (348).

(5) *Hingu* v. *Heramba*, (1910) 8 Ind Cas 81 (86): 13 Cal L Jour 139 [Distinguishing 31 Cal 195]. See also *Gangadhar Sirkar* v. *Khaja Abdul Ajij*, (1909) 2 Ind Cas 77 (78): 11 Cal L Jour 34: 14 Cal W N 128.

(6) *Parmeshri Das* v. *Kakiria*, 1922 Lah 230 (232): 2 Lah 13: 3 Lah L Jour 22: 63 Pun L R 1921: 60 Ind Cas 772.

(7) *Onkarlal* v. *Raj Mahomed*, 1921 Nag 1 (1 and 2): 17 Nag L R 209: 65 Ind Cas 279.

(8) *Pancham* v. *Ansar Hussain*, 1926 P C 85 (86, 87): 53 Ind App 187: 24 All L J 736: 1926 Mad W N 520: 48 All 457: 24 Mad L W 241: 31 Cal W N 324: 99 Ind Cas 650 P C.

(9) *Jagannath Rao Pantulu Garu* v. *Brindavanam Seshayya*, (1907) 17 Mad L Jour 281 (282): *Bhagabati Charan Roy* v. *Luton Mondal*, (1902) 7 Cal W N 218 (223): *Jago* v. *Mahadeo*, (1921) 59 Ind Cas 709 (710) Nag.

(10) *Vithoba Yadeo* v. *Suryabhan*, 1924 Nag 80 (80): 69 Ind Cas 554; *Sawatram* v. *Ganeshlal*, 1923 Nag 30 (31): 69 Ind Cas 521.

(11) *Reguna Nagendram Chetty* v. *Kuppusamy Iyer*, (1916) 36 Ind Cas 593 (593): 4 Mad L W 148; *Gauhar Bibi* v. *Ghulam Muhammad*, (1909) 4 Ind Cas 923 (924): 1909 Pun Re No 82: 1909 Pun W R 88.

(12) *Devaraj* v. *Shivram*, (1914) 25 Ind Cas 463 (466): 70 Pun Re 1914: 260 Pun L R 1914: 165 Pun W R 1914: *Kamala Devi* v. *Gurudayal*, (1919) 51 Ind Cas 283 (284): 17 All L J 880.

(13) *Khandu Lal* v. *Fazal*, (1919) 51 Ind Cas 956 (958): 1 Lah 21: *Ram Autar* v. *Beni Singh*, 1922 Oudh 135 (136, 137): 25 Oudh Cas 89: 68 Ind Cas 196.

(14) *Jagodish Ram* v. *Mukand Lal*, 1928 Lah 763 (764): 10 Lah L Jour 309: 30 Pun L R 105: 109 Ind Cas 331.

O. 7, R. 7, Note 1.

may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

[R. S. C., O. 20, R. 6.]

Synopsis.

1. Relief.
2. General or other relief.
3. Alternative relief.
4. Events happening after suit.

Court's power to grant relief not founded on pleadings. See Note 1, Pt. (4).

Relief to be specifically stated. See Note 1.

1. Relief.—This rule and O. 2, R. 2, sub-Rule 3 should be read together, and so reading them, the following general propositions may be deduced:—

(1) If the plaintiff, being entitled to more than one relief in respect of the same cause of action, omits to sue for any one of such reliefs, he shall not afterwards sue for any relief so omitted.

(2) Every plaint shall state *specifically* the relief which the plaintiff claims, either simply, or in the alternative.

(3) But a *general or other* relief need not, however, be specifically asked for, but may be given by the Court as if it had been asked for.

Where a question arises as to whether a plaintiff has asked for a particular relief in his plaint, the *whole* of the plaint must be considered,[1] and the *substance* and not merely the *form* of the plaint should be looked to.[2] But this liberality of construction is subject to the limit that the facts and documents which entitle the plaintiff to the relief claimed must be *stated or referred to* in his pleading. In *Mahomed Zahoor Ali Khan* v. *Mt. Thakooranee Rutta Koer*,[3] their Lordships of the Privy Council observed as follows:—

"Though the committee is always disposed to give a liberal construction to pleadings in Indian Courts so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings."

In *Sri Mahant Govind Rao* v. *Sita Ram Kesho*,[4] their Lordships of the Privy Council observed that the general rule that a plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his

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Order 7, Rule 7—Note 1.

(1) *Raoji* v. *Chaturbhuj*, 1931 Nag 198 (200): 27 Nag L R 299: 134 Ind Cas 857.

(2) *Sundara Ganapathi* v. *Dairasikamani*, 1931 Mad 94 (95): 1930 Mad W N 359: 129 Ind Cas 824; *Kalikumar Vidyaratna* v. *Kashi Chandra Mitra*, (1911) 11 Ind Cas 882 (884) Cal; *Firm Sunder Dass* v. *Firm Jassa Singh*, 1926 Lah 417 (418): 8 Lah L Jour 166: 27 Pun L R 344: 93 Ind Cas 928.

(3) (1868) 11 Moo Ind App 468 (474): 9 Suth W R P C 9: 2 Suth 107: 2 Sar 320 P C.

(4) (1898) 2 Cal W N 681 (685): 25 Ind App 195: 21 All 33: 7 Sar 370 P C. See also *Gokul Dalsaram* v. *Shrimal Kasturchand*, (1904) 6 Bom L R 288 (290); *Mukambika Shettithi* v. *Shid Daya Shetti*, 1924 Mad 116 (117): 18 Mad L W 543: 75 Ind Cas 618; *Nazoo Meah* v. *Mezar Ali*, 1926 Cal 1003 (1005): 43 Cal L Jour 501: 95 Ind Cas 1011; *Haji Khan* v. *Baldeo Das*, (1901) 24 All 90 (93): 1901 All W N 188.

pleadings, does not apply where the substantial matters which constitute the title of all the parties are touched in the *issues* and have been fully *put in evidence* in the case. Relief can be granted in such cases on the basis of such matters. O. 7, R. 7, Note 1.

It follows from what has been said above that no relief can be granted upon facts and documents not disclosed in the pleadings, nor dealt with by the issues or the evidence in the case.[5] Thus where the plaintiff asks for a particular relief on a specific ground, he cannot be granted the same relief on a different ground which is not at all disclosed in the plaint.[6] A plaintiff suing for a declaration of title to a certain property under a sale-deed executed in his favour, cannot succeed on the ground of *adverse possession* if the facts in support of that ground are not disclosed in the plaint.[7] But where a ground of relief *is disclosed* in the plaint, the fact that the plaintiff asked for the relief on a *different* ground will not disentitle him to relief on the ground disclosed in the pleading.[8]

Where a plaintiff claims a larger relief than he is entitled to, the suit should not be dismissed on that ground, but the plaintiff should be given the relief he is entitled to[9] unless the ground on which the lesser relief can be granted is *inconsistent* with the case of the plaintiff as set out in his pleadings or would lead to a determination of the issues which would embarrass the defendant.[10] Nor is it a ground for dismissing a suit that groundless charges

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(5) *Viraswami Gramini* v. *Ayyasamy Gramini*, (1906) 1 Mad H C R 471 (477); *Sasthi Charan De Dass* v. *Sarojini Debya*, (1909) 2 Ind Cas 492 (493): 10 Cal L Jour 213 [Relief restricted to property in plaint]; *Nogendra Mohan Roy* v. *Pyari Mohan Saha*, (1915) 30 Ind Cas 420 (422): 43 Cal 103: 21 Cal L Jour 605: 20 Cal W N 319 [Plaintiff cannot claim relief on defendant's allegations abandoning his case]; *Jankee* v. *Jhanjoo*, (1870) 2 N W P H C R 407; *Bhola Singh* v. *Banwari*, 1923 All 59 (59): 5 L R All (Civ) 670: 82 Ind Cas 350; *Maung Me* v. *Ma Sein*, (1910) 8 Ind Cas 962 (965): 5 L B R 192; *Sri Mahant Govind Rao* v. *Sita Ram*, (1899) 21 All 53 (69): 25 Ind App 195: 2 Cal W N 681: 7 Sar 370 P C; *Maikal Servai* v. *Thambusamy Servai*, (1914) 25 Ind Cas 934 (935): 1 Mad L W 853: 1914 Mad W N 784; *Chidambaram Pillai* v. *Muthu Pillai*, (1910) 5 Ind Cas 764 (766): 7 Mad L Tim 95.

(6) *Koonj Behari Lall* v. *Gridhareee Lall*, (1868) 10 Suth W R 189 (189): 1 Beng L R (S N) 12; *Lal Din* v. *Abdul Ghani*, 1927 Lah 36 (36): 99 Ind Cas 922: 8 Lah L Jour 546: 27 Pun L R 771 [Where plaintiff claims easement by prescription, no relief can be given on basis of easement by necessity]; *Mohendra Nath Ghose* v. *Nabin Chandra Ghose*, (1920) 57 Ind Cas 504 (504, 505) Pat [Where plaintiff claimed easement by prescription, no relief can be given on basis of a natural right]; *Shiu Suhai Mullick* v. *Lalla Hari Suhai Sing*, (1869) 3 Beng L R App 142 [Suit for pre-emption on ground of partnership—Plaintiff cannot get relief on the ground of vicinage].

(7) *Somasundaram* v. *Vadivelu*, (1908) 31 Mad 531 (532): 4 Mad L Tim 344.

(8) *Krishna Kumar De* v. *Kalinath Guha Ray*, (1917) 41 Ind Cas 421 (422) Cal; *Rajrup* v. *Abdul*, (1881) 6 Cal 394 (403, 404): 7 Ind App 240: 4 Sar 199: 7 Cal L Rep 529: 4 Ind Jur 530: 3 Suth 816: 4 Shom L R 7; *Achul* v. *Rajun*, (1881) 6 Cal 812 (814). See also *Secretary of State* v. *Mathurabhai*, (1890) 14 Bom 213 (220); *Surjoo Pershad* v. *Kashee Rawut*, (1874) 21 Suth W R 121 (122); *Roushan Bibee* v. *Hurray Kristo*, (1882) 8 Cal 926 (930) [Suit for rent on *kabuliyat*—Suit for rent may be decreed on other evidence if *kabuliyat* not proved]; *Laljee Singh* v. *Bunwary*, (1876) 25 Suth W R 448 (448).

(9) *Ammalu Ammal* v. *Namagiri*, (1918) 43 Ind Cas 760 (767): 22 Mad L Tim 391: 33 Mad L Jour 631: 6 Mad L W 722: 1918 Mad W N 110; *Malik Ahmed* v. *Shamsi Jahan*, (1906) 28 All 482 (487): 33 Ind App 81: 3 All L J 360: 10 Cal W N 626: 3 Cal L Jour 481: 1 Mad L Tim 143: 8 Bom L R 397: 16 Mad L Jour 269: 8 Sar 918; *Lakshuman* v. *Hari*, (1879-80) 4 Bom 584 (588, 589); *Benode Behari Patra* v. *Janki Kalwar*, (1915) 29 Ind Cas 468 (469) Cal; *Pitambur* v. *Ram Joy*, (1867) 7 Suth W R 92 (93); *Chunde Churn Chuckerbutty* v. *Koorban Ali*, (1868) 10 Suth W R 362 (363); *Pulamada* v. *Ravuthu*, (1888) 11 Mad 94 (97); *Karu Musi Brahmanna Sastrudu* v. *Jaldu Venkatasubba Rao*, (1913) 19 Ind Cas 848 (848): 24 Mad L Jour 561: 1913 Mad W N 432 [Decree for admitted amount passed though plaintiff claimed larger figure]; *Viswanathaswami Naicker* v. *Kamu Ammal*, (1913) 21 Ind Cas 724 (729): 24 Mad L Jour 271; *Nambasiva Iyer* v. *Subramaniya Iyer*, (1916) 36 Ind Cas 576 (576): (1916) 2 Mad W N 214: 4 Mad L W 260; *Ghoosti* v. *Sitku*, (1918) 44 Ind Cas 557 (557) Nag; *Khuda Bux* v. *Fatteh Khatun*, (1918) 46 Ind Cas 679 (681): 140 Pun W R 1918: 13 Pun Re 1919; *Mt Huri* v. *Roshan*, 1923 Sind 5 (8): 16 Sind L R 112: 71 Ind Cas 161; *Jokhan* v. v. *Mahesh Singh*, (1915) 27 Ind Cas 720 (721): 13 All L J 150 [Plaintiff sued for possession—Possession subject to conditions of service decreed]. See however *Asa Ram* v. *Sukha Singh*, 1921 Lah 336 (336): 4 Lah L Jour 416 [Plaintiff's case partly false—Whole suit should be dismissed].

(10) *Ammalu Ammal* v. *Namagiri Ammal*, (1918) 43 Ind Cas 760 (767): 22 Mad L Tim 391: 33 Mad L Jour 631: 6 Mad L W 722: 1918 Mad W N 110.

O. 7, R. 7, Notes 1—2.

of fraud are made against the plaintiff, provided he has a good cause of action.[11] But a Court cannot grant a *larger* relief than that claimed, even if the plaintiff is really entitled to it, unless the plaintiff gets the plaint *amended* with the leave of the Court.[12]

Where the plaintiff has omitted to ask for the appropriate reliefs, he may apply for amendment of the plaint by inserting a prayer for the grant of such reliefs.[13] *See* O. 6, R. 17.

A Court will not grant any relief which it cannot enforce[14] or which is useless and unprofitable to the parties.[15]

2. General or other reliefs.—As has been seen in Note 1, *ante*, a general or other relief need not be specifically asked for in the plaint, but can always be granted by the Court as if it had been asked for. Where, from mistake, or inadvertence the plaintiff omits to pray for the proper relief, or, if the relief claimed in the plaint is not wholly sufficient or appropriate, the Court has always the power to grant the proper relief according to the circumstances of the case.[1] Thus a Court can always award future interest on the sum found to be due to the plaintiff even though the latter has not claimed it.[2] The Court may in a suit for exclusive possession pass a decree for *joint* possession.[3] Similarly in a suit for sale of mortgaged property the Court may pass a personal decree against the mortgagor-defendant provided the personal covenant is not barred by limitation.[4]

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(11) *Rehmatunnissa Begum* v. *Price*, 1917 P C 116 (117): 42 Bom 380: 45 Ind App 61: 16 All L J 513: 20 Bom L R 714: 27 Cal L Jour 623: 22 Cal W N 601: 35 Mad L Jour 262: 23 Mad L Tim 400: 8 Mad L W 53: 5 Pat L W 25: 12 Bur L Tim 91: 45 Ind Cas 568 P C; *Ghulam Hazarat Khan* v. *Rahimad Khan*, (1911) 9 Ind Cas 429 (431) Oudh. But see *Duli Chand* v. *Monohur Lall*, (1878) 2 Cal L Rep 18 (21-2).

(12) *Sooriah Row* v. *Cotaghery*, (1866) 5 Suth W R 127 (128): 2 Moo Ind App 113; *Percival* v. *The Collector of Chittagong*, (1903) 30 Cal 516 (519); *Kannayya* v. *Venkatta*, (1917) 40 Mad 1 (7, 8): 32 Mad L Jour 221: 5 Mad L W 580: 39 Ind Cas 439 (443): 1917 Mad W N 367.

(13) *Abdul Kadir* v. *Bangarusamy Naicker*, (1911) 10 Ind Cas 260 (261): 9 Mad L Tim 429: 1911 Mad W N 270; *Bai Anope* v. *Moolchand Girdhar*, (1885) 9 Bom 355 (357).

(14) *Luchmon Sahai Chowdhry* v. *Kanchan*, (1884) 10 Cal 525 (527) [Prayer for relief which Court cannot enforce should be treated as a mere surplusage]; *Krishnaballabah* v. *Governor of Bihar and Orissa*, 1926 Pat 305 (312): 5 Pat 595: 96 Ind Cas 791: 7 Pat L Tim 695.

(15) *Pancham Singh* v. *Thakur Singh*, 1925 Oudh 598 (600): 86 Ind Cas 380: 1 Oudh W N 760; *Rajkeshwar Singh* v. *Shyam Bihari*, 1927 Pat 286 (287): 8 Pat L Tim 477: 103 Ind Cas 313.

Note 2.

(1) *Gopi Narayan Khauna* v. *Bansidhar*, (1905) 27 All 325 (331): 7 Bom L R 427: 9 Cal W N 577: 2 All L J 336: 8 Sar 779: 2 Cal L Jour 173: 15 Mad L Jour 191: 32 Ind App 123; *Tola Ram* v. *Govindji*, 1929 All 555 (555): 118 Ind Cas 381; *Faqira* v. *Hardewa*, 1928 All 172 (175, 176): 26 All L J 217: 50 All 559; *Inayat Singh* v. *Izzat-un-nissa Begam*, (1905) 27 All 97 (122): 1904 All W N 174: 1 All L J 435; *Devshi* v. *Bhikamchand*, 1927 Bom 125 (127): 29 Bom L R 147: 100 Ind Cas 993; *Gungaram* v. *Junmajoy*, (1878) 1 Cal L Rep 144 (146); *Sreemutty Nistarini Dossee* v. *Mukhun Loll Dutt*, (1872) 17 Suth W R 432 (439): 9 Beng L R 11; *Mohan Lal* v. *Maya Mal*, 1921 Jour 27 (1): 4 Lah L Jour 393; *Rao Sardar Singh* v. *Rao Vishal Singh*, 1930 Nag 92 (94): 120 Ind Cas 321: 26 Nag L R 94; *Sakaldip Singh* v. *Imrit Barhi*, 1930 Pat 71 (74): 10 Pat L Tim 630: 120 Ind Cas 292; *Satyataran Chaudhury* v. *Jyoti Prasad Sinha Deo*, 1923 Pat 386 (390): 76 Ind Cas 940: 1923 Pat H C C 153: 5 Pat L Tim 330.

(2) *Rup Ram* v. *Harphul*, 1921 Lah 125 (126): 2 Lah 256: 107 Pun L R 1921: 64 Ind Cas 896.

(3) *Uttam Singh* v. *Chuhra*, 1926 Lah 567 (568): 96 Ind Cas 253; *Sasthi Charan* v. *Sarojini*, (1909) 2 Ind Cas 492 (493): 10 Cal L Jour 213; *Hyat Khan* v. *Buttan Khan*, (1909) 3 Ind Cas 54 (54): 5 Nag L R 105; *Rajjab Shah* v. *Tahir Shah*, 1921 All 106 (107): 43 All 318: 19 All L J 61: 60 Ind Cas 878 [Suit for partition—Property impartible—Joint possession can be decreed]; *Muthuramakrishna* v. *Marimuthu Goundan*, (1914) 24 Ind Cas 363 (366): 38 Mad 1036: 26 Mad L Jour 532; *Viswanathasawmi Naicker* v. *Kamu Ammal*, (1913) 21 Ind Cas 724 (729, 733): 24 Mad L Jour 271.

(4) *Sourendra Mohan* v. *Hari Prasad*, 1925 P C 280 (288): 52 Ind App 418: 42 Cal L Jour 592: 50 Mad L Jour 1: 91 Ind 1033: 24 All L J 33: 1926 Mad W N 49: 5 Pat 135: 7 Pat L Tim 97: 28 Bom L R 1126: 30 Cal W N 482; *Sukhdeo* v. *Lachman*, (1902) 24 All 456 (457): 1902 All W N 114; *Sheo Narain* v. *Jai Gobind*, (1882) 4 All 281 (285): 1882 All W N 33; *Abbakke* v. *Kinhiamma*, (1906) 29 Mad 491 (495).

But the power to grant such relief is controlled by the following considerations:— O. 7, R. 7, Note 2.

(1) The relief granted should be based on facts stated or referred to in the plaint and should not be inconsistent with the case set up by the plaintiff[5] or with the relief claimed by him.[6] Thus the Court cannot pass a decree for the possession of the property in a suit for *confirmation* of possession, inasmuch as the relief of possession is not consistent with the case set up by the plaintiff or with the relief claimed by him.[7] Similarly in a suit for injunction on the basis of title, the Court cannot declare that the plaintiff is entitled to a right of easement.[8] For other illustrations, *see* the under-mentioned cases.[9]

(2) The relief granted should be based on the same cause of action as the relief claimed in the suit.[10]

(3) The relief granted to the plaintiff should not be of an entirely *different description* from the relief claimed in the plaint. The plaintiff "cannot desert the specific relief claimed and, under the general prayer, ask a relief of another *description*, unless the facts and circumstances of the case, consistently with the rules of the Court, maintain that relief".[11] Thus an injunction will not ordinarily be granted under the power to

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(5) *Hiern* v. *Mill*, (1806) 13 Vessey 114, referred to in 1923 Pat 386 (390); *Mohammad Zahoor Ali Khan* v. *Mussammat Thakooranee Rutta Kooer*, 11 Moo Ind App 468 (474): 9 Suth W R P C 9: 2 Suth P C J 107: 2 Sar P C J 320; *Gargill* v. *Bower*, (1878) 10 Ch D 502 (508): 47 L J Ch 649: 38 L T 779, followed in 31 Cal 433; *Gopi Narain Khauna* v. *Bansidhar*, (1905) 27 All 325 (331): 7 Bom L R 427: 9 Cal W N 577: 2 All L J 336: 8 Sar 779: 2 Cal L Jour 173: 15 Mad L Jour 191: 32 Ind App 123 P C; *Ram Gulam Sahu* v. *Durga Pershad*, 1921 Pat 14 (17): 6 Pat L Jour 190: 2 Pat L Tim 325: 1921 Pat H C C 235: 60 Ind Cas 980: 3 U P L R (Pat) 75; *Gobind Chunder Mookerjee* v. *Doorga Prasad Baboo*, (1874) 22 Suth W R 248 (254): 14 Beng L R 337; *Uzir* v. *Hari Charn Pal*, (1917) 37 Ind Cas 671 (672) (Cal); *Debi Dayal* v. *Bhan Pertap*, (1904) 31 Cal 433 (440): 8 Cal W N 408; *Nudiar Chand Shaha* v. *Prannath Shaha*, (1873) 21 Suth W R 8 (10); *Satyataran Chaudhury* v. *Jyoti Prasad*, 1923 Pat 386 (390): 1923 Pat H C C 153: 5 Pat L Tim 330: 76 Ind Cas 940; *Sambayya* v. *Gopalakrishnamma*, (1892) 15 Mad 489 (490): 2 Mad L Jour 257; *Mahmudakhatun Chowdrani* v. *Mahomed Elahadad Khan Pani*, (1914) 23 Ind Cas 332 (335): 17 Cal W N 427 P C; *Hira Lal* v. *Mati Lal*, (1870) 5 Beng L R 682; *Jugal Kissore* v. *Kartic Chunder*, (1892) 21 Cal 116 (120, 121); *Pandey Bishonath Roy* v. *Bhyrub Singh*, (1867) 7 Suth W R 145 (146); *Bishen Singh* v. *Prem Singh*, 1929 Lah 126 (127): 10 Lah L Jour 513: 112 Ind Cas 485; *Sitara* v. *Ishaq Khan*, (1916) 32 Ind Cas 865 (367, 368): 2 Oudh L J 584.

(6) *Chinnasami Iyangar* v. *Kuppusami Iyengar*, (1897) 7 Mad L Jour 50 (51) [Suit by usufructuary mortgagee for possession—Decree for return of mortgage money cannot be given]; *Haji Mahamadbhai Peerbhai* v. *Bai Havabai*, 1924 Bom 507 (508): 26 Bom L R 145: 80 Ind Cas 269.

(7) *Lal Das* v. *Ram Narain Sukul*, (1921) 63 Ind Cas 2 (3) Pat.

(8) *Sambayya* v. *Gopalakrishnamma*, (1892) 15 Mad 489 (490): 2 Mad L Jour 257.

(9) *Hans Raj* v. *Ram Chand*, 1924 Lah 713 (716): 5 Lah 509: 6 Lah L Jour 286: 83 Ind Cas 1047 [Suit for specific performance—Damages also awarded under general relief]; *Hassan Bai* v. *Umaji*, (1904) 28 Bom 153 (161, 162, 163): 5 Bom L R 898 [Suit for sale—Redemption in favour of prior mortgagee passed]; *Balkisan Lal* v. *Topeswar*, (1911) 14 Ind Cas 845 (848): 17 Cal W N 219: 15 Cal L Jour 446, (Do.); *Mahalinga Pathan* v. *Tirumalai Pillai*, (1910) 8 Ind Cas 64 (64): 8 Mad L Jour 433 [Suit for cancellation of sale-deed—Decree for unpaid purchase money passed]; *Ma Shwe Thet* v. *Ma Hla Shin*, (1917) 41 Ind Cas 579 (579) Rang [Suit for share of inheritance—Treated as administration suit]; *Lukhee Kanto* v. *Sumeeruddi*, (1874) 13 Beng L R 243 [Suit for rent on *kabuliyat*—Rent at previous rate decreed as *kabuliyat* was not proved].

(10) *Sital Das Babaji* v. *Pertap Chunder Sarma*, (1909) 3 Ind Cas 408 (414, 415): 11 Cal L Jour 2; *Basawant Kumari* v. *Nakchedi Pande*, (1905) 27 All 174 (176): 1905 All W N 207: 1 All L J 628; *Karam Chand* v. *Sultan*, (1912) 13 Ind Cas 650 (651): 72 Pun W R 1912: 92 Pun L R 1912; *Uzir* v. *Hari Charan Pal*, (1917) 37 Ind Cas 671 (672) Cal.

(11) *Hiern* v. *Mill*, (1806) 13 Vessey 114, referred to in 1923 Pat 386 (390) [Per Lord Erskine, L C]; *Cockerell* v. *Dickens*, (1836-37) 2 Moo Ind App 353 (389, 390): 3 Moo P C 93: 1 Sar 203; *Hemendra Nath Roy* v. *Upendra Narain Roy*, (1916) 32 Ind Cas 437 (445): 22 Cal L Jour 419: 20 Cal W N 446: 43 Cal 743; *Sher* v. *Piara Ram*, 1924 Lah 324 (325): 69 Ind Cas 501.

O. 7, R. 7, Note 2.

grant general relief.[12] "It must be expressly prayed because the defendant might by his answer make a different case under the general prayer from what he would if an injunction were specifically prayed."[13] The *test* therefore in such cases is to see whether the defendant will not be taken by surprise or be embarrassed by such relief being granted.[14] There can be no surprise if the relief granted is *consistent* with that claimed and with the case raised in the pleadings[15] or if the parties knew the case which had to be tried.[16] Thus a declaratory decree may be passed in a suit for possession of property[17] or a decree for ejectment may be made in a suit for partition,[18] provided there is no surprise under the circumstances of the case, to the defendants. Similarly *damages* may be awarded in addition to a decree for specific performance[19] or *an account* directed to be taken in a suit *for money*.[20] But the Court cannot pass a decree for a general taking of accounts of a partnership in a suit to recover plaintiff's share alone in one item of the partnership assets,[21] nor can it, in a personal claim pass a decree for sale of property in default of the payment of the sum decreed.[22] Where a reversioner sues a Hindu widow for an *injunction* restraining her from committing waste and for the *appointment of a receiver*, he is not entitled to a *declaration* of his reversionary right if he fails to establish his right to the reliefs claimed.[23]

The Court cannot, under the power to grant further relief pass a decree in favour of a *pro forma* plaintiff if it is found that the real plaintiff is not entitled to the relief claimed.[24]

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(12) *Castelli* v. *Cooke*, 7 Hare 89; *Kristo Mohiny* v. *Kallyprosunno*, (1881) 6 Cal 485 (489-90): 8 Cal L Rep 43; *Ningappa* v. *Shivappa*, (1895) 19 Bom 323 (327).

(13) Story's Equity Pleadings, S 41, p 37 cited in 19 Bom 325 (327).

(14) *Hemendra Nath* v. *Upendra Narain*, (1916) 32 Ind Cas 437 (441, 445): 43 Cal 743: 22 Cal L Jour 419: 20 Cal W N 446; *Sital Das Babaji* v. *Pertap Chunder Sarma*, (1909) 3 Ind Cas 408 (414, 415): 11 All L J 2; *Narsi* v. *Parshottam*, 1928 Bom 484 (486): 30 Bom L R 1277: 52 Bom 875; *Firm Sundar Das Vir Bhan* v. *Firm Jassa Singh Jiwan Singh*, 1926 Lah 417 (418): 8 Lah L Jour 166: 27 Pun L R 344: 93 Ind Cas 928; *Narain Das* v. *Buto*, (1919) 53 Ind Cas 722 (724): 13 Sind L R 159; *Satyataran Chaudhury* v. *Jyoti Prasad Sinha Deo*, 1923 Pat 386 (390): 1923 Pat H C C 153: 5 Pat L Tim 330: 76 Ind Cas 940.

(15) *Hemendra Nath Roy* v. *Upendra Narain Roy*, (1916) 32 Ind Cas 437 (445): 43 Cal 743: 22 Cal L Jour 419: 20 Cal W N 446.

(16) *Firm Sundar Das* v. *Firm Jassa Singh*, 1926 Lah 417 (418): 8 Lah L Jour 166: 27 Pun L R 344: 93 Ind Cas 928.

(17) *Arjun* v. *Jug Lal*, 1923 Lah 422 (423): 85 Ind Cas 95; *Sher* v. *Piara Ram*, 1924 Lah 324 (325): 69 Ind Cas 501; *Tola Ram* v. *Mt Govindi*, 1929 All 555 (555): 118 Ind Cas 381 [Suit for possession—Declaration that transfer by widow to defendant was void beyond widow's life-time granted under general prayer]; *Mahadeo* v. *Bhaglu*, (1917) 39 Ind Cas 596 (597): 1 Pat L W 405 [Suit for possession—Declaratory decree that Plaintiff is entitled to possession after expiry of term, passed].

(18) *Rajjab Shah* v. *Tahir Shah*, 1921 All 106 (107): 43 All 318: 19 All L J 61: 60 Ind Cas 878.

(19) *Hansraj* v. *Ram Chand*, 1924 Lah 713 (716): 5 Lah 509: 6 Lah L Jour 286: 83 Ind Cas 1047.

(20) *Krishnadhan Banerji* v. *Sanyasi Charan*, (1919) 51 Ind Cas 597 (605): 23 Cal W N 500: 29 Cal L Jour 280.

(21) *Annamalai Chetty* v. *Annamalai Chetty*, (1919) 52 Ind Cas 456 (459): 10 Mad L W 67.

(22) *Chhoteylal* v. *Iqbal Narain*, 1925 Oudh 550 (552): 85 Ind Cas 331.

(23) *Janaki* v. *Narayanasami*, (1917) 37 Ind Cas 161 (163): 1916 P C 117: 20 Mad L Tim 168: 31 Mad L Jour 225: 14 All L J 997: (1916) 2 Mad W N 188: 20 Cal W N 1328: 39 Mad 634: 18 Bom L R 856: 24 Cal L Jour 309: 4 Mad L W 530: 43 Ind App 207 P C.

(24) *Debi Dayal* v. *Bhan Pertap*, (1903) 31 Cal 433 (440): 8 Cal W N 408.

O. 7, R. 7, Notes 2—3.

The equitable relief under this rule may be granted even by the appellate Court,[25] though it will be slow to interfere with the discretion exercised by the trial Court in granting appropriate relief under this rule.[26]

3. Alternative Relief.—"A person may rely upon one set of facts if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them.[1] Thus a plaintiff may claim specific performance of a contract or, in the alternative, cancellation of the contract and damages.[2] In a suit based on a sale-deed the plaintiff may, in the alternative, claim refund of the consideration paid if the sale-deed becomes unenforceable.[3] Similarly a plaintiff may in a suit on a negotiable instrument, claim in the alternative, a decree on the original consideration.[4] So also in a suit based on tenancy, the plaintiff can claim damages for use and occupation in the alternative.[5] But in all such cases plaintiff has to *set out the facts* relied on by him in his alternative claim distinctly and separately.[6] He cannot be allowed to pick out such of the allegations as will support any alternative case put forward by him.[7] In a suit by a son to set aside a transfer by his mother, the plaintiff specifically alleged that his mother was of unsound mind, and stated further that she was under the control of the donee. The Privy Council was inclined to the view that the claim based on undue influence cannot be entertained as it was not specifically pleaded.[8] So also in a suit on a Hundi, the Privy Council declined to pass a decree on the original consideration as such an alternative relief had not been prayed for.[9]

But where in a suit, all the facts giving rise to the alternative claim are *fully stated in the plaint*, the fact that the plaintiff has not *formally* asked for the relief on the alternative claim, is no bar to the granting of the relief on that basis.[10]

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(25) *Dinanath Sarma* v. *Gour Nath Sarma*, 1925 Cal 434 (435): 82 Ind Cas 964.

(23) *Sunder Das* v. *Jassa Singh Jiwan Singh*, 1923 Lah 417 (419): 3 Lah L Jour 166: 27 Pun L R 344: 93 Ind Cas 928; *Brijo Ram* v. *Bhugwan Doss*, (1867) 7 Suth W R 180 (181); *Pakkiri Md* v. *Subramania Naicker*, (1909) 4 Ind Cas 356 (357) Mad.

Note 3.

(1) *Davy* v. *Garret*, 7 Ch D 473 (489): 47 L J Ch 218 (Per Lindley, L J); *Lakshimi Bai* v. *Hari*, (1872) 9 Bom H C 1.

(2) *Karsan Das* v. *Chhota Lal*, 1924 Bom 119 (127): 25 Bom L R 1037: 77 Ind Cas 275: 48 Bom 259 [S 37 of the Specific Relief Act].

(3) *Nekjannessa Bibi* v. *Abbas Molla*, 1925 Cal 193 (194): 40 Cal L Jour 160: 84 Ind Cas 657 [Suit for khas possession—Alternative claim for refund of Salami].

(4) *Sadasuk Janki Dass* v. *Sri Kishen Pershad*, 1918 P C 146 (146): 46 Cal 663: 46 Ind App 33: 17 All L J 405: 1 U P L R 37: 21 Bom L R 605: 29 Cal L Jour 340: 23 Cal W N 937: 36 Mad L Jour 429: 25 Mad L Tim 258: 10 Mad L W 143: 1919 Mad W N 310: 50 Ind Cas 216 P C; *Sundara Iyer* v. *Arumugam Pillai*, 1924 Mad 520 (521): 44 Mad L Jour 361: 17 Mad L W 374: 32 Mad L Tim 118: 72 Ind Cas 325; *Nathusa* v. *Phulchandra*, (1912) 14 Ind Cas 399 (401): 8 Nag L R 7; *Nathu Ram* v. *Dogar Mal*, 1924 Lah 144 (145): 4 Lah 198: 75 Ind Cas 555.

(5) *Leary* v. *Maung On Gaing*, (1911) 11 Ind Cas 863 (863, 864): 4 Bur L Tim 197; *Ajodhya Singh* v. *Kushro Begum*, 1924 Oudh 97 (98): 74 Ind Cas 582; *Venkatachalamayya* v. *Simhadri Naidu*, 1926 Mad 1071 (1072): 1926 Mad W N 687: 24 Mad L W 564: 97 Ind Cas 933.

(6) *Official Assignee* v. *Bidyasundari*, (1920) 54 Ind Cas 700 (703): 24 Cal W N 145: 30 Cal L Jour 428.

(7) *Rajendra* v. *Ganga Ram*, (1910) 6 Ind Cas 472 (472): 12 Cal L Jour 70: 37 Cal 856.

(8) *Ismail* v. *Hafiz Boo*, (1906) 33 Cal 773 (782, 783) P C: 33 Ind App 86: 8 Bom L R 379: 3 All L J 353: 3 Cal L Jour 484: 16 Mad L Jour 166: 10 Cal W N 570: 1 Mad L Tim 137.

(9) *Firm of Sadasukh Janki Das* v. *Kishen Prasad*, 1918 P C 146 (146): 46 Cal 663: 46 Ind App 33: 17 All L J 405: 1 U P L R 37: 21 Bom L R 605: 29 Cal L Jour 340: 23 Cal W N 937: 36 Mad L Jour 429: 25 Mad L Tim 258: 10 Mad L W 143: 1919 Mad W N 310: 50 Ind Cas 216 P C.

(10) *Gulab Gir* v. *Nath Mal*, 1932 Nag 23 (26, 27): 27 Nag L R 327: 137 Ind Cas 33; *Ram Raghubir* v. *United Refineries*, 1931 Rang 139 (143): 9 Rang 56: 134 Ind Cas 737; *Nathu Ram* v. *Dogar Mal*, 1924 Lah 144 (145): 4 Lah 198: 75 Ind Cas 555; *Sheo Narain* v. *Jai Gobind*, (1882) 4 All 281 (283): 1882 All W N 33; *Raghunath Sahay* v. *Chandra Prasad Singh*, (1912) 15 Ind Cas 268 (269, 270): 17 Cal W N 100; *Parbathi Charan Mukerji* v. *Amarendra*

O. 7, R. 7, Notes 3—4.

The plaintiff might rely upon different allegations in the alternative claim even though they may be inconsistent with each other.

See O. 6, R. 2, Note 5.

A prayer for *alternative* relief cannot be converted into one for *additional* relief.[11] A plaintiff praying for a relief and also for a lesser relief in the alternative, cannot be deemed to have waived his right to the relief originally claimed.[12] Where the plaintiff asks for one of two alternative reliefs and is granted one, he cannot, in appeal, contend that he should be given the other relief.[13]

4. Events happening after suit.—The ordinary rule is that the rights of parties must be determined as at the date of the action, and not on the basis of rights which accrued to them after the institution of the suit.[1] Thus, where the plaintiff has no cause of action at all to institute the suit, he will not ordinarily be allowed to take advantage of a cause of action arising subsequent to the suit and claim relief on that basis.[2] Nor where a plaintiff has a cause of action on the date of the suit, will relief be ordinarily refused to him on that basis by reason of subsequent events.[3]

But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, the Courts may depart from the general rule and mould the relief on the basis of the altered circumstances.[4] Thus where, pending a suit for a declaration of title, the defend-

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Nath Battacharjee, 1926 Cal 831 (834): 53 Cal 418: 96 Ind Cas 97; *Mahesh Singh* v. *Chauharja Singh*, (1882) 4 All 245 (247): 1882 All W N 31.

(11) *Mt Sarjo Kuar* v. *Sheikh Enait*, 1924 All 271 (272): 74 Ind Cas 331.

(12) *Alliance Bank* v. *Kahan Singh*, (1914) 25 Ind Cas 856 (859): 111 Pun W R 1914: 216 Pun L R 1914: 4 Pun Re 1915.

(13) *Reajuddin Patwari* v. *Syed Abdul Jobbar*, 1924 Cal 445 (446): 69 Ind Cas 504.

Note 4.

(1) *Radha Koer* v. *Ajodiya Dass*, (1908) 7 Cal L Jour 262 (264); *Dinker Rao* v. *Sham Rao*, 1930 Nag 173 (177): 122 Ind Cas 699: 26 Nag L J 208 [Suit for possession on redemption—Plaintiff becoming entitled to possession only during suit—Not taken into account]; *Lalloo Persad* v. *Lachuman*, 1924 Pat 438 (438): 3 Pat 224: 82 Ind Cas 510 [Suit on basis of relinquishment by *A*—Relinquishment made only during suit]; *Bhekbharee* v. *Kishen Prasad*, (1871) 15 Suth W R 106 (106); *Subbaiya* v. *Shunmugam*, 1928 Mad 245 (246): 1927 Mad W N 527: 108 Ind Cas 319 [Suit decreed for instalments fallen due—No decree could be given for instalments fallen due during suit]; *Venkataramana Butta* v. *Gundaraya*, (1908) 31 Mad 403 (404): 4 Mad L Tim 221; *Parmanand* v. *Sahib Ali*, (1889) 11 All 438 (443, 444): 1889 All W N 155.

(2) *Ramanatham Chetti* v. *Pulikutty Servai*, (1898) 21 Mad 288 (290): 8 Mad L Jour 121 [Suit by landlord to eject trespassers pending lease —Subsequent expiry of lease—Plaintiff cannot get relief on that basis, *see*, however, 1928 Pat 396: 1929 Mad W N 165 and 37 Ind Cas 962]; *Gulzar* v. *Kalyan*, (1893) 15 All 399 (403): 1893 All W N 170 [Death of person subsequent to suit giving title to plaintiff]; *Nanakchand* v. *Mehar Jawaya*, (1910) 8 Ind Cas 576 (577): 137 Pun W R 1910 [Suit by mortgagee for possession before expiry of period fixed for payment—Subsequent expiry of period will not entitle plaintiff to decree]; *Rangayya Naidu* v. *Basana Simon*, 1926 Mad 594 (597): 94 Ind Cas 639: 23 Mad L W 367 [Suit for redemption premature—Period expired during pendency of litigation—Suit dismissed].

(3) *Soha Lal* v. *Amba Prasad*, 1922 All 526 (526): 20 All L J 888: 69 Ind Cas 685; *Wamanrao* v. *Rustomji*, (1897) 21 Bom 701 (703); *Purkhit* v. *Ananda*, (1908) 8 Cal L Jour 116 (119): 12 Cal W N 1086; *Gobinda* v. *Perumdevi*, (1889) 12 Mad 136 (138) [Suit for mere declaration—Further relief becoming available during suit—Declaration cannot be refused]; *Lakshimi Ammal* v. *Alamelu*, 1924 Mad 309 (310): 45 Mad L Jour 811: 18 Mad L W 874: 1923 Mad W N 839: 79 Ind Cas 325; *Raicharan* v. *Bishwanath*, (1915) 26 Ind Cas 410 (411): 20 Cal L Jour 107; *Fateh Singh* v. *Jagannath Baksh Singh*, 1923 Oudh 242 (245): 10 Oudh L J 132: 74 Ind Cas 549.

(4) *Ram Rattan* v. *Bishun*, (1907) 6 Cal L Jour 74 (78): 11 Cal W N 732; *Kuldip Mahto* v. *Muhammad Hashim*, 1928 Pat 396 (397, 398) [Suit by landlord against trespasser while lease was running, for declaration and formal possession through tenant—Lease expiring—Decree for possession can be given. But *see* 21 Mad 288]; *Hari Lal* v. *Mulchand*, 1928 Bom 427 (430): 30 Bom L R 1149: 52 Bom 883: 113 Ind Cas 27; *Ahmadji* v. *Mahmad Jee*, (1899) 1 Bom L R 218 (219) [*P* sued as heir of *X*—Held, not heir in presence of *M*—*M* died pending suit, decree can be given on basis of *M*'s death]; *Nurimiah* v. *Ambika*, (1917) 34 Ind Cas 869 (873): 44 Cal 47: 20 Cal W N 1009: 24 Cal L Jour 140; *Suraj*

ant takes possession of the property in dispute, the plaintiff may amend the plaint by adding a prayer for possession instead of bringing another suit.[5] Similarly if, pending a suit for partition by *A* against his brothers *B* and *C*, *B* dies, *A* can amend his plaint and claim a half share instead of one-third.[6] Again, where in a suit for money the real cause of action arose only after the institution of the suit it was held in the cases noted below, that the Court should not reject the plaint and drive the plaintiff to file a fresh suit but should pass a decree on the basis of such subsequent cause of action.[7] It is not only in the power but sometimes the *duty* of the Court to take notices of subsequent event where, if it is not so done, the Court might decide matters no longer in controversy or deliver judgment which could not be carried into effect or grant a relief which is inappropriate and ineffectual.[8]

O. 7, R. 7, Note 4.

But the discretionary power to depart from the general rule and to take notice of subsequent events will not be exercised where it would have the effect of taking away the jurisdiction of the Court[9] or there is great delay in making the application[10] or if a fresh enquiry into other facts becomes necessary.[11] It will not also be exercised where the subsequent cause of action is alleged to arise by virtue of something done *in the suit itself*.[12] Thus in a suit for possession against a tenant on the ground of forfeiture by denial of title, the plaintiff on

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Pal Singh v. *Ram Jit*, 1929 All 341 (343, 344): 1929 All L J 267: 10 L R A Rev 166; *Dawlat* v. *Nagorao*, 1927 Nag 230 (232): 23 Nag L R 57: 103 Ind Cas 720; *Iswari Pershad* v. *Dulhin Gunjeswari Devi*, 1927 Pat 422 (425): 8 Pat L Tim 456: 101 Ind Cas 220; *Sheikh Dallu* v. *Punjab*, 1924 Nag 344 (345): 78 Ind Cas 95; *Chinta Hararan Das* v. *Radha Charan Poddar*, (1917) 37 Ind Cas 962 (963) Cal [Suit for *khas* possession against lessee on the ground of relinquishment—Relinquishment not proved but *pendente lite* lease expired—Decree for *khas* possession can be given]; *Anant Ram* v. *Lala Murlidhar*, 1924 Nag 204 (207): 78 Ind Cas 194 [Relief refused on basis of subsequent events]; *Narayan* v. *Mussamat Tulsi*, 1925 Nag 104 (106, 108): 80 Ind Cas 607 [Relief refused on the basis of subsequent events]; *Thimmayya* v. *Siddappa*, 1925 Mad 63 (64): 75 Ind Cas 112; *Subbaraya Chetty* v. *Nachiarammal*, (1917) 44 Ind Cas 863 (863): 1918 Mad W N 199: 7 Mad L W 403; *Rasul Jehan* v. *Ram Surun*, (1895) 22 Cal 589 (596); *Doraisamy Pillai* v. *Cinnia Goundan*, (1918) 43 Ind Cas 560 (562): 22 Mad L Tim 538: 1918 Mad W N 89: 34 Mad L Jour 258: 7 Mad L W 335; *Pandurang* v. *Baija*, 1925 Nag 251 (256, 257): 8 Nag L J 14: 95 Ind Cas 371. See also *Krishnaji Raiji* v. *Ganesh Bapuji*, (1881-82): 6 Bom 139 (142, 143) [Auction purchaser's suit for redemption of a mortgage—Sale certificate not obtained on date of suit—Production at trial—Decree for redemption proper].

(5) *Subba Nayakan* v. *Rami Naicken*, (1912) 16 Ind Cas 734 (735) Mad; *Hamid Mirza Beg* v. *Ahmed Mirza Beg*, (1922) 68 Ind Cas 986: 1922 Oudh 266: (267, 268): 9 Oudh L J 359.

(6) *Sangili* v. *Mookan*, (1893) 16 Mad 350 (353): 3 Mad L Jour 137; *Nur Khatun* v. *Soomar Sawayo*, (1915) 31 Ind Cas 7 (8): 9 Sind L R 61; *Valluru* v. *Kunnamma*, 1926 Mad 6 (12): 49 Mad L Jour 479: 22 Mad L W 287: 1925 Mad W N 622: 90 Ind Cas 881; *Vishnu* v. *Shri Ram*, 1921 Bom 455 (456): 45 Bom 983: 23 Bom L R 391: 61 Ind Cas 398.

(7) *Sitaram* v. *Ramchandra*, (1918) 44 Ind Cas 863 (863) 26 Pun Re 1918: 31 Pun W R 1918: 114 Pun L R 1918; *Kanshi Ram* v. *Jaimal Singh*, 1923 Lah 590 (591): 6 Lah L Jour 31: 75 Ind Cas 562; *Butchi Raju* v. *Sitaramayya*, 1926 Mad 377 (377): 1926 Mad W N 9: 93 Ind Cas 955: 23 Mad L W 707. See also *Labhu Ram* v. *Charnu*, 1929 Lah 409 (415): 30 Pun L R 306: 11 Lah L Jour 251: 116 Ind Cas 317; *Ghulam Fatima* v. *Rahman* (1919) 50 Ind Cas 270 (271): 127 Pun Re 1919.

(8) *Mills* v. *Green*, 159 U S 651 Referred to in 1925 Nag 104 (107); *Narayan* v. *Mussamat Tulsi*, 1925 Nag 104 (107): 80 Ind Cas 607; *Ramsom* v. *City of Pierre*, (1900) 41 C C A 585 [Referred to in 6 Cal L Jour 74 (79)]; *Hanmant* v. *Secretary of State*, 1930 Bom 254 (260): 54 Bom 125: 32 Bom L R 155: 129 Ind Cas 391.

(9) *Appalasuri* v. *Kannamma*, 1926 Mad 6 (12): 49 Mad L Jour 479: 22 Mad L W 287: 1925 Mad W N 622: 90 Ind Cas 881.

(10) *Appalasuri* v. *Kannamma*, 1926 Mad 6 (12): 49 Mad L Jour 479: 22 Mad L W 287: 1925 Mad W N 622: 90 Ind Cas 881.

(11) *Appalasuri* v. *Kannamma*, 1926 Mad 6 (12): 49 Mad L Jour 479: 22 Mad L W 287: 1925 Mad W N 622: 90 Ind Cas 881.

(12) *Vithu* v. *Dhondi*, (1891) 15 Bom 407 (414); *Amraj Singh* v. *Sarab Sukh*, (1918) 46 Ind Cas 650 (651, 652) Oudh [Plea in written statement cannot furnish cause of action to plaintiff]; *Abdulla Shah* v. *Muhammad Shah*, 1922 Lah 437 (439): 66 Ind Cas 616 [Plea in written statement cannot furnish cause of action]; *Hemangini* v. *Sri Gobinda*, (1902) 29 Cal 203 (206): 6 Cal W N 69 [Tenancy terminated during suit—Notice to quit alleged in plaint not proved—Suit itself cannot be a notice]; *Debidayal* v. *Bhan Pratap*, (1903) 31 Cal 433 (440): 8 Cal W N 408.

O. 7, R. 7, Note 4.

failing to prove such denial before suit, cannot take advantage of a denial in the written statement of the defendant.[13] The Court also will not exercise such discretionary power if the subsequent cause of action is entirely different and distinct from the cause of action as originally alleged.[14]

Where subsequent to the date of judgment of the first Court events happen which entitled the plaintiff to a change in the relief, can the appellate Court take notice of such events and mould the relief accordingly? In *Mt. Anand Moyee Chowdhoorayan* v. *Sheeb Chunder Roy*[15] Their Lordships of the Privy Council observed as follows:—

"The first and most important question is, whether the decision of the Principal Suther Ameen was, *when pronounced,* a correct decision of the issues *then pending* before him between the then parties to the suit. No subsequent event, or devolution of interest, can affect this question; because to give effect to these, should justice require it, would be the office not of an appeal, but of some supplemental proceeding."

It was, however, held in the undermentioned cases[16] that there were exceptions to that general rule and in that such exceptional cases the appellate Court may take notice of events happening after the date of the judgment of the first Court. The introduction of the new rule O. 41, R. 33 on the lines of the English Rules of the Supreme Court enabling the appellate Court not only to pass any order which ought to have been passed or made but to pass such *further or other decree or order* as the case may require makes it now perfectly clear that on appeal "such a judgment may be given as ought to be given if the case came at that time before the Court of first instance".[17]

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(13) *Maharajah of Jeypore* v. *Rukmani*, 1919 P C 1 (4): 42 Mad 589: 46 Ind App 109: 17 All L J 552: 21 Bom L R 655: 29 Cal L Jour 528: 23 Cal W N 889: 36 Mad L Jour 543: 26 Mad L Tim 16: 10 Mad L W 381: 1919 Mad W N 271: 50 Ind Cas 631 P C; *Madavan* v. *Athinangiyar*, (1892) 15 Mad 123 (124): 2 Mad L Jour 81; *Pertap* v. *Maigh*, (1909) 2 Ind Cas 656 (657, 658): 13 Cal W N 949: 36 Cal 927; *Mallikadasi* v. *Makhamlal Chowdhry*, (1905) 2 Cal L Jour 389 (396): 9 Cal W N 928; *Madan Mohan Saha* v. *Rajabali*, (1901) 28 Cal 223 (227); *Nizamuddin* v. *Mamtazuddin*, (1901) 28 Cal 135 (138): 5 Cal W N 263; *Pran Nath Saha* v. *Madhu Khulu*, (1886) 13 Cal 96 (98, 99); *Amba Bai* v. *Bhau*, (1896) 20 Bom 759 (764). But see *Baba* v. *Vishwanath Joshi*, (1884) 8 Bom 228 (230).

(14) *Saroj Ranjan* v. *Joydurya Dasi*, 1927 Cal 56 (57): 44 Cal L Jour 263: 98 Ind Cas 845; *Sethru Cherla Ramachandra* v. *Maharajah of Jeypore*, (1916) 34 Ind Cas 411 (412, 413): (1916) 1 Mad W N 354: 19 Mad L Tim 360.

(15) *Anund Moyee* v. *Sheeb Chunder*, (1861-63) 9 Moo Ind App 287 (300-301): 2 Suth W R 19: Marsh 455: 1 Suth 485: 1 Sar 854.

(16) *Hazari Mull* v. *Janaki Prosad*, (1907) 6 Cal L Jour 92 (93); *Ramyad* v. *Bindeswari*, (1907) 6 Cal L Jour 102 (104); *Udit Chobey* v. *Rashika*, (1907) 6 Cal L Jour 662 (666): 3 Mad L Tim 41; *Sakha Ram* v. *Hari*, (1881-82) 6 Bom 113 (115); *Rustomji* v. *Sheth*, (1901) 25 Bom 606 (613, 614): 3 Bom L R 227.

(17) *Suresh Chandra* v. *Kanthi Chandra*, 1928 Cal 436 (437): 47 Cal L Jour 530: 110 Ind Cas 715; *Quilter* v. *Mapleson*, (1882) 9 Q B D 672: 52 L J Q B 44: 47 L T 562: 31 W R 75 C A: Rel on 20 Cal L Jour 107; Ref 1 Mad W N 369: 37 Mad 1; *Ananta Ram* v. *Lala Murlidar*, 1924 Nag 204 (207): 78 Ind Cas 194; *Nadir Husain* v. *Sadiq Husain*, 1925 All 361 (361): 23 All L J 138: 6 L R All Civ 19: 86 Ind Cas 589: 47 All 324; *Choley Lall* v. *Bansi Dhar*, 1929 All 699 (701); *Pandurang* v. *Ramachandra*, 1930 Bom 554 (556, 557): 54 Bom 902: 32 Bom L R 1252 [Even in second appeal, the Court should take into consideration the events that have happened since filing of first appeal and grant relief accordingly]; *Bunwari Lal* v. *Sheo Shankar*, (1909) 1 Ind Cas 670 (675): 13 Cal W N 815; *Gorakala Kanakaiya* v. *Janardha Padhai*, (1910) 8 Ind Cas 736 (737): 36 Mad 439: 1910 Mad W N 841: 9 Mad L Tim 64: 21 Mad L Jour 31 F B [Change of law subsequent to original Court's decree]; *Thenirkulam Muthusamy Iyer* v. *Kalyani Ammal*, (1917) 38 Ind Cas 223 (225): 40 Mad 818: 21 Mad L Tim 93: 5 Mad L W 334, (Do.); *Sethrucharla Ramachandra* v. *Maharajah of Jeypore*, (1916) 34 Ind Cas 411 (412, 413): 1 Mad W N 354: 19 Mad L Tim 360; *The Firm of Naraindas Jaini Lal* v. *The Firm of Jai-Narain-Bain Lal*, 1923 Lah 24 (25): 5 Lah L Jour 210: 75 Ind Cas 786.

R. 8. [New.] *Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.*

Relief founded on separate grounds.

O. 7, R. 8, Note 1.

[R. S. C., O. 20, R. 7. *See* O. 1, Rr. 1 to 7 and O. 2, Rr. 1 to 6.]

Synopsis.

1. Relief founded on separate grounds.

1. Relief founded on separate grounds.—The object of this rule is to prevent the trial being embarrassed by the want of clearness in the allegations in the plaint. Plaintiff may, as has been seen in Rule 2, *ante*, in a proper case, rely upon one set of material facts for his relief and also on another and even inconsistent set of material facts for relief in the alternative; but where such alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts each alternative relief is claimed.[1]

See "alternative and inconsistent allegations", O. 6, R. 2, *supra*, and alternative relief O. 7, R. 7, *supra*.

R. 9. [S. 58.] (1) The plaintiff shall endorse on the plaint, or annex thereto, a *list of* the documents (if any) which he has produced along with it; and, if the plaint *is* admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief *claimed* in the suit, in which case he shall present such statements.

O. 7, R. 9.

Procedure on admitting plaint.

Concise statements.

(2) *Where* the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

Order 7, Rule 8—Note 1.

(1) *Official Assignee* v. *Bidyasundari*, (1919) 54 Ind Cas 700 (703): 30 Cal L Jour 428: 24 Cal W N 145; Re *Morgan*, 35 Ch D 472. See also *Premsukhdas* v. *Shankerdas*, 1929 Nag 347 (347): 120 Ind Cas 404.

O. 7, R. 9. (4) The chief ministerial officer of the Court shall sign such *list* and copies or statements if, on examination, he finds them to be correct.

[1877—58. *See* O. 7, Rr. 4 and 5.]

Local Amendments.

ALLAHABAD.

In R. 9 (*a*) for the semicolon *after* "it" in clause (1), *substitute* a full stop and *delete* the rest of this clause as well as clauses (2) and (3); and

(*b*) *Re-number* clause (4) as clause (2), *deleting* the words "or statements" therein.

BENGAL.

Cancel clause (1) and *substitute* therefor the following:—

"(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1-A) The plaintiff shall present with his plaint:—

(*i*) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements;

(*ii*) a petition for service of summons to appear and answer together with the fees and draft forms of summons."

MADRAS.

In R. 9 of O. 7, *after* the word "and" occurring in the fourth line *delete* the comma and the five words following, *viz.*, "if the plaint is admitted" and *insert* the expression "along with the plaint" *after* the words "shall present".

NAGPUR.

Substituting the following *for* Rule 9:—

"9. (1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it.

(2) The chief ministerial officer of the Court shall sign such lists and the copies of the plaint presented under Rule 1 of Order 4, if, on examination, he finds them to be correct."

OUDH.

In Rule 9 (1) *for* the words "and if the plaint is admitted, shall present", *substitute* the words "and shall, at the same time, present". Also *delete* the words "unless the Court . . . . present such statements", as well as sub-Rules (2) and (3), and *re-number* sub-Rule (4) as sub-Rule (2) *deleting* the words "or statements".

RANGOON.

In O. 7, R. 9 (1), *add* the words "on the day on which the plaint is admitted" *after* the word "present".

SINDH.

Substitute the following *for* sub-Rule (1) of Rule 9 in Order 7:—

"9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and shall present along with the plaint as many copies of it on plain paper as there are defendants; on application made, the

Court, may by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason accept instead a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, presented along with the plaint."

O. 7, R. 9, Note 1.

Synopsis.

1. Procedure on admitting plaint.

Representative capacity. See R. 4, Note 2 and Rule 5, Note 1, Pt. (2).

When a suit is instituted. See Notes to O. 4, R. 1.

1. **Procedure on admitting plaint.**—This rule relates to the procedure adopted when a plaint is admitted. It provides for presentation into Court of concise statements instead of copies of plaints for service on the defendants in the cases mentioned in the rule. These statements should contain the nature of the claim or of the relief claimed, and the capacity in which the party sues or is sued (sub-S. 2). As to the representative capacity of plaintiff, *see* O. 7, R. 4, *supra*, and as to the representative capacity of defendants, *see* O. 7, R. 5, *supra*.

Return of plaint.

R. 10. [S. 57.] (1) The plaint shall *at any stage of the suit*[2] be returned to be presented to the Court *in which the suit should have been instituted.*[7]

O. 7, R. 10, Note 1.

Procedure on returning plaint.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

[1877—S. 57; 1859—S. 30.]

Synopsis.

1. Scope of the rule.
2. "At any stage of the suit."
3. Return of plaint by Appellate Court.
4. Return of plaint by Small Cause Court.
5. Return of plaint by Civil Court to Revenue Court and vice versa.
6. Return of applications.
7. Court in which the suit should have been instituted.
8. Court-fee.
9. Limitation.
10. Chartered High Courts.
11. Appeal.
12. Revision.

In what cases plaint may be returned. See Note 1.

Rule mandatory. See Note 2, Pt. (1).

Want of jurisdiction. See Note 1.

1. **Scope of the Rule.**—It is enacted in S. 15 *ante* that every suit shall be instituted in the Court of the *lowest grade competent* to try it. Where a suit is instituted in a wrong Court, *i.e.*, in a Court which is either not *competent* to try it, or which, though competent, is not the Court of the *lowest grade* competent to try it, the plaint should be *returned*, under the provisions of this rule to be presented to the proper Court. The reason is this: where the Court has no jurisdiction over the suit, a judgment given by it will be a determination *coram non judice* and it would be a futile proceeding for the judge to go on with an investigation which would have no jural effect.[1] Where the Court has

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Order 7, Rule 10—Note 1.

(1) *Prabhakar* v. *Viswambhar*, (1884) 8 Bom 313 (318).

O. 7, R.10, Note 1.

jurisdiction, but is not the Court of the *lowest grade* competent to try it, it would, if such suits are entertained and tried, be overcrowding Courts of higher grade with suits, which, it is the object of the legislature to prevent.[2]

Where the Court comes to the conclusion that the suit should have been instituted in another Court, the only thing that it can do is to *return* the plaint for presentation to that Court and not to *dismiss* the suit.[3] But it has been held that a British Indian Court has no jurisdiction to return a plaint for presentation to a Court *outside British India*.[4]

The provisions of this rule are wide enough to cover all cases where the Court is unable to entertain the suit for want of jurisdiction, whatever may be the nature of the objection to its jurisdiction.[5] The shape in which the suit is *originally instituted* is the test of jurisdiction. Therefore, where it is found *in the course of the hearing*, as the result of admissions made by the parties or of the evidence led by them that the relief which the plaintiff was really entitled to was not cognisable by that Court the rule does not apply.[6]

Illustrations.

1. *M* filed a plaint in a Sub-Court praying for a declaration that a certain tax was illegal and also for damages for illegal entry into his house. The Judge amended the plaint by striking out the reliefs other than that for damages and then, holding that the claim for damages would lie only in the Small Cause Court, returned the plaint for presentation to that Court. *Held*, that the order was not justified, *Motabhai Motilal* v. *The Surat City Municipality*, I. L. R. 20 Bom 675.

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(2) See S 15, Note 1.

(3) *Ram Jas Singh* v. *Babu Nandan Singh*, 1922 All 424 (424): 44 All 686: 70 Ind Cas 98; *Kalka Pershad* v. *Jangi Singh*, 1931 All 664 (665): 133 Ind Cas 411; *Zaharia* v. *Gopal*, (1906) 3 All L J 511 (513): 1906 All W N 195; *Khooshul* v. *Palmer*, (1866) 1 Agra 280; *Pachaoni Awasthi* v. *Ilahi Bakhsh*, (1882) 4 All 478 (480): 1882 All W N 113: 7 Ind Jur 211; *Mohan Lal* v. *Bhutteshwar*, 1925 All 142 (143): 5 L R All Civ 709: 83 Ind Cas 1; *Puttappa* v. *Veerabhadrappa*, (1905) 7 Bom L R 993 (994); *Isak* v. *Khatija*, (1899) 23 Bom 756 (759); *Ladhaji* v. *Hari*, (1899) 23 Bom 679 (681): 1 Bom L R 176; *Babaji* v. *Lakshmibai*, (1884) 9 Bom 266 (268); *Khandu Moreshwar* v. *Shivji Gorkiji*, (1868-69) 5 Bom H C R 212; *Khogendro Narain* v. *Gouri Kant*, (1882) 11 Cal L Rep 300 (302); *Rughoonundan Prasad Singh* v. *Chutter Paul Singh*, (1868) 10 Suth W R 335 (335); *Shurut Soondures* v. *Khemunkuree*, (1866) 5 Suth W R, Act X, 87 (87); *Dheraj Mahtab Chand* v. *Damooder Singh*, 1864 Suth W R 65 (65); *Kartick Nath* v. *Bundeput Mahatah*, (1875) 23 Suth W R 263 (263); *Ram Gutty* v. *Goonomonee*, (1869) 11 Suth W R 177 (180); *Prosad Doss Mullick* v. *Russick Lall Mullick*, (1881) 7 Cal 157 (163): 8 Ca L Rep 329; *Amirchand* v. *Buti Shah*, 1930 Lah 195 (196): 31 Pun L R 302: 125 Ind Cas 334 [Should not send it to District Judge for transfer under S 24]; *Trustee of the Vizianagram Estate* v. *Paila Achannah*, 1926 Mad 140 (141): 22 Mad L W 522: 1925 Mad W N 771; *Narayani Ammal* v. *Secretary of State*, (1917) 41 Ind Cas 167 (168) Mad; *Venkatadri Appa Row* v. *Venkata Ratnam*, (1910) 6 Ind Cas 702 (702): 7 Mad L Tim 350; *Jivaraju* v. *Purushotham*, (1884) 7 Mad 171 (174); *Kandu* v. *Konda*, (1885) 8 Mad 62 (63); *Chandu* v. *Kombi*, (1886) 9 Mad 208 (213); *Secretary of State* v. *Natabar Mangraj*, 1927 Pat 254 (255): 6 Pat 358: 103 Ind Cas 435; *Shukru* v. *Farzand Ali*, 1925 Oudh 735 (736): 88 Ind Cas 991 [Should not decide the suit on the merits]; *Kin Twe U* v. *Ripley*, (1892-96) U B R 338. See also *Raj Kishore Lal* v. *Alam Ara Begum*, 1926 Pat 28 (29): 90 Ind Cas 82; *Mi Zon Ma Gyi* v. *Nga Ba*, (1909) 4 Ind Cas 814 (815) [Transfer by High Court to another Court proceedings should not be forwarded, but plaint must be returned]; *Etizad Husain* v. *Beni Bahadur*, (1916) 33 Ind Cas 619 (620): 18 Oudh Cas 364 [But if the valuation of the suit is not fraudulent and is admitted by defendant, plaint should not be returned if it is found that the market value exceeds pecuniary jurisdiction]. But see *Koylashnath Roy* v. *Bodun Monee Debia*, 2 Hay 886.

(4) *Gokul Das* v. *Hansraj*, (1911) 9 Ind Cas 824 (824) All.

(5) *Madho Ram* v. *Dharam Singh*, 1930 Lah 394 (395): 31 Pun L R 305: 127 Ind Cas 708.

(6) *Motabhai* v. *The Surat City Municipality*, (1896) 20 Bom 675 (676, 677); *Tayabally* v. *Bibi Fatma*, 1932 Sind 67 (69); *Goverdhandas Vishindas* v. *Mt Rijhibai*, 1930 Sind 252 (253); *Mohammadbhai Husenbhai* v. *Adamji Halim Bhai*, 1922 Bom 152 (154): 64 Ind Cas 919: 46 Bom 229: 23 Bom L R 1086; *Sharam Singh* v. *Sadhu Singh*, 1928 Lah 484 (486): 110 Ind Cas 293; *Rajagopala Iyer* v. *Muthuramier*, 1926 Mad 339 (340): 91 Ind Cas 737; *Jageshwar Kuer* v. *Tilakdhari*, 1924 Pat 267 (268): 2 Pat 746: 77 Ind Cas 587: 5 Pat L Tim 422; *Sheikh Nurkhan* v. *Shaikh Rahim*, (1920) 54 Ind Cas 655 (657) Nag; *Dorabji* v. *Havabee*, (1913) 20 Ind Cas 278 (279): 6 Bur L Tim 85: 7 L B R 20; *Badami Kuar* v. *Dinurai*, (1886) 8 All 112 (113): 1886 All W N 28. See also *Md Abdul Gafoor* v. *Mahtab*, (1917) 41 Ind Cas 231 (232): 2 Pat L Jour 394; *Kedar Nath* v. *Genga Ratan*, 1929 All 907 (907): 118 Ind Cas 667.

2. *S* sued *R*, his co-owner, in the Sub-Court claiming Rs. 1,152-13-0 as his share of profits for certain years. The suit was dismissed and *S* appealed in respect of Rs. 450 only. The appellate Court remanded the case for re-trial in respect of that claim. The Subordinate Judge who had pecuniary jurisdiction over Rs. 1,000 returned the plaint for presentation to the Munsif's Court. *Held*, that this rule applied only where the suit as *originally framed* was wrongly instituted and did not apply to any part of a dismissed claim abandoned in appeal and that, hence, the order returning the plaint was not justified. *Nur Khan* v. *Shaik Rahim*, (1920) 54 Ind. Cas. 655. **O. 7, R. 10, Note 1.**

A Court has no jurisdiction to act under this rule after it has passed a decree in that suit.[7] Nor can it do so unless it comes to a definite *finding* that the suit should have been instituted in another Court.[8] Thus, a Court has no power to return the plaint for presentation to the proper Court merely on the ground that it would be more advantageous to the defendant to have the suit tried in that Court.[9]

Where a Court returns a plaint for presentation to the proper Court on the ground that it was beyond its jurisdiction, the plaintiff is entitled to relinquish a portion of the claim, so as to bring the suit within the pecuniary jurisdiction of the former Court and to represent the plaint in the same Court.[10]

Suppose now that two reliefs are claimed in a plaint, one of which the Court is not competent to grant, can the Court return the plaint as regards the relief which it is not competent to grant? There is a conflict of opinion on this point. According to one view, it is competent for the Court to return the plaint in respect of the cause of action which is not within its jurisdiction, and proceed with the suit in respect of the cause of action within its jurisdiction on a certified copy of the plaint.[11] A contrary view has been taken in the undermentioned cases,[12] which hold that the Court should retain the plaint, striking out therefrom such portions as are not within its jurisdiction and in respect of which the plaintiff could file another suit.

It is open to a Court to ignore a relief as being based on no cause of action and then to return the plaint under this rule, if it finds that the rest of the claim is within the jurisdiction of an inferior Court.[13] The Court can also return a plaint, when it finds the plaint has been over valued.[13-a]

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(7) *Ratikanta Morya* v. *Sanaton Baidya*, 1930 Cal 147 (147): 125 Ind Cas 104: 33 Cal W N 168 (N); *Fazal Karim* v. *Municipal Committee, Jullundur*, 1929 Lah 107 (110): 118 Ind Cas 537; In re *Bai Amrit*, (1884) 8 Bom 380 (389, 390); In the matter of *The Petition of Tufani Singh*, (1871) 6 Beng L R (App) 141; *Jhandu* v. *Gurmukh Singh*, 1872 Pun Re No 39. See also *Raghosaran* v. *Bishendeo Narain*, 1929 Pat 722 (723): 118 Ind Cas 139.

(8) *Amar Nath* v. *Hakim Rai*, 1929 Lah 248 (249): 117 Ind Cas 369; *Bisheshar Prasad Pandey* v. *Raghubir*, 1926 All 58 (59): 24 All L J 83: 90 Ind Cas 353: 48 All 168.

(9) *Rakhalraj Banerjee* v. *Ranjan Bagtani*, 1927 Cal 87 (88): 97 Ind Cas 979; *Zamarin* v. *Fateh Ali*, (1905) 32 Cal 146 (151).

(10) *P Varada Pillai* v. *P V Thillai Govindaraja Pillai*, 1931 Mad 8 (9): 32 Mad L W 694: 59 Mad L Jour 953: 129 Ind Cas 254; *Karambar Pandrapandaram* v. *A Ponnapandaram*, (1909) 3 Ind Cas 725 (725): 33 Mad 262: 6 Mad L Tim 261; *Ramachandrayya* v. *Venkataratnam*, 1926 Mad 133 (134): 22 Mad L W 582: 1925 Mad W N 804: 92 Ind Cas 800.

(11) *Secretary of State* v. *Natabar*, 1927 Pat 254 (255): 6 Pat 358: 103 Ind Cas 435; *Kishori Lall* v. *Ram Shunder*, 1921 All 193 (193): 19 All L J 822: 64 Ind Cas 688.

(12) *Shankar* v. *Balakrishna*, 1926 Bom 283 (283, 284): 28 Bom L R 521: 94 Ind Cas 783; *Bhagwati Prasad* v. *Govind Dat*, (1917) 41 Ind Cas 125 (126): 4 Oudh L Tim 374; *Mathra Das* v. *Hakim Singh*, (1912) 16 Ind Cas 752 (752): 247 Pun L R 1912: 261 Pun W R 1912.

(13) *Baldeo Das Kedar Nath*, v. *The Bombay Mercantile Bank*, (1920) 54 Ind Cas 364 (366): 6 Oudh L J 640.

(13-a) *Krishnan* v. *Ravi Varma*, (1885) 8 Mad 384 (387).

O. 7, R. 10, Notes 1—2.

A Court which has once returned the plaint for presentation to another Court, has no jurisdiction to re-entertain it although the latter Court has returned it for presentation to the former Court unless the order of the former Court is set aside by a superior Court.[14]

Where a Munsif's Court returns a plaint for presentation to proper Court, and in appeal against that order, the District Court holds that the Munsif's Court *has* jurisdiction to entertain the plaint, the Munsif's Court is bound by such order.[14-a] But where a Munsif returns a plaint for presentation to the Revenue Court and the Revenue Court returns it as being not cognizable by it, and the District Judge *in an appeal from the order of the Revenue Court* holds that it is a suit cognizable by the Civil Court, the Munsif is not bound by the order of the District Judge. He may make such order on the plaint as he thinks proper, when it is represented to him.[14-b] When one Court returns a plaint for presentation to another Court and the latter returns it for presentation to the former, the High Court can interfere and say in which Court the plaint is to be filed.[14-c]

Where a plaint is returned under this rule the *vakalathnama* should also be returned as it enures for the suit in the Court in which it is subsequently presented.[15]

This rule is made applicable to proceedings under the Chota Nagpur Tenancy Act.[16]

2. At any stage of the suit.—The direction in this rule is imperative[1] and as soon as the Court arrives at a conclusion at any stage of the suit that it should have been instituted in some other Court, the plaint should at once be returned.[2] The words "at any stage of the suit" have been newly added and give effect to the Full Bench decision in I.L.R. 8 Bom. 313.

A Court which has no jurisdiction over a suit cannot pass any judicial order in such a suit except the orders which the statute empowers it to pass[3]

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(14) *Razaur Rahaman* v. *Athar Hussain*, 1922 Pat 368 (369): 2 Pat L Tim 739: 64 Ind Cas 496.

(14-a) *Narayanasamy Naidu* v. *Kamuri Ramayya*, (1915) 26 Ind Cas 475 (476): 16 Mad L Tim 244: 1914 Mad W N 713: 1914 Mad W N 870: *Gopisetti Narayanaswamy Naidu Garu* v. *Kottayya*, (1917) 42 Ind Cas 483 (484): 6 Mad L W 239.

(14-b) *Kaliba Sahib* v. *Subbaraya Iyer*, 1926 Mad 365: 23 Mad L W 99: 1926 Mad W N 123: 1926 Mad W N 178: 92 Ind Cas 621.

(14-c) *Razaur Rahman* v. *Athar Hussain*, 1922 Pat 368.

(15) *Maharastrarmajnan Kosh* v. *Bijjulal*, 1923 Nag 182 (187): 19 Nag L R 36: 6 Nag L J 100: 71 Ind Cas 436.

(16) Act VI of 1908. S 265 (3) (m).

Note 2.

(1) *Kannusami Pillai* v. *Jagathambal*, (1918) 46 Ind Cas 265 (269): 1918 Mad W N 497: 24 Mad L Tim 46: 8 Mad L W 145: 41 Mad 701: 35 Mad L Jour 27; *Ganesh* v. *Tatya*, 1927 Bom 257 (258): 51 Bom 236: 101 Ind Cas 343: 29 Bom L R 280; *Bhadeshwar* v. *Gaurikant Nath*, (1882) 8 Cal 834 (836); *Khogendro Narain Chowdhry* v. *Gouri Kant Nath*, (1882) 11 Cal L Rep 300 (302); *Ambalavana Pandara* v. *Pichakutti Odayan*, (1919) 53 Ind Cas 308 (309): 1920 Mad W N 163: 10 Mad L W 525; *Muttirulandi* v. *Kottayan*, (1887) 10 Mad 211 (212); *Amirchand* v. *Buti Shah*, 1930 Lah 195 (196): 125 Ind Cas 334: 31 Pun L R 302.

(2) *Prabhakar Bhat* v. *Viswambhar*, (1884) 8 Bom 313 (318) F B [Overruling 7 Bom 487]; *Bhadeshwar* v. *Gaurikant*, (1882) 8 Cal 834 (836); *Kannusamy Pillai* v. *Jagathambal*, (1918) 46 Ind Cas 265 (269): 41 Mad 701: 1918 Mad W N 497: 24 Mad L Tim 46: 8 Mad L W 145: 35 Mad L Jour 27; *Abdul Samad* v. *Rajendro Kishore Singh*, (1879) 2 All 357 (358); *Vasudev* v. *Narayan*, 4 Bom 642, Note 2; *Mst Edee* v. *Shaikh Hefazut*, (1870) 13 Suth W R 358 (358); *Rem Gutty* v. *Goonomoonee*, (1869) 11 Suth W R 177 (178); *Asa Ram* v. *Bakhshi Ram*, (1919) 53 Ind Cas 331 (331) Lah; *Waryam Singh* v. *Bela Singh*, 1907 Pun W R 16 [Returned after trial of an issue]; *Hayatu* v. *Ghulam Hossein Shah*, (1910) 10 Ind Cas 980 (980): 4 Sind L R 264 [Returned at a late stage]. See also *Yacoob* v. *Mohan Singh*, (1888) 11 Mad 482 (483, 484): 13 Ind Jur 13. But see *Muzhur Ali* v. *Basso*, (1867) 8 Suth W R 46 (48); *Ram Gopal* v. *Asa Ram*, 1869 Pun Re No 88.

(3) *Kannusamy Pillai* v. *Jagathambal*, (1918) 46 Ind Cas 265 (269): 1918 Mad W N 497: 24

and all the proceedings in the suit before such return are of no effect.[4] Thus, where a Court finds that a suit is undervalued and on re-valuation the suit is found to be beyond the pecuniary jurisdiction of that Court, the proper procedure to be followed by the Court is to return the plaint for presentation to the proper Court and not to call upon the plaintiff to pay the proper Court-fee according to the correct valuation and to reject the plaint under O. 7, R. 11 on non-payment of the additional Court-fee.[5] O. 7, R. 10, Notes 2—5.

3. **Return of plaint by appellate Court.**—S. 107 provides that an 'appellate Court shall have the same powers and shall perform as nearly as may be, the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein'. Therefore, when an appellate Court decides that the suit should have been instituted in another Court, it has power to direct the plaint to be returned for presentation to the proper Court.[1]

4. **Return of plaint by Small Cause Court.**—This rule is applicable to Provincial Small Causes Courts as well and therefore, when such a Court finds that a suit is not cognizable by it, it should not go into the merits of the case, but should return the plaint under this rule.[1]

5. **Return of plaint by Civil Court to Revenue Court and vice versa.**—When a Civil Court finds that a suit is triable only by a Revenue Court, and not by itself, it should return the plaint to be presented to that Court.[1] Similarly the Revenue Court has the same power.[2]

Mad L Tim 46: 8 Mad L W 145: 41 Mad 701: 35 Mad L Jour 27; *Govindaraja Naicker* v. *Kassim Sahib*, 1928 Mad 384 (384): 54 Mad L Jour 409: 108 Ind Cas 542: 27 Mad L W 291 [Plaint cannot be amended so as to give jurisdiction]; *Moshingan* v. *Mozari*, (1886) 12 Cal 271 (272), (Do.); *Prabhakar* v. *Visvambhar*, (1884) 8 Bom 313 (317) F B, (Do.).

(4) *Govindasamy* v. *Kalia Perumal*, 1921 Mad 696 (698): 16 Mad L W 155: 1922 Mad W N 83: 66 Ind Cas 837 [Per Sadasiva Aiyar, J]; *Radha Kishen* v. *Kidar Nath*, (1912) 15 Ind Cas 773 (774): 96 Pun Re 1912: 221 Pun W R 1912 [Evidence taken by first Court cannot be used in proper Court].

(5) *Renganatha Aiyangar* v. *Sundararaja Aiyangar*, 1930 Mad 699 (699): 31 Mad L W 831: 58 Mad L Jour 651: 1930 Mad W N 840: 126 Ind Cas 111; *Bethasamy Naicken* v. *Nagammal*, 1931 Mad 69 (70): 1930 Mad W N 656: 59 Mad L Jour 899: 33 Mad L W 68: 129 Ind Cas 625; *Ramanna* v. *Ami Reddi*, 1931 Mad 67 (69): 129 Ind Cas 826: 61 Mad L Jour 43: 34 Mad L W 352; *Ganesh* v. *Tatya*, 1927 Bom 257 (258): 51 Bom 236: 101 Ind Cas 343: 29 Bom L R 280. But see *Kandasamy Goundan* v. *Subbai Goundan*, 1924 Mad 646 (647): 46 Mad L Jour 345: 34 Mad L Tim 92: 1924 Mad W N 338: 77 Ind Cas 781 [Dissented in cases cited before].

Note 3.

(1) *Wahedullah* v. *Kanhaya Lal*, (1903) 25 All 174 (176): 1902 All W N 222 F B; *Goor Bux* v. *Brij Lal*, (1899) 26 Cal 275 (278): 3 Cal W N 243; *Abdul Gafur* v. *Nuruddin*, 1923 All 137 (139): 20 All L J 984: 71 Ind Cas 411: 45 All 193: 4 L R All Civ 28; *Kalian Dayal* v. *Kalian Narer*, (1885) 9 Bom 259 (265): 9 Ind Jur 428; *Babaji* v. *Lakshmi Bai*, (1885) 9 Bom 266 (268); *Baimahkor* v. *Bulakhi Chaku*, (1876) 1 Bom 538 (543); *Vasudeo* v. *Narain*, (1879-80) 4 Bom 642 N; *Abdullah* v. *Asraf Ali*, (1908) 7 Cal L Jour 152 (164); *Prosad Das Mullick* v. *Russaik Lall Mullick*, (1881) 7 Cal 157 (163): 8 Cal L Rep 329; *Edoo* v. *Hefazut Hossein*, (1870) 13 Suth W R 358 (359) [Whether Court of first appeal or second appeal, it should return]; *Nagamma* v. *Subba*, (1888) 11 Mad 197 (199); *Muttirulandi* v. *Kottayan*, (1887) 10 Mad 211 (212); *Shadi* v. *Mussammat Aishan and Shahabuddin*, (1878) Pun Re No 55 [Should return notwithstanding a trial on the merits in the Court of first instance]; *Permeshri* v. *Gobind Ram*, (1884) Pun Re No 90 [Returned in revision]; *Shankar Das* v. *Ghasita*, (1876) Pun Re No 73 [Chief Court on a reference directed the lower Court to return the plaint].

Note 4.

(1) *Padu Muhammad* v. *Chutra Nath*, (1917) 41 Ind Cas 203 (205): 27 Cal L Jour 590; *Abdul Ameeth Sahib* v. *Ponnambala Muthurian*, 1926 Mad 679 (680): 1926 Mad W N 286: 94 Ind Cas 550: 23 Mad L W 757: 51 Mad L Jour 158; *Sheo Budh* v. *Surjan*, (1913) 19 Ind Cas 427 (427): 11 All L J 238 [S 23 of the Provincial Small Cause Courts' Act does not debar a return under this rule]; *Permeshri* v. *Gobind Ram*, (1884) Pun Re No 90; *Shukru* v. *Farzand Ali* 1925 Oudh 735 (736): 88 Ind Cas 991: 2 Oudh W N 549.

Note 5.

(1) *Tarapat* v. *Ram Ratan*, (1893) 15 All 387 (390): 1893 All W N 164; *Ambalavana* v. *Pichakutti Odayar*, (1919) 53 Ind Cas 308 (309): 10 Mad L W 525: 1920 Mad W N 163; *Muttirulandi* v. *Kottayan*, (1887) 10 Mad 211 (212); *Kalka* v. *Ram Suchit*, 1925 Oudh 499 (499): 12 Oudh L J 362: 2 Oudh W N 499: 89 Ind Cas 511: 6 L R A (Oudh) 85.

(2) *Ram Jas* v. *Babu Nandan Singh*, 1922 All 424 (424): 44 All 686: 70 Ind Cas 98.

O. 7, R. 10, Notes 5—9.

S. 99 of the Punjab Tenancy Act provides that where a Revenue Court or a Civil Court returns a plaint to be presented to the other Court and the latter Court is of opinion that the suit should have been instituted in the former Court, it should not again return the plaint, but refer the matter to the Chief Court.[3]

6. Return of applications.—This rule applies only to *plaints* and not to applications. Thus a Court cannot under this rule return an *application* for leave to sue in *forma pauperis*.[1] Nor can it return an application for the ascertainment of mesne profits on the ground that the amount exceeds the Court's pecuniary jurisdiction.[2]

7. Court in which the suit should have been instituted.—Where a suit is wrongly instituted in a case in which only an application should have been made to the executing Court, the plaint can be returned for presentation, as an application, to the executing Court.[1]

Where a plaint, returned under this rule, is presented to the proper Court without any undue delay but in the interval, immoveable property which is the subject-matter of the suit is alienated, is the alienation affected by the doctrine of *lis pendens*, enacted in S. 52 of the Transfer of Property Act? The High Court of Rangoon has held that the words 'at any stage of the *suit*' show that it cannot be said that there was *no suit pending* before the presentation to the proper Court, and that therefore, the doctrine of *lis pendens* will apply.[2]

8. Court-fee.—Where a plaint is returned for presentation to the proper Court, it does not lose its force by reason of the fact that the Court-fee stamp affixed thereto was cancelled by the Court in which the suit was instituted. The Court of representation is bound to give credit for the Court-fee already paid.[1] But if in the interval between the date of the original presentation and the presentation in the proper Court, the fee payable on the plaint is increased by the legislature, the amount of Court-fee payable is governed by the law in force on the date of the proper presentation.[2]

9. Limitation.—Where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suit are identical.[1] Therefore, for purposes of limitation the date of the institution of the suit is the date on which the plaint is presented to the Court in which

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(3) *Kure* v. *Ghisa*, 1904 Pun Re No 63; *Heta Ram* v. *Chandan*, (1912) 13 Ind Cas 447 (447): 49 Pun W R 1912: 101 Pun L R 1912.

Note 6.

(1) *Nur Muhammad* v. *Malvi Jamil Ahmad*, (1919) 52 Ind Cas 688 (689) All.

(2) *Muhammad Abdul Gafoor* v. *Mahtab*, (1917) 41 Ind Cas 231 (232, 233): 2 Pat L Jour 394.

Note 7.

(1) *Baldeo Das Kedar Nath* v. *Bombay Mercantile Bank, Ltd*, (1920) 54 Ind Cas 364 (366): 6 Oudh L J 640.

(2) *Ma Than* v. *Maung Ba Gyan*, 1927 Rang 145 (146, 147): 5 Rang 101: 101 Ind Cas 797.

Note 8.

(1) *Visweswara Sarma* v. *Nair*, (1911) 10 Ind Cas 201 (205, 209): 21 Mad L Jour 533: 10 Mad L T 29: 35 Mad 567; *Ganesh* v. *Tatya*, 1927 Bom 257 (257): 51 Bom 236: 101 Ind Cas 343: 29 Bom L R 280; *Prabhakarbhat* v. *Viswambhar*, (1884) 8 Bom 313 (317) F B [Overruling 7 Bom 487]; *Edoo* v. *Sheikh Hefazut Hossain*, (1870) 13 Suth W R 358 (358); *Amin Jan* v. *Ibrahim*, (1884) Pun Re No 91.

(2) *Bimala Prosad* v. *Lalmoni*, 1926 Cal 355 (356): 30 Cal W N 90: 91 Ind Cas 862.

Note 9.

(1) *Ram Dutt* v. *Sasoon & Co*, 1929 P C 103 (107): 1929 All L J 254: 33 Cal W N 485: 29 Mad L W 682: 56 Mad L Jour 614: 6 Oudh

it ought to have been instituted.[2] But the plaintiff can, in such a case, avail himself of the provisions of S. 14 of the Limitation Act, and claim the exclusion of the time during which the prior proceeding was prosecuted in good faith.[3] The period that can be deducted under that section is the period from the date of the *filing of the plaint* to the date on which it was *finally returned* by the Court for representation.[4] There is a difference of opinion on the question whether the Court returning a plaint under this rule can allow the plaintiff a period within which he might represent it in the proper Court. In an earlier case of the Calcutta High Court[5] it was held that the Court had a discretion to grant a reasonable time within which the plaintiff might present the plaint to the proper Court. But the same High Court has in a later decision[6] held that the order granting time is a nullity and will not save the suit from the bar of limitation.

10. Chartered High Courts.—Order 49, Rule 3, sub-R. 1 provides that this rule is not applicable to Chartered High Courts. As to the practice of the High Court of Bombay on its Original Side, *see* the undermentioned cases.[1]

11. Appeal.—An order under this rule, returning a plaint to be presented to the proper Court is appealable under O. 43, R. 1 (*a*), whether the order is made by the Court of the first instance[1] or by the Court of first appeal in the exercise of its powers under S. 107 *ante*.[2] But where such an order is reversed or confirmed in appeal, a *second appeal* is barred by the provisions of

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W N 473: 49 Cal L Jour 462: 115 Ind Cas 713: 31 Bom L R 741: 56 Ind App 128: 1929 Mad W N 546: 56 Cal 1048; *Labhu Ram* v. *Charnu*, 1929 Lah 409 (416): 30 Pun L R 306: 11 Lah L Jour 251: 116 Ind Cas 317 [Suit in District Court—Transfer to Subordinate Court—Subordinate Court returned—Presentation again to District Court—Suit is a continuation of the original one. This rule will apply]; *Hira Chand* v. *G I P Ry Co, Ltd*, 1928 Bom 421 (422): 30 Bom L R 970: 52 Bom 548 [Plaintiff should include all intermediate transactions between date of first presentation and that of representation].

(2) *Bhupendra Kumar* v. *Purna Chandra*, (1914) 24 Ind Cas 232 (234) Cal; *Madho Ram* v. *Dharm Singh*, 1930 Lah 394 (395): 31 Pun L R 305: 127 Ind Cas 708; *Sharam Singh* v. *Sadhu Singh*, 1928 Lah 484 (486): 110 Ind Cas 293. See also *Ajapa Natesa Pandara Sannadhi* v. *Rama Lingam Pillai*, (1913) 20 Ind Cas 767 (767): 24 Mad L Jour 658. But see *Ganga Prasad Rai* v. *Rama Nund Gir*, (1915) 30 Ind Cas 544 (545) All [It is submitted that it is wrongly decided]; *Khellat Chunder* v. *Nusseebunnissa*, (1871) 16 Suth W R 47 (47), (Do.).

(3) *Hirachand* v. *G I P Ry Co, Ltd*, 1928 Bom 421 (422): 30 Bom L R 970: 52 Bom 548; *Hedlot Khasia* v. *Karan Khasiani*, (1912) 13 Ind Cas 377 (381): 15 Cal L Jour 241; *Razaur Rahman* v. *Athar Husain*, 1922 Pat 368 (369): 2 Pat L Tim 739: 64 Ind Cas 496.

(4) *Sinnakaruppan* v. *Muthiah Chettiar*, 1926 Mad 178 (179): 22 Mad L W 816: 92 Ind Cas 373 [Order of return confirmed on appeal. Date of appellate order is not the test. It is the actual date of return endorsed under sub-rule 2]. But see *Krishna Variar* v. *Kunji Taravanar*, (1893) 3 Mad L Jour 190 (191) [Dissented from in 1926 Mad 178].

(5) *Nibaran Chandra* v. *S O Mukherjee*, (1910) 6 Ind Cas 637 (637) Cal.

(6) *Ganga Charan Das* v. *Akil Chandra*, (1916) 35 Ind Cas 595 (597): 24 Cal L Jour 355.

Note 10.

(1) *Prabhakarbhat* v. *Vishambhar*, (1884) 8 Bom 313 (316) [Practice is to return plaint even in the course of the trial]. But see In Re *Bai Amrit*, (1884) 8 Bom 380 (387) [The practice of the Original Side is to retain the plaint unless it has been returned on presentation].

Note 11.

(1) *Abdul Samad* v. *Rajendra Kishore Singh*, (1879) 2 All 357 (358); *Pachaoni* v. *Elahi Bakhsh*, (1882) 4 All 478 (480): 1882 All W N 113: 7 Ind Jur 211; *Mashesher Buksh Singh* v. *The Collector of Gazeepore*, (1867) 2 Agra 214; *Nilkant* v. *Balwant*, 1925 Bom 431 (431): 27 Bom L R 635: 88 Ind Cas 753; *Peeurishah* v. *Surajmal*, (1912) 16 Ind Cas 575 (575): 17 Cal W N 503: 16 Cal L Jour 371; *Chilukuri Narasimhacharyulu* v. *Zamindar of Bobbili*, (1919) 52 Ind Cas 1001 (1001): 26 Mad L Tim 153: 10 Mad L W 178: 1919 Mad W N 599. See also (1925) 26 Pun L R 342 (343) [If no appeal is filed, the correctness of the order cannot be challenged in Court in which it is refiled nor in appeal therefrom].

(2) *Wahid-ullah* v. *Kanhaya Lal*, (1903) 25 All 174 (176): 22 All W N 222 F B [Appeal lies to the High Court under S 106, C P C—Overruling 3 All 456]; *Nand Kishore* v. *Abdul Rahman*, (1919) 52 Ind Cas 801 (802): 17 All L J 1034: 42 All 74; *Dalip Singh* v. *Kundan Singh*, (1914) 22 Ind Cas 614 (615): 36 All 58: 12 All L J 21; *Raghunath* v. *Ganesh*, (1920) 18 All L J 214: 42 All 222: 54 Ind Cas 381 [Order of Court to which suit is transferred]; *Goor Bux* v. *Brij Lal*, (1899) 26 Cal 275 (278): 3 Cal W N 243 [Appeal lies to the High Court under S 106, C P C]; *Joynath* v. *Lal Bahadur*, (1882) 8 Cal 126 (130): 10 Cal L Rep 146; *Chinnasamy* v. *Karuppa*, (1898) 21 Mad 234 (235) [Where the appeal was filed as a second appeal, it was allowed to be amended into an appeal from an order]; *Badri Singh* v. *Lalta Singh*, 1925 Oudh 70 (71): 79 Ind Cas 1024: 1 Oudh W N 156; *Hira Lal* v. *Korori Mal*, (1899) Pun Re No 59

O. 7, R. 10, Note 11.

S. 104, sub-S. 2.[3] The appellate order reversing that of the Court of first instance cannot also be construed as an order of remand under O. 41, R. 23 so as to be appealable under O. 43, R. 1 (*u*) inasmuch as the order is not one passed on appeal from a decree. But the aggrieved party can under S. 105 dispute the correctness of the order in an appeal from the decree if he is otherwise entitled to do so.[4]

Where a Small Cause Court returns a plaint under S. 23 of the Provincial Small Cause Courts Act, to be presented to an ordinary Civil Court in order to decide a question of title to immoveable property, the Civil Court has no jurisdiction to return again the plaint under this rule, as the reference to the Civil Court by the Small Cause Court was under a special provision of law empowering the Small Cause Court to make such reference.[5] S. 192 of the Madras Estates Land Act excludes the operation of O. 43 to proceedings under that Act and consequently where, in an appeal to the District Court from a decree in a suit under that Act, the District Court, holding that the Revenue Court had no jurisdiction, directed the plaint to be presented to the proper Court, it was held that no appeal lay against the order of the District Court to the High Court.[6]

It has been held by the High Court of Madras and the Judicial Commissioner's Court of Nagpur that a plaintiff whose plaint is returned for presentation to the proper Court and who accordingly presents the plaint to the proper Court does not forfeit his right of appeal against the order of return simply, on the ground that he chose to file his plaint in the latter Court.[7] But the High Court of Calcutta and the Judicial Commissioner's Court of Oudh have taken a contrary view.[8] The High Court of Calcutta, has, however, in a later case held that the plaintiff will not forfeit his right of appeal if he specifically *reserves* his right to do so.[9]

An appellate Court which reverses an order returning a plaint under this rule, has no jurisdiction to *remand* the case to the lower Court for fresh dis-

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[Dissenting from (1898) Pun Re No 15]. But see *Nidhu* v. *Nihala*, (1898) Pun Re 15 [See 588 (b) corresponding to O 43, R 1 (a) applies only order of Court of first instance].

(3) *Naubat Singh* v. *Baldeo Singh*, (1911) 9 Ind Cas 666 (667): 33 All 479: 8 All L J 312: *Ulfat Rai* v. *Tulsi Pershad*, (1930) 125 Ind Cas 581: 1930 Notes 6 (C): *Krishna Ram* v. *Narsingh*, (1881) 3 All 855 (856): 1881 All W N 101; *Nilkant Vasudeo Samant* v. *Balwant Pandurang Samant*, 1925 Bom 431 (431): 27 Bom L R 635: 88 Ind Cas 753; *Chhubu Mian* v. *Har Charan Das*, (1913) 18 Ind Cas 529 (530): 119 Pun Re 1912: 101 Pun L R 1913: 48 Pun W R 1913; *Chiranji Lal* v. *Jit Mal*, (1909) 4 Ind Cas 977 (977): 96 Pun L R 1909: 108 Pun W R 1909; *Bhawani* v. *Harbans Singh*, (1920) 2 Lah L Jour 587; *Jwala Prasad* v. *East Indian Ry Co*, (1918) 46 Ind Cas 99 (100): 16 All L J 535; *Labhu* v. *Balwant Singh*, 1931 Lah 294 (295): 32 Pun L R 362: 12 Lah 646: 134 Ind Cas 203. But see *Kallan Das* v. *Nawalsingh*, (1875-78) 1 All 620 (622) [Decision under the Code of 1877, holding the order of the first Court to be a decree—It is no longer law under this Code].

(4) *Venkatanarasu* v. *Kotayya*, 1926 Mad 900 (901): 51 Mad L Jour 119: 1926 Mad W N 613: 24 Mad L W 630: 97 Ind Cas 790; *Hayat Ali Khan* v. *Ishar Das*, 1926 Lah 141 (141): 89 Ind Cas 384.

(5) *Chander Baden* v. *Sheodhar*, (1913) 18 Ind Cas 325 (325): 18 Cal W N 380: *Hara Mohan* v. *Sudhanshu Bhusan*, 1926 Cal 83 (84): 85 Ind Cas 1002.

(6) *Venkataramayya* v. *Chakali*, (1918) 45 Ind Cas 471 (472): 34 Mad L Jour 309: 23 Mad L Tim 251: 7 Mad L W 508: 1918 Mad W N 327: 41 Mad 554.

(7) *Narain Nair* v. *Chheria Kathiri Kutty*, (1918) 45 Ind Cas 89 (89): 41 Mad 721: 34 Mad L Jour 397: *Ramachandra Tejmal* v. *Mohan Lal*, 1930 Nag 207 (208): 121 Ind Cas 668: 13 Nag L J 4: 26 Nag L R 300. See also *Abdul Aziz* v. *Chandu Sonu*, 1925 Bom 418 (418): 27 Bom L R 652: 89 Ind Cas 68 [Plaintiff changed his mind after representation and appealed. After losing the appeal he can again present the plaint in the proper Court].

(8) *Beni Madhub* v. *Jotindra Mohun*, (1907) 5 Cal L Jour 580 (582): 11 Cal W N 765: *Suraj Kunwar* v. *Sardar*, (1908) 11 Oudh Cas 98 (100).

(9) *Tara Kanta* v. *Kali Prasad*, (1919) 53 Ind Cas 1001 (1002): 23 Cal W N 942.

posal; the proper procedure is to annul the order of the trial Court and direct it to dispose of the suit according to Law.[10] O. 7, R. 10, Notes 11—12.

Where a memorandum of appeal is returned for presentation to the proper Court, is the order of return appealable? The High Courts of Calcutta, Allahabad and Lahore[11] have held that the word "plaint" in this rule does not include a memorandum of appeal and that, therefore, no appeal lies from such an order. The High Court of Madras, the Chief Court of Lower Burma and the Judicial Commissioner's Court of Oudh, have, on the other hand, held that an appeal does lie in such cases.[12]

12. Revision.—Where a Court erroneously returns a plaint for presentation to the proper Court, it fails to exercise a jurisdiction vested in it and a revision will lie if the other condition in S. 115 are satisfied.[1] *See also* Note 11 to S. 115 and the cases cited in foot-note 2 thereto. As to whether an order of the *appellate Court* confirming or reversing an order of the Court of first instance returning a plaint under this rule, is revisable *see* Note 15 to S. 115 and the undermentioned cases.[2]

Rejection of plaint.

R. 11. [Ss. 53 & 54.] The plaint shall be rejected in the following cases :— O. 7, R. 11.

(*a*) *where it does not disclose a cause of action*:[3]

(*b*) *where* the relief *claimed* is under-valued,[4] and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :

(*c*) *where* the relief *claimed* is properly valued, but the plaint is written upon paper insufficiently stamped,[5] and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so :

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(10) *Kand Hai Lal* v. *Anantu*, 1925 Oudh 393 (394): 2 Oudh W N 239: 12 Oudh L J 277: 87 Ind Cas 172; *Maqbul Husain* v. *Rajendra Narain*, (1909) 4 Ind Cas 780 (781): 12 Oudh Cas 888. See also *Thoppukattu Ramayya Goundan* v. *Sadagopachariar*, (1916) 32 Ind Cas 759 (760): 1915 Mad W N 784. But see *Kushi Ram* v. *Daljit Khan*, (1882) All W N 45 (45) [Appellate Court must decide the case on the merits].

(11) *Raghunath Charan Singh* v. *Shamo Koeri*, (1903) 31 Cal 344 (347); *Chatturbhuj Maheswri* v. *Harlal Agarwala*, 1925 Cal 335 (336): 80 Ind Cas 858; *Gaizaddy* v. *Soroj Kumar*, (1929) 117 Ind Cas 849: 32 Cal W N 693; *Nuruddin Khan* v. *Pran Kishen*, (1918) 47 Ind Cas 16 (17): 40 All 659: 16 All L J 630; *Shiv Dial* v. *Shiv Ram Das*, 1928 Lah 635 (635): 111 Ind Cas 72.

(12) *Kunhikutti* v. *Achotti*, (1891) 14 Mad 462 (464); *Krishna Pattar* v. *Kavalappara Mooppil Nair*, (1917) 38 Ind Cas 772 (773): 5 Mad L W 294; *Maung Po Mya* v. *Palaniappa Chetty*, (1900-07) 1 L B R 32 (33); *Kalka* v. *Ram Suchit*, 1925 Oudh 499 (499): 89 Ind Cas 511: 12 Oudh L J 362: 2 Oudh W N 499. See also *Bai Amba* v. *Pranjivandas*, (1894) 19 Bom 198 (201).

Note 12.

(1) *Nur Muhammad* v. *Malvi Jamil Ahmad*, (1919) 52 Ind Cas 688 (689) All; *Razaur Rahman* v. *Athar Hussain*, 1922 Pat 368 (369): 64 Ind Cas 496: 2 Pat L Tim 739.

(2) *Venkataramayya* v. *Chakalai*, (1918) 45 Ind Cas 471 (472): 34 Mad L Jour 309: 23 Mad L Tim 251: 7 Mad L W 508: 1918 Mad W N 327: 41 Mad 554; *Narasimmacharyulu* v. *Zamindar of Bobbili*, (1919) 52 Ind Cas 1001 (1001): 10 Mad L W 178: 1919 Mad W N 599: 26 Mad L Tim 153; *Chhubu Mian* v. *Harcharan Das*, (1913) 18 Ind Cas 529 (530): 119 Pun Re 1912: 48 Pun W R 1913; *Khunai Tewari* v. *Mt Dil Kunwar*, 1923 Oudh 38 (39): 79 Ind Cas 237. See also *Bhagwati Prasad Singh* v. *Govind Dat*, (1917) 41 Ind Cas 125 (125): 4 Oudh L J 374.

O. 7, R. 11, Notes 1—2.

(*d*) *where* the suit appears from the statement in the plaint to be barred by any law.[7]

[1877—Ss. 53, 54; 1859—Ss. 29, 31, 32.]

Local Amendment.

BENGAL.

Add the following as clause (*e*):—

"(*e*) Where any of the provisions of Rule 9 (1-A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so."

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. "Where it does not disclose a cause of action."
4. "Where the relief claimed is under valued."
5. Where the plaint is insufficiently stamped.
6. Memorandum of appeal insufficiently stamped.
7. Where the suit appears to be barred by any law.
8. Rejection of plaint on other grounds.
9. Rejection of plaint in part.
10. At what stage plaint can be rejected.
11. Appeal.
12. Revision.
13. Review.

Applicability of this rule to chartered High Courts. See Note 2.
Courts' duty to examine plaint. See Note 3, Pt. (1).
Extension of time. See Note 5, Pts. (5) and (6).
Rule how far mandatory. See Note 5, Pts. (7) and (8); and Note 10, Pt. (1).
Within a time to be fixed by the Court. See Note 5, Pts. (3) and (4).

1. Legislative changes.—

1. Clause (*a*) corresponds to clause (*a*) of S. 53 of the old Code which provided that "the plaint may, at the discretion of the Court, at, or any time before the settlement of issues be rejected . . . . ." *See* Note 10 and the undermentioned cases decided under the old Code.[1]
2. The words "Positive rule of" before "law" in clause (*d*) have been omitted.
3. Clause (*d*) of S. 54 of the old Code has been omitted, as this Code does not anywhere provide for the return of pleadings for amendment.

2. Scope of the rule.—This rule enacts that the plaint shall be rejected in the four classes of cases mentioned in clauses (*a*) to (*d*). But the instances given cannot be regarded as exhaustive of *all* the cases in which a Court can reject a plaint, or as limiting the inherent powers of the Court in respect thereof.[1] Thus a Court has jurisdiction, in a proper case, to reject the plaint filed by the next friend of a minor on the ground that it is not in the *interests of the minor* that the suit should be proceeded with[1-a] So also where it is alleged that a suit was instituted without the signature and authority of the plaintiff, the Court will frame a preliminary issue on the point and reject the

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Order 7, Rule 11—Note 1.

(1) *Shah Ahamad* v. *Taree Rai*, (1881) 7 Cal 343 (345) [Held too late to reject a plaint in appeal for want of cause of action, as the proceedings in the lower Court showed that plaintiff was entitled to relief]; *Saïendra* v. *Karali*, (1905) 2 Cal L Jour 535 (537), (Do.) But see *Secretary of State* v. *Sukhdeo*, (1899) 21 All 341 (345): 1899 All W N 151.

Note 2.

(1) *Harihar* v. *Jagennath*, 1924 Oudh 413 (414): 11 Oudh L J 260: 83 Ind Cas 778.

(1-a) *Lakshumanan Chetty* v. *Lakshumanan Chettiar*, (1914) 25 Ind Cas 738 (738): 1 Mad L W 875.

plaint if it finds the issue against the plaintiff.[2] An appellate Court has the same powers of rejecting a plaint as the Court of first instance.[3] O. 7, R. 11; Notes 2—3.

Where a suit is disposed of under this rule, the Court ought not to dismiss the suit, but should *reject* the plaint.[4] The effect of rejection as distinguished from a dismissal is that, in the former case, the plaintiff would not under Rule 13, *infra*, be precluded from filing a fresh plaint in respect of the same cause of action, if he so desires.

A plaintiff is not entitled to have the dismissal of a suit for default, set aside under O. 9, R. 9 on the ground that the plaint should have been rejected.[5]

This rule does not apply to Chartered High Courts in the exercise of their ordinary, or extraordinary original civil jurisdiction (*see* O. 49, R. 3, *infra*). The High Court of Allahabad has, in the undermentioned case[6] held that this rule is inapplicable to their *appellate* jurisdiction also notwithstanding the provisions of S. 107 of the Code.

3. "**Where it does not disclose a cause of action**".—When a plaint is filed, it is the duty of the Court to see that the plaint contains the necessary allegations which must be proved before a decree could be given, and, if not, to reject the plaint.[1] To enable a Court to reject a plaint on this ground, it should look at the *plaint* and at nothing else.[2] In asking the Court to decide an issue like this (which is called a plea of *demurrer*), the defendants must be taken to admit *for the sake of argument* that the allegations of the plaintiff in his plaint are true *modo et forma*—in manner and form.[3] In doing so they must be taken to reserve their right to show that those allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled. The power to reject a plaint under this clause must be exercised only if the Court comes to the conclusion that even if all the allegations are proved, the plaintiff would not be entitled to any relief whatever.[4]

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(2) See also *Bibi Sadhu* v. *Ghulam Haidar Shah*, (1910) 7 Ind Cas 600 (600): 4 Sind L R 35.

(3) *Ram Piari* v. *Balgobind Das*, 1885 All W N 291 (294); *Vithoba Yadeo* v. *Suryabhan*, 1924 Nag 80 (80): 69 Ind Cas 554.

(4) *Ganga Narain* v. *Tiluckram*, (1888) 15 Cal 533 (538): 15 Ind App 119: 5 Sar 168: 12 Ind Jur 254; *Radha Kanta* v. *Debendra Narayan* 1922 Cal 506 (506): 49 Cal 880: 70 Ind Cas 101: *Luckee Prea* v. *Brindaban*, (1869) 12 Suth W R 313 (314); *Shridhar Hari* v. *Chima*, (1873) 10 Bom H C R 17; *Nagar Mal* v. *Macpherson*, (1880) 3 All 766 (768): 1881 All W N 66 [Should be rejected and not returned]; *Daboo Jha* v. *Luwa Jha*, (1869) 11 Suth W R 223 (223) [May be allowed to be amended]; *Subramaniya Pattar* v. *Valiya Nayar*, (1898) 8 Mad L Jour 187 (189). See also *Birj Krishna Das* v. *Murli Rai*, (1920) 56 Ind Cas 316 (320): 4 Pat L Jour 703 [This rule does not apply when Appellate Court acts under S 12 of the Court Fees Act—S 10 of the Court Fees Act will apply].

(5) *Rambhanjan Singh* v. *Pashupat Rai*, 1924 Pat 271 (272): 2 Pat 784: 74 Ind Cas 847.

(6) *Balkaran Rai* v. *Gobind Nath Tiwari*, (1890) 12 All 129 (152): 1890 All W N 39.

Note 3.

(1) *Sadhu Kathalia* v. *Dhirendra Nath*, 1928 Cal 425 (425): 55 Cal 590; *Jawahir Singh* v. *Sassoon & Co*, 1923 Lah 290 (291): 75 Ind Cas 165; *Maung Ba Thaung* v. *Ma Shin Min*, (1917) 37 Ind Cas 15 (18): 9 L B R 37: 10 Bur L Tim 189; *Maung Myo* v. *Mi Myit Shu*, (1892-1896) U B R, Vol 2, 244; *Nga Shwe Win* v. *Nga Chan E*, 1872-1892 L B R 365.

(2) *Izzat Ali* v. *Muhammad Sharfatulla Khan*, (1917) 39 Ind Cas 553 (554): 39 All 516: 15 All L J 541; *Girdharlal* v. *Jayannath*, (1873) 10 Bom H C R 182 [Should not refer to documents and facts not stated in or annexed to the plaint]. But see *Man Gobind* v. *Umbika Monee*, (1871) 16 Suth W R 218 (219).

(3) *Kanhaiyalal* v. *National Bank of India, Ltd*, (1913) 40 Ind App 56 (63): 40 Cal 598: 17 Cal W N 541: 1913 Mad W N 406: 13 Mad L Tim 406: 11 All L J 413: 17 Cal L Jour 478: 15 Bom L R 472: 184 Pun L R 1913: 25 Mad L Jour 104: 18 Ind Cas 949 P C.

(4) *Collins* v. *Charles Booth & Co*, 1921 Sind 106 (108): 17 Sind L R 9: 80 Ind Cas 958; *Lakshimi Ammal* v. *Thikaram*, (1862-63) 1 Mad H C R 240 (243) [Mere unlikelihood of plaintiff's success will not justify rejection]. See also *Shridhar Hari* v. *Chima Valad*, (1873) 10 Bom H C R 17; *Balava* v. *Shidgouda*, (1870) 7 Bom H C R 99.

O. 7, R. 11, Notes 3—5.

As to cases where a cause of action accrues after the presentation of the plaint *see* O. 7, R. 7. *See also* the undermentioned cases[5] deciding whether a particular plaint did or did not disclose a cause of action.

The expression "cause of action" as used in this rule does not mean a claim which is still enforceable under the Law of Limitation. Where, therefore, a suit is barred by time it cannot be said that the plaint does not disclose a cause of action, and that it falls to be dealt with under cl. (*a*). The Court may, however, proceed under cl. (*d*).[6]

4. "Where the relief claimed is under-valued."—If the Court comes to the conclusion that the plaintiff's valuation of a suit is fictitious, it can compel him to make a correct valuation and can reject the plaint on his failure to do so; but it cannot *itself* fix a valuation in place of the plaintiff's valuation.[1] If the correct valuation would make the Court incompetent to try the suit, then the matter falls under R. 10, *ante*, and not under the clause, (*see* O. 7, R. 10, Note 2).

In order to determine whether a suit is properly valued or not the Court must confine its attention to the *plaint* and should not look to other circumstances which may subsequently influence the judgment of the Court as to the true value of the relief sought.[2]

See also Note 5, *infra*, and S. 6, Note 4.

5. Where the plaint is insufficiently stamped.—Where the plaint is *properly valued* (either at the time of the presentation itself or at a time subsequent thereto, in pursuance of an order of the Court under cl. (*b*), but is *insufficiently stamped*, the Court can act under this rule.[1] But the Court can-

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(5) Cases where plaint disclosed a cause of action:—*Bhagwandas Lakshmi Narain* v. *B N W Ry.* 1929 All 597 (598): 1929 All L J 859: 119 Ind Cas 95: 51 All 895; *Makhan Lall* v. *B B & C I Ry. Co.* (1914) 25 Ind Cas 77 (78): 12 All L J 339; *Rajah Shoraj Singh* v. *Nurkhan*, (1875) 7 N W P 354; *Jugmohan Tewari* v. *Baldeo Naik*, (1868) 3 Agra 162; *Kshitish Chandra Acharya* v. *Osmond*, (1912) 14 Ind Cas 4 (5): 39 Cal 587: 16 Cal W N 516; *Nawab Singh* v. *Charan Rana*, (1902) 6 Cal W N 411 (413); *Kaseenath* v. *Reejoonissa*, *Marsh* 198: 1 Hay 467; *Golam Ali* v. *Futtick Chunder*, (1868) 10 Suth W R 460 (460); *Bhona* v. *Pallan*, (1867) 11 Suth W R 131 (131); *Kanakasabapathy* v. *Hajee Osman Sahib*, 1925 Mad 192 (193, 194): 47 Mad L Jour 791: 20 Mad L W 910: 1925 Mad W N 279: 87 Ind Cas 760; *Durgamma* v. *Kechamayya*, 1925 Mad 792 (792): 48 Mad L Jour 351: 1925 Mad W N 162: 91 Ind Cas 717; *Kottappa* v. *Vallur Zamindar*, (1902) 25 Mad 50 (54); *Ramasamy* v. *Ramoo Moopan*, (1866-68) 3 Mad H C R 372 (373); *Udaya Varma* v. *Nayar*, (1862-63) 1 Mad H C R 322 (325); *Jalla Ram* v. *Labha*, 1926 Lah 472 (472): 27 Pun L R 317: 97 Ind Cas 809; *Ganda Mal* v. *Thakar Harkishen*, 1900 Pun Re No 3: 1900 Pun L R 10 [Suit premature—Returned for amendment—When represented cause of action had arisen—Plaint should not be rejected]; *Muhammad Sharif* v. *Mahomedbhai Husseinbhai* v. *Adamja Halimbhai*, 1922 Bom 152 (154): 46 Bom 229: 23 Bom L R 1086: 64 Ind Cas 919; *Krishnaji* v. *Wamaji*, (1894) 18 Bom 144 (146); *Shridhar Hari* v. *Chima*, (1873) 10 Bom H C R 17; *Srinivasa* v. *Venkata*, (1898) 11 Mad 148 (151); *Ramasamy* v. *Selattammal*, (1881) 4 Mad 375 (379, 380); *Kallynauth Shaw* v. *Rafeeblochun Mozoomdar*, (1863) 2 Ind Jur N S 343; *Luckey Money Dassee* v. *Khetter Coomary Dossee*, (1863) 2 Ind Jur N S 117; *Maung Shwe Hmyin* v. *Ma Pu Ma*, (1892-1896) U B R 507; *Secretary of State for India* v. *Ram Autar*, (1901) 4 Oudh Cas 29 (30).

(6) *Bhajja* v. *Md Said Khan*, 1932 All 543 (545): 1932 All L J 489: 138 Ind Cas 396.

Note 4.

(1) *Asiq Ali* v. *Imtiaz*, (1917) 42 Ind Cas 891 (892): 39 All 723: 15 All L J 794; *Balvantrao* v. *Bhima Shankar*, (1889) 13 Bom 517 (519); In the matter of *Kali Pada Mukherjee*, 1930 Cal 686 (688): 34 Cal W N 870: 58 Cal 281. See also *Bai Hirugavri* v. *Gulabdas Jamnadas*, (1914) 22 Ind Cas 71 (72): 15 Bom L R 1123. But see *Umatul Batul* v. *Nauji*, (1907) 11 Cal W N 705 (711): 6 Cal L Jour 427.

(2) *Rajahbala Dasi* v. *Radhika Charan Roy*, 1924 Cal 969 (969): 40 Cal L Jour 150: 79 Ind Cas 982.

Note 5.

(1) *Selima Sheehan* v. *Hafez Mahomed Fateh Nashib*, (1932) 36 Cal W N 567 (569): 1932 Cal 685. See also *Naranjan Singh* v. *Labh Singh*, 1931 Lah 622 (623): 32 Pun L R 455: 133 Ind Cas 654.

not exercise the powers conferred under this clause after the suit has been *decided finally* so far as that Court is concerned.[2] O. 7, R. 11, Note 5.

Under the old Code there was a conflict of opinion as to whether a suit would become barred by limitation where the deficiency in Court-fee is supplied *after* the period of limitation for the suit but *within the time fixed* by the Court. The conflict has now been set at rest by the enactment of S. 149. For a full discussion of the subject, *see* Note 7 to S. 149 and the following cases.[3]

A plaint cannot be rejected under this rule for under-valuation or for insufficiency of stamp unless the plaintiff is *given an opportunity* to correct the valuation or to supply the deficient stamp as the case may be, within a time to be fixed by the Court, and he fails to do so.[4] Nor does the use of the words "shall be rejected" prevent the Court from exercising its powers under S. 148 of the Code and enlarge the time fixed by it, from time to time.[5] No *express* order is necessary for such extension of time. An extension may be *inferred* from the fact that the Court has actually allowed a thing to be done beyond the prescribed time.[6]

Where a plaint is written upon insufficiently stamped paper and the plaintiff does not supply the requisite stamp within the time fixed by the Court, can he be allowed to reduce his claim so as to bring it within certain Court-fees? There is a conflict of opinion on this point. The High Courts of

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(2) *Mahadei* v. *Ram Kishen*, (1885) 7 All 528 (532): 1885 All W N 140; *Ismail Shah* v. *Saleh Mahomed Shah*, 1925 Lah 326 (327): 7 Lah L Jour 18: 86 Ind Cas 266.

(3) **Cases under the old Code, in addition to those given in Note 7 to S 149:**—*Dwarka Nath* v. *Kedar Nath*, (1909) 2 Ind Cas 1 (3); *Mahtab Rai* v. *Gopal Rai*, 1905 Pun Re No 104: 152 Pun L R 1905: 126 Pun W R 1905; *Aziz-un-nissa* v. *Mukim-un-nissa*, (1901) 4 Oudh Cas 108 (114); *Santokh Narain* v. *The Collector of Ghazipur*, (1909) 3 Ind Cas 557 (558) All; *Babu Lall* v. *Asi Kunwar*, (1905) 27 All 197 (199): 24 All W N 224; *Durga Singh* v. *Bisheshar Dayal*, (1902) 24 All 218 (220): 1902 All W N 27 [Dissented from in 27 All 197]. **Cases under the new Code in addition to those given in Note 7 to S 149:**—*Ram Dial* v. *Sher Singh*, 1923 All 538 (538): 21 All L J 387: 45 All 518: 4 L R All Civ 251: 74 Ind Cas 358 [Ruling in 15 All 65 held to be superseded by this rule]; *Surendra* v. *Atabuddin*, 1922, Cal 234 (235): 26 Cal W N 391: 70 Ind Cas 43; *Deonath Sahai* v. *Radha Kant Prasad*, 1922 Pat 56 (56): 3 Pat L Tim 142: 70 Ind Cas 378.

(4) *Radha Kanta Sha* v. *Debendra Narayan Sha*, 1922 Cal 506 (508): 49 Cal 880: 70 Ind Cas 101: 27 Cal W N 566: 38 Cal L Jour 74; *Subramaniya Iyer* v. *Rama Iyer*, 1927 Mad 1002 (1003): 54 Mad L Jour 67: 105 Ind Cas 881; *Thakoor Putuck* v. *Ramsoomrun*, (1878) 1 N W P 16; *Bai Anope* v. *Mulchand*, (1885) 9 Bom 355 (357); *Raghunath* v. *Gengadhar*, (1888) Bom P J 58; *Bhaishankar* v. *Motiram*, 1888 Bom P J 120; *Jiwandass* v. *Khushabai Ram*, (1917) 39 Ind Cas 766 (766): 27 Pun L R 1917: 25 Pun W R 1917; *Wasawa Ram* v. *Bahadur Chand*, (1914) 25 Ind Cas 24 (25): 194 Pun L R 1914; *Khusal Singh* v. *Puran Singh*, 1888 Pun Re No 156; *Basavayya* v. *Venkatappayya*, 1926 Mad 676 (677): 1926 Mad W N 341: 51 Mad L Jour 90: 95 Ind Cas 439; *Subramaniya Pattar* v. *Valiya Nayar*, (1898) 8 Mad L Jour 187 (189); *Deoraj* v. *Kunj Behari*, 1930 Oudh 104 (105): 6 Oudh W N 1105: 5 Luck 474: 124 Ind Cas 420; *Deonath Sahai* v. *Radha Nath Prasad*, 1922 Pat 56 (56): 3 Pat L Tim 142: 70 Ind Cas 378; *Rambhanjan Singh* v. *Pushpat Rai*, 1924 Pat 271 (272): 2 Pat 784: 74 Ind Cas 847; *Nanekchand* v. *Jiwan Mal*, (1914) 25 Ind Cas 435 (436): 35 Pun Re 1914: 237 Pun L R 1914 [Deficiency not supplied within time fixed—Plaint must be rejected]; *Brahmomoyi* v. *Andisi*, (1900) 27 Cal 376 (378) [If within that time period of limitation expires, the suit is barred by time].

(5) *Chuni Lal* v. *Ajudhia Prasad*, (1897) 19 All 240 (243): 1897 All W N 40; *Ram Dial* v. *Sher Singh*, 1923 All 538 (538): 21 All L J 387: 45 All 518: 4 L R All Civ 251: 74 Ind Cas 358; *Bhugwandas* v. *Haji Abu Ahmed*, (1892) 16 Bom 263 (266); *Rajkishori Koer* v. *Madan Mohan Singh*, (1904) 31 Cal 75 (78); *Nasir Mandal* v. *Satish Chandra Ghosh*, (1919) 51 Ind Cas 154 (155) Cal; *Dwarka Nath* v. *Kedar Nath*, (1909) 2 Ind Cas 1 (2) Cal; *Diwan Amir Hussain Khan and others* v. *Babu Nanak Chand and others*, (1910) 6 Ind Cas 424 (425): 14 Cal W N 882: 12 Cal L Jour 62; *Hara Kumar Pal Chowdhry* v. *Sheikh Safatullah*, (1905) 2 Cal L Jour 70 (73): 9 Cal W N 844 [Deficit Court-fee paid one day after time fixed—If on that date suit is not barred, it can go on]; *Muhammad Safi Muhammad Ayub* v. *Delhi House of Multan*, 1928 Lah 274 (275); *Chanda Singh* v. *Isher Singh*, 1894 Pun Re No 113; *Basavayya* v. *Venkatappayya*, 1926 Mad 676 (677): 1926 Mad W N 341: 51 Mad L Jour 90: 95 Ind Cas 439; *Subramaniyam* v. *Ramaswamy*, (1899) 9 Mad L Jour 348 (348); *Nandkishore* v. *Jionath*, 1926 Nag 312 (312): 93 Ind Cas 64; *Kamakhya Dat Ram* v. *Shyam Lal*, 1927 Oudh 507 (507): 1 Luck Cas 574: 104 Ind Cas 527; *Aziz-un-nissa* v. *Mukimunissa*, (1901) 4 Oudh Cas 108 (115); *Adit Prosad Singh* v. *Ramharakh Ahir*, 1925 Pat 435 (437): 4 Pat 180: 1925 Pat H C C 147: 91 Ind Cas 213.

(6) See Note 8 to S 148 *ante*. See also *Kolisetty Basaviah* v. *Venkatappayya*, 1926 Mad 676 (677): 1926 Mad W N 341: 51 Mad L Jour 90: 95 Ind Cas 439; *Pudmanand Singh* v. *Anant Lal Misser*, (1907) 34 Cal 20 (24, 27, 29): 11 Cal W N 38: 1 Mad L Tim 355: 4 Cal L Jour 421.

O. 7, R. 11, Notes 5—6.

Allahabad and Madras have held that it is open to the plaintiff to relinquish a portion of the claim in order to bring it within a certain Court-fees.[7] The High Courts of Calcutta and Bombay have, on the other hand, held that under such circumstances the Court has no jurisdiction to do so and is bound to reject the plaint, on the ground that this rule is mandatory.[8]

Where a plaintiff is given time to pay additional Court-fee under this rule and he does not appear on the date fixed in consequence of which the Court dismisses the suit, the order though one of dismissal must be deemed to be an order under this rule, and not under O. 9, R. 8, so that a fresh suit on the same cause of action will not be barred under O. 9, R. 9.[9] Cl. (*c*) of this rule does not apply to the case of failure of a plaintiff to pay stamp duty on a partition decree.[10]

6. Memorandum of appeal insufficiently stamped.—This Rule applies in terms to *plaints* insufficiently stamped. Where a *memorandum of appeal* is found to be presented with an insufficient Court-fee, is the Court bound to grant time to the appellant to make up the deficiency? There is a conflict of opinion on this point. According to the High Courts of Bombay[1] and Calcutta[2] and the Chief Court of Oudh[3] this rule applies to memorandum of appeals also by virtue of S. 107. A contrary view has been taken by the High Courts of Allahabad,[4] Lahore,[5] and Patna[6] and the Judicial Commissioner's Court of Nagpur.[7] This view proceeds on the ground that the insertion of S. 582 in the old Code corresponding to S. 149, providing for memorandum of appeals, shows that the rule does not apply to memorandum of appeals. The High Court of Madras expressed this view in an earlier case,[8] but has, in a later case[9] dissented from this view and adopted the former view. *See also* Note 9 to S. 149.

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(7) *Ram Pershad* v. *Biman*, (1905) 27 All 151 (152): 1 All L J 577: 1904 All W N 198 [Plaintiff can abandon a portion of his claim, so as to avoid payment of additional Court-fee]: *Neelchalam* v. *Narasing Dass*, 1931 Mad 716 (716): 1931 Mad W N 677: 34 Mad L W 252: 134 Ind Cas 816.

(8) *Midnapur Zamindari Co* v. *The Secretary of State*, (1917) 40 Ind Cas 96 (97): 44 Cal 352: 21 Cal W N 834 [Court has no power to allow amendment by omitting prayer in respect of which extra Court-fee was ordered]: *Vallie* v. *Mahomad*, (1915) 26 Ind Cas 746 (747): 16 Bom L R 763.

(9) *Narayanan* v. *Sankaran Nair*, 1929 Mad 344 (345): 117 Ind Cas 789: *Brundaban Das* v. *Bandhu Padhan*, 1932 Pat 11 (12): 133 Ind Cas 449. See also *Mt Jantan* v. *Ahmad*, 1928 Lah 221 (223): 106 Ind Cas 817 [Conditional decree that it was to be of no effect unless deficit Court-fee is paid—Such order is to be deemed an order of rejection].

(10) *Sheomangal* v. *Dil Raj*, (1919) 50 Ind Cas 886 (887): 17 All L J 493: 1 U P L R (All) 9.

Note 6.

(1) *Achut* v. *Nagappa*, (1914) 21 Ind Cas 337 (338): 15 Bom L R 902: 38 Bom 41.

(2) *Nussurut Ali* v. *Muhammad Kanoo*, (1869) 11 Suth W R 541 (541) [Under S 31 of Act VIII of 1869). See also *Jananda Sundari Shaha* v. *Madhabchandra Mala*, 1932 Cal 482 (484, 485): 59 Cal 888: 138 Ind Cas 643.

(3) *Dearaj* v. *Kunj Behari*, 1930 Oudh 104 (105): 6 Oudh W N 1105: 5 Luck 474: 124 Ind Cas 420.

(4) *Brijbukhan* v. *Tota Ram*, 1929 All 75 (76): 26 All L J 1199: 50 All 980: 118 Ind Cas 228. See also *Jai Singh Gir* v. *Sita Ram Singh*, 1923 All 349 (349): 74 Ind Cas 757: 21 All L J 333: 4 L R All (Civ) 188. But see *Sheo Pratab Singh* v. *Sheo Gholam Singh*, (1878-80) 2 All 875 (876) [Shoud fix time under S 54 (*b*) of 1882 Code].

(5) *Lekh Ram* v. *Ramji Das*, (1920) 57 Ind Cas 215 (216): 1 Lah 234: 3 Lah L Jour 370: 144 Pun L R 1920 [Decided on the assumption that S 149 applied and not this rule—Time for payment was refused as not being a *bona fide* case of mistake]. But see *S Sardar Kushal Singh* v. *Puran Singh*, 1888 Pun Re No 156 [This would appear not to be good law in view of 57 Ind Cas 215].

(6) *Ram Sahay Ram Pandey* v. *Lakshmi Narain Singh*, (1917) 42 Ind Cas 675 (676): 3 Pat L Jour 74: 5 Pat L W 18.

(7) *Atma Ram* v. *Singhai Kastur Chand*, 1930 Nag 224 (225): 26 Nag L R 183: 124 Ind Cas 241.

(8) *Akkaraju Narayana Rao* v. *Akkaraju Seshamma*, (1915) 26 Ind Cas 33 (34): 27 Mad L Jour 677.

(9) *Narasimha Rao* v. *Venkatakrishnarao Bahadur*, 1932 Mad W N 104 (104).

Where an appeal is filed in time and the deficient Court-fee is paid within the time fixed by the Court, though on that date the appeal would have been barred by limitation, the appeal must be deemed to have been filed on the date when it was presented.[10] O. 7, R. 11, Notes 6—8.

7. Where the suit appears to be barred by any Law—Cl. (d).—This clause authorises the rejection of a plaint where the suit appears, from the statement in the plaint, to be barred by any law.[1] Where a plaint appears to be barred by limitation and no ground of exemption from limitation is mentioned therein, the Court may in proper cases allow an amendment of the plaint under O. 6, R. 17, so as to make a plea of exemption, if any.[2]

8. Rejection of plaint on other grounds.—As has been seen in Note 2 *ante* the instances given in this rule are not exhaustive of the case in which a Court may reject a plaint. But a Court has no power to reject a plaint merely because it is defective in that it does not comply with some provisions of law.[1] The proper procedure in such a case, is to call on the plaintiff to cure the defect and on his failure to do so, to proceed to decide the suit forthwith and to dismiss it under O. 17, R. 3 or to reject the plaint under its inherent powers.[2] S. 203, sub-S. 4 of the Madras Estates Land Act (I of 1908) provides that the following clause shall be deemed to be added to this rule as Cl. (*e*), *viz.*:—

"(*e*) In any suit to which S. 203 of the Madras Estates Land Act, 1908, applies, if the certified copy therein mentioned is not annexed to the plaint and the plaintiff on being required by the Court to produce it fails to do so within this time allowed by the Court."

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(10) *Pitcha Sahib* v. *Sub-Collector of North Arcot*, (1892) 15 Mad 78 (79); *Chennappa* v. *Regunatha*, (1892) 15 Mad 29 (34): 1 Mad L Jour 598; *Nellavadiva Ammal* v. *Subramaniya Pillai*, (1917) 38 Ind Cas 617 (618, 623): 31 Mad L Jour 269: 40 Mad 687; *Syed Ambur* v. *Kali Chand*, (1875) 24 Suth W R 258 (258). But see *Balkaran Rai* v. *Gobind Nath Tivari*, (1890) 12 All 129 (142): 1890 All W N 39 F B [Deficit Court-fee if supplied after limitation, appeal barred—This decision was superceded by the enactment of S 582 (A) of the old Code corresponding to the present S 149]; *Yakutun Nissa* v. *Kishoree Mohun*, (1892) 19 Cal 747 (749), (Do.).

Note 7.

(1) *Bachchu Singh* v. *The Secretary of State for India*, (1903): 25 All 187 (193): 1903 All W N 13 [Suit against Secretary of State without notice under S 80]; *Tarapal* v. *Ram Ratan*, (1893) 15 All 387 (390): 1893 All W N 164; *Pran Krishna Shah* v. *Kripa Nath*, (1916) 35 Ind Cas 76 (79): 21 Cal W N 209: 29 Cal L Jour 17; *Sawan Singh* v. *Surian Singh*, 1927 Lah 83 (83): 99 Ind Cas 538 [Suit bad for multifariousness, falls under this clause]; *Raman Nayyar* v. *Subramaniya*, (1894) 17 Mad 87 (88); *Vithoba Yadeo* v. *Suryabhan*, 1924 Nag 80 (80): 69 Ind Cas 554; *Maung Yat* v. *Maung Tarok*, (1900-07) 1 L B R 16 (17); *Ratanchand Dharam* v. *The Secretary of State*, (1915) 27 Ind Cas 232 (233): 18 Cal W N 1340 [Rule does not apply unless the suit appears to be barred on the face of it]; *Maqsood Ali* v. *Deputy Commissioner of Bara Banki*, 1928 Oudh 495 (498): 5 Oudh W N 927, (Do.) See also *Nawab Singh* v. *Charan Rana*, (1902) 6 Cal W N 411 (413) [Executive orders not "positive rule of law"].

(2) *Gunnaji* v. *Makanji*, (1910) 3 Ind Cas 159 (160): 10 Bom L R 969: 11 Bom L R 498: 6 Mad L Tim 234: 34 Bom 250. See also *Secretar of State for India* v. *Golabrai Paliram*, 1932 Cal 146 (146): 35 Cal W N 930: 135 Ind Cas 873: 59 Cal 150.

Note 8.

(1) *Maharajah Sir Rameswar Singh Bahadur* v. *Sadhananda Jha*, (1920) 55 Ind Cas 445 (447): 2 U P L R (Pat) 29: 1 Pat L Tim 188; *Md Baksh* v. *Malik Musa*, 1924 Lah 608 (608): 76 Ind Cas 254 [Non-production of a document under O 7, R 14]; Ex Parte *Rayachand Amichand*, (1864) 2 Bom H C 369, (Do.); *Arunachalam Chetty* v. *Prabahayya Chetty*, (1912) 17 Ind Cas 580 (581): 1912 Mad W N 1207: 25 Mad L Jour 174 [Want of signature and verification]; *Duragir* v. *Kollu*, (1911) 10 Ind Cas 731 (732): 7 Nag L R 33 [Want of proper signature]; *Tulsi Ram* v. *Munshi Ram*, 1904 Pun Re No 57 [Insufficient or improper verification]; *Shahab-Ud-Din* v. *Anjumani Naumania*, (1911) 10 Ind Cas 212 (213): 132 Pun L R 1911: 248 Pun W R 1911 [Misjoinder of parties and causes of action or non-joinder of parties]; *Durga* v. *Kala Chand*, (1903) 7 Cal W N 615 (616) [Insufficient identification of property]; *Kazem* v. *Danesh*, (1897) 1 Cal W N 574 (576), (Do.); *Shoeraj Singh* v. *Nur Khan*, (1875) 7 N W P H C 354 [Wrong date given for cause of action]. But see the following cases under the old Code; *Sudhendu Mohun* v. *Durga Dasi*, (1887) 14 Cal 435 (439); *Pholu Shah* v. *Ditta Singh*, 1901 Pun Re No 56: 94 Pun L R 1901; *Raja Ram* v. *Luchman Prasad*, (1867) 8 Suth W R 15 (16): Beng L R Sup 731.

(2) *Rameshwar Singh* v. *Sadahanand Jha*, (1920) 55 Ind Cas 445 (447): 1 Pat L Tim 188: 2 U P L R (Pat) 29.

O. 7, R. 11, Notes 9—11.

9. **Rejection of plaint in part.**—A plaint, cannot, under this rule, be rejected *in part* and retained in part. It should be rejected as a *whole.*[1] Thus, where, in a suit by two plaintiffs against the Secretary of State for India, one of them has failed to give notice as required by S. 80 of the Code, the plaint should be rejected as a whole and not merely as regards the plaintiff who had failed to give notice.[2]

10. **At what stage plaint can be rejected.**—The provisions of this rule are imperative and can be brought into operation at *any stage* of the suit. Therefore, the registration of a plaint does not prevent its rejection under this rule.[1] Where, however, a plaint is rejected in the early stages of the suit there is no justification for allowing excessive costs to the defendant.[2]

11. **Appeal.**—An order rejecting a plaint whether under this rule or not is a *decree* as defined in S. 2, sub-S. 2 *ante* and hence is appealable as such.[1] But in cases coming under Clause (*b*) of this rule, if the order is based merely upon a valuation of the subject-matter of the suit and the only question involved is as to the *amount* upon which the Court-fee has to be paid, the decision of the first Court is final under S. 12 of the Court Fees Act. Where, however, the question is, what provision of the Court Fees Act, applies to the relief sought for in the plaint or under what category the suit falls, the decision is not final under that section and an appeal is not barred.[2]

Note 9.

(1) *Raghubans Puri* v. *Jyotiss Swarupa*, (1907) 29 All 325 (326): 1907 All W N 68; *Venkatarangiah* v. *The Secretary of State*, 1931 Mad 175 (176): 32 Mad L W 810: 59 Mad L Jour 923: 129 Ind Cas 456: 54 Mad 416; *Collins* v. *Charles Booth & Co*, 1921 Sind 106 (108): 17 Sind L R 9: 80 Ind Cas 958.

(2) *Venkatarangiah Appa Rao* v. *Secretary of State for India in Council*, 1932 Mad 175 (176): 32 Mad L W 810: 59 Mad L Jour 923: 129 Ind Cas 456: 54 Mad 416.

Note 10.

(1) *Brahmomoyi Dasi* v. *Andi Si*, (1900) 27 Cal 376 (378): *Radha Kanta Sha* v. *Dabendra Narayan Shah*, 1922 Cal 506 (508): 49 Cal 880: 70 Ind Cas 101: 27 Cal W N 566: 38 Cal L Jour 74: *Hira Lal Banerji* v. *Surendera Nath Sarbanga*, 1926 Cal 504 (508): 91 Ind Cas 488; *Karaman Singh* v. *Norman Cockell*, (1897) 1 Cal W N 670 (671); *Kishore* v. *Sabdal*, (1890) 12 All 553 (555): 1889 All W N 185; *Venkatesa* v. *Ramaswamy*, (1895) 18 Mad 338 (341); *Sri Kishan* v. *Pir Baksh*, (1888) Pun Re No 126; *Trimbak Patil* v. *Madho Rao*, (1905) 1 Nag L R 103 (105); *Male* v. *Maung Po Maung*, (1892-96) U B R 253. See also *Umamoee* v. *Raj Kristo*, (1899) 3 Cal W N 220 (221). But see *Hubibul Hossein* v. *Muhammad Reza*, (1882) 8 Cal 192 (195): 10 Cal L Rep 385 [Dissented from in 27 Cal 376]: *Vallia Kesava* v. *Suppannair*, (1878) 2 Mad 308 (309): 4 Ind Jur 286 [Dissented from in 18 Mad 338]; *Damodar Das* v. *Gopal Chand*, (1885) 7 All 79 (81): 1884 All W N 303 F B [Under S 53 of the old Code corresponding to Cl (a) it was held that a plaint could be rejected for want of a cause of action only at or before the first hearing. This has now been omitted].

(2) *Nanak Chand* v. *Jiwan Mal*, (1914) 25 Ind Cas 435 (436): 35 Pun Re 1914: 237 Pun L R 1914

Note 11.

(1) *Ramgopal Sanyal* v. *Narendra Nath*, 1929 Cal 226 (227): 49 Cal L Jour 81: 115 Ind Cas 368; *Shahu* v. *Bakri*, 1921 Lah 43 (43): 3 Lah L Jour 237: 67 Ind Cas 901 [Memo of appeal must be an *ad valorem* Court-fee]; *Cotton Syndicate* v. *Malawa Mal*, 1929 Lah 83 (84): 108 Ind Cas 597 [It is not essential that a decree should be drawn up]; *Chandi Prasad Mitra* v. *Gobind Sahay*, (1917) 39 Ind Cas 791 (792): 1 Pat L W 499; *Rameshwardhari* v. *Sadhu Saran*, 1923 Pat 354 (354): 4 Pat L Tim 261: 72 Ind Cas 629: 2 Pat 504. See also *Amrta Lal Kumar* v. *Sisir Kumar Basu*, 1926 Cal 427 (427): 87 Ind Cas 651 [Rejection for insufficiency of Court fee. Value for appeal is the same as in plaint. Additional Court fee for appeal and plaint if any, can be ordered only after enquiry]. But see *Muhammad Abdul Aziz* v. *Muhammad Abdul Jalil*, (1910) 5 Ind Cas 371 (372) [Order of rejection by a Court acting under the Agra Tenancy Act is not a decree under S 177 of that Act].

(2) *Chunia* v. *Ramdial*, (1877) 1 All 360 (362): 1 Ind Jur N S 851; *Vithal Krishna* v. *Balakrishna*, (1886) 10 Bom 610 (616) F B [The decisions in 3 Bom 145: 2 Bom 219 and 9 Bom 355 would appear to be not good law in view of this decision]; *Dada* v. *Nagesh*, (1899) 23 Bom 486 (488); *Sirdar Singhji* v. *Ganapat Singhji*, (1893) 17 Bom 56 (59); *Kashinath* v. *Govinda*, (1890) 15 Bom 82 (83): *Studd* v. *Mati*, (1901) 28 Cal 334 (338); *Ajoodhya Pershad* v. *Genga Pershad*, (1881) 6 Cal 249 (250): 6 Cal L Rep 567; *Beniram* v. *Ramlall*, 13 Cal 189 (191); *Prokesh* v. *Bishambhar*, (1910) 5 Ind Cas 18 (19): 14 Cal W N 343; *Umrao Mirza* v. *Mary Jones*, (1883) 12 Cal L Rep 148 (151); *Ganga Monee* v. *Gopal Chunder*, (1873) 19 Suth W R 214 (214); *The Collector of Sylhet* v. *Kalee Coomer Dutt*, (1871) 16 Suth W R (F B) 10 (12): 7 Beng L R 663 [Overruling 13 Suth W R 415 and 6 Beng L R 12]; *Champaden Vittil* v. *Kunnammal*, (1894) 4 Mad L Jour 183 (188); *Kanaran* v. *Komappan*, (1891) 14 Mad 169 (170); *Annamalai Chetti* v. *Cloete*, (1882) 4 Mad 204 (208); *Mani Lal* v. *Durga Prosad*, 1924 Pat 673 (675): 3 Pat 930: 80 Ind Cas 667: 5 Pat L Tim 425: 1924 Pat H C C 254; *Chandramani* v. *Basdeo*, (1919) 49

O. 7, R. 11, Notes 11—12.

The High Court of Calcutta has held in the undermentioned cases[8] that though this rule applies to a memorandum of appeal by virtue of S. 107, still, an order rejecting a *memorandum of appeal* for deficiency of Court-fee is not a decree or a final order.

See Note 19 to S. 96 *ante*.

Where a plaint returned under R. 10 *ante* for presentation to the proper Court, is rejected by the latter Court, and the order of return is reversed on appeal, the plaintiff having suppressed the fact of rejection, the appellate order is void and the only remedy of the plaintiff is to appeal against the order of rejection.[4]

12. Revision.—An order rejecting a plaint being a decree and appealable as such; a revision against such an order is incompetent.[1] But where appeal is barred under S. 12 of the Court Fees Act,[2] or where an appeal against an order under this rule is rejected as incompetent[3] or where the plaint is rejected by a Provincial Small Cause Court,[4] the order is revisible if the conditions of S. 115 are satisfied. There is a conflict of opinion on the question whether an order demanding *additional Court-fee* is open to revision, so long as the order has not resulted in the rejection of the plaint by non-compliance with the order. It has been held in the undermentioned cases[5] that no revision lies, since the plaintiff has another remedy open to him by way of appeal on the rejection of the plaint. The contrary opinion has been maintained in the undermentioned cases[6] on the ground that the question is really one of jurisdiction as the plaint has to be rejected if the stamp duty has not been paid. According to the High Court of Calcutta, where the plaintiff's valuation is accepted by the Court as correct on an examination for the facts alleged, the order is not open to revision inasmuch as such an order does not fall within S. 115

Ind Cas 442 (449): 4 Pat L Jour 57; *Sada Kuar* v. *Buta Singh*, (1914) 25 Ind Cas 565 (566): 80 Pun Re 1914: 265 Pun L R 1914: 167 Pun W R 1914; *Gumani* v. *Banwari*, (1920) 54 Ind Cas 733 (736): 22 Oudh Cas 289; *Manghanmal* v. *Tolaram*, (1912) 16 Ind Cas 773 (774): 6 Sind L R 72. See also *Narayan* v. *The Secretary of State for India in Council*, (1894) Bom P J 425 [Decision final under S 12 Court Fees Act]; *Balkaran* v. *Govind*, (1890) 12 All 129 (153): 1890 All W N 39. But see *Md Sadik* v. *Md Jan*, (1889) 11 All 91 (93): 1888 All W N 286 [Held to be erroneous in 12 All 129 so far as it decided that even a decision on a question under S 12 Court Fees Act was appealable].

(3) *Beniram* v. *Ramlal*, (1886) 13 Cal 189 (191) [Rejection of plaint by minors suing as adults]; *Janandasundari Shaha* v. *Madhab Chandra Mala*, 1932 Cal 482 (484, 485): 59 Cal 388: 138 Ind Cas 643 [Rejection does not preclude appellant from presenting a fresh memo of appeal]. But see *Vithal* v. *Balkrishan*, (1888) Bom P J 339.

(4) *Ramchandra* v. *Shripathi*, 1929 Bom 202 (204, 205): 31 Bom L R 357: 118 Ind Cas 252.

Note 12.

(1) *Ramgopal Sanyal* v. *Narendra Nath*, 1929 Cal 226 (227): 49 Cal L Jour 81: 115 Ind Cas 368; *Omrao* v. *Jones*, (1882) 12 Cal L Rep 148 (151); *Azim Bibi* v. *Imtiaz Begam*, 1925 Lah 191 (192): 78 Ind Cas 604; *Sada Kuar* v. *Buta Singh*, (1914) 25 Ind Cas 565 (566): 80 Pun Re 1914: 265 Pun L R 1914: 167 Pun W R 1914; *Chunni Lal* v. *Roshan Lall*, (1919) 53 Ind Cas 427 (428): 120 Pun Re 1919: 42 Pun L R 1920.

(2) *Chandramani Koer* v. *Basdeo Narain Singh*, (1919) 49 Ind Cas 442 (449): 4 Pat L Jour 57; *Vithal Krishna* v. *Balakrishna*, (1886) 10 Bom 610 (616) F B.

(3) *Sher Singh* v. *Pola*, 1929 Lah 125 (125): 112 Ind Cas 490.

(4) *Md Shafi* v. *Delhi House of Mutton*, 1928 Lah 274 (275).

(5) *Nawab* v. *Duni Chand*, (1912) 16 Ind Cas 475 (476): 1912 Pun Re No 69: 202 Pun W R 1912: 212 Pun L R 1912; *Narain Singh* v. *Basudeo Prasad Singh*, 1930 Pat 277 (278): 11 Pat L Tim 172: 122 Ind Cas 152; *Bhubneshwari Prasad* v. *Mohan Lal*, (1920) 55 Ind Cas 786 (786): 1 Pat L Tim 5; *Ma E* v. *Ma E*, 1925 Rang 199 (199): 4 Bur L Jour 1: 86 Ind Cas 509.

(6) *Sudalaimuthu Pillai* v. *Peria Somasundaram Pillai*, 1925 Mad 722 (723): 1925 Mad W N 104: 87 Ind Cas 25: 48 Mad L Jour 514: *Mani Lal* v. *Durga Prosad*, 1924 Pat 673 (676): 3 Pat 930: 80 Ind Cas 667: 1924 Pat H C C 254: 5 Pat L Tim 425; *Banky Behari* v. *Ram Bahadur*, (1918) 44 Ind Cas 891 (892): 4 Pat L W 281: 1918 Pat H C C 223: 4 Pat L Jour 191.

and as the decision could be challenged in an appeal from the decree in the suit.[7]

O. 7, R. 11, Notes 12—13.

13. **Review.**—An order rejecting a plaint can be reviewed if the conditions of O. 47, R. 1 are satisfied.[1]

O. 7, R. 12, Note 1.

Procedure on rejecting plaint.

R. 12. [S. 55.] *Where a* plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

[1877—S. 55.]

Synopsis.

1. Rejection of memorandum of appeal.

1. **Rejection of memorandum of appeal.**—It has been held by the High Court of Allahabad that where a memorandum of second appeal is rejected by virtue of this rule read with S. 107, the procedure prescribed by this rule should be followed.[1]

O. 7, R. 13, Note 1.

Where **rejection of plaint does not preclude presentation of fresh plaint.**

R. 13. [S. 56.] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

[1877—S. 56; 1859—S. 36.]

Synopsis.

1. Rejection of plaint does not preclude fresh plaint.

1. **Rejection of plaint does not preclude fresh plaint.**—Where a plaint is rejected, under R. 11, *ante*, the plaintiff is not thereby precluded from presenting a fresh plaint in respect of the same cause of action, provided his right of action is not barred by the Law of Limitation.[1] But where the order is in substance one of *dismissal* though in form one of rejection, as where the Court purports to reject the plaint after a full trial on the merits and after recording a finding adversely to the plaintiff, a subsequent suit in respect of the same subject-matter based upon the same cause of action will be barred as *res judicata*.[2]

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(7) *Official Assignee* v. *Mahomed Syed Ali*, 1925 Cal 814 (815): 29 Cal W N 627: 86 Ind Cas 853.

Note 13.

(1) *Rameshwardhari Singh* v. *Sadhu Saran Singh*, 1923 Pat 354 (355): 2 Pat 504: 4 Pat L Tim 261: 72 Ind Cas 629; *Adit Pershad Singh* v. *Ramharakh Ahir*, 1925 Pat 435 (437): 4 Pat 180: 1925 Pat H C C 147: 91 Ind Cas 213.

Order 7, Rule 12—Note 1.

(1) *Rudr Prasad* v. *Baij Nath*, (1893) 15 All 367 (370): 1893 All W N 115 [Per Aikman, J.].

Order 7, Rule 13—Note 1.

(1) *Ganga Narain* v. *Tilukram*, (1888) 15 Cal 533 (538): 15 Ind App 119: 5 Sar 168: 12 Ind Jur 254 P C; *Kishore Singh* v. *Sabdal Singh*, (1890) 12 All 553 (556): 1889 All W N 185; *Sawan Singh* v. *Surain Singh*, 1927 Lah 83 (83): 99 Ind Cas 538; *Sankaranarayana* v. *Venkatarama*, 1925 Mad 1045 (1046): 86 Ind Cas 491; *Dullabh Jogi* v. *Narayan Lakhu*, (1866-67) 4 Bom H C R A C 110; *Kadumbinee Dossia* v. *Annapoorna*, (1870) 14 Suth W R 289 (290). See also *Balkaran Rai* v. *Gobind Nath Tiwari*, (1890) 12 All 129 (148): 1890 All W N 39 F B [Similarly in the case of dismissal of a suit under S 10, Court Fees Act]; *Mohammad Salim* v. *Nabian Bibi*, (1886) 8 All 282 (287): 1886 All W N 119, (Do.).

(2) *Santhanathammal* v. *Isaki Suppan*, (1921) 60 Ind Cas 694 (696): 1920 Mad W N 616: 12 Mad L W 457.

DOCUMENTS RELIED ON IN PLAINT.

O. 7, R. 14, Note 1.

R. 14. [S. 59.] (1) *Where* a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Production of document on which plaintiff sues.

(2) *Where* he *relies* on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents.

[1877—Ss. 58, 59, 62, 63; 1859—S. 39.]

Local Amendments.

OUDH.

Order 7, Rule 14. (In Oudh for sub-S. (2) of Rule 14 *substitute* the following):—

(2) Where he relies on any other documents as evidence in support of his claim, he shall enter all of them in a list to be added or annexed to the plaint and shall produce in Court, when the plaint is presented, such of them as are in his possession or power. In regard to the documents not in his possession or power, he shall, if possible, state in whose possession or power they are, and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose.

Explanation.—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the plaintiff, it will not be deemed to be "in the power" of the plaintiff.

N.-W. F. P.

Add "And shall also produce such documents as are in his possession or power".

Synopsis.

1. Scope and object of the rule.
2. Right of the defendant to inspect the documents relied on by the plaintiff. See O. 11, R. 15, Note 3.
3. Failure to comply with this rule. See Note 1, supra and Rule 18, infra.
4. Loss of document after production. See Note 1, supra.

Defendant entitled to copy of such document, before filing written statement. See Note 3, Pt. (15) and see O. 11, Rule 15.

"He shall enter such document in a list." See Note 1, Pts. (3) and (10).

Production of document on which plaintiff sues. See Note 1.

1. Scope and object of the rule.—This rule makes a distinction between a document *sued* on and a document *relied* on by the plaintiff as evidence in support of his claim.[1] Where a plaintiff *sues* upon a document he should *produce* the document into Court when the plaint is presented[2] except where such

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Order 7, Rule 14—Note 1.

(1) *Chandmull Ganeshmull* v. *Dhanraj Ganpatroy*, (1920) 56 Ind Cas 457 (458): 24 Cal W N 302.

(2) *Gangadhar Mahadev Mirashi* v. *Krishnaji Vishram Nadkarni*, (1920) 57 Ind Cas 598 (599): 22 Bom L R 819: 44 Bom 625; *Jogendra Kumar Ghose* v. *Ananda Chandra Mozumdar*, (1918) 44 Ind Cas 21 (22) Cal; *Atta Ollah* v. *Sukeendeen*, (1864) Suth W R 271 (272); *Lekhraj Roy* v. *Mutty Madhub*, (1870) 14 Suth W R 95 (97); *Manooram Shaw* v. *Hurry Persad Roy Bourke*, O C 162; *Premsook* v. *Rajkisto*, (1863) 1 Hyde 145 (146); *Anonymous*, 1 Ind Jur O S 14; *Kamenee Dossee* v. *Hurromoney Dossee Bourke*, O C 91.

O. 7, R. 14, Note 1.

document is an entry in a shop book or account, in which case, he should produce a *true copy* of the entry to be filed with the plaint and the procedure laid down in Rule 17, *infra*, should be followed. Where the plaintiff *relies* on any document as *evidence* in support of his claim, he should enter such document in a list to be annexed to the plaint, whether the document is in his power or not.[3] But even such documents should if they are in his possession or power, be *produced* into Court at or before the first hearing of the suit.[4] (*See* O. 13, R. 1, *infra*.) A document on which the plaintiff has not in terms sued, and which is not produced into Court when the plaint is presented, can only be treated, if subsequently produced, as a piece of *evidence* and not as *creating any* rights in favour of the plaintiff.[5]

The object of this rule is to exclude documents as to the existence of which, at the date of the suit, there may be reasonable doubt and as to the genuineness of which suspicions might arise when subsequently tendered.[6] The provisions of this rule therefore are imperative[7] and compel the plaintiff to produce or disclose all documents on which he relies in support of his claim.[8] But the plaintiff's failure to produce or disclose the documents as provided by this rule, does not entail the return,[9] or rejection of the plaint or the dismissal of the suit.[9-a] The only penalty for such default is that he cannot produce the documents in evidence at the hearing without the leave of the Court (*see* Rule 18, *infra*).

This rule, however, does not apply if the plaintiff himself is not *aware* of the existence of any documents which he subsequently discovers as supporting his claim.[10]

It has been held by the Privy Council that if the plaintiff produces the document sued on, as required by this rule, and the document is lost subsequently from the custody of the Court, the plaintiff should be allowed to adduce secondary evidence of the document under S. 65 of the Evidence Act, 1872, without showing how the original document was lost.[11]

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(3) *Khetsidas* v. *Narotamdas*, (1908) 32 Bom 152 (153): 9 Bom L R 1084: *Minakshi* v. *Velu*, (1885) 8 Mad 373 (374); *Talewar Singh* v. *Bhagwan Das*, (1908) 12 Cal W N 312 (315): 8 Cal L Jour 147; *Banwari Lal* v. *Mahesh*, (1918) 49 Ind Cas 540 (542): 1918 P C 118: 45 Ind App 284: 41 All 63: 21 Oudh Cas 228: 23 Cal W N 577: 1919 Mad W N 490: 6 Oudh L J 168 [A horoscope intended to refresh memory of the maker thereof need not be entered in the list of documents]; *Kanta Prasad* v. *Deputy Commissioner, Partabgarh*, 1927 Oudh 612 (612): 1 Luck Cas 56: 101 Ind Cas 911; *Hari Ram* v. *Fori Ram*, 1928 Pat 555 (557): 7 Pat 589: 110 Ind Cas 536. See also *Ramprasad Chimanlal* v. *Hazarimull Lalchand*, 1931 Cal 458 (461): 58 Cal 418: 134 Ind Cas 538 [The documents themselves need not be annexed to the plaint].

(4) *Manbodh Missir* v. *Bhairo Missir*, 1922 Pat 569 (571): 1922 Pat H C C 300: 4 Pat L Tim 322: 77 Ind Cas 848.

(5) *Sulaiman* v. *Bipaththunnisa*, 1916 P C 217: 19 Bom L R 394: 25 Cal L Jour 273: 21 Cal W N 553: 32 Mad L Jour 137: 21 Mad L Tim 210: 1917 Mad W N 213: 1 Pat L W 210: 39 Ind Cas 243.

(6) *Meva Lal Saha* v. *Kunerji Jha*, (1909) 2 Ind Cas 946 (948): 13 Cal W N 797: 10 Cal L Jour 33; *Sukan Sahu* v. *Jhari Mahto*, (1921) 60 Ind Cas 372 (373, 374) Pat.

(7) *Meva Lal Saha* v. *Kunerji Jha*, (1909) 2 Ind Cas 946 (948): 13 Cal W N 797: 10 Cal L Jour 33.

(8) *T S Murugesam Pillai* v. *M D Gnanasambanda*, 1917 P C 6 (8): 40 Mad 402: 44 Ind App 98: 15 All L J 281: 19 Bom L R 456: 25 Cal L Jour 589: 21 Cal W N 761: 32 Mad L Jour 369: 21 Mad L Tim 288: 5 Mad L W 759: 1917 Mad W N 487: 1 Pat L W 457: 39 Ind Cas 659 [Practice of withholding documentary evidence by parties deprecated by Privy Council].

(9) *Mahomed Baksh* v. *Sikander Khan*, 1930 Lah 480 (480): 122 Ind Cas 488.

(9-a) *Gopal Gundappa Naick* v. *Vishnu Krishna Naick*, (1898) 22 Bom 971 (972). In re *Rayachand*, (1864-66) 2 Bom H C R 369 (369); *Hikmatullah Khan* v. *Abdul Azim Khan*, 1921 All 218 (218): 19 All L J 185: 61 Ind Cas 412; *Md Bakhsh* v. *Malik Musa*, 1924 Lah 608 (608): 76 Ind Cas 254.

(10) *Lahanu* v. *Motiram*, 1921 Nag 49 (49, 50): 4 Nag L J 33: 63 Ind Cas 968.

(11) *Tulsi Ram* v. *Ram Saran*, 1925 P C 80 (82): 23 All L J 109: 2 Oudh W N 256: 6

2. Right of the defendant to inspect the documents relied on by the plaintiff.—*See* O. 11, R. 15, Note 3. O. 7, R. 14.

3. Failure to comply with this rule.—*See* Note 1 *supra* and rule 18 *infra.*

4. Loss of document after production.—*See* Note 1 *supra.*

O. 7, R. 15.

R. 15. [S. 60.] *Where* any such document *is* not in *the* possession or power *of the plaintiff*, he shall, if possible, state in whose possession or power it is.

Statement in case of documents not in plaintiff's possession or power.

[1877—S. 60.]

Local Amendment.

OUDH.

Rule 15, *deleted* by Oudh Chief Court.

O. 7, R. 16, Note 1.

R. 16. [S. 61.] *Where* the suit *is* founded upon a negotiable instrument, *and* it *is* proved that the instrument is lost, and an indemnity *is* given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may *pass* such decree as it would have *passed* if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

Suits on lost negotiable instruments.

[1877—S. 61.]

Synopsis.

1. Suit on a lost negotiable instrument.

1. Suit on a lost negotiable instrument.—In a suit based on a *lost* negotiable instrument, the plaintiff should give sufficient indemnity against possible claims of persons in respect of that instrument.[1]

O. 7, R. 17.

R. 17. [S. 62.] (1) *Save in so far as is otherwise provided by the Bankers' Books Evidence Act*, 1891, *where* the document on which the plaintiff sues *is* an entry in a shop-book or other *account* in his possession or power, the plaintiff shall produce the book

Production of shop-book.

L R P C 70: 86 Ind Cas 552: 27 Bom L R 777: 29 Cal W N 965: 49 Mad L Jour 132: 22 Mad L W 86: 26 Pun L R 419.

Order 7, Rule 16—Note 1.

(1) *Dhurga Das* v. *Kanshi Ram*, (1912) 16 Ind Cas 769 (771): 166 Pun L R 1912: 273 Pun W R 1912; *Duggempudi Nagamma* v. *Tirumala Reddi Peda Venkata Reddi*, (1921) 59 Ind Cas 363 (364): 12 Mad L W 147.

O. 7, R. 17, Note 1.

or account at the time of filing the plaint, together with a copy of the entry on which he relies.

Original entry to be marked and returned.

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if *it is* found correct, *certify it to be so and* return the book to the plaintiff and cause the copy to be filed.

[1877—Ss. 58, 62, 63; 1859—S. 39.]

Local Amendment.

ALLAHABAD.

Add the following proviso to O. 7, R. 17 of the Code of Civil Procedure:—

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the person producing it or some one on his behalf shall attest it as a true copy, and in that case the Court or its officer need not examine or compare the copy with the original.

Synopsis.

1. Shop-book or Account.

Bankers' Book Evidence Act. See Note 1.

1. **Shop-book or Account.**—Section 4 of the Bankers' Book of Evidence Act,[1] provides that a certified copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as the original entry is now by law admissible, but not further or otherwise. The term 'Bankers Books' includes ledgers, daybooks, cash books, account books and all other books used in the ordinary course of business of a bank.[2] Therefore if the document sued on is a banker's book it is not necessary to produce the original book itself along with the plaint: it is enough if a certified copy of the entry or entries is produced. But it should be shown that the bank is one to whose books the provisions of the Bankers' Book Evidence Act have been extended.[3]

If the document sued on is not a banker's book but is an entry in a shop book or account the plaintiff should produce the book or account at the time of filing the plaint together with a true copy of the entry sued on.[4] Thereupon the Court or its officers should mark the document for identification[4-a] and should, if the copy is found to be correct, file the copy along with the plaint.

Order 7, Rule 17—Note 1.

(1) Act XVIII of 1891.

(2) *The Bankers' Book Evidence Act*, 1891, S 2 (3).

(3) *Empress* v. *Patrick*, (1900) 4 Cal W N 433 (434); *The Bankers Books Evidence Act*, 1891, S 2 (2) and S 3.

(4) *Ram Singh* v. *Ramchand*, (1920) 57 Ind Cas 185 (190): 1 Lah 6: 6 Pun W R 1920: 19 Pun L R 1920. See, however, *Hari Ram* v. *Fori Ram*, 1928 Pat 555 (557): 7 Pat 589: 110 Ind Cas 536 [In this case it was held that the accounts were not *sued on* but were only *relied on*].

(4-a) *Atmaram* v. *Amir Chand*, (1865) 3 Bom H C R A C 92 (93); *Krishnaji* v. *Dalaba*, (1891) 15 Bom 687 (689, 690, 691).

But the fact that the original document is *not* presented along with the plaint, as provided by this rule and the plaint is registered is not a ground for rejecting the plaint: but the plaintiff cannot afterwards produce the document in evidence except with the leave of the Court as provided by rule 18 *infra*.[5] O. 7, R. 17, Note 1.

R. 18. [S. 63.] (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. O. 7, R. 18, Note 1.

Inadmissibility of document not produced when plaint filed.

(2) Nothing in this *rule* applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

[1877—Ss. 58, 62, 63; 1859—S. 39.]

Synopsis.

1. Scope and object of the rule.
2. Cases where leave is not necessary.
3. Revision.

Appellate Court's power to consider documents rejected or admitted by trial Court. See Note 1, F.-N. (3); Note 1, Pt. (5); and Note 1, F.-N. (6).

"To refresh his (witnesse's) memory." See Note 2, Pt. (1).

1. Scope and object of the Rule.—The Policy underlying this rule is to exclude evidence, the existence of which at the date of the suit is doubtful, and as to the genuineness of which suspicion may arise because it was produced at a late stage of the suit.[1] The Court has, however, a wide discretion with regard to the reception of documents which were not produced with the plaint or entered in the list of documents[2] and where there can be no doubt about the genuineness of the documents produced, such as certified copies of public documents or records of judicial proceedings, Courts will not as a rule shut them out.[3] But even in such cases leave may be refused where there has been unreasonable delay in the production of documents, unless satisfactory reasons are assigned for the delay.[4] An appellate Court will not ordinarily interfere with the discretion exercised by the lower Court under this rule.[5]

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(5) *Gopal Gudapa* v. *Vishnu Krishna*, (1897) 22 Bom 971 (972); Ex parte *Rajachand Amichand*, (1864-66) 2 Bom H C R 369.

Order 7, Rule 18—Note 1.

(1) *Mewa Lal Sahu* v. *Kuverji Jha*, (1909) 2 Ind Cas 946 (948): 13 Cal W N 797: 10 Cal L Jour 33.

(2) *Saroda Prosad* v. *Umashankar*, 1927 Cal 168 (169, 173): 44 Cal L Jour 385: 99 Ind Cas 258.

(3) *Tadewar Singh* v. *Bhaguandas*, (1908) 12 Cal W N 312 (315): 8 Cal L Jour 147; *Mahadevappa* v. *Srinivasa Rao*, (1882) 4 Mad 417 (418) [Improper rejection—Urged as a ground in appeal]; *Deridas Jagjivan* v. *Piryada Begum*, (1894) 8 Bom 377 (379), (Do.); *Jogendra Kumar* v. *Ananda Chundra Mazumdar*, (1918) 44 Ind Cas 21 (Cal); *Lopez* v. *Dreberg*, (1864) Suth W R Act X 67; *Suken Sahu* v. *Jhari Mahto*, 60 Ind Cas 372 (374) (Pat).

(4) *Gangadhar* v. *Krishnaji*, (1920) 57 Ind Cas 598 (599): 44 Bom 625: 22 Bom L R 819; *Gholam Muhammad* v. *Maya Dass*, 1867 Pun Re No 98; *Ameer Chund Lohata* v. *Ram Ruttan Roy*, (1872) 18 Suth W R 515 (516); *Roy Luchmeepat* v. *Moshuruff Ali*, (1876) 25 Suth W R 80 (80).

(5) *Minakshi* v. *Velu*, (1885) 8 Mad 373 (374-

Advocate High Court
& Family

O. 7, R. 18, Notes 1—3.

The leave granted by the Court need not be *express*, but may be gathered from the records and the circumstances of the case.[6]

2. Cases where leave is not necessary.—Sub-rule 2 of this Rule enacts that the rule as to the inadmissibility of documents not produced with, or referred to in the plaint does not apply to the following cases:—

(1) Where the document is to be handed over to the witness for the purpose of refreshing his memory and not one to be relied upon as a probative document in itself in support of the plaintiff's case.[1]

(2) Where the documents are produced in answer to any case set up by the defendant.[2]

(3) Where they are produced for the cross-examination of the defendant's witnesses. The words "defendant's witnesses" include also plaintiff's witnesses who have turned hostile to the plaintiff and whom the plaintiff is permitted to cross-examine.[3]

3. Revision.—The question of admission of evidence is not ordinarily a question of jurisdiction but is merely one of law and no revision will lie in such cases.[4]

Local Amendments.

ALLAHABAD.

O. 7. Allahabad Rules 19—22.

Add the following rules to Order 7:—

19. Every plaint or original petition shall be accompanied by a proceeding giving an address written in English in block letters at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present

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375); *Lahanu* v. *Motiram*, 1921 Nag 49 (50): 4 Nag L J 33: 63 Ind Cas 968; *Mohabeer Dass* v. *Lalla Dass*, (1864) 1 Suth W R 12 (12); *Gour Surun* v. *Kankya Singh*, (1865) 2 Suth W R 237 (238); *Hur Chunder* v. *Wooma Soondurree*, (1875) 23 Suth W R 170 (170); *Akbar Ali* v. *Bhyea Lal*, (1881) 6 Cal 668 (670): 7 Cal L Rep 497: 3 Shom L R 260.

(6) *Mt Haji Begam* v. *Jawahir Singh*, (1913) 20 Ind Cas 331 (332): 11 All L J 537 (539); *Gosain Tota* v. *Raja Rukminibullab*, (1869) 3 Beng L R 34: 12 Suth W R 32 (32) P C [Case where Trial Court admitted documents at a late stage].

Note 2.

(1) *Banwari Lal* v. *Mahesh*, 1918 P C 118: 41 All 63: 45 Ind App 284: 21 Oudh Cas 228: 23 Cal W N 577: 1919 Mad W N 490: 6 Oudh L J 168: 49 Ind Cas 540 P C; *Ramji Maduji* v. *Rangayya Chetty*, (1862-63) 1 Mad H C R 168 (170).

(2) *Gappamal* v. *Piara Lal*, (1916) 32 Ind Cas 619 (621): 38 Pun W R 1916; *Manbodh Missir* v. *Bhairo Missir*, 1922 Pat 569 (571): 1922 Pat H C C 300: 4 Pat L Tim 322: 77 Ind Cas 848: 4 U P L R (Pat) 97.

(3) *Shankar* v. *Govinda*, (1920) 54 Ind Cas 311 (312) Nag.

Note 3.

(1) *Pranhari* v. *Chandra Kumar*, (1914) 25 Ind Cas 204 (205) Cal.

another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

O. 7, Allahabad Rules 22—26.

23. Where a party engages a pleader, notices or process for service on him shall be served in the manner prescribed by Order 3, Rule 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

26. Nothing in these rules shall apply to the notice prescribed by Order 21, Rule 22.

BOMBAY.

O. 7, Bom. Rules 19—26.

The following shall be *added* as Rules 19 to 26 in Order 7:—

"19. Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

Address to be filed with plaint or original petition.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

Nature of address to be filed.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

Consequences of failure to file address.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registerd address by registered post pre-paid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

Procedure when party not found at the place of address.

23. Where a party engages a pleader, notice or processes on him shall be served in the manner prescribed by Order 3, Rule 5, unless the Court directs service at the address for service given by the party.

Service of notice on pleaders.

24. A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

Change of address.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

Rules not binding on Court.

26. Nothing in these rules shall apply to the notice prescribed by Order 21, Rule 22.

Applicability to notice under Order 21, Rule 22.

O. 7, Lah. Rules 19—25.

LAHORE.

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

"20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore.

"21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

"22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice, summons or other process shall be fixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served.

"23. Where a party engages a pleader, notices, summonses or other processes for service on him shall be served in the manner prescribed by Order 3, Rule 5, unless the Court directs service at the address for service given by the party.

"24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

"25. Nothing in these rules shall prevent the Court from directing the service of a notice summons or other process in any other manner, if, for any reasons, it thinks fit to do so."

O. 7, Nag. Rules 19—21.

NAGPUR.

Add the following as Rules 19 to 23:—

"19. Every plain or original petition shall be accompanied by an address at which service of process may be made on the plaintiff or the petitioner. The address shall be within the local limits of the civil district in which the suit or petition is filed, or of the civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

Registered address.

Registered address by a party subsequently added as plaintiff or petitioner.

20. Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

Consequence of non-filing of registered address.

21. (1) If the plaintiff or the petitioner fails to file a registered address as required by Rule 19 or 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where a suit is dismissed or a petition rejected under sub-Rule (1), the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any

sufficient cause from filing the registered address at the proper time, the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition. O. 7, Lah. Rules 21—23.

22. Where the plaintiff or the petitioner is not found at his registered address and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

Affixing of process and its validity.

23. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform."

Change of registered address.

OUDH.

19. Every plaint or original petition shall be accompanied by an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. This address shall be called the "registered address", and service thereat shall be deemed to be sufficient service. O. 7, Oudh Rules 19—26.

20. Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. A registered address shall be within the local limits of the District Court within which the suit or petition is filed, if the plaintiff or petitioner resides or carries on business within those limits.

22. If a plaintiff or petitioner fails to file a registered address as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

23. Where the registered address of the plaintiff or petitioner is within the limits of a head-quarters, town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

24. In all cases to which Rule 23 does not apply where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house. If, on the date fixed, such plaintiff or petitioner is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

25. Whenever a plaintiff or petitioner has engaged a pleader to act for him a notice or process for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at his registered address:

Provided that, where a notice is served on a pleader under the above rule, he shall be given sufficient time to communicate with his client and to receive instructions.

Explanation.—Where ten days' time has been allowed under this rule, this shall be deemed sufficient time within the meaning of this proviso in the absence of an application made within such ten days by the pleader concerned for further time.

26. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform, and may be either served upon the pleader for such parties or be sent to them by registered post, as the Court thinks fit.

O. 7, Oudh Rule 27.

27. Nothing in Rr. 19 to 26 shall prevent the Court from directing the service of a notice or process in any other manner, if for any reason, it thinks fit.

O. 7, Pat. Rules 19—22.

PATNA.

Add the following Rules 19 to 22:—

"19. Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiffs or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement.

20. An address for service filed under the preceding rule shall state the following particulars:—

(1) the name of the street and number of the house (if in a town);

(2) the name of the town or village;

(3) the Post office;

(4) the district; and

(5) the munsifi (if in Bihar and Orissa) or the District Court (if outside Bihar and Orissa).

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit."

O. 7, Sind Rules, 19—23.

SIND.

Add the following as Rules 19 to 26 in Order 7:—

19. *Address to be filed with plaint or original petition.*—Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added, shall immediately on being so added, file a memorandum in writing of this nature.

20. *Nature of address to be filed.*—An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

21. *Consequence of failing to file address.*—Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. *Procedure when party not found at the place of address.*—Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post pre-paid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. *Service of notice on pleaders.*—Where a party engages a pleader, notice or process on him shall be served in the manner prescribed by Order 3, Rule 5, unless the Court directs service at the address for service given by the party.

24. *Change of address.*—A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit. O. 7, Sind Rules 24—26.

25. *Rules not binding on Court.*—Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

26. *Applicability to notice under Order* 21, *Rule* 22.—Nothing in these rules shall apply to the notice prescribed by Order 21, Rule 22.

N.-W. F. P.

Add the following rules:—

19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons, or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately, on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed or, of the district Court within which the party ordinarily resides, if within the limits of the North-West Frontier Province.

21. Where a plaintiff or petitioner fails to file an address for service shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties, or be sent to them by registered post as the Court thinks fit."

Order 7, Rule 22 (Allahabad).

Where service has been effected by affixture of the notice on the outer door of the house, but the party is not present on the date fixed for his appearance, the Court ought under this rule to order notice by *registered post*. Otherwise the service cannot be considered to be sufficient.[1]

This rule applies also to appellate proceedings by virtue of O. 41, R. 38 (3) All.[2]

ORDER VIII.

WRITTEN STATEMENT AND SET-OFF.

R. 1. [S. 110.] *The defendant* may, *and, if so required by the Court, shall,* at or before the first hearing *or within such time as the Court may permit, present a written statement of his defence.* O. 8, R. 1.

Written Statement.

[1877—S. 110; 1859—S. 120.]

Order 7, Rule 22 (Allahabad).

(1) *Mathura Prasad* v. *Bhup Narain,* 1921 All 52 (52, 53): 43 All 411: 19 All L J 145: 61 Ind Cas 135.

(2) *Mathura Prasad* v. *Bhup Narain,* 1921 All 52 (52): 43 All 411: 19 All L J 145: 61 Ind Cas 135.

O. 8, R. 1, Note 1.

Local Amendments.

LAHORE.

The following was *added*:—

"and with such written statement shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set off.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence or claim for set-off he shall enter such documents in a list to be added or annexed to the written statement."

OUDH.

Order 8, Rule 1, *add* the following as Rule 1 (2), and read *the existing Rule* 1 *as Rule* 1 (1):—

1 (2).—The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case, shall produce with the written statement such of the documents as are in his possession or power, and shall cause the others to be summoned on a date to be fixed by the Court for the purpose.

Explanation.—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the defendant, it will not be deemed to be "in the power" of the defendant.

N.-W. F. P.

Add a sub-clause (2) "The defendant at the time of presenting a written statement shall, where he relies on any documents (whether in his possession or power or not), enter such documents in a list and produce those documents which are in his possession or power."

Synopsis.

1. Written statement.
2. Supplemental written statement. See O. 6, R. 7 and O. 8, R. 9.
3. First hearing—Meaning of.
4. Court-fee not leviable on written statement.

Presentation of written statement by whom and when. See Note 1.
Written statement—Contents of. See Notes to O. 6, Rr. 2 and 7.

1. Written statement.—A written statement is the pleading of the defendant, and must be filed by him *personally*, or on his behalf by *a duly constituted agent*. The filing of a written statement by a *third* person on behalf of the defendant is not sanctioned by the Code.[1]

Where, after the service of summons the defendant has not had sufficient time to enable him to file a written statement[2] or where the Court requires him to file a written statement[3] it should grant an adjournment for that purpose. An appellate Court cannot call for a written statement from the defendant.[4] As to what a written statement should or should not contain, *see* O. 6, Rr. 2 and 7.

Order 8, Rule 1—Note 1.

(1) *Shair Ali* v. *Jagmohan Ram*, 1931 All 338 (335): 1931 All L J 181: 131 Ind Cas 548: 53 All 466; *Surnomaee* v. *Bykunt*, (1876) 25 Suth W R 17 (18); *Denomoyee Dosee* v. *Tara Churn Coondoo*, 1865 Bourke Oudh Cas 153; *Shamas-ud-din* v. *Allah Dad Khan*, 1925 Lah 65 (66): 6 Lah L Jour 351: 82 Ind Cas 603 [Defendant who is not a necessary party cannot contest suit].

(2) *Lokhenath* v. *Sobanath*, (1866) 5 Suth W R Act X 39 (39); *Gajendra Shah* v. *Ram Charan*, 1930 Oudh 171 (172): 4 Luck 529: 7 Oudh W N 197: 121 Ind Cas 894 [Small cause suit—Statement not necessary in the absence of specific notice in the summons].

(3) *Ram Rutton* v. *Oriental Inland Steam Navigation Co*, 2 Hyde 89.

(4) *Juggessur Mookerjee* v. *Gopee Kishen*, (1866) 5 Suth W R 50 (51).

O. 8, R. 1, Notes 2—4.

2. Supplemental written statement.—*See* Order 6, Rule 7 and Order 8, Rule 9.

3. First hearing—Meaning of.—The "first hearing" of a suit does not mean the day on which the *witnesses are examined* or the trial taken up. It means the day on which the Court goes into the pleadings in order to understand the contentions of the parties. In suits in which issues have to be framed, the day on which such issues are framed is the first hearing of the suit[1] in as much as on that day the Court looks into the pleadings with a view to understand the contentions of the parties. This is made clear by the provisions of Order 10, Rule 1 under which "the Court shall, at the *first hearing* of the suit, ascertain from each party or his pleader whether he admits or denies, such allegations or facts as are made in the plaint or written statement if any of the opposite party."

In cases in which no issues need be framed, such as small cause suits, the first hearing will, it is conceived, be the day on which the Court goes into the case of the parties for the purpose of trial.

4. Court-fee not leviable on written statement.—Written statements called for by the Court after the first hearing are specially exempted from a fee by S. 19, clause 3 of the Court Fees Act (of 1870). But it cannot be inferred therefrom that written statements filed at or before the first hearing are chargeable with a fee, since the legislature has expressly repealed the provision in the Code of 1859 requiring Court-fee on all written statements.[1]

O. 8, R. 2.

R. 2. [New.] *The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.*

New facts must be specially pleaded.

[R. S. C., O. 19, R. 15. *See* O. 6, Rr. 4 and 8.]

Synopsis.

1 Scope of the rule.
2 Special defences.
3. Alternative defences. See O. 6, R. 2 Notes.
4. Fraud. See O. 6, R. 4.
5. Limitation.
6. Facts showing illegality.
7. Joint contractors—Separate defences.

Payment. See Note 2.
Performance. See Note 2.
Special pleas—Instances. See Note 2, Pt. (2).

Note 3.

(1) *Chidambaram Chettiar* v. *Parvathi Achi*, 1926 Mad 847 (349): 23 Mad L W 69: 1926 Mad W N 156: 93 Ind Cas 16; *Abdul Rahman* v. *Shib Lal Sahu*, 1922 Pat 252 (254) (2): 1922 Pat H C C 81: 6 Pat L Jour 650: 2 Pat L Tim 572: 63 Ind Cas 570: 4 U P L R (Pat) 13; *Gour Huree Chowdhry* v. *Pran Huree Laha*, (1874) 21 Suth W R 42 (43); *Mahaboob Hossein* v. *Putasoo Kumari*, (1868) 10 Suth W R 179 (181): 1 Beng L R (A C) 120; *Taran Mandal* v. *Rajchandra Mandal*, (1919) 50 Ind Cas 296 (297) Cal [First hearing of suit means the day when the case is actually gone into].

Note 4.

(1) *Nagu* v. *Yeknath*, (1880-81) 5 Bom 400 (402, 403): 5 Ind Jur 650; In re *Cherag Ali* v. *Kadir*, (1883) 12 Cal L Rep 367 (370).

O. 8, R. 2, Notes 1—2.

1. **Scope of the rule.**—It is the duty of a defendant to *particularise* in his defence all points, either of fact or of law, which he desires to take.[1] If he does not do so, he will not be allowed to raise a new plea depending upon evidence for its determination, for the first time in appeal.[2] It has been held by the High Court of Calcutta that a plea of *estoppel* is not one 'which shows the suit to be not maintainable' and, that therefore, can be allowed to be raised for the first time in appeal under O. 41, R. 2, though not raised in the written statement.[3] Whether a matter has been pleaded sufficiently to give the Court the right to form a judgment, depends upon the allegations and form of the pleadings; the Courts must not look to the mere wordings of the plaint, but to the issues settled and the manner of the treatment in the lower Court.[4] "The effect of the rule is, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that, the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it and protect the other party, if necessary, by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the Court will deal with him as is just".[5] Thus a plea though not taken in the statement can be raised provided it is taken before the trial has commenced and no prejudice is caused to the plaintiff.[6]

2. **Special defences.**—In answer to the claim of a plaintiff, (for instance, on the basis of a contract), the defendant may admit that he made the contract, but may avoid the effect of that admission by pleading performance, fraud, release, limitation, etc.[1] Such a plea is called a plea in *confession and avoidance*. For instances of the nature of the pleas that may be set up in defence *see* the undermentioned cases.[2]

Order 8, Rule 2—Note 1.

(1) *Sarifun Mandalin* v. *Feradoul Khatun*, 1923 Cal 578 (578): 76 Ind Cas 603; *Akshoy Kumar Banerjee* v. *Corporation of Calcutta*, (1915) 27 Ind Cas 261 (264): 42 Cal 625: 19 Cal W N 37: 21 Cal L Jour 177 [Plea of purchaser for value without notice]; *Mulji Jitha* v. *Macleod*, (1903) 5 Bom L R 991 (995), (Do.).

(2) *Hanmantram* v. *Shankarlal*, 1926 Jour 99 (4): 28 Bom L R 513: 95 Ind Cas 573 [Plea of want of notice to quit]; *Aithan Gope* v. *Khakhai Sahu*, 1922 Pat 356 (358): 3 Pat L Tim 367: 67 Ind Cas 790: 1 Pat 612 [Want of legal necessity]; *Jagadish Prasad* v. *Hoshyar Singh*, 1928 All 596 (606): 26 All L J 1289, (Do.).

(3) *Kishen Dyal Gir* v. *Mahommed Amirul Hussein*, (1915) 26 Ind Cas 673 (674): 19 Cal W N 942.

(4) *Kannu Pillai* v. *Gopalan Nair*, (1915) 26 Ind Cas 337 (339): 1914 Mad W N 883; *U Thoudaya* v. *Nga Ni*, (1913) 18 Ind Cas 568 (570, 571): (1912) 1 U B R 141 [It will cause great hardship to non-suit because of a careless written statement].

(5) In re *Robinson's settlement, Gant* v. *Hobbs*, (1912) 1 Ch 717 (727, 728) [Per Buckley, L J].

(6) *Murari Lal* v. *David*, 1925 All 241 (2), (243): 22 All L J 1116: 6 L R All Civ 106: 84 Ind Cas 739: 47 All 291; *Gour Chunder Biswas* v. *Greesh Chunder Biswas*, (1867) 7 Suth W R 120 (121).

Note 2.

(1) *Ekoji Kunbi* v. *Akaji Kunbi*, (1920) 54 Ind Cas 131 (133) (1) Nag.

(2) *Lakshmi Dass* v. *Roop Laul*, (1907) 30 Mad 169 (175, 178): 17 Mad L Jour 19: 2 Mad L Tim 4 [Defendant may set up invalidity of a transaction though he has not avoided it by a suit within limitation]; *Venkatachalapathy* v. *Robert Fischer*, (1907) 30 Mad 444 (445): 17 Mad L Jour 294, (Do.); *Orr* v. *Sundara Pandya*, (1894) 17 Mad 255 (256), (Do.); *Ramanasari* v. *Muthusami*, (1907) 30 Mad 248 (250), (Do.); *Shahziauddin Abdul Hossein* v. *Kailash Chandra Shaha*, (1905) 2 Cal L Jour 599 (601), (Do.); *Ranganath* v. *Govind*, (1904) 28 Bom 639 (642): 6 Bom L R 592, (Do.); *Hargovindas Lakshmidas* v. *Bajibhai Jijibhai*, (1890) 14 Bom 222 (226), (Do.); *Surendra Narain Roy Chowdhury* v. *Dinanath Basu*, (1916) 36 Ind Cas 33 (34): 43 Cal 554 [Lessee can plead eviction by title paramount in suit for rent]; *Chandra Kanta* v. *Bhagjur Bepari*, (1909) 1 Ind Cas 525 (527) Cal [Can plead *jus tertii* provided he states definitely the name of the person]; *Faiyaz Husain* v. *Prag Narain*, (1907) 29 All 339 (346): 34 Ind App 102: 9 Bom L R 656: 4 All L J 344: 11 Cal W N 561: 5 Cal L Jour 563: 17 Mad L Jour

3. **Alternative defences.**—*See* Order 6, Rule 2 Notes.

4. **Fraud.**—*See* O. 6, R. 4.

5. **Limitation.**—A party should not be allowed to raise a plea of limitation for the first time in appeal where such plea involves a decision upon questions of fact.[1] Where the written statement asserts that the suit is barred by limitation, it is not necessary that the plea ought to be stated more explicitly, as by reference to the *particular article* of the Limitation Act.[2] But where the plaint itself shows that the suit is filed after the period prescribed, the Court is not precluded from going into the question of limitation even though it is not raised in the statement, provided it does not necessitate any investigation into any fresh facts.[3] As a matter of fact under section 3 of the Limitation Act the Court must dismiss the suit if on the facts stated in the plaint, the claim is barred.

6. **Facts showing illegality.**—A plea of illegality of the consideration for a bond which is the subject of suit must be definitely pleaded in the written statement for it is a case in which particulars may be necessary. The plea cannot be raised for the first time in the arguments.[1] *See also* Notes to Order 6, Rule 8.

7. **Joint contractors—Separate defences.**—In a suit against joint contractors, a successful defence pleaded by one only, enures for the benefit of the others as well.[1]

R. 3. [New.] *It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.*

Denial to be specific.

[R. S. C., O. 19, R. 17.]

Synopsis.

1. Scope of the rule.
2. "Except damages."

1. **Scope of the rule.**—A defendant can either admit or deny the several allegations made in the plaint. If he decides to deny any such allega-

263: 10 Oudh Cas 314: 2 Mad L Tim 191 P C [*Lis pendens* is a good defence]; *Bellamy* v. *Sabine*, (1857) 1 De G & Jo 566, (Do.); *Babaji* v. *Krishna*, (1894) 18 Bom 372 (374) [Defendant can plead that transaction was a sham one to defraud creditors]; *Preonath Koer* v. *Kazi*, (1903) 8 Cal W N 620, (Do.); *Munshi* v. *Mahomed Jalish*, (1908) 12 Cal W N 409 (411-412), (Do.); *Dalsukhram* v. *Charles De Bretton*, (1904) 28 Bom 326 (329): 6 Bom L R 73 [But he cannot set up as a defence an agreement the object of which is to stifle a prosecution]; *Venkatasubba Rao* v. *Vigneswaradu*, 1928 Mad 840 (845): 1928 Mad W N 336: 28 Mad L W 82: 56 Mad L Jour 52: 110 Ind Cas 554 [Suit for ejectment—Defendant having no title—Can still put the plaintiff to proof of his title].

Note 5.

(1) *Bhushan Chandra Pal* v. *Narendra Nath Koer*, (1921) 60 Ind Cas 280 (282): 32 Cal L Jour 236; *Secretary of State* v. *Annada Mohan Roy*, 1921 Cal 661 (671, 672): 34 Cal L Jour 205: 66 Ind Cas 287 [Especially where bar is under special law]; *Sheikh Haji Sadakali Khan* v. *Janakinath Singha Roy*, 1924 Cal 463 (463): 69 Ind Cas 194, (Do.). *Kedar Nath* v. *Mohesh Chandra*, (1918) 46 Ind Cas 787 (789): 28 Cal L Jour 216, (Do.); *Hasan Imam* v. *Debi Prasad*, 1924 Pat 664 (664): 3 Pat 546: 5 Pat L Tim 303: 1924 Pat H C C 189: 80 Ind Cas 956.

(2) *Juanendra Mohan Dutt* v. *Umesh Chandra Guha*, 1922 Cal 544 (545) (1): 26 Cal W N 985.

(3) *Dhanji Jairam Mali* v. *Secretary of State*, 1921 Bom 381 (383, 384): 45 Bom 920: 23 Bom L R 279: 61 Ind Cas 347.

Note 6.

(1) *Nur Ilahi* v. *Mawaz Khan*, 1925 Lah 345 (346) (1): 7 Lah L Jour 86: 86 Ind Cas 683: 26 Pun L R 76.

Note 7.

(1) *Pirie* v. *Richardson*, (1927) 1 K B 448.

O. 8, R. 3, Notes 1—2.

tion he must do so *clearly and explicitly*.[1] Thus, in *Grocott* v. *Lovatt*[2] the plaintiff alleged in para. 3 of his statement of claim that the defendants, on or about a certain date, falsely and maliciously wrote, printed and published a certain hand bill. The reply of the defendant to this was: "the defendant denies the facts alleged in para. 3 of the statement of claim." The Court of appeal held that the denial was sufficient. But a statement that the defendant "puts the plaintiff to proof of the several allegations in the plaint" or that he "does not admit the correctness of the statements contained in the plaint" is not a sufficient denial within the meaning of this rule (*see* Rule 5 below). The rule is not limited to denial alone; it includes non-admission as well, so that where a defendant pleads that he does not admit a particular allegation in the plaint, it would be a sufficient traverse.[3] As to the effect of failure to deny specifically, *see* O. 8, R. 5.

As a general rule the defendant should admit whatever facts can be proved against him without trouble; otherwise it would suggest that there is no substantial defence.[4] No party should traverse matter not alleged; he should be content to answer the case that is actually laid against him and should not plead that which he thinks his opponent meant or ought to have raised.[5]

2. Except damages.—The exception in this rule makes it unnecessary for the defendant to deny the claim to or amount of damages.[1] It is probably intended that damages shall be deemed to be put in issue in all cases, unless expressly admitted.

O. 8, R. 4.

R. 4. [New.] *Where a defendant denies an allegation of fact in the plaint, he must not do so evasively,* *Evasive denial.* *but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.*

[R. S. C., O. 19, R. 19.]

Synopsis.

1. Plaint allegations not to be denied evasively.

Order 8, Rule 3—Note 1.

(1) *Thorp* v. *Holdsworth*, (1876) 3 Ch D 637 (640); *Subramania Iyer* v. *Hitchcock*, 1925 Mad 950 (957): 22 Mad L W 26: 85 Ind Cas 900 [Defendant should specifically deny publication in a libel suit]; *Bhagela Koer* v. *Abdul Rahman*, (1916) 36 Ind Cas 77 (81, 82) Pat [In a suit for money, "accounts incorrect" is not a specific denial].

(2) *Grocott* v. *Lovatt*, (1916) 61 S J 28. See also *Adkins* v. *North Metropolitan Tramway Co*, 63 L J Q B 361.

(3) Per Jessel M R in *Thorp* v. *Holdsworth*, 3 Ch D 637 (640); *Balaghat Husain* v. *Abid Baksh*, 1927 All 225 (2), (226): 95 Ind Cas 1; *Sheikh Muhammad Ibrahim* v. *Ali Nabi*, (1920) 54 Ind Cas 107 (109): 6 Oudh L J 600; *Ullaman & Co* v. *Cusar Leuba*, (1909) 4 Ind Cas 318 (318): 13 Cal W N 82 P C.

(4) *Lee Conservancy Board* v. *Button*, (1881) 6 App Cas 685.

(5) *Rassam* v. *Budge*, (1893) 1 Q B 571.

Note 2.

(1) *Wood* v. *Earl of Durham*, (1888) 21 Q B D 501 (506, 508); *Ross & Co* v. *Scriven*, (1916) 34 Ind Cas 235 (238): 20 Cal W N 1192: 43 Cal 1001; *Scott* v. *Sampson*, (1882) 8 Q B D 491 (495, 507) [Where special damages are claimed, it is however advisable to plead to it].

O. 8, R. 4, Note 1.

1. Plaint allegations not to be denied evasively.—*A* sues *B* for dissolution of partnership alleging that he agreed to enter into partnership with him to carry on certain business. *B* in his written statement admits that he agreed to enter into partnership as alleged but adds that "the terms of the arrangement between himself and the plaintiff were not definitely agreed upon as alleged." This is an *evasive* denial of the fact of partnership and is not permissible.[1] Similarly, where several circumstances are set out in the plaint as constituting the details of certain transactions, and, the defendant, instead of denying the several circumstances specifically, denies them as a whole using almost the precise language of the allegations denied, the denial will, as a rule, be considered *evasive*.[2] Thus, if the plaintiff in an action for wages alleges that he has served the defendant as a hired servant from the 25th March, 1908 to 24th June, 1909, at Epson, in the County of Surrey, it would be a bad traverse for the defendant to plead "the plaintiff did not serve the defendant as a hired servant from the 25th March, 1908 to 24th June, 1909 at Epson in the County of Surrey." He must deny that the plaintiff ever served him at all, or else state how long he admits the plaintiff did serve him. He must not traverse the place which are immaterial, or, if he does, he must add the words 'or at any other place' after the words 'the plaintiff did not serve him at Epson'.[3] But where the plaintiff, claiming title under one *S* alleged that she died on the 28th of September, 1906, and the defendant pleaded that he did not admit that *S* died on the 28th of September, 1906, and that the suit was barred by limitation, the denial is not *evasive*, in as much as there is only one fact and that has been stated to be not admitted.[4] Where a denial is evasive leave to amend may be given under O. 6, R. 17, except where the defendant is found to have acted *mala fide*.[5]

O. 8, R. 5.

R. 5. [New.] *Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:*

Specific denial.

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

[R. S. C., O. 19, R. 13.]

Synopsis.

1. Scope of the rule.
2. Facts not denied specifically will be taken as admitted.
3. "Except as against a person under disability."
4. Admission if binds co-defendants.
5. Court may require the fact so admitted to be proved.
6. Rule does not apply where no written statement is filed.

Order 8, Rule 4—Note 1.

(1) *Thorp* v. *Holdsworth*, (1876) 3 Ch D 637: 45 L J Ch 406.

(2) *Rajagopalachariar* v. *Bashyachariar*, 1924 Mad 838 (839): 47 Mad L Jour 520: 20 Mad L W 399: 1924 Mad W N 788: 82 Ind Cas 584; *Sri Kishan Pandey* v. *Ghana Nand Joshi*, 1929 All 721 (2), (723): 1929 All L J 1153; *Sharifun Mandalin* v. *Feradoul Khatun*, 1923 Cal 578 (578): 76 Ind Cas 603.

(3) See Odger's Principles of Pleading and Practice, 10th Edn, p 166.

(4) *Rajagopalachariar* v. *Bashyachariar*, 1924 Mad 838 (839): 47 Mad L Jour 520: 20 Mad L W 399: 1924 Mad W N 788: 82 Ind Cas 584.

(5) *Tildesby* v. *Harper*, (1878) 10 Ch D 393 [On appeal from 7 Ch D 403].

O. 8, R. 5, Notes 1—2.

Admissions in pleadings—Effect. See Note 2.
Not admitted. See Note 1.

Onus of proof—Where plaint allegations not denied. See Note 2, Pt. (1).

1. **Scope of the rule.**—"The whole object of pleadings is to bring the parties to an issue, and the object of this order is to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what the real point to be decided was."[1] This rule states the effect of the failure to conform to rule 3 *ante* and must not be read in a sense inconsistent with rule 3; therefore, a *general* denial cannot mean a denial by *implication*.[2] The word 'specifically' qualifies also the words 'or stated to be not admitted' and therefore, a refusal to admit must also be stated specifically.[3] The words "if not denied specifically . . . or stated to be not admitted" must be read to mean "if not denied specifically . . . or if *not* stated to be not admitted". In other words every allegation of fact in the plaint will be deemed to be admitted, if in the written statement, it is specifically neither denied nor stated to be not admitted.[4]

2. **Facts not denied specifically will be taken as admitted.**—The effect of this rule is to relieve the plaintiff from the obligation of *proving* such allegations in his plaint as are neither specifically denied nor stated to be not admitted in the written statement.[1] Thus, where in a suit for ejectment the land from which it is sought to eject a tenant is alleged to be "old waste" under the Madras Estates Land Act, 1908, and this is not traversed in the written statement, the defendant cannot afterwards plead that the land is not "old waste".[2] A plea that the defendant *does not admit any of the allegations* in the plaint except such as have been expressly admitted and that he puts the plaintiff to the proof of all allegations not so admitted is not a sufficient denial within the meaning of this rule: every allegation so denied will be deemed to have been admitted.[3] Similarly a plea that the defendant does not admit the correctness of certain allegations in the statement of claim and requires proof thereof, is not a sufficient denial.[4] Where a plaintiff suing as a curator of the estate of a deceased person, stated in the plaint that he was authorised by the Court to sue, and the defendant stated in reply that those allegations were not known to him, it was held that it was not open to him to raise again the question of

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Order 8, Rule 5—Note 1.

(1) *Thorp* v. *Holdsworth*, (1876) 3 Ch D 637: 45 L J Ch 406 [Per Jessel, M R].

(2) *Subramania* v. *Hitchcock*, 1925 Mad 950 (957): 22 Mad L W 26: 85 Ind Cas 900.

(3) *Subramania* v. *Hitchcock*, 1925 Mad 950 (957): 22 Mad L W 26: 85 Ind Cas 900; *Rutter* v. *Tregent*, (1879) 12 Ch D 758: 48 L J Ch 791: 41 L T 16: 27 W R 902.

(4) *Balaghat Husain* v. *Abid Bakhsh*, 1927 All 225 (2), (226, 227): 95 Ind Cas 1; *Hall* v. *L & N W Ry Co*, (1877) 35 L T 848 [Per Grove, J at p 849].

Note 2.

(1) *Srimati Sakalbatti* v. *Munshi Mundal*, (1919) 49 Ind Cas 733 (734) Pat; *Laxmi Narayan* v. *Chunni Ram*, (1917) 38 Ind Cas 14 (15): 18 Bom L R 946: 41 Bom 89; *Gwalk Cotton Spinning and Weaving Mills Ltd* v. *Budha Ram*, 1931 Lah 203 (204): 12 Lah L Jour 293: 131 Ind Cas 206; *Commissioner for Port of Rangoon* v. *Maola Dawood Sons & Co*, (1911) 9 Ind Cas 470 (472): 4 Bur L Tim 26; *Apaji Patil* v. *Apa*, (1902) 26 Bom 735 (737): 4 Bom L R 534; *Khemsingh* v. *Ali Sher*, (1920) 54 Ind Cas 263 (264): 25 Pun L R 1920: 8 Pun W R 1920; *Amir Beg* v. *Ghulam Nabi*, (1917) 38 Ind Cas 893 (893): 1917 Pun Re No 1; *Alam Singh* v. *Seth Gopal Das*, 1923 Nag 7 (7): 68 Ind Cas 661; *Veknath* v. *V Gulab Chand*, (1862-65) 1 Bom H C R 85; *Ahmedbee* v. *Dabee*, (1872) 18 Suth W R 287 (287).

(2) *Jampana* v. *Venkata*, (1919) 50 Ind Cas 946 (946): 36 Mad L Jour 248: 42 Mad 315.

(3) *Subramania* v. *Hitchcock*, 1925 Mad 950 (957): 22 Mad L W 26: 85 Ind Cas 900; *Harris* v. *Gamble*, (1878) 7 Ch D 877: 47 L J Ch 344: 38 L T 253.

(4) *Rutter* v. *Tregent*, (1879) 12 Ch D 758: 48 L J Ch 791: 41 L T 16: 27 W R 902; *Chaithram* v. *Khemchand*, 1929 Sind 7 (8): 113 Ind Cas 370.

the plaintiff's authority to sue.[5] But where a landlord sues a tenant for recovery of possession on the ground that the defendant had forfeited his lease by denial of his title and this plea is not traversed by the defendant such non-denial, though amounting to an admission of the denial of title will not by itself work a forfeiture of which the plaintiff can take advantage in that suit in as much as the forfeiture must have accrued *before* the suit was instituted.[6] O. 8, R. 5, Notes 2—5.

As to the effect of admissions made in the written statement, *see* the undermentioned cases[7] and also Evidence Act, Ss. 17 to 31 and S. 58.

3. "Except as against a person under disability."—The rule of admission by non-denial does not apply where the defendant is a person under disability such as a minor.[1] But this exception has nothing to do with *the conduct of the suit*. Thus, if at the time of the framing of issues or at the trial, the person representing a minor defendant admits certain allegations of fact, it cannot be said that this rule in any way affects such admissions.[2]

4. Admission, if binds co-defendants.—As to whether and when an admission made by a defendant in his written statement will bind co-defendants, *see* Ss. 17—23 of the Evidence Act and the undermentioned cases.[1]

5. Court may require the facts so admitted to be proved.—In England the rule as to admission by non-denial is very stringent and a defendant who omits to traverse, in his defence, any allegation of fact in the statement of claim is not allowed to traverse that fact at the trial. In India, the general practice is not to construe the pleadings very strictly and on this principle, the defendant who had omitted to traverse in his written statement, allegations made in the plaint, was allowed, in cases arising under the old Code, to traverse them at the hearing under special circumstances.[1] The proviso to this

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(5) *Lakhmi Chand* v. *Ram Lal Kapoor*, 1931 All 423 (424): 133 Ind Cas 414.

(6) *Kewal Ram* v. *Abdul Hai*, 1923 Lah 409 (410): 71 Ind Cas 779.

(7) *Radhachurn* v. *Chunder Monee*, (1868) 9 Suth W R 290 (291) [Defendant's admission should be taken as a whole]; *Sooltan* v. *Chand Bibee*, (1868) 9 Suth W R 130 (130, 131), (Do.); *Poolin Behary* v. *Watson*, (1868) 9 Suth W R 190 (190): Beng L R Supp Vol 904, (Do.); *Rajah Nilmony* v. *Ramanoograh*, (1867) 7 Suth W R 29 (30), (Do.); *Brojoraj* v. *Bishonath*, 1864 Suth W R (Gap) 305 (306), (Do.); *Judoo* v. *Rajah Baroda*, (1874) 22 Suth W R 220 (221), (Do.); *Devidas* v. *Mamooji*, 1924 Nag 103 (103): 20 Nag L R 7: 78 Ind Cas 104, (Do.); *Sriram* v. *Ramlal*, (1913) 18 Ind Cas 878 (880): 11 All L J 255, (Do.); *Manikial Baboo* v. *Ramdas Mazumdar*, (1868) 1 Beng L R A C 92: 10 Suth W R 132 [Admission may shift burden of proof]; *Maharajah Mirza Ananda* v. *Pidaparti Suryanarayana*, (1885) 9 Mad 307 (318): 4 Sar 696: 10 Ind Jur 193: 13 Ind App 32 P C; *Baikanthanath* v. *Chandra Mohan*, (1868) 1 Beng L R A C 133 (137): 10 Suth W R 189; *Burjorji Cursetji* v. *Muncherji Kuverji*, (1880) 5 Bom 143 (153); *Javanmal Jitmal* v. *Muktabai*, (1890) 14 Bom 516 (519).

Note 3.

(1) *Govindasami Padayachi* v. *Sami Padayachi*, 1923 Mad 114 (115): 43 Mad L Jour 579: 16 Mad L W 911: 31 Mad L Tim 258: 1923 Mad W N 42: 69 Ind Cas 724.

(2) *Nagappa* v. *Sidalingappa*, (1918) 47 Ind Cas 589 (590): 35 Mad L Jour 372.

Note 4.

(1) *Amrito* v. *Rajonee*, (1875) 23 Suth W R 214 (217): 15 Beng L R 10: 2 Ind App 113: 3 Sar 430 P C [Will not bind co-defendants]; *Narindar Singh* v. *C M King*, 1928 Lah 769 (771): 10 Lah L Jour 339: 29 Pun L R 715, (Do.); *Azizullah* v. *Ahmed Ali*, (1885) 7 All 353 (369): 1885 All W N 54: 9 Ind Jur 395, (Do.); *Kali Dutt Jha* v. *Abdul Ali*, (1889) 16 Cal 627 (635): 16 Ind App 96: 5 Sar 326: 13 Ind Jur 130 P C (Do.); *Lachman* v. *Tansukh*, (1884) 6 All 395 (398): 1884 All W N 136, (Do.); *Chundereshwar Narain* v. *Chuni Ahir*, (1882) 9 Cal L Rep 359 (360), (Do.); *Kali Kishore* v. *Gopi Mohan*, (1898) 2 Cal W N 166 (168), (Do.); *Mookta Keshee* v. *Koylash Chunder*, (1867) 7 Suth W R 493 (495), (Do.); *Niamatoollah* v. *Himmut Ali*, (1874) 22 Suth W R 519 (520), (Do.); *Kowsullah Sundari* v. *Mukta Sundari*, (1885) 11 Cal 588 (590): 10 Ind Jur 66 [But co-contractors are bound if admission is made with reference to the transaction in issue]; *Meajan* v. *Alimuddin*, (1916) 34 Ind Cas 571 (575, 577): 44 Cal 130: 25 Cal L Jour 42: 20 Cal W N 1217, (Do.).

Note 5.

(1) *Madho Pershad* v. *Gajadhar*, (1885) 11 Cal 111 (117): 11 Ind App 186: 4 Sar 574: 8 Ind Jur 694: R & J 85 P C; *Anundmoyee* v. *Sheeb Chunder*, (1862) 9 Moo Ind App 287 (301): 2 Suth W R 19: Marsh 455: 1 Suth 485: 1 Sar 854 P C; *Deo Nandan* v. *Meghumahton*, (1901) 34 Cal 57 (64): 11 Cal W N 225: 5 Cal L Jour 181; *Natha Singh* v. *Jodha Singh*, (1884) 6 All 406 (414): 1884 All W N 140; *Mulji* v. *Anupram*, (1890) 7 Bom H C R 136; *Nawab Nazim*

O. 8, R. 5, Notes 5—6.

rule now makes it clear that the failure of the defendant to deny the allegations in the plaint does not necessarily amount to proof and that the Court could, in its discretion, require proof of such allegations.[2] The discretion should be exercised where the Court suspects that the admission is made collusively, or to avoid a rule of public policy[3] or where the defendant's failure to deny the allegation is due to ambiguous and unsatisfactory assertions in the plaint[4] or where the defendant is taken by surprise or misunderstands the plaint.[5] The discretion should usually be exercised by the Court of first instance.[6]

6. Rule does not apply where no written statement is filed.—It is clear from the wording of this rule, that it is not intended to apply to a case where the defendant *has not put in a written statement*. A Court is, therefore, not justified in passing a decree on no evidence where the defendant does not file a written statement.[1]

O. 8, R. 6.

R. 6. [S. 111.] (1) *Where in* a suit for the recovery of money[3] the defendant claims to set-off against the plaintiff's demand any ascertained sum of money[4] legally recoverable[6] by him from the plaintiff, not exceeding the pecuniary limits of *the* jurisdiction *of the Court*,[8] and both parties fill the same character[9] as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, *present* a written statement containing the particulars of the debt sought to be set off.

Particulars of set-off to be given in written statement.

(2) *The written statement shall have the same effect as a plaint* in a cross-suit so as to enable the Court to pronounce a final judgment *in respect* both of the original *claim and of the set-off*: but *this*

Effect of set-off.

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v. *Amrao Begam*, (1873) 21 Suth W R 59 (60); *Mookta Keshee Dossee* v. *Koylash Chunder Mitter*, (1867) 7 Suth W R 493 (495); *Hameedoollah* v. *Genda*, (1872) 17 Suth W R 171 (172); *Bhoobhun Chunder Shome* v. *Ram Dayal Shanunto*, (1870) 14 Suth W R 55 (57): 5 Beng L R App 62.

(2) *Satyes Chandra* v. *Monmohini*, (1914) 25 Ind Cas 567 (570): 19 Cal L Jour 518; *Bombay Baroda and Central India Railway Co* v. *Firm Budh Sen-Puspchand*, (1924) All 180 (182): 46 All 55: 21 All L Jour 830: 4 L R (All) Civ 570: 79 Ind Cas 562; *Vir Singh* v. *Bhola Singh*, 1924 Lah 744 (744): 6 Lah L Jour 358: 82 Ind Cas 617; *Muniappa Chettiar* v. *Vellachami Mannadi*, (1918) 49 Ind Cas 278 (280): 9 Mad L W 5: 25 Mad L Tim 19: 1918 Mad W N 853; *Naja Mia* v. *Abdul Kadar*, (1918) 45 Ind Cas 878 (879) Cal [Because the standard of pleadings in this country is not very high—Not to be strictly construed]; *Abdul Ghafur Molla* v. *Gholam Rahaman Naskar*, (1917) 39 Ind Cas 460 (461) Cal, (Do.); *Azhimanila Veettil Kannu Pillai* v. *Kapinari Gopalan Nair*, (1915) 26 Ind Cas 337 (339): 1914 Mad W N 883, (Do.).

(3) *Venkata Reddi* v. *Muthu Pambulu Naick*, (1921) 60 Ind Cas 554 (556): 39 Mad L Jour 463: 1920 Mad W N 512: 58 Ind Cas 801: 28 Mad L Tim 213.

(4) *Kundan Lal* v. *Makundi Kunwar*, 1924 All 150 (152): 45 All 571: 77 Ind Cas 609.

(5) *Govindasami Padayachi* v. *R Sami Padayachi*, 1923 Mad 114 (115): 43 Mad L Jour 579: 16 Mad L W 911: 31 Mad L Tim 258: 1923 Mad W N 42: 69 Ind Cas 724.

(6) *Venkata Reddi* v. *Muthu Pambulu Naick*, (1921) 60 Ind Cas 554 (556): 39 Mad L Jour 463: 1920 Mad W N 512: 58 Ind Cas 801: 28 Mad L Tim 213.

Note 6.

(1) *J B Ross* v. *O R Scriven*, (1916) 34 Ind Cas 235 (238, 242): 43 Cal 1001: 20 Cal W N 1192; *Narindar* v. *King*, 1928 Lah 769 (771): 10 Lah L Jour 339: 29 Pun L R 715; *Gobind Gorhi* v. *Baldeo Ram*, 1930 Pat 293 (296): 126 Ind Cas 369 [In such a case defendant is not debarred from giving evidence traversing allegation made in plaint]; *Laxman* v. *Babusa*, 1925 Nag 380 (381): 85 Ind Cas 768 [Does not apply to oral pleading]. But see *Mt Bhuribai* v. *Ishak Hussain*, 1923 Nag 83 (84): 69 Ind Cas 619 [Submitted not correct]; *Bhujang Rao* v. *Bali Ram*, 1928 Nag 165 (166): 11 Nag L J 78: 103 Ind Cas 879, (Do.).

shall not affect the lien, upon the amount decreed, of any pleader[16] in respect of the costs payable to him under the decree. O. 8, R. 6.

(3) *The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.*

Illustrations.

(*a*) *A* bequeaths Rs. 2,000 to *B* and appoints *C* his executor and residuary legatee. *B* dies and *D* takes out administration to *B's* effects. *C* pays Rs. 1,000 as surety for *D;* then *D* sues *C* for the legacy. *C* cannot set-off the debt of Rs. 1,000 against the legacy, for neither *C* nor *D* fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(*b*) *A* dies intestate and in debt to *B*. *C* takes out administration to *A's* effects and *B* buys part of the effects from *C*. In a suit for the purchase-money by *C* against *B*, the latter cannot set-off the debt against the price, for *C* fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*.

(*c*) *A* sues *B* on a bill of exchange. *B* alleges that *A* has wrongfully neglected to insure *B's* goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(*d*) *A* sues *B* on a bill of exchange for Rs. 500. *B* holds a judgment against *A* for Rs. 1,000. The two claims being both definite pecuniary demands may be set off.

(*e*) *A* sues *B* for compensation on account of trespass. *B* holds a promissory note for Rs. 1,000 from *A* and claims to set off that amount against any sum that *A* may recover in the suit. *B* may do so, for, as soon as *A* recovers, both sums are definite pecuniary demands.

(*f*) *A* and *B* sue *C* for Rs. 1,000. *C* cannot set off a debt due to him by *A* alone.

(*g*) *A* sues *B* and *C* for Rs. 1,000. *B* cannot set off a debt due to him alone by *A*.

(*h*) *A* owes the partnership firm of *B* and *C*, Rs. 1,000. *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs. 1,500 due in his separate character. *C* may set off the debt of Rs. 1,000.

[1877—S. 111; 1859—S. 121; R. S. C., O. 19, R. 3. *See* O. 20, R. 19.]

Local Amendments.

PATNA.

To Rule 6 (1) should be *added* the words:—

"and the provisions of O. 7, Rr. 14 to 18 shall, *mutatis mutandis,* apply to a defendant claiming set off as if he were a plaintiff."

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. Suit must be one for the recovery of money. See also Note 6 to S. 73.
4. "Any ascertained sum of money."
5. Equitable set-off in cases of unascertained sums of money.
6. "Legally recoverable from plaintiff."
7. Separate debt not to be set-off against joint and several debt.
8. "Not exceeding the limits of the pecuniary jurisdiction of the Court."
9. Both parties must fill the same character.
10. Winding-up proceedings.
11. Insolvency proceedings.
12. Proceedings under the Agra

O. 8, R. 6, Notes 1—2.

Tenancy Act and other special Acts.
13. Effect of not claiming set-off.
14. Court-fee.
15. Counter claim.
16. Solicitor's lien for costs.
17. Appeal.
18. Limitation.

Claims between principal and agent. See Note 2, F.-Ns. (6), (5) and (2).
Defendant entitled to a decree on set-off admitted in plaint. See Note 2, F.-N. (4).
Omission to claim set-off whether res judicata. See Note 13, Pt. (1).
Rent—Could it be set-off. See Note 12.
Set-off against an assignee. See Note 6, Pts. (10) and (11).
Shall have the same effect as a plaint. See Note 2, Pt. (4).
Unliquidated damages—Whether can be set-off. See Note 4, Pt. (1) and Note (5).

1. Legislative changes.—

Sub-clause (3) of this rule is new.

2. Scope and applicability of the rule.—The doctrine of set-off may be defined as "the extinction of debts of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another".[1] A plea of *set-off* must be distinguished from a plea of *payment*. A payment refers to a satisfaction or extinguishment of a debt effected *prior to the raising of the defence* of payment, while a plea set-off *prays for* a satisfaction or extinguishment hereof commencing in the future after the date of the plea.[2] In order to enable a defendant to claim a set off the following conditions must exist.[3]

(1) The suit must be for *recovery of money*.

(2) The defendant's claim must be for an *ascertained* sum of money.

(3) It must be *legally recoverable*.

(4) Both the parties must fill the *same character* as they fill in the plaintiff's suit.

(5) The sum claimed by way of set-off *should not exceed the pecuniary limits* of the jurisdiction of the Court.

O. 20, R. 19, cl. (1) shows that a decree can be passed in favour of a defendant pleading a set-off; therefore, the defendant is in the position of a plaintiff as regards a set-off pleaded by him.[4] No Court can entertain a plea of set-off if it has no jurisdiction of any kind to entertain a suit, if one is brought for the recovery of the money sought to be set-off.[5]

Order 8, Rule 6—Note 2.

(1) *Ishri* v. *Gopa Saran*, (1884) 6 All 351 (355): 1884 All W N 125: 8 Ind Jur 635; *Mylapore Permanent Benefit Fund, Ltd* v. *T Arogyasami Pillai*, (1917) 38 Ind Cas 233 (235): 40 Mad 1004: 21 Mad L Tim 233: 32 Mad L Jour 528.

(2) *Hoe Moe* v. *I M Seedat*, 1925 Rang 22 (25): 2 Rang 349: 84 Ind Cas 956. See also *Bajirao* v. *National Stores*, 1927 Nag 120 (1) (120): 9 Nag L J 227: 99 Ind Cas 510; *Chisholm* v. *Gopal Chunder*, (1889) 16 Cal 711 (713); *The Secretary of State* v. *Madari*, (1891) 13 All 295 (299) F B; *Edward Dalglish* v. *Ramdin Singh*, (1910) 5 Ind Cas 67 (68): 14 Cal W N 170; *Koonjo Behari* v. *Nilmoney*, (1879) 4 Cal L Rep 296 (297).

(3) *Bhikanrao* v. *Shridhar*, 1931 Nag 12 (13): 130 Ind Cas 87; *Panuganti Narasimha Rao* v. *Srinivasa Jagannatha Rao*, (1919) 53 Ind Cas 234 (237): 42 Mad 873: 37 Mad L Jour 193: 10 Mad L W 183: 1919 Mad W N 628: 26 Mad L Tim 276; *Chinnappa* v. *Raghunatha*, (1892) 15 Mad 29 (33): 1 Mad L Jour 598.

(4) *Panuganti Narasimha Rao* v. *Srinivasa Jagannath Rao*, (1919) 53 Ind Cas 234 (236): 42 Mad 873: 37 Mad L Jour 193: 10 Mad L W 183: 1919 Mad W N 628: 26 Mad L Tim 276; *Khemchand Daryanomal* v. *Menghomal Chuharmal*, 1921 Sind 50 (51): 15 Sind L R 172: 66 Ind Cas 789 [Hence in the absence of proof, the set-off should be disallowed]; *Srimati Jagadamba Dasi* v. *J M Grob*, (1870) 5 Beng L R 639; *Haya Takha* v. *Abdulakha*, (1869) 6 Bom H C R A C J 151; *Hart* v. *Grosser*, (1909) 9 Cal W N 748 (749) [Set-off admitted in plaint—Defendant entitled to decree though plaintiff's suit fails].

(5) *Beeni Madho* v. *Gaya Prasad*, (1893) 15 All 404 (405): 1893 All W N 168; *Hafiz Sulaman* v. *Baroda Das*, 1899 All W N 143 (145,

Where the defendant does not specifically plead a set-off in his written statement, the Court may decline to allow the same to be set up subsequently.[6] Similarly where no issues are framed on the plea and no application is made by the defendant therefor, it is not open to him to raise it in appeal.[7] Nor can a defendant who has failed to claim a set off before decree in a suit, claim it in execution proceedings.[8] Where, however, he states in the written statement that he will file a separate suit in respect of his claim, he is not precluded from proving a set-off afterwards on getting the written statement amended.[9] O. 8, R. 6, Notes 2—3.

Where the defendant sets up a plea of set-off falling under this rule, the Court has no option to refuse to adjudicate on it.[10] But a plaintiff cannot compel a defendant to plead a set off. Thus where a plaintiff in a suit deducted a sum of money due from him to the defendant with a view to bring the suit within the jurisdiction of the Small Cause Court, it was held that the procedure was illegal and that the plaintiff could not enforce a set-off on the defendant.[11]

3. Suit must be one for the recovery of money.—Under the Code of 1859, it was necessary that the suit should have been for a *debt*. A set off could not, therefore, be pleaded in a suit for *mesne profits*, such suit not being for the recovery of a debt.[1] Under the present rule it is sufficient that the suit is one for the *recovery of money*. The illustrations to this rule show that no matter what the title may be, no matter whether such title arises *ex delicto* or *ex contractu*, so long as the *relief is sought to recover money*, it is a suit for money, and a set off can be pleaded therein under this rule.[2] A suit on a negotiable instrument is a suit for money.[3] But a suit merely for dissolution of a partnership or for an account is not a suit for money,[4] though, if there is also a prayer for the payment of such balance as might be found due to the plaintiff, the suit would be one for the payment of money.[5] A suit to enforce a mortgage under which the right to a personal decree is barred is not a suit for money and no set off can be pleaded therein under this rule.[6]

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147); *Mula Kuar* v. *Ulfat Singh*, 1886 All W N 172 (172); *Muhammad Raza* v. *Kubra Bibi*, (1912) 15 Ind Cas 526 (528) Oudh; *Vithaldas Gulabdas Seth* v. *The Hyderabad Spinning & Weaving Co, Ltd*, 1923 Bom 24 (25): 24 Bom L R 328: 67 Ind Cas 326: 47 Bom 182 [Case of counter-claim].

(6) *Dhani Ram* v. *Fida Hussain*, 1927 Lah 431 (432): 28 Pun L R 297: 102 Ind Cas 688; *Mrs O Simon* v. *Arogiaswami Pillai*, (1914) 25 Ind Cas 361 (361): 16 Mad L Tim 122; *Poorna Chandra* v. *Beharee*, (1870) 14 Suth W R 473 (473). See also *J N Johannes* v. *R W Marshall*, (1897-1901) U B R 244; *Permanand* v. *Jagat Narain*, (1910) 6 Ind Cas 162 (162, 163): 32 All 525: 7 All L J 543 [But in a suit by a principal against an agent for accounts, it is unnecessary for the defendant to plead a set off].

(7) *Nan Karay* v. *Ko Htaw*, (1886) 13 Cal 124 (135): 13 Ind App 48: 10 Ind Jur 312: 4 Sar 702.

(8) *National Bank of Upper India, Ltd* v. *Gopal Das*, 1924 Oudh 434 (435): 11 Oudh L J 517: 81 Ind Cas 651: 27 Oudh Cas 248: 1 Oudh W N 290.

(9) *Abdul Kader* v. *Faroji Bin Ali*, 1925 Mad 228 (229): 20 Mad L W 531: 83 Ind Cas 769.

(10) *Subramania Aiyar* v. *Dharamumbal Ammal*, (1920) 57 Ind Cas 656 (656): 12 Mad L W 85.

(11) *Ramdeo* v. *Pokhiram*, (1894) 21 Cal 419; *Ayasing Uttamsing Firm of* v. *Chetandas Janoomal Firm of*, 1925 Sind 319 (320): 87 Ind Cas 955.

Note 3.

(1) *Rotee Rumun* v. *Greeja Nund*, (1866) 5 Suth W R 160 (160): 1870 Bom P J 74 (74).

(2) *Ramjivan Mal* v. *Chand Mal*, (1888) 10 All 587 (598): 1888 All W N 258.

(3) *Bhikanrao* v. *Shridhar*, 1931 Nag 12 (13): 130 Ind Cas 87 [*See also* illustrations (*c*) and (*d*) to section].

(4) *Nan Karay* v. *Ko Htaw*, (1886) 13 Cal 124 (135): 13 Ind App 48: 10 Ind Jur 312: 4 Sar 702 [Suit for account is not one for money]; *Ramjivan Mal* v. *Chand Mal*, (1888) 10 All 587 (593): 1888 All W N 258.

(5) *Ramjivan Mal* v. *Chand Mal*, (1888) 10 All 587 (593): 1888 All W N 258.

(6) *Fakir Chandra Dutta* v. *Messrs Gisborne & Co*, (1904) 8 Cal W N 174 (177).

O. 8, R. 6, Notes 4—5.

4. **"Any ascertained sum of money."**—*See* illustrations (c), (d) and (e) above. An "ascertained sum of money means a sum of money of which the amount is fixed and known; it does not mean a sum *admitted* by the other side or *decreed* by Court; the words are used in contradistinction to unliquidated damages.[1] The mere fact that an arithmetical calculation is necessary to arrive at the total sum cannot render such total an unascertained sum of money.[2] Thus where, in a suit by a landlord against his tenant for rent, the tenant pleaded that he was entitled to set off a commission of three per cent. on the amount of the collections made by him on behalf of the landlord, it was held that the set off was for an ascertained sum of money.[3] But where the set off is in respect of a claim for damages which is not ascertained,[4] or where the amount can be ascertained only on taking accounts[5] or by determining the *quantum* of the share due to the defendant[6] or where the claim is for interest on a sum due to the defendant fixed by him at an arbitrary rate,[7] this rule will not apply. Unascertained sums may, however, be set off by the *consent of parties* when they compromise the suit.[8]

5. **Equitable set off in cases of unascertained sums of money.**—The right to set-off dealt with by this rule is called a *legal* set-off. But the rule does not take away from the parties any right to set-off which they would have had *independently* of the Code.[1] Thus in cases of mutual debits and credits, and in cases where cross demands arise out of same transaction, or, are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant driven to a cross suit, Courts of Equity in England have allowed a plea of set off even though the amount may be *unascertained*. This set-off is known as an *equitable* set-off and such a right is recognised in this country also apart from the provisions of this rule.[2] The provi-

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Note 4.

(1) *Edward* v. *Ramdin*, (1910) 5 Ind Cas 67 (68): 14 Cal W N 170; *Har Prasad* v. *Ram Sarup*, 1924 All 872 (873): 22 All L J 844: 82 Ind Cas 340: 5 L R A Civ 734: 46 All 922; *Bhikanrao* v. *Shridhar*, 1931 Nag 12 (13): 130 Ind Cas 87; *Dilter Koer* v. *Harkhoo*, (1917) 37 Ind Cas 367 (369) Pat; *Goswami Chandra Deoji* v. *Durgapada Duttacharya*, (1910) 5 Ind Cas 211 (212): 7 All L J 105; *Stooke* v. *Taylor*, 5 Q B D (N S) 569 (575). See also the following cases for examples *Firm Shee Prasad Radha Kishen* v. *Indore Malwa United Mills*, (1917) 39 Ind Cas 508 (511): 1917 Pun Re No 62: 1917 Pun W R 65 [Damages assessed by arbitrators]; *Ramzan Khan* v. *Bikha Misra*, (1883) All W N 5 (5) [Suit for salary—Set off of a definite amount received on behalf of defendant]; *Ramu Sahu* v. *Thakur Dayal Rai*, (1917) 39 Ind Cas 888 (889): 2 Pat L W 62 [Several orders awarding costs made in the same proceeding]; *Bharat Prasad Saki* v. *Rameshwar Koer*, (1901) 30 Cal 1066 (1069): 8 Cal W N 118 [Case of rent]; *Channu Lal* v. *Asharfi Lal*, (1907) 29 All 649 (650): 4 All L J 535: 1907 All W N 230; *Debel Kunwar* v. *Ambika Partap Singh*, (1903) 25 All 266 (270): 1903 All W N 34; *Watson & Co* v. *Maharanee Brojosoondaree*, (1871) 16 Suth W R 224 (225) [Case of rent]; *Bhagawani* v. *Baijnath*, (1869) 2 Beng L R A C 84 [Case of assignee].

(2) *Mahomed Nassoruddin* v. *Oppenheimer*, (1903-1904) 2 L B R 186 (187, 189) F B.

(3) *Rameshwar Singh* v. *Hallijha*, (1917) 38 Ind Cas 71 (71) Pat.

(4) *Victoria Mills Co, Ltd* v. *Brij Mohan Lal*, (1917) 38 Ind Cas 203 (203): 39 All 362: 15 All L J 262; *Pir Bakhsh* v. *Rameshwar Nath*, 1929 All 52 (52): 111 Ind Cas 790; *Dobson and Barlow* v. *Bengal Spinning and Weaving Co*, (1897) 21 Bom 126 (135); *Mahomed Nassoruddin* v. *S Oppenheimer*, (1908) 2 L B R 186 (190, 191) F B.

(5) *Galstaun* v. *Radhakissen Chamaria*, 1931 Cal 23 (24): 129 Ind Cas 420: 57 Cal 855; *Firm of Keeverbhan Sukanand* v. *Firm of Madandas Sirsomal*, (1919) 49 Ind Cas 193 (195): 12 Sind L R 70.

(6) *Bishan Chand* v. *Oudh Behari Lal*, (1917) 40 Ind Cas 350 (351): 1 Pat L W 615: 2 Pat L Jour 451: 1917 Pat H C C 279.

(7) *Bidra Ban* v. *Ganpat Rai*, (1912) 14 Ind Cas 463 (463): 38 Pun W R 1912: 80 Pun L R 1912.

(8) *Mt Bebee Bachun* v. *Sheikh Hamid Hoseia*, (1871) 10 Beng L R 45: 17 Suth W R 113 (115): 14 Moo Ind App 377: 2 Suth 531: 3 Sar 39.

Note 5.

(1) *Rash Behary Dey* v. *Bhavani Churn*, (1906) 34 Cal 97 (99); *Munglechand* v. *Gopal Ram Bhose*, (1906) 34 Cal 101; *Rookminy* v. *Mulk*, (1883) 9 Cal 914 (918): 12 Cal L Rep 534; *Maiden* v. *Bhondu*, (1910) 7 Ind Cas 1006 (1006): 77 Pun Re 1910: 108 Pun W R 1910: 145 Pun L R 1910. See also cases in foot-note (2) below.

(2) *Clark* v. *Ruthanavaloo Chetti*, (1864-65) 2 Mad H C 296 (303); *Ram Das* v. *Dwarka Das*, 1930 All 875 (876): 128 Ind Cas 763; *Nandram*

sions of Order 20, Rule 19, sub-rule 3 also show that this rule is not exhaustive. The distinction, however, between a legal set off and equitable set off is, that, while, in the former case the Court is *bound* to entertain and adjudicate upon the plea when raised,[3] the defence of equitable set off cannot be claimed as a *matter of right*[4] but, the Court has a discretion to adjudicate upon it in the same suit or to order it to be dealt with in a separate suit.[5] Thus where a Court thinks that the investigation into the claim of equitable set off will cause great delay it may refuse to allow it[6] or may order the enquiry to proceed on such terms as it thinks fit.[7]

O. 8, R. 6, Note 5.

It is essential for a valid claim to an equitable set off that the cross demands should have arisen out of the *same transaction*. A plea of equitable set off will not be available where it relates to a different transaction.[8] Thus where a plaintiff who promised to supply seven hundred tons of coal supplied only 469 tons and sued the defendant for the price thereof, the later can claim set-off in respect of damages for the breach of contract caused by the failure to supply the full stock promised.[9] Similarly in a suit for the recovery of the principal and interest due on a mortgage bond the defendant can plead an equitable set off in respect of the loss occasioned by the plaintiff's failure to make repairs while in possession of the mortgaged properties.[10]

Similarly also where a washerman who lost some of the articles given to him to wash, sued his employer for wages, it was held that the latter could equitably set off the price of the articles so lost.[11] In all the above cases it

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v. *Ram Prasad*, (1905) 27 All 145 (148): 1904 All W N 193: 1 All L J 529; *Naiz Gukhan* v. *Durga*, (1893) 15 All 9 (10): 1892 All W N 115; *Prayilal* v. *Maxwell*, (1885) 7 All 284 (287): 1885 All W N 40; *Gauri Sahai* v. *Ram Sahai*, (1875) 7 N W P 157; *Kishorchand* v. *Madhowji*, (1879-80) 4 Bom 407 (413); *Dobson* v. *Bengal Spinning Co*, (1897) 21 Bom 126 (135); *Nanjan Ahmed Haji Ali* v. *Salemahomed Peermahomed*, 1923 Bom 113 (118): 24 Bom L R 998: 77 Ind Cas 943; *Ramdhari Singh* v. *Permanund Singh*, (1913) 21 Ind Cas 716 (718): 19 Cal W N 1183; *Chisholm* v. *Gopal Chunder Surma*, (1889) 16 Cal 711 (714); *Bhaghat Panda* v. *Bamdeb Panda*, (1885) 11 Cal 557 (560); *Narendra Krishna Chakraburty* v. *Ashutosh Bhattacharji*, (1931) Cal 358 (359): 35 Cal W N 17: 132 Ind Cas 195; *Kalanand* v. *Sri Prosad*, (1913) 19 Ind Cas 901 (903): 17 Cal W N 1060: 19 Cal L Jour 152 [Principal and agent]; *Sheosaran* v. *Mohabir Pershad*, (1905) 32 Cal 576 (580): 2 Cal L Jour 73; *Khetsidas* v. *Shib Narayan*, (1905) 9 Cal W N 178 (179, 189, 190); *Brojendra Nath Das* v. *Budge Jute Mill Co*, (1893) 20 Cal 527 (531); *S Govinda Rao* v. *A Matada Rudrayya*, 1925 Mad 830 (831): 49 Mad L Jour 14: 1925 Mad W N 228: 90 Ind Cas 465; *Krishnaswamy Pillai* v. *Municipal Commissioners of Madras*, (1868-69) 4 Mad H C 120 (126, 127); *Gobind Parshad* v. *Muree Brewery Co*, (1885) Pun Re No 47; *Fateh Mahomed* v. *Ramzan Khan*, (1915) 27 Ind Cas 316 (317): 8 Sind L R 122; *Shiran Das* v. *Mulomal*, (1913) 19 Ind Cas 390 (390): 6 Sind L R 138; *Secretary of State* v. *Madari Lal*, (1891) 13 All 296 (300): 1891 All W N 85. See also *Sheo Narain Singh* v. *Bishunath Singh*, 1914 P C 153 (154 155): 17 Oudh Cas 33: 18 Cal W N 426: 27 Mad L Jour 128: 1 Oudh L J 159: 22 Ind Cas 315; *Abdul Ali* v. *Puran Mal*, (1914) 25 Ind Cas 560 (562): 82 Pun Re 1914: 277 Pun L R 1914; *Ramgopal* v. *Majeti Mallikharjanudu*, (1862-63) 1 Mad H C R 396 (397); *Roulet* v. *Fetterle*, (1894) 18 Bom 717 (720); *Warburton* v. *Anderson*, (1876) Pun Re No 25. But see *Scanlan* v. *Herrold*, (1868) 10 Suth W R 295 (295); *Gocool Coomar* v. *Bhichook Singh*, (1874) 22 Suth W R 1 (2); *Raghu* v. *Ashraf*, (1878-80) 2 All 252 (253): 4 Ind Jur 249; *Ram Dayal* v. *Ram Dhun*, 1868) 3 Agra H C R 43.

(3) *Subramania Iyer* v. *Dharmambal Ammal*, (1920) 57 Ind Cas 656 (656): 12 Mad L W 85.

(4) *Dobson and Barlow Ltd* v. *The Bengal Spinning & Weaving Co*, (1897) 21 Bom 126 (135).

(5) See cases in foot-notes (6) and (7) below.

(6) *Dobson and Barlow Ltd* v. *The Bengal Spinning and Weaving Co*, (1897) 21 Bom 126 (136).

(7) *Ramdhari Singh* v. *Parmanund Singh*, (1913) 21 Ind Cas 716 (718): 19 Cal W N 1183.

(8) *Ram Deo* v. *Pokhiram*, (1894) 21 Cal 419 (423); *Fakir Chandra* v. *Gisborne*, (1901) 8 Cal W N 174; *H A Levy & Co* v. *Gertrude Levy*, 1930 Lah 808 (809): 126 Ind Cas 444; *Dillor* v. *Hurkhoo Singh*, (1917) 37 Ind Cas 367 (369) Pat; *Bishunchand* v. *Audh Bihari Lal*, (1917) 40 Ind Cas 350 (351): 2 Pat L Jour 451: 1 Pat L W 615: 1917 Pat H C C 279; *Kallu Mal* v. *Partab Singh*, 1926 Oudh 301 (302): 92 Ind Cas 787; *Mt Zukkobai* v. *Bhal Singh*, 1926 Nag 155 (156): 8 Nag L J 205: 92 Ind Cas 74; *Hosserina Bibi* v. *James Smith*, (1874) 13 Beng L R 440: 22 Suth W R 15 (16).

(9) *Kallyanjee Shamjee* v. *Shorrock*, (1910) 6 Ind Cas 924 (925): 37 Cal 334. See also *Naiz* v. *Durga*, (1893) 15 All 9 (11): 1892 All W N 115.

(10) *Shiva* v. *Jaru*, (1892) 15 Mad 290 (291).

(11) *Maiden* v. *Bhondu*, (1910) 7 Ind Cas 1006

O. 8, R. 6, Notes 5—6.

will be seen that the cross demand of the defendant arose out of the same transaction as that on which the plaintiff's claim was based. But where the plaintiff sues a limited company for recovery of dividend payable to him as a shareholder, the company is not entitled to set off damages for breach of a contract by him to deliver cotton.[12] The reason is that the later claim arises out of a *different transaction* altogether from that on which the plaintiff's claim was based.

6. **"Legally recoverable from plaintiff."**—Where *a legal set off* is claimed, it is necessary that the amount set off, must be 'legally recoverable' from the plaintiff. The words 'legally recoverable' have no reference to the ability of the debtor to pay the demand in full; a sum may be legally recoverable, though, in the result, the creditor may be satisfied with a dividend.[1] A sum cannot be said to be 'legally recoverable' where the plaintiff is not bound by law to pay it[2] or where he is not liable to the defendant in respect of that debt;[3] or where the claim is barred by *res judicata*,[4] or is based upon a decree incapable of execution,[5] or upon a document not receivable in evidence.[6] A *barred debt* is not legally recoverable and, therefore, in order to enable a defendant to claim a set off under this rule the sum due to him must not have been barred by the law of limitation *on the date of the suit*.[7] The right to plead this defence arises when the action is brought, so that it does not become barred subsequently by the statute of limitations.[8] A claim which is barred by limitation according to the law of the place where the suit is instituted, but is subsisting according to the *lex loci contractus* is a legally recoverable claim.[9]

Where *A* transfers to *C* a debt due to him by *B*, *C* takes it subject to the liabilities and equities to which *A* is subject as against *B*, under the provisions of S. 132 of the Transfer of Property Act, 1882. If *B* therefore has a legally recoverable claim against *A* in respect of another debt, he can enforce the same as against *C* also, by way of set-off.[10] But if the amount of such set-off *exceeds*

(1006): 1910 Pun Re No 77: 108 Pun W R 1910: 145 Pun L R 1910.

(12) *Vithal Das Gulabdas* v. *The Hyderabad Spinning and Weaving Co, Ltd.* 1923 Bom 24 (25): 67 Ind Cas 326: 24 Bom L R 328: 47 Bom 182.

Note 6.

(1) *Ahmedabad Advance S E Co* v. *Laxmisankar*, (1906) 30 Bom 173 (193): 7 Bom L R 246.

(2) *Chennappa* v. *Raghunatha*, (1892) 15 Mad 29 (34): 1 Mad L Jour 598; *Surnomoyee* v. *Purrish Narain*, (1879) 4 Cal 576 (581); *Shumbhu* v. *Hurro Sundari*, (1882) 11 Cal L Rep 140 (142); *Zumuneerunnissa* v. *Gayer*, (1866) 6 Suth W R Civ Ref 26 (27) [Case of rent]; *Gocool Coomar* v. *Bhichoock*, (1874) 22 Suth W R 1 (2).

(3) *Kallu Mal* v. *Partab Singh*, 1926 Oudh 301 (302, 303): 92 Ind Cas 787; *Mercantile Bank* v. *Rochaldas*, 1926 Sind 225 (228): 95 Ind Cas 358 [Defendants have no claim against plaintiff]; *Tiluk Chandra* v. *Jasoda Kumar*, (1906) 11 Cal W N 215 (216) [Suit by *benamidar* against *A* —Costs awarded to *A*—Subsequent suit by real owner against *A*—Latter cannot set off costs].

(4) *Abdullah Khan* v. *Sreekunto*, (1871) 15 Suth W R 252 (252): *Amir Zama* v. *Nathu Mal*, (1886) 8 All 396 (401): 1886 All W N 159.

(5) *Huro Pershad* v. *Kishoree*, (1871) 16 Suth W R 308 (309).

(6) *Dinonath Mookerjee* v. *Debnath Mullick*, (1870) 13 Suth W R 307 (309): 5 Beng L R App 1.

(7) *Raja Narendra Lal Khan* v. *Tarubala Dasi*, 1921 Cal 67 (68): 48 Cal 817: 25 Cal W N 800: 66 Ind Cas 209; *Subraya Bhandary* v. *Janardhana Bhandary*, 1921 Mad 688 (688, 689): 41 Mad L Jour 370: 30 Mad L Tim 15: 14 Mad L W 534: 62 Ind Cas 852; *Kanailal Kundu* v. *Nitya Saran Mukerjee*, (1918) 47 Ind Cas 938 (941) Cal; *Vellayappa Moothan* v. *Krishna Moothan*, (1918) 44 Ind Cas 428 (432, 433): 34 Mad L Jour 32; *Kanna Pisharodi* v. *Kombiachen*, (1885) 8 Mad 381 (383); *Heera Lall* v. *Bishen Suhaye*, (1864) 1 Suth W R 296 (297) [Case of rent]; *Firm, Bishambar Das Mul Raj* v. *Firm, Salig Ram Bindra Ban*, (1930) 122 Ind Cas 490 (490) Lah: 1930 Notes 12 (c); *Sohna* v. *Nand Ram*, 1898 Pun Re No 53.

(8) *Walker* v. *Clements*, (1850) 15 Q B 1046.

(9) *Bachnan Lal* v. *Banarsi Das*, (1913) 35 All 238 (239): 18 Ind Cas 769: 11 All L J 144.

(10) *Subramania Pattar* v. *Kiradadasan*, (1912) 16 Ind Cas 686 (687): 1912 Mad W N 1235; *Arunachalam Chetti* v. *Subramanian Chetti*, (1907) 30 Mad 285 (288): 17 Mad L Jour 87; *Subramanian* v. *Muthuswami*, (1907) 17 Mad L

the amount of the debt assigned, *B* can recover nothing from *C*. He must only sue *A* for the balance.[11] O. 8, R. 6, Notes 6—7.

In cases of *equitable set off*, can a barred debt be pleaded by way of set off? It has been held that where there is a fiduciary relationship, as of trustee and *cestui qui trust* or where there is accountability as between plaintiff and defendant, even barred debts can be set off.[12] But in the undermentioned case[13] the High Court of Madras refused to extend this principle to a case of lessor and lessee and to allow an equitable set off in answer to a suit *for rent*, on the ground that equity cannot act contrary to the statute of limitations or evade its operation. *See also* the cases cited below.[13-a]

Where on a plea of set off it is found that money is due to the defendant *in excess* of that due to the plaintiff, and the defendant's claim is barred *on the date of the written statement* but not on the date of the plaint, the question arises whether the Court can pass a decree for the balance in favour of the defendant. The High Courts of Madras[14] and Bombay[15] and the Judicial Commissioner's Court of Nagpur[16] have held that the plea is a weapon of defence, upto the amount of the plaintiff's claim but that it is one of attack so far as the amount is in *excess* of the claim and that, therefore, limitation in regard to its recovery must be determined with reference to the date of the *written statement*. The Allahabad High Court has, on the other hand, held that a decree could be passed for the balance in favour of the defendant if not barred on the *date of the suit*.[17]

7. Separate debt not to be set off against joint and several debt.—Illustration (g) to this section adopts the general principle of law that a joint and a separate debt cannot be set off against each other.[1] Where the debt sought to be set off is due jointly to the defendant and another, who is not a

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Jour 481 (482) [Suit by Receiver of estate of *A*, against *B*—*B* having claim against *A* may set off against Receiver also]; *Bhagwani Kunwar* v. *Lalla Baijnath Prasad*, 2 Beng L R (A C) 84; *Sitaram Brahmin* v. *Kanhaiyalal*, (1903) 16 C P L R 118 (120, 121). But see *Subramania Iyer* v. *Subramania Pattar*, (1916) 34 Ind Cas 859 (859): 40 Mad 683: (1916) 1 Mad W N 351: 30 Mad L Jour 615; *Harry Vaningen* v. *Dhunna Lal*, (1882) 5 Mad 108 (112) [The endorsee of an overdue note is not liable to set off due by the payee to the maker].

(11) *Government of Newfoundland* v. *Newfoundland Railway Co*, 13 App Cas 199.

(12) *Chidambara* v. *Krishnaswami*, (1915) 28 Ind Cas 221 (225, 228): 39 Mad 365: 28 Mad L Jour 285: 2 Mad L W 241 [Trustee and cestui qui trust]; *Sheo Saran* v. *Mohabir Pershad*, (1905) 32 Cal 576 (580): 2 Cal L Jour 73 [Between mortgagor and mortgagee]; *Parasurama* v. *Venkatachelam*, (1913) 21 Ind Cas 701 (701, 702): 1914 Mad W N 198: 25 Mad L Jour 561, (Do.); *Nursingh Narain* v. *Lukputty*, (1880) 5 Cal 833 (335), (Do.); *Muratsingh Lachman Singh* v. *Baktawarsingh*, (1893) 6 C P L R 22 (23), (Do.); *Sultan Muhammad* v. *Ladha Singh*, 1926 Lah 633 (634): 96 Ind Cas 844, (Do.); *Nathan Prasad Shah* v. *Kali Prasad Shah*, 1926 Pat 77 (79): 1925 Pat H C C 317: 90 Ind Cas 785: 7 Pat L Tim 158, (Do.); *Ramdhari Singh* v. *Parmanund*, (1913) 21 Ind Cas 716 (718): 19 Cal W N 1183; *Gajadhar Mahta* v. *Raghubhar Gope*, (1907) 12 Cal W N 60 (62); *Edward Dalgleish* v. *Ramdin Singh*, (1910) 5 Ind Cas 67 (68): 14 Cal W N 170.

(13) *Vyravan* v. *Srinath Deivasikamani*, (1916) 32 Ind Cas 80 (80 and 81): 3 Mad L W 24: 3 Mad L Jour 59: 39 Mad 939.

(13-a) See also *Panuganti Narasimha Rao* v. *Zamindar of Tiruvur*, (1919) 53 Ind Cas 234 (237): 42 Mad 873: 37 Mad L Jour 193: 10 Mad L W 183: 1919 Mad W N 628: 26 Mad L Tim 276; *Najan Ahmed Haji Ali* v. *Sale Mahomed Peermahomed*, 1923 Bom 113 (114): 24 Bom L R 998: 77 Ind Cas 943.

(14) *Panuganti Narasimha Rao* v. *Zamindar of Tiruvur*, (1919) 53 Ind Cas 234 (237, 238): 37 Mad L Jour 193: 10 Mad L W 183: 1919 Mad W N 628: 26 Mad L Tim 276: 42 Mad 873.

(15) *Najan Ahmed Haji Ali* v. *Salemohamed Peermahomed*, 1923 Bom 113 (114): 24 Bom L R 998: 77 Ind Cas 943.

(16) *Beni* v. *Bisan Dayal*, 1925 Nag 445 (447): 89 Ind Cas 871.

(17) *Pregi Lal* v. *Maxwell*, (1885) 7 All 284 (288): 1885 All W N 40 [Per Oldfield, J whose judgment prevailed].

Note 7.

(1) *The New Fleming Spinning and Weaving Co* v. *Kessowjinaik*, (1885) 9 Bom 373 (404); *Bholrub* v. *Hafizunnissa*, (1878) 2 Cal L Rep 414 (418) [Case of rent]; *Dhunput* v. *Forbes*, 1 Ind Jur N S 354; *Huree* v. *Hur Kishore*, (1875) 23 Suth W R 134 (135).

O. 8, R. 6, Notes 7—10.

party to the suit, it cannot be pleaded by way of set off; for the defendant could not have sued the plaintiff without making the other person a party to the suit.[2]

8. "**Not exceeding the limits of the pecuniary jurisdiction of the Court.**"—It has been seen in Note 2, *ante* that a Court cannot entertain a plea of set off it would have no jurisdiction of *any* kind to take cognisance thereof. It follows that the value of the claim of set-off must be within the *pecuniary jurisdiction* of the Court.[1] Where both the amount of claim and the value of the set off are each within the jurisdiction of the Court, it is immaterial that the *combined amount* of the two claims is beyond its jurisdiction.[2] The words 'not exceeding the pecuniary limits of the jurisdiction of the Court' must be construed as applying to the whole of the ascertained sum; therefore, the valuation of the set off for purposes of jurisdiction is the *entire* sum pleaded and not the difference between the plaintiff's claim and the defendant's claim.[3] But where the plaintiff *admits* in the plaint any portion of defendant's claim, that portion must be deducted in determining the jurisdiction of the Court to try the set off.[4] In a small cause suit a set off beyond the pecuniary limits of the Small Cause Court's jurisdiction cannot be entertained even though it may be within the pecuniary limits of that Court sitting on the original side.[5]

9. **Both parties must fill the same character.**—In order to entitle a defendant to plead a set off it is necessary that the parties should fill the *same character* as they fill in the plaintiff's suit.[1] *See also* illustrations (*a*) and (*b*) to this rule. Thus an amount due to the defendant in the capacity of a *manager* cannot be set off against a *personal* claim against him.[2]

10. **Winding up proceedings.**—A debtor to a company, who is not a member thereof, is entitled in an action by the liquidators to recover the amount due from him, to plead by way of set off an ascertained sum of money due to him from the company, provided it had become payable before the date of suit.[1] But a debt due by the company to a firm of which the defendant is a

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(2) *Umanath Das* v. *Monsur*, (1910) 5 Ind Cas 570 (571): 14 Cal W N 786: 11 Cal L Jour 406.

Note 8.

(1) *Ram Lal* v. *Lancaster*, (1871) 3 N W P H C R 114; *Ramzan Khan* v. *Bikha Misr*, 1883 All W N 5 (5) [Provided the set off is within the limits it is immaterial if it exceeds the claim of the plaintiff].

(2) *Jit Singh* v. *Mulu Shah*, 1889 Pun Re No 69.

(3) *Hoe Moe* v. *Seedat*, 1925 Rang 22 (25): 2 Rang 349: 84 Ind Cas 956; *D S Abraham & Co* v. *Ibraham Gorabhoy*, 1925 Rang 65 (66, 67): 2 Rang 462: 84 Ind Cas 971 [Same rule applies to equitable set off]; *Brojendra* v. *Budge Budge Jute Mill Co*, (1893) 20 Cal 527 (531); *Thakar Das* v. *Nand Lal*, 1890 Pun Re No 17.

(4) *D S Abraham & Co* v. *Ibrahim Gorabhoy*, 1925 Rang 65 (67): 84 Ind Cas 971: 2 Rang 462.

(5) *Barote Gaga* v. *Panju Ramjan*, (1890) 14 Bom 371 (372) [See S 33, Provincial Small Cause Courts Act IX of 1887). But see *Rampratap* v. *Ganesh*, (1888) 12 Bom 31 (33) [Submitted not correct].

Note 9.

(1) *Alliance Bank of Simla* v. *Mohan Lal*, 1927 Lah 228 (239): 8 Lah 105: 101 Ind Cas 762: 28 Pun L R 427; *Chennappa* v. *Raghunatha*, (1892) 15 Mad 29 (33): 1 Mad L Jour 598 [Debt due to defendant by deceased can be set off in a suit by the L Rs of the deceased]; *Grish Chunder* v. *Koomaree*, (1864) 1 Suth W R Mis 23 (23), (Do.); *Raghavendra Raoji* v. *Yalgurad Ramchandra*, (1917) 39 Ind Cas 17 (17): 19 Bom L R 67: 41 Bom 163 [Plaintiff's claim for goods supplied—Set off for wages can be allowed]; *Rajaram* v. *Ramchandra*, 1926 Nag 33 (34): 89 Ind Cas 944 [Suit by ex-minor for unpaid purchase money—Debt due by his guardian cannot be set off]; *Madhavrao Moreshwar* v. *Rama Kalu Ghadi*, (1915) 27 Ind Cas 350 (351): 16 Bom L R 746: 39 Bom 131 [Plaintiff's claim as inamdar—Defendant's as pujari—No set off]; *Lakshman* v. *Madhav*, (1891) 15 Bom 186 (189) [Different character]; *Rochaldas Gidoomal & Co* v. *Mercantile Bank of India*, 1925 Sind 142 (143, 144): 78 Ind Cas 596, (Do.).

(2) *Abul Hasan* v. *Zohra Jan*, (1883) 5 All 299 (301): 1883 All W N 45.

Note 10.

(1) Reference under Presidency Small Cause Courts Act, (1905) 28 Mad 240 (243); *Mehr*

O. 8, R. 6, Notes 19—13.

partner cannot be set off, since the defendant does not fill the *same character* as in the plaintiff's suit.[2] A member of a company with limited liability, which is under liquidation, is not entitled to set off paid up calls or calls to be paid up against a debt due by him to the company and thus give himself a preference over the other creditors of the company.[3] But in a suit by the liquidator of a company for recovery of money due to the company from a director, the director can plead a set off in respect of sums due to him from the company.[4]

11. Insolvency proceedings.—S. 47 of the Presidency Towns Insolvency Act (III of 1909) and S. 46 of the Provincial Insolvency Act (V of 1920) provide for set-off in case of *mutual dealings* between an insolvent and his creditors. There can be no set-off unless there are mutual dealings.[1] Mutual credits which may be set-off include credits which have a natural tendency to terminate in debts, and not merely credits which must *necessarily* terminate in debts.[2] This principle of set off in insolvency is a doctrine of equity and its object is not merely to avoid cross actions, but to do substantial justice. Therefore, it cannot be extended to a case where at the time of insolvency the debtor of the insolvent, with full knowledge that the latter has become hopelessly involved, buys a third person's claim against the insolvent in order to relieve himself of the liability of having to pay his just debts.[3]

12. Proceedings under the Agra Tenancy Act and other special Acts.—S 193 (*g*) of the Agra Tenancy Act (II of 1901) provides that no set-off shall be allowed in any suit under that Act except a sum due to the defendant on an *unsatisfied decree under that Act* or any other enactment repealed thereby.[1] No set off can be allowed, under S. 140 of the Oudh Rent Act (XXII of 1886), in a suit for arrears of rent.[2] A Revenue Court acting under S. 24 of the Bengal Tenancy Act (X of 1859) has jurisdiction to allow the claim of set off.[3] No set-off, whether legal or equitable shall be pleaded by way of defence to any suit under the Madras Estates Land Act I of 1908.[4]

13. Effect of not claiming set off.—A defendant who has a claim for set-off is not *bound* to put it forward in answer to the suit against him and his

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Chand v. *Amritsar Bank*, (1915) 28 Ind Cas 975 (976): 63 Pun Re 1915: 69 Pun W R 1915: 89 Pun L R 1915.

(2) *Alliance Bank of Simla Ltd* v. *Mohan Lal*, 1927 Lah 228 (229): 8 Lah 105: 101 Ind Cas 762: 28 Pun L R 427.

(3) *Mylapore Permanent Benefit Fund, Ltd* v. *Arogyaswami Pillai*, (1917) 38 Ind Cas 233 (235): 21 Mad L Tim 233: 32 Mad L Jour 528: 40 Mad 1004.

(4) *Ahmedabad Advance Spinning and Wearing Co* v. *Laxmishanker*, (1906) 30 Bom 173 (194): 7 Bom L R 246.

Note 11.

(1) *Young* v. *Bank of Bengal*, (1836-37) 1 Moo Ind App 87 (147, 148, 149): 1 Moo P C 150: 1 Sar 97; *Miller* v. *Bear*, (1880) 6 Cal L Rep 294 (295) [Set off allowed as a case of mutual credits].

(2) In the matter of *C L Canthom & Co*, (1910) 5 Ind Cas 845 (846): 33 Mad 53: 8 Mad L Tim 83. But see *Miller* v. *The National Bank of India*, (1892) 19 Cal 146 (158, 159) [Reciprocal demands must naturally terminate in a debt].

(3) *Radha Kishen* v. *Ganga Ram*, (1914) 23 Ind Cas 927 (929): 1914 Pun W R 118: 95 Pun L R 1914: 53 Pun Re 1914.

Note 12.

(1) *Govind Ram* v. *Kunj Behari*, 1924 All 341 (344, 349): 83 Ind Cas 403: 46 All 398: 22 All L J 217 F B [Case of rent by assignees]; *Ramchandar* v. *Mona*, 1907 All W N 269 (270): 4 All L J 681.

(2) *The Hon'ble M Partab Narain Singh* v. *Prabhu Ram*, (1898) 1 Oudh Cas 100 (102).

(3) *Mohima Runjun* v. *Nobo Coomar*, (1872) 18 Suth W R 339 (340).

(4) S. 192 (*e*).

O. 8, R. 6, Notes 13—14.

omission to do so does not preclude him from bringing a separate suit in respect of it.[1] But if he *does* set up such claim, he must do so in respect of the *entire* amount due. He cannot claim a set-off in respect of a portion only, and subsequently sue for the balance.[2] There is, however, an exception to this rule. 'In all actions for goods sold and delivered with a warranty, or for work and labour, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract; and to the extent that he obtains or is capable of obtaining an abatement of the price on that account, *he must be considered as having received satisfaction for the breach of contract;* and he is precluded from recovering in another action to that extent, *but no more*'.[3]

Illustration.

A, an agent sued *B* his principal for recovery of money alleged to be due to him on account of advances made by him for purchase of chillies, giving credit in the plaint for the price of 82 bags of chillies belonging to *B* and sold by him. *B* then sued *A* in another Court for damages on the ground that the sale of the 82 bags was unauthorised. *B's* suit was stayed under S. 10 of the Code. He did not agree to have the question of damages tried by way of set-off in *A's* suit and a decree was passed in favour of *A* as claimed in the plaint. Then in *B's* suit *A* pleaded that *B* having already recovered a portion of the damages in his suit, namely, to the extent which he (*A*) had given credit in his plaint, the claim for the balance is barred. It was held that, the suit was not barred on the principle stated above.[4]

14. Court-fee.—Before this Code was enacted the general trend of opinion among the several Courts was that *ad valorem* Court-fee must be paid on a written statement pleading a set-off *under this rule*.[1] It has now been made clear by the amendment of the Court Fees Act referred to in Schedule IV of this Code that Court-fee must be paid on such statements, regarding them as plaints.

But it has been held in the undermentioned cases that written statements pleading *equitable set-off*, are not chargeable with Court-fee.[2] A plea

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Note 13.

(1) *Pichi Aiyar* v. *Subbarayar*, (1915) 29 Ind Cas 34 (34): 28 Mad L Jour 513; *Amritsar National Banking Co. Ltd* v. *Fazl Ilahi*, (1919) 52 Ind Cas 850 (851): 74 Pun Re 1919: 98 Pun L R 1919: 107 Pun W R 1919; *Tithal Das* v. *The Hyderabad Spinning and Weaving Co.* 1923 Bom 24 (25): 67 Ind Cas 326: 24 Bom L R 328: 47 Bom 182; *D Chandramouli* v. *Gunda Satyanarayana*, 1926 Mad 1020 (1021): 24 Mad L W 282: 97 Ind Cas 488 [Same rule applies to cases of equitable set off]; *Sutrame Govinda Rao* v. *Rudrayya*, 1925 Mad 830 (831): 49 Mad L Jour 14: 1925 Mad W N 228: 90 Ind Cas 465. (Do.).

(2) *Nawbut Pattak* v. *Mahesh Narayan*, (1905) 32 Cal 654 (657, 662): 1 Cal L Jour 364; *Annenammal* v. *Menakshi*, (1921) 60 Ind Cas 226 (229): 12 Mad L W 173.

(3) *Mondel* v. *Steel*, (1841) 8 M & W 858; *Davis* v. *Hedges*, (1871) 6 Q B 687.

(4) *Sutrame Govinda Rao* v. *A M Rudrayya*, 1925 Mad 830 (832): 1925 Mad W N 228: 49 Mad L Jour 14: 90 Ind Cas 465.

Note 14.

(1) *Chennappa* v. *Raghunatha*, (1892) 15 Mad 29 (34): 1 Mad L Jour 598; *Bai Shri Majirajbai* v. *Narotam*, (1889) 13 Bom 672 (673); *Guise* v. *Anantharam*, (1906) 10 Cal W N 199 (200); *Amirzama* v. *Nathu Mal*, (1886) 8 All 396 (401): 1886 All W N 159; *Pragi Lal* v. *Maxwell*, (1885) 7 All 284 (288): 1885 All W N 40; *J N Johannes* v. *R W Marshall*, 1897-1901 U B R, Vol II, 244. But see *Md Nassoruddin* v. *S Oppenheimer*, (1903-1904) 2 L B R 186 (190) F B; *Fakir Chandra* v. *Gisborne*, (1904) 8 Cal W N 174 [Obiter].

(2) *Ram Das* v. *Dwarka Das*, 1930 All 875 (876): 128 Ind Cas 763; *Subramanian* v. *Muthuswami* (1907) 17 Mad L Jour 481 (482); *Bhagat Singh* v. *Devi Dial*, 1908 Pun Re No 85: 1908 Pun W R 80: 130 Pun L R 1908; *Ramangir* v. *Achheram*, 1927 Nag 74 (75): 97 Ind Cas 916 [If defendant, claims a decree in his favour for excess, he must pay Court-fee on the excess]; *Beragi Ram* v. *Raja Ram*, (1911) 10 Ind Cas 250 (253): 163 Pun L R 1911: 214 Pun W R 1911 [In partnership suits defendant may get a decree in his favour without paying Court-fee].

of set-off should not be entertained by a Court until the Court-fee with respect to it has been paid by the defendant.[3] O. 8, R. 6, Notes 14—16.

15. Counter claim.—A set off is a statutory defence to a plaintiff's action; a counter claim is substantially a cross action. The counter claim need not be an action of the same nature as the original action or even analogous thereto.[1] Though there is no provision in this Code for making a counter claim,[2] a Court has got the power to treat the counter claim as the plaint in a cross suit and hear the two together if the counter claim is properly stamped.[3] It has, however, been held by the Calcutta High Court that it has no such power.[4]

16. Solicitor's lien for costs.—"A solicitor has at Common Law, and apart from any order of the Court or statute, a lien over property recovered or preserved or the proceeds of any judgments obtained for the clients by his exertions."[1] This lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vic. Ch. 127, by which statute the lien was very much extended.[2] It applies to property of every description including costs ordered to be paid to the client[3] except that it does not attach to real property.[4] But the Calcutta High Court has held in the undermentioned case[5] that it applies to immoveable property also. This lien has priority over any attachment by a judgment-creditor so long as the moneys attached remain within the jurisdiction of the Court; that is, until they are realised and paid off to the judgment-creditor.[6] The Solicitor's lien is a particular lien; it is, therefore, not available for the general balance of account between the solicitor and the client, but extends only to the cost of recovering or preserving the property in question, including the cost of protecting the solicitor's right to such costs and of establishing the lien.[7] Although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention

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(3) *Muthu* v. *Yunuku*, (1916) 36 Ind Cas 957 (958): 10 Bur L Tim 242 [Where no Court-fee has been paid in the Lower Court, appellate Court cannot order payment of Court-fee]; *Muhammad Raza* v. *Kubra Bibi*, (1912) 15 Ind Cas 526 (528) Oudh.

Note 15.

(1) *Beddall* v. *Maitland*, 17 Ch D 174 (181) [Per Try J].

(2) *Saya Bya* v. *Maung Kyaw Shun*, 1924 Rang 346 (346): 2 Rang 276: 82 Ind Cas 721; *Samrathrai* v. *Kasturbhai*, 1930 Bom 216 (216): 32 Bom L R 212: 127 Ind Cas 412 [R 119-B of the Bombay High Court Rules provides for counter claim being made].

(3) *Saya Bya* v. *Maung Kyaw Shun*, 1924 Rang 346 (346): 2 Rang 276: 82 Ind Cas 721 [In a suit for possession of land, defendant, counter-claimed on the strength of an agreement of sale in his favour].

(4) *Gour Chandra Goswami* v. *Chairman Nabadwip Municipality*, 1922 Cal 1 (1): 80 Ind Cas 192 [In a suit for declaration that a house is not liable to assessment, counter-claim cannot be made].

Note 16.

(1) *Tyabji Dayabhai & Co* v. *Jetha Devji & Co*, 1927 Bom 542 (545): 29 Bom L R 1196: 105 Ind Cas 383: 51 Bom 855; Ex parte *Morrison*, (1860) L R 4 Q B 153 (156); *Nawab Nazim* v. *Heeralall*, (1873) 10 Beng L R 444 [Where a fund on which there is lien is attached, the order will be against the other party not to pay without notice to the attorney]; *Bai Kesserbai* v. *Narranji Walji*, (1880) 4 Bom 353 (356, 357).

(2) *Devkabai* v. *Jefferson*, (1886) 10 Bom 248 (253): 10 Ind Jur 422.

(3) *Tyabji Dayabhai & Co* v. *Jetha Devji & Co*, 1927 Bom 542 (545): 51 Bom 855: 105 Ind Cas 383: 29 Bom L R 1196.

(4) *Sadasand* v. *Parashram*, 1928 Bom 108 (110): 52 Bom 336: 108 Ind Cas 705: 30 Bom L R 153.

(5) *Kumar Krishna* v. *Hari Narain*, (1916) 33 Ind Cas 708 (710): 43 Cal 676: 20 Cal W N 537.

(6) *Ved* v. *Wagle & Co*, 1925 Bom 351 (352): 49 Bom 505: 88 Ind Cas 81: 27 Bom L R 556; *Subramanyan* v. *Hurry*, (1887) 14 Cal 374 (375, 376).

(7) *Narayanaswami* v. *Chellapalli Hanumanulu*, (1909) 4 Ind Cas 398 (398): 7 Mad L Tim 229: 20 Mad L Jour 326: 33 Mad 255.

O. 8, R. 6. Notes 16—18.

of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney.[8] The Court has the power to enforce the solicitor's lien by summary procedure in the suit itself.[9] But where complicated questions of fraud and collusion arise, the solicitor will, as a matter of practice, be referred to a separate suit.[10]

Under sub-R. (2) of this rule a set-off cannot be made so as to affect the lien of the pleader in respect of his costs.[11] Thus costs ordered to be paid by a petitioning-creditor to a debtor when an adjudication in bankruptcy is set aside, cannot be set-off to the prejudice of the solicitor's lien against the debts due to the petitioning-creditor.[12] But it has been held by the Calcutta High Court that this lien is only a claim or right to ask for the intervention of the Court for his protection when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs and that the lien is subject to all the equities between the client and the other parties interested in the property, so that it ought not to intercept the right claimed by the judgment-debtor to set-off a prior decree which he had obtained against the client.[13]

17. **Appeal.**—An appeal does not lie against an order on a preliminary issue disposing of the claim to a legal set-off, advanced by the defendant.[1] The reason is that under O. 20, R. 19 only one decree can in such a case be drawn up and, therefore, it cannot be said that there is a conclusive adjudication within the meaning of S. 2, Cl. 2. An objection cannot be taken up in appeal, for the first time, that a plea of equitable set-off cannot be entertained by the Court.[2]

The valuation of a claim of set-off is the amount claimed by the defendant and an appeal relating to a claim of set-off will lie to the High Court where it exceeds Rs. 5,000.[3] Where a claim of set-off is disposed of without demanding Court-fees from the defendant and the lower appellate Court decides that no Court-fee is necessary, such an omission is only a mere irregularity within the meaning of S. 99 of the Code and is not a ground for reversing the decision in second appeal.[4]

18. **Limitation.**—*See* Note 6, *ante*.

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(8) *Cullianji* v. *Raghowaji*, (1906) 30 Bom 27 (33): 6 Bom L R 879; *Khetter* v. *Kali*, (1898) 25 Cal 887 (890): 2 Cal W N 508; *Ramnath* v. *Matungince*, (1874) 12 Beng L R 110.

(9) *Harnandroy* v. *Gootiram*, (1919) 54 Ind Cas 691 (693): 46 Cal 1070 [Original client dead and his Legal Representative a man of no substance—Summary remedy enforced].

(10) In re *Tyabji & Co*, (1905) 7 Bom L R 547 (556); *Mahommad Zohurubddin* v. *Mahomed, Nooroodeen*, (1894) 21 Cal 85 (91, 92); *Ram Doyal* v. *Ramdeo*, (1900) 27 Cal 269 (271): 4 Cal W N 208.

(11) *The Ahmedabad Advance Spinning and Weaving Co* v. *Lakshmi Shankar*, (1906) 30 Bom 173 (195): 7 Bom L R 246.

(12) *Ebrahim Ahmed*, In re, 1930 Bom 516 (517): 32 Bom L R 1076: 128 Ind Cas 24; Ex parte *Cleland*; In re *Davies*, (1867) 2 Ch 808.

(13) *Bhupendra Nath* v. *Sassoon & Co*, (1917) 38 Ind Cas 30 (31): 43 Cal 932: 21 Cal W N 106. See also *Brijnath* v. *Jugernath*, (1879) 4 Cal 742 (744): 4 Cal L Rep 122.

Note 17.

(1) *Sheo Prasad* v. *Indore Malwa United Mills, Ltd*, (1917) 39 Ind Cas 508 (511): 65 Pun W R 1917: 62 Pun Re 1917.

(2) *Narendra Krishna Chakraburthy* v. *Ashutosh Bhattacharji*, 1931 Cal 358 (359): 35 Cal W N 17: 132 Ind Cas 195.

(3) *Ram Lal* v. *Lancaster*, (1871) 3 N W P H C R 114; *Ram Jiwan Mal* v. *Chand Mal*, (1888) 10 All 587 (594, 600): 1888 All W N 258.

(4) *Abdul Aziz* v. *Razak Ali*, (1913) 19 Ind Cas 918 (919): 17 Cal L Jour 365 (F B).

R. 7. [New.] *Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.* O. 8, R. 7.

Defence or set off founded on separate grounds.

[R. S. C., O. 20, R. 7. *See* O. 7, R. 8.]

R. 8. [New.] *Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.* O. 8, R. 8, Note 1.

New ground of defence.

[R. S. C., O. 24, Rr. 1 & 2.] *See* R. 9, *infra*.]

Synopsis.

1. Court can take notice of subsequent events.

1. **Court can take notice of subsequent events.**—A Court can take cognisance of events which happen during the pendency of the litigation as a defence to the action.[1] Though a Court of appeal will not ordinariiy take notice of any facts which may have arisen subsequent to the judgment of the lower Court, it will do so in exceptional cases where, by so doing, it can shorten litigation and best attain the ends of justice.[2] *See also* Notes to O. 7, R. 7, Note 4.

R. 9. [S. 112.] *No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.* O. 8, R. 9 Note 1.

Subsequent pleadings.

[1877—S. 112; 1859—S. 122.] [See O. 6, R. 7.]

Synopsis.

1. Subsequent pleadings.

1. **Subsequent pleadings.**—This rule requires the leave of the Court before any party can present a further pleading after the written statement has been filed.[1] As to when a party will be allowed to file a subsequent pleading

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Order 8, Rule 8—Note 1.

(1) *Harilal* v. *Mulchand*, 1928 Bom 427 (439): 30 Bom L R 1149: 52 Bom 883: 113 Ind Cas 27; *Manilal* v. *Gokaldas*, 1921 Bom 310 (315): 45 Bom 245: 59 Ind Cas 53: 22 Bom L R 1048 [Defendant can plead in his written statement an adjustment of the claim made after suit]. But see *Shyama* v. *Mokhda*, (1911) 10 Ind Cas 49 (50): 15 Cal W N 703: 13 Cal L Jour 481.

(2) *Ram Ratan* v. *Mohant Sahu*, (1907) 6 Cal L Jour 74 (78): 11 Cal W N 732.

Order 8, Rule 9—Note 1.

(1) *Juvansingji* v. *Dola Chhala*, 1925 Bom 390 (396): 27 Bom L R 890: 91 Ind Cas 272; *Narayanasami Aiyar* v. *Krishnamurthi Aiyar and others*, (1915) 26 Ind Cas 927 (932): 1915 Mad W N 122: 17 Mad L Tim 48; *Jadub Ram* v.

O. 8, R. 9, Note 1.

and when not, *see* the cases noted below.[2] If the pleadings of either party is too vague, the Court may require him to file a further and fuller statement under this rule.[3] It has been held by the High Court of Bombay in the undermentioned case[4] that where the defendant does not make a counter claim or plead a set-off, the plaintiff cannot be called upon to put in a written statement in answer to the defendant's allegations. It is submitted that this decision is not correct.[5] An additional written statement filed long after the fixed date, cannot be removed from the record unless the opposite party takes immediate steps for its removal.[6]

The additional written statement should not set-up a new case or state facts inconsistent with the original written statement. *See* Notes to O. 6, R. 7.

O. 8, R. 10.

R. 10. [S. 113.] *Where* any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may *pronounce judgment* against him, or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court.

[1877—Ss. 113, 370; 1859—S. 106.]

Local Amendments.

OUDH.

11. Every defendant in a suit or opposite party in any proceeding shall, on the first day of his appearance in Court, file an address (to be called the "registered address") for service on him of any subsequent notice, summons or other process; and, if he fails to do so, shall be liable, at the discretion of the Court, to have his defence or reply, if any, struck out, and to be placed in the same position as if he had made no defence or reply.

An order under this rule may be passed by the Court, *suo motu* or on the application of any party.

12. Rules 21, 23 and 25 to 27 of Order 7, shall apply, so far as may be, to addresses for service filed under the preceding rule, and Rule 24 shall, in the same manner, apply but as if the words at the beginning, "In all cases to which Rule 23 does not apply" were omitted.

Ram Lochun, (1866) 5 Suth W R 56 (58) [Under 1859 Code, Court had no power to allow a subsequent pleading unless required by Court—This is no longer law]; *Mirza Ali Nukee* v. *Mirza Torab Ali*, (Gap Vol) Suth W R (1864) 44 (44), (Do.).

(2) *Lakhmichand* v. *Chotooram Motiram*, (1900) 24 Bom 403 (406): 2 Bom L R 778 [Defendant's ignorant of true facts and allowed to file a subsequent pleading]; *Lall Mahomed* v. *Dhoolee Ram Doss*, (1874) 22 Suth W R 377 (377): 1 Ind App 387: 14 Beng L R 60: 3 Sar 395: 3 Suth 47 P C [Explaining plaint—No prejudice—Allowed]; *Dasimani Dasi* v. *Srinath Ghose* (1869) 3 Beng L R App 11 (*b*) [Allowed on condition of costs being paid]; *Babu Bishandayal Singh* v. *Mt Jaiseri Kuer*, (1918) 48 Ind Cas 746 (747): 1918 Pat H C C 323 [Delay of more than a year—Refused]; *Haji Sahoo* v. *Ayeshanni*, (1903) 27 Bom 485 (491): 5 Bom L R 475: 7 Cal W N 665: 30 Ind App 127: 8 Sar 477 P C [After close of plaintiff's case not allowed]; *M Bezonji* v. *The New Dhurumsey Spinning and Weaving Co*, (1879-80) 4 Bom 576 (578): 5 Ind Jur 482 [Cannot be allowed after the hearing is begun]; *Denomoye* v. *Tarachurn*, Bourke P C 153 [Not allowed—No sufficient cause]; *Parma Nand* v. *Thiku*, (1915) 30 Ind Cas 817 (817): 57 Pun L R 1916: 121 Pun W R 1915 [Pleading piecemeal should be avoided as far as possible].

(3) *Ali Kader* v. *Govind*, (1890) 17 Cal 840 (848); *Jahangeer Buksh* v. *Bhickarjee Lall*, (1869) 11 Suth W R 71 (72): 6 Beng L R (A C) 42 (Note); *Juggessur* v. *Gopee Kishen*, (1866) 5 Suth W R 50 (51) [Can only be called for by Court of original jurisdiction].

(4) *Chimava Rachaya* v. *Gangava Gangadharaya*, 1929 Bom 413 (413): 31 Bom L R 1118.

(5) See also *Juvansingji* v. *Dola Chhala*, 1925 Bom 390 (392): 27 Bom L R 890: 91 Ind Cas 272 [The observations of Marten J suggest that Court can call upon a plaintiff to file a written statement].

(6) *New Fleming Spinning and Weaving Co* v. *Kessowji Naik*, (1885) 9 Bom 373 (381, 382).

13. Nothing in Rules 11 and 12 shall apply to the notice prescribed by Order 21, Rule 22.'' **O. 8, R. 10.**

ALLAHABAD.

''11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service written in English in block letters and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24, 25 and 26 of Order 7 shall apply, so far as may be; to addresses for service filed under the preceding rule.''

LAHORE.

''11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons, notice or other process served on him as the date of hearing, file in Court a proceeding stating his address for service, and, if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule.''

PATNA.

11. Every party, whether original, added or substituted, who appears in any suit or other proceedings shall at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20 and 22 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule.''

N.-W. F. P.

Add the following Rules:—

11. ''Every party, whether original, added or substituted, who intends to appear and defend any suit or original petition shall on or before the date fixed in the summons or notice served on him as the date of hearing file in Court a proceeding stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20 and 22 of Order 7 shall apply, so far as may be, to addresses for service, filed under the preceding rule.''

NAGPUR.

Rules 11 to 13 (new). *Add* the following as Rules 11 to 13:—

11. Every defendant in a suit or opposite party in any proceedings, shall, on the first day of his appearance in Court, file an address for service on him of any subsequent process. The address shall be within the local limits of the civil district in which the suit or petition is filed or of the civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the ''registered address'' and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

Registered address.

O. 8, R.10.

12. (1) If the defendant or the opposite party fails to file a registered address as required by Rule 11, he shall be liable, at the discretion of the Court, to have his defence struck out and to be placed in the same position as if he had made no defence.

Consequence of non-filing of registered address.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where the Court has struck out the defence under sub-Rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out.

(3) Where the Court has struck out the defence under sub-Rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order; and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding.

Provided that where a decree is of such a nature that it cannot be set aside as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposite parties.

13. Rules 20, 22 and 23 of Order 7, shall apply, so far as may be, to addresses for services filed under Rule 11."

SIND.

Add the following as Rules 11 and 12 in Order 8:—

11. *Parties to file addresses.*—Every party whether original, added or substituted, who appears in any suit or other proceeding shall, on or before the date fixed in the summons or notice served on him, as the date of hearing, file in Court, a memorandum in writing stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just:

Provided that this rule shall not apply to a defendant who has filed a written statement, but who is examined by the Court under S. 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule.

12. *Applicability of Rules* 20 *and* 22-26 *of Order 7 to addresses for service.*—Rules 20, 22, 23, 24, 25 and 26 of Order 7, shall apply so far as may be, to addresses for service filed under the last preceding rule.

BOMBAY.

The following shall be *added* as Rules 11 and 12 in Order 8:—

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court, a memorandum in writing stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit:

Parties to file addresses.

Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under S. 7 of the Dekkhan Agriculturists'

Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule. **O. 8, R.10, Note 1.**

Applicability of Rr. 20 and 22-26 of O. 7 to addresses for service.

12. Rules 20, 22, 23, 24, 25 and 26 of Order 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule."

Synopsis.

1. Scope.
2. Appeal.

Pronounce judgment. See Note 1, Pt. (10).
Written statement not filed—Court's power to decree suit. See Note 1, Pts. (1) to (3) and (11).

1. Scope.—It has been held by the High Court of Rangoon that the power given to the Court by this rule to pronounce judgment refers to a written statement which has been *demanded by the Court under Rule* 9.[1] But according to Mr. Justice Ayling of the High Court of Madras,[2]—and the Chief Court of Oudh[3] also seems to take the same view—this rule relates back to Rule 1, as well as to Rule 9, and, therefore, applies to written statements required by the Court *under Rule* 1, as well. Mr. Justice Seshagiri Ayyar took a contrary view.

This rule applies only to a *specific* requirement by the Court to the filing of a written statement and not to *general direction* in the summons that such a statement may be filed.[4] The High Court of Bombay has held in the undermentioned case[5] that a Court has no power to call upon a plaintiff to put in a written statement except in answer to a set off, and to dismiss the suit on his failure to do so. It has been already submitted in notes to Rule 9 that this view is not correct. A conditional order, as for instance, an order directing a statement, *if any*, to be filed[6] or an order merely permitting a statement to be filed[7] will not entail the penalty imposed by this rule. Where a party files a written statement expressing his inability to supply the *particulars* asked for by the Court, it is not a failure to present a written statement within the meaning of this rule.[8]

The Court cannot strike out a defence for failure of the defendant to present a further written statement called for by it.[9] A judgment pronounced under this rule must satisfy the requirements of 'judgment' as defined in S. 2, sub-S. 9 and, therefore, the Court should go into the case and pronounce a decision upon the facts so far as they are before it.[10] A plaintiff is not entitled to obtain a decree before the date on which the summons is returnable

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Order 8, Rule 10—Note 1.

(1) *A K Moopan* v. *Karupana*, 1928 Rang 261 (262): 6 Rang 466: 112 Ind Cas 438.

(2) *Rangaswami Udayan* v. *Manickam Pillai*, (1917) 40 Ind Cas 223 (225): 1917 Mad W N 241. But see *Sivarajadhani* v. *Kuppagantulu*, (1865) 2 Mad H C R 311 (312) [Dissented from in 40 Ind Cas 223].

(3) *Dhiraj Kuwar* v. *Sarju Narain Singh*, 1925 Oudh 567 (568): 12 Oudh L J 532: 2 Oudh W N 391: 88 Ind Cas 540; *Nanhe* v. *Tasadduq Hussain*, (1912) 15 Ind Cas 212 (212): 15 Oudh Cas 78.

(4) *Dhiraj Kuwar* v. *Sarju Narain Singh*, 1925 Oudh 567 (568): 12 Oudh L J 532: 2 Oudh W N 391: 88 Ind Cas 540.

(5) *Chimawa Rachaya* v. *Gangawa Gangadharaya*, 1929 Bom 413 (413): 31 Bom L R 1118.

(6) *Muthiah Chettiar* v. *Loka Singh*, 1927 Mad 1007 (1008): 53 Mad L Jour 504: 39 Mad L Tim 273: 105 Ind Cas 288.

(7) *Manekchand* v. *Aka*, 1887 Bom P J 31.

(8) *Orr* v. *Nagappa Chetty*, (1906) 16 Mad L Jour 30 (30, 31).

(9) *Hans Raj* v. *Jhanda Mal*, 1892 Pun Re No 59.

(10) *Nanhe* v. *Tasadduq Hussain*, (1912) 15 Ind Cas 212 (212): 15 Oudh Cas 78 [Passing a mere decree without a judgment is a material irregularity].

O. 8, R. 10, Notes 1—2.

even though the summons directs that the written statement should be filed on or before a day before such returnable date.[11]

2. **Appeal.**—An order *pronouncing* judgment against a party under this rule is appealable as an order under O. 43, R. 1 (*b*).[1] But an order *refusing to pronounce* a judgment under this rule is not appealable.[2]

Rule 11 (Lahore).

This rule applies to defendants who are corporations as well as to other defendants.[1] The rule is mandatory so far as the filing of the proceeding stating the addresses for service is concerned; but the matter is left to the discretion of the Court and it is not bound to strike off the defence of the defaulting party in every case.[2]

ORDER IX.

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

O. 9, R. 1, Note 1.

R. 1. [S. 96.] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Parties to appear on day fixed in summons for defendant to appear and answer.

[1877—S. 96; 1859—S. 109.]

Synopsis.

1. Applicability of Order 9 to execution proceedings.
2. Applicability of Order 9 to applications under Order 9 itself.

Appearance. See O. 3, R. 1.
Applicability to appearance at adjourned hearing. See O. 17.
Applicability to probate proceedings. See Note 1, Pt. (2).
On the day fixed in the summons—Meaning. See O. 8, R. 1, Note 3.

1. **Applicability of O. 9 to execution proceedings.**—There is nothing in O. 21, which deals with execution of decrees and orders, specifically empowering the Court to apply O. 9, to execution proceedings. Hence the provisions of O. 9, can apply, if at all, only by virtue of Section 141. In *Thakur Prasad* v. *Fakirulla*[1] the Judicial Committee of the Privy Council held that the proceedings referred to in Section 647 of the Code of 1882 (now Section 141) included *original matters* such as proceedings in probates, guardianships, and so forth

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(11) *Dhirajlal* v. *Hormusji*, (1908) 32 Bom 534 (539): 10 Bom L R 301 [Statement not filed].

Note 2.

(1) *Dhiraj Kuwar* v. *Sarju Narain Singh*, 1925 Oudh 567 (567): 12 Oudh L J 532: 2 Oudh W N 391: 88 Ind Cas 540 [Where Court ought to have proceeded under O 9, R 6 instead of this rule, an application under O 9, R 13 will lie]. *Orr* v. *Nagappa Chetty*, (1906) 16 Mad L Jour 30 (31) [Costs to be calculated as in an appeal from an order]. See also *Jang Bahadur* v. *Raghuraj Singh*, (1901) 4 Oudh Cas 372 (373, 374).

(2) *Jagat Singh* v. *Daya Kishan Paul*, 1931 Lah 77 (77): 131 Ind Cas 129: 31 Pun L R 946.

Rule 11, Lahore.

(1) *Municipal Committee, Lahore* v. *Kesho Ram*, 1929 Lah 459 (460): 115 Ind Cas 31.

(2) *Municipal Committe, Lahore* v. *Kesho Ram*, 1929 Lah 459 (460): 115 Ind Cas 31.

Order 9, Rule 1—Note 1.

(1) (1895) 17 All 106 (111): 22 Ind App 44: 5 Mad L Jour 3: 6 Sar 526 P C.

and did not include executions. Notwithstanding this decision of the Privy Council, it was still held in some cases[2] that S. 141 could be applied to make Order 9, apply to execution proceedings. The consensus of authority in the several High Courts may, however, now be taken to be fairly established that O. 9, does not apply to execution proceedings.[3] Thus it has been held not to apply to proceedings under O. 21, Rule 2[4] or O. 21, Rule 89[5] or O. 21, R. 90[6] or O. 21, Rr. 97 to 101.[7] For a full discussion, *see* S. 141, *ante*. When an execution application is dismissed for default the party can file a fresh application[8] and in a proper case can invoke the inherent powers of the Court for

O. 9, R. 1, Note 1.

(2) *Abdur Rahman Mullick* v. *Khorban Mullick Matwali*, (1909) 2 Ind Cas 156 (156) Cal; *Safdar Ali* v. *Kishun Lal*, (1910) 7 Ind Cas 241 (241): 12 Cal L Jour 6; *Subbiah Naicker* v. *Ramanathan Chettiar*, (1914) 22 Ind Cas 899 (906): 37 Mad 462: 26 Mad L Jour 189: 1914 Mad W N 205: 1 Mad L W 251; *Bhuban Behary Nag Mazumdar* v. *Dhirendra Nath Banerji*, (1916) 33 Ind Cas 581 (582): 20 Cal W N 1203; *Nihal Chand* v. *Chanda Singh*, (1912) 13 Ind Cas 859 (860): 82 Pun L R 1912: 3 Pun W R 1912; *Gauri* v. *Hinga*, (1921) 59 Ind Cas 575 (576): 23 Oudh Cas 349; *Krishna Chandra* v. *Pratap Chandra*, (1906) 3 Cal L Jour 276 (279); *Seetul Pershad* v. *Mahomed Kureem Khan*, (1873) 5 N W P H C R 164; *Tukaram* v. *Khandu*, (1896) 20 Bom 541 (542); *Kalee Kristo* v. *Mahomed Kader*, (1869) 12 Suth W R 428 (429); *Dhonkal* v. *Phakkar*, (1893) 15 All 84 (101): 1893 All W N 36; *Biswa Sonan* v. *Binanda Chunder*, (1884) 10 Cal 416 (423); *Rajpal* v. *Chooramun*, (1872) 4 N W P 10; *Kundan Lal* v. *Md Khan*, 1929 Lah 506 (506): 30 Pun L R 243: 11 Lah L Jour 142: 120 Ind Cas 276; *Amolakchand* v. *Jawhir Mahomed*, (1903) 16 C P L R 92 (94) [Order absolute under old Code—Proceeding in a suit—O 9, R 13 applies]. See also *Mt Jafri Begam* v. *Laksmi Dar*, (1901) 4 Oudh Cas 238 (240), (Do.).

(3) *Bhikam Khan* v. *Dan Singh*, 1923 All 544 (1), (544): 74 Ind Cas 7; *Lakshmibai* v. *Ravji*, 1929 Bom 217 (219): 31 Bom L R 400: 118 Ind Cas 700; *Akramnissa* v. *Valiulnissa*, (1894) 18 Bom 429 (431, 432); *Ningappa* v. *Gangawa*, (1886) 10 Bom 433 (434); *Jung Bahadur* v. *Muhadeo Proshad*, (1902) 31 Cal 207 (209): 8 Cal W N 160; *Lal Narain Singh* v. *Md Rafiuddin*, (1901) 28 Cal 81 (83); *Asim Mandal* v. *Raj Mohan Das*, (1911) 11 Ind Cas 385 (386): 13 Cal L Jour 532; *Charu Chandra* v. *Chandi Charan Roy*, (1915) 27 Ind Cas 492 (493): 19 Cal W N 25; *Madan* v. *Baikanta Nath*, (1906) 10 Cal W N 839 (840); *Gour Mohan* v. *Tarachand* (1869) 3 Beng L R App 17: 11 Suth W R 567 (568); *Narendra* v. *Rakhal Das*, 1925 Cal 510 (510, 511): 79 Ind Cas 351: 41 Cal L Jour 286; *Safitannessa Khatun* v. *Megh Lal Gope*, 1926 Cal 735 (735): 43 Cal L Jour 285: 94 Ind Cas 172; *Hari Singh* v. *Sanwan Mal Gopi Chand*, 1929 Lah 744 (745): 121 Ind Cas 189; *Coates* v. *Kashi Ram*, 1903 Pun Re No 76: 170 Pun L R 1903; *Rura Mal* v. *Kuria*, 1894 Pun Re No 62; *Arunachalam* v. *Veerappa Chettiar*, 1931 Mad 656 (659): 1931 Mad W N 533: 61 Mad L Jour 348: 34 Mad L W 360: 134 Ind Cas 806 F B; *Ramaraghava Reddi* v. *Rajah of Venkatagiri*, 1927 Mad 355 (355): 52 Mad L Jour 123: 25 Mad L W 192: 99 Ind Cas 954; *Narayana* v. *Muthu*, 1926 Mad 980 (981): 51 Mad L Jour 219: 1926 Mad W N 890: 97 Ind Cas 1008: 50 Mad 67; *Kaliakkal* v. *Palani Koundan*, 1926 Mad 412 (413 414): 50 Mad L Jour 200: 23 Mad L W 227: 1926 Mad W N 245: 92 Ind Cas 533; *Kajuluriswami* v. *Sree Rajah Chintalapati Sooryanarayana Razu* 1925 Mad 126 (127): 47 Mad L Jour 269: 20 Mad L W 192: 1924 Mad W N 672: 81 Ind Cas 841; *Kali* v. *Shama Rao*, (1917) 37 Ind Cas 229 (230): 5 Mad L W 124: 21 Mad L Tim 297; *Balasubramania* v. *Swarnammal*, (1913) 21 Ind Cas 32 (34): 38 Mad 199: 1913 Mad W N 685: 14 Mad L Tim 196: 25 Mad L Jour 367; *Ritu Kuer* v. *Alakhdeo Narain*, (1918) 47 Ind Cas 154 (155): 4 Pat L Jour 330: 1918 Pat H C C 265: 5 Pat L W 208; *Harlal* v. *Narayan*, 1922 Nag 267 (269): 18 Nag L R 152: 64 Ind Cas 420: 4 Nag L J 118; *Dalchand* v. *Narain*, (1919) 51 Ind Cas 237 (238) Nag; *Iqbal Narain* v. *Mt Jagrani* 1925 Oudh 552 (555): 28 Oudh Cas 158: 85 Ind Cas 450: 1 Oudh W N 847; *Jagat Sinha* v. *Rajpal Kuar*, 1928 Oudh 478 (478): 5 Oudh W N 895; *Gunjra Koer* v. *Lakhan Koer*, (1916) 35 Ind Cas 337 (338) Pat. See also *Deumal Rachandmal* v. *Firm of Lalchand*, 1931 Sind 97 (98): 133 Ind Cas 65: 25 Sind L R 475 F B [But inherent power held to exist]. But see *Ramappa Chettiar* v. *Ekambara*, 1924 Mad 715 (715): 47 Mad L Jour 13: 47 Mad 651: 34 Mad L Tim 309: 1924 Mad W N 479: 79 Ind Cas 818 (1) [Case of claim petition].

(4) *Hanseswari Dasi* v. *Radhika Prasad*, (1921) 63 Ind Cas 855 (856, 857) Cal. See also *Lakhpat Rai* v. *Bella Mall—Jamal Rai*, 1931 Lah 505 (505): 132 Ind Cas 206 [Conceded and assumed].

(5) *Bhagwan* v. *Dattatraya*, 1926 Bom 377 (378): 28 Bom L R 686: 50 Bom 457: 96 Ind Cas 411.

(6) *Bhikhan* v. *Jalpadat*, 1921 Pat 293 (2), (295): 2 Pat L Tim 270: 62 Ind Cas 113; *Dasarathy Chakravarty* v. *Maharaja Khaunish Chandra Ray*, 1927 Cal 938 (939): 45 Cal L Jour 60: 100 Ind Cas 343; *Kaura Lal* v. *The Punjab National Bank, Ltd*, 1926 Lah 109 (109): 89 Ind Cas 360; *Bhubaneswar Prasad Singh* v. *Tilakdhari Lal*, (1919) 49 Ind Cas 617 (618): 4 Pat L Jour 135: 1919 Pat H C C 75; *Diljan Mikha Bibi* v. *Hemanta Kumar Roy*, (1915) 29 Ind Cas 395 (396): 19 Cal W N 758; *Kalikanta Chuckerbutty* v. *Shyam Lal* (1917) 38 Ind Cas 598 (599): 25 Cal L Jour 163 [O 9, R 9 not applicable to application under O 21, R 90 dismissed for default].

(7) *Kaliakkal* v. *Palani*, 1926 Mad 412 (414, 415): 50 Mad L Jour 200: 23 Mad L W 227: 1926 Mad W N 245: 92 Ind Cas 533; *Sheo Nandan Chaudhury* v. *Debi Lal Chaudhury*, 1923 Pat 239 (241): 2 Pat 872: 4 Pat L Tim 93: 1923 Pat H C C 78: 1 Pat L R 134: 71 Ind Cas 484; *Satya Narain Lal* v. *Gobind Sahay*, (1918) 43 Ind Cas 951 (952): 3 Pat L Jour 250: 4 Pat L W 102; *Jugal Kishore* v. *Bachinder Mohan*, (1919) 52 Ind Cas 416 (416) Pat; *Hari Charan Ghose* v. *Manmatha Nath Sen*, (1913) 19 Ind Cas 683 (684): 41 Cal 1: 18 Cal W N 343; *Dwarka Das Babu Ram* v. *Vaish Flour Mill*, 1931 All 594 (595): 1931 All L J 622.

(8) *Nageshwar Prasad* v. *Jai Narayan*, 1922 Oudh 201 (2), (202): 73 Ind Cas 73; *Bharat Chandra Nath* v. *Yasin Sarkar*, (1917) 41 Ind Cas 586 (588): 21 Cal W N 769; *Bharat Indu* v. *Hakim Asghar Ali Khan*, 1923 All 460 (1), (460): 45 All 148: 21 All L J 135: 73 Ind Cas 453; *Hira Singh* v. *Jotti Prasad*, 1889 All W N

O. 9, R. 1, Notes 1—2.

a re-hearing.[9]

2. **Applicability of O. 9 to applications under O. 9 itself.**—Where an application under R. 4 or R. 9 or R. 13 of this order is itself dismissed for default, does a fresh application to restore that application lie? There is a conflict of opinion on this point. It has been held by the High Courts of Lahore,[1] Madras,[2] Rangoon,[3] the Judicial Commissioner of Nagpur,[4] and the Chief Court of Oudh[5] that such an application can be filed, the reason being the proceedings contemplated under O. 9, are in the nature of an original suit and that by virtue of S. 141, O. 9, applies to them. On the other hand, the High Courts of Bombay,[6] Calcutta,[6-a] and Patna[7] have held that a *second application* to restore a prior application dimissed for default does not lie. But High Courts of Allahabad,[8] and Calcutta[9] have struck a *via media* and held that the application for restoration can itself be treated as a *second application* for restoring the suit provided there is no bar by limitation. In later cases the same High Courts have held that in a proper case the Court can also restore a prior application dismissed for default under its *inherent* powers.[10]

But no appeal lies under O. 43, R. 1, from an order refusing to restore an application dismissed for default.[11]

204; *Kamala Kanta Roy* v. *Monaraddi*, (1920) 58 Ind Cas 203 (205) Cal; *Ritu Koer* v. *Alakdeo Narain Singha*, (1918) 47 Ind Cas 154 (156): 4 Pat L Jour 330: 1918 Pat H C C 265: 5 Pat L W 208.

(9) *Nabu Sahu* v. *Kamdev Maity*, 1928 Cal 179 (179): 47 Cal L Jour 87: 107 Ind Cas 729; *Issarsingh* v. *Udhavdas*, 1921 Sind 55 (56): 17 Sind L R 105: 83 Ind Cas 749; *Raja Debi Baksh* v. *Habib Shah*, (1913) 19 Ind Cas 526 (528): 35 All 331: 40 Ind App 151: 16 Oudh Cas 194: 17 Cal W N 829: 11 All L J 625: 18 Cal L Jour 9: 15 Bom L R 640: 1913 Mad W N 566: 25 Mad L Jour 148: 14 Mad L Tim 33 P C; *Lalbux* v. *Chaithram*, (1915) 29 Ind Cas 592 (592): 8 Sind L R 327; *Baldeo Prasad Shukul* v. *Sukhdeo Prasad Shukul*, 1929 All 485 (487): 121 Ind Cas 552; *Abdul Karim* v. *Chaudhri Ram Singh*, 1924 Lah 350 (351): 69 Ind Cas 506; *Ram Shankar Tewari* v. *Ram Narain Tewari*, 1928 All 301 (301): 26 All L J 382: 108 Ind Cas 576 [Mistaken order of dismissal for default —Can be restored]; *Sarat Chandra Haldar* v. *Mitra Mukerjee*, 1927 Cal 420 (420): 100 Ind Cas 518; *Bhalu* v. *Ram Lal*, 1921 Lah 67 (67, 68): 2 Lah 66: 64 Pun L R 1921: 60 Ind Cas 720; *Shankar Rao* v. *Manik Rao*, 1923 Nag 18 (19): 68 Ind Cas 643.

(3) *S A Menon* v. *Rev Father J F Lafon*, 1926 Rang 74 (75): 3 Rang 534: 93 Ind Cas 94.

(4) *Kalicharan* v. *Ratansingh*, 1923 Nag 293 (294): 19 Nag L R 119: 75 Ind Cas 589; *Manakji* v. *Surajmal*, (1911) 10 Ind Cas 705 (705): 7 Nag L R 32; *Brijmohan* v. *Raghoba*, 1932 Nag 101 (102): 28 Nag L R 83.

(5) *Mt Jamna* v. *Mt Ramraj*, 1923 Oudh 146 (146): 9 Oudh L J 627: 74 Ind Cas 380.

(6) *Manke* v. *Walwekar*, 1923 Bom 386 (386): 80 Ind Cas 182.

(6-a) *Sourendra Nath Mitra* v. *Jatindra Nath Ghose*, 1929 Cal 17 (18): 32 Cal W N 811: 115 Ind Cas 357.

(7) *Ramghulam Singh* v. *Sheo Deonarain Singh*, (1919) 51 Ind Cas 152 (153): 4 Pat L Jour 287; *Ramghulam Singh* v. *Sheodeonarain Singh*, 1922 Pat 121 (121): 1922 Pat H C C 5.

(8) *Pitambar Lal* v. *Dodee Singh*, 1924 All 503 (504): 46 All 319: 22 All L J 191: 5 L R All (Civ) 229: 78 Ind Cas 358; *Gobind Singh* v. *Kalyan Dass*, (1917) 38 Ind Cas 673 (674, 675): 15 All L J 24.

(9) *Sarat Krishna Bose* v. *Biseswar Mitra*, 1927 Cal 534 (536): 54 Cal 405: 31 Cal W N 576: 103 Ind Cas 69; *Bhola Nath De* v. *Nrishimha Prasad Roy*, 1923 Cal 552 (552): 76 Ind Cas 533; *Bepin Behari Saha* v. *Abdul Barik*, (1916) 35 Ind Cas 613 (614): 44 Cal 950: 21 Cal W N 30: 24 Cal L Jour 446.

(10) *Ganesh Prasad* v. *Bhagelu Ram*, 1925 All 773 (774): 23 All L J 817: 6 L R All (Civ) 412: 89 Ind Cas 350: 47 All 878; *Harbans Singh* v. *Suresh Datta Tewari*, 1929 All 624 (624): 118 Ind Cas 669: 1929 All L J 1082; *Sarat Krishna Bose* v. *Biseswar Mitra*, 1927 Cal 534 (536): 54 Cal 405: 31 Cal W N 576: 103 Ind Cas 69.

(11) *Hara Kumar* v. *Murari Mohan*, 1922 Cal 572 (572): 36 Cal L Jour 184: 69 Ind Cas 1003; *Jagdish* v. *Harbans*, (1918) 43 Ind Cas 54 (54): 2 Pat L Jour 720: 2 Pat L W 221; *Hirasa* v. *Sheo Kuwar*, (1923) 72 Ind Cas 547

Note 2.

(1) *Kirpa Singh* v. *Mula Singh*, (1919) 50 Ind Cas 401 (402): 1 Pun L R 1919: 10 Pun W R 1919; *Abdul Rahman* v. *Shahana*, (1920) 58 Ind Cas 748 (749): 1 Lah 339: 1 Lah L Jour 188; *Jivani* v. *Bhagal Singh*, 1907 Pun Re No 97: 33 Pun L R 1908: 176 Pun W R 1907; *Firm Piare Lal Mohan Lal* v. *Haider*, 1927 Lah 71 (1) (71): 27 Pun L R 564: 99 Ind Cas 1055; *Hukum Chand* v. *Jowala Singh*, 1927 Lah 904 (905): 100 Ind Cas 313; *Nand Lal* v. *Jetha Ram*, 1929 Lah 878 (879): 117 Ind Cas 908.

(2) *Venkatanarasimha Rao* v. *H Suryanarayana*, 1926 Mad 325 (326): 50 Mad L Jour 75: 23 Mad L W 409: 92 Ind Cas 802; *Salar Beg Saheb* v. *Karumanchi Kottayya*, 1926 Mad 654 (654): 23 Mad L W 538: 94 Ind Cas 151; *Jivani* v. *Bhagal Singh*, 97 Pun Re 1907: 33 Pun L R 1908; *Nalu Subba Row* v. *Gauti Venkataratnam*, (1914) 22 Ind Cas 689 (690) Mad.

This Rule and Rule 2 of this Order apply to the Arakan Hills.[12]

O. 9, R. 2, Notes 1—2.

R. 2. [S. 97.] *Where* on the day so fixed it is found that the summons has not been served upon *the defendant* in consequence of the failure of the plaintiff to pay the court-fee *or postal charges (if any) chargeable* for such service, the court may *make an* order that the suit be dismissed:

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay *costs.*

Provided that no such order shall be *made* although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

[1877—S. 97, 1861—S. 5.]

Local Amendment.

ALLAHABAD.

After the words in the fourth line, "for such service" *insert* the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant."

Synopsis.

1. Scope of the rule.
2. "Defendant."
3. Failure to pay Court-fee or charges— When entails dismissal.
4. Plaintiff's remedy after dismissal.
5. Appeal.
6. Revision.

On the day so fixed. See Note 3, Pt. (8). Proviso. See Note 3, Pt. (7).

1. Scope of the rule.—The rule applies only to cases of plaintiff's failure to *pay process fee or postal charges* for service of summons on the defendant. Consequently the Court cannot dismiss the suit under this rule for failure on the part of the plaintiff to furnish the *correct address* of the defendant.[1] The Allahabad High Court has held in the undermentioned case[2] that where the plaintiff failed to pay the process fee and the Court ordered him to pay a certain sum as damages and he failed to pay that also, the Court can dismiss the suit under this rule.

The failure contemplated is not merely an omission to pay the requisite charges but also to pay the same *within the time fixed.*[3]

2. 'Defendant'.—The word '*defendant*' does not include the guardian *ad litem* of a minor defendant as he is not a defendant in the legal sense of the term and the mere fact that no process fee is paid for issuing notice to such a

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(548) Nag; *Sharaf Husain* v. *Haidar Husain*, 1922 All 337 (337): 20 All L J 519: 67 Ind Cas 320; *Bajit Lal Pathak* v. *Rameshwar Singh*, 1928 Pat 335 (336): 7 Pat 333: 9 Pat L Tim 669: 109 Ind Cas 264; *Lok Nath* v. *Mt Sattan Bai*, 1923 Lah 302 (2), (303): 73 Ind Cas 821; *Chandra Sahai* v. *Durga Prasad*, 1924 All 682 (2), (684): 46 All 538: 22 All L J 427: 5 L R All (Civ) 331: 79 Ind Cas 323; *Faridbi* v. *Md Amin*, (1913) 19 Ind Cas 97 (98): 9 Nag L R 33.

(12) See The Arakan Hills Civil Justice Regulation VIII of 1874 and the Arakan Hills District Laws Regulation, 1916 (I of 1916), Sch I.

Order 9, Rule 2—Note 1.

(1) *Hira Mal* v. *Abdul Aziz*, 1927 Lah 170 (170): 9 Lah L Jour 135: 99 Ind Cas 898; *Ishar Singh* v. *Bishan Singh*, 1931 Lah 655 (655): 132 Ind Cas 524: 32 Pun L R 836.

(2) *Baqar Hussain* v. *Tirpati Govind Nath Tiwari*, 1927 All 464 (464): 100 Ind Cas 691.

(3) *Sadanand* v. *Nathia*, (1911) 11 Ind Cas 906 (907): 7 Nag L R 114.

O. 9, R. 2, Notes 2—6.

guardian is no ground for dismissing the suit under this rule[1] especially where there are other major defendants in the suit.[2] Where the summons has been served upon a wrong person instead of on the real defendant, and he appears and denies his liability, the proper order to pass is to dismiss the suit with costs.[3]

3. Failure to pay Court-fee or charges.—When entails dismissal.—O. 48, R. 1, sub-Rule 2 requires that the Court shall fix a time for payment of the process fee. And unless it so fixes a time for the deposit of the process fee[1] and gives the party reasonable time and opportunity to comply with its orders[2] it cannot dismiss the suit. But mere ignorance on the part of the plaintiff's agent as to the proper Court in which the process fees ought to be deposited is no ground for not dismissing the suit.[3]

There is a conflict of opinion as to whether the failure on the part of the plaintiff to pay process fees for a *newly added defendant,* will entail the dismissal of the whole suit. The High Court of Bombay has held that the whole suit ought to be dismissed even against the original defendant unless he waives his objection thereto.[4] But according to the Allahabad[5] and Patna[6] High Courts the dismissal should be only against that *particular* defendant. According to the proviso, if notwithstanding the plaintiff's default in paying the process fees the defendant appears, the Court cannot dismiss the suit.[7] It follows that this Court cannot dismiss the suit on a day previous to the date fixed in the summons for the appearance of the defendant.[8]

4. Plaintiff's remedy after dismissal.—The plaintiff can apply under R. 4 to set aside the order of dismissal or may bring a fresh suit.[1]

5. Appeal.—The order of dismissal is not a decree within S. 2 (2) and no appeal lies therefrom[1]; the undermentioned decisions to the contrary[2] under old Act are no longer good law.

6. Revision.—Where under O. 5, R. 10 as amended in Punjab the plaintiff has an option to have the summons served in the ordinary way *or* by registered post and the Court ordered the plaintiff to pay both process fees and postal charges, the order is illegal and the suit cannot be dismissed for

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Note 2.

(1) *Gobind Ram* v. *Muhammad,* (1911) 11 Ind Cas 317 (318): 1912 Pun Re No 35: 115 Pun W R 1911: 211 Pun L R 1911.

(2) *Surendra Mohan Singha* v. *Gena Sardar,* (1920) 55 Ind Cas 826 (827): 1 Pat L Tim 125.

(3) *London, Bombay and Mediterranean Bank* v. *Mahomed Ibrahim,* (1879-80) 4 Bom 619 (623).

Note 3.

(1) *Purshader Lal* v. *Ambika Persad,* (1869) 11 Suth W R 290 (290): 3 Beng L R App 25; *Ajodhya Prasad* v. *Secretary of State,* 1924 Nag 298 (299): 79 Ind Cas 123.

(2) *Ramapati* v. *Sachinandan,* (1920) 55 Ind Cas 650 (651) Cal.

(3) *Pran Chunder Roy* v. *Juggessur Mookerjee,* (1869) 11 Suth W R 417 (418): 3 Beng L R 68.

(4) *Shek Abas* v. *Ibrahimji Hasanji,* (1868) 5 Bom H C R 118.

(5) *Gulab Dai* v. *Jiwan Ram,* (1878-80) 2 All 318 (320).

(6) *Ramanand Singh* v. *Chandrama Singh,* 1921 Pat 422 (1) (422): 2 Pat L Tim 256: 60 Ind Cas 377.

(7) *Golab Kuer* v. *Bibi Saira,* (1919) 53 Ind Cas 41 (41) Pat; *Syed Ali* v. *Adib* (1890) 15 Bom 160 (162).

(8) *Gulab Dai* v. *Jiwan Ram,* (1878-80) 2 All 318 (320).

Note 4.

(1) *Bissessur* v. *Murli,* (1883) 9 Cal 163 (165): 11 Cal L Rep 409.

Note 5.

(1) *Lachmi Narain* v. *Darbari Lal,* (1916) 33 Ind Cas 737 (737): 38 All 357: 14 All L J 347; *Luckychurn* v. *Budurunnissa,* (1883) 9 Cal 627 (628): 12 Cal L Rep 484: 7 Ind Jur 604: *Abdur Rahman* v. *Sughra Begum,* (1911) 9 Ind Cas 484 (485) All.

(2) *Kanhya Lal* v. *Radha Churn,* (1867) 7 Suth W R 338 (338): Beng L R Supp Vol 662:

failure of the plaintiff to pay the postal charges. The High Court will, in such a case revise the order of dismissal.[1] Similarly where the process fee was paid in sufficient time though not within the date fixed by the Court and the suit was dismissed, the High Court will interfere in revision.[2] For other instances of interference by the High Court *see* the undermentioned cases.[3] O. 9, R. 2, Note 6.

Where neither party appears, suit to be dismissed.

R. 3. [S. 98.] *Where* neither party appears *when the suit is called on for hearing, the Court may make an order that* the suit be dismissed. O. 9, R. 3, Note 1.

[1877—Ss. 98, 99; 1859—S. 110.]

Synopsis.

1. Where neither party appears.
2. "Appearance". See O. 9, R. 9 and O. 3, R. 1.
3. "When the suit is called on for hearing."
4. "The Court may make an order that the suit be dismissed."
5. Dismissal pending arbitration proceedings.
6. Appeal and review.

1. Where neither party appears.—A dismissal under this rule is justified only where neither party appears. Thus if the plaintiff[1] or his agent[2] or his pleader duly instructed[3] is present, the fact that *no evidence is adduced* will not enable the Court to order a dismissal under this rule. If, however, both the parties are absent, the mere presence of the pleaders *without instructions* is not an appearance and a dismissal under this rule is justified.[4]

Where the plaintiff and *some* of the defendants do not appear but the other defendants appear and the suit is dismissed, the dismissal, *in so far as it is against the absent defendants* is under this rule, while, as against the defendant or defendants who appeared, it is under Rule 8.[5]

Where an application was filed by the respondent in an appeal praying that the appellant should be called upon to give security for the costs of the appeal and, on the day fixed for the hearing of the application, both parties were absent in consequence of which the application was rejected, it was held

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2 Ind Jur N S 229; *Dinobundoo Chatteray* v. *Beharee Lal Mookerjee*, (1865) 3 Suth W R Mis 23.

Note 6.

(1) *Golab Kuer* v. *Bibi Saira*, (1919) 53 Ind Cas 41 (41) Pat.

(2) *Firm of Bhagat Sham Singh* v. *Nur Khan*, 1927 Lah 157 (158): 9 Lah L Jour 96: 99 Ind Cas 909.

(3) *Ralla Ram* v. *Raj*, 1922 Lah 63 (63, 64): 4 Lah L Jour 71: 67 Ind Cas 945; *Shahab Din* v. *Anjamaninaumania*, 1906 Pun W R 65; *Nanak Chand* v. *Ahmad Din*, 1930 Lah 440 (441): 129 Ind Cas 755 [Failure to pay process fee—Dismissal of suit—Not open to revision under S 115—But relief granted under S 151 as separate suit was barred]; *Thakur Prasad* v. *Sita Ram*, 1932 Oudh 106 (107): 8 Oudh W N 1179: 138 Ind Cas 796 [Dismissal of a small cause suit under this rule—Revision lies under S 25, Provincial Small Cause Courts Act].

Order 9, Rule 3—Note 1.

(1) *Hingo Singh* v. *Jhuri Singh*, (1918) 46 Ind Cas 390 (391): 40 All 590: 16 All L J 462; *Collector of Jaunpur* v. *Tahule*, 1905 All W N 92 (92).

(2) *Kunj Behari Singh* v. *Sheodhakin Pandey*, 1922 Pat 504 (507): 3 Pat L Tim 447: 68 Ind Cas 659.

(3) *Naurang Ram Sahu* v. *Bhakhori Mandar*, (1919) 51 Ind Cas 189 (190): 4 Pat L Jour 277.

(4) *Bejoychand Mahtap* v. *Satish Chandra Chowdhury*, (1911) 9 Ind Cas 842 (844) Cal; *Venkatappa Nayanum Varu* v. *Padi Ramakrishnappa*, (1916) 32 Ind Cas 714 (715) Mad; In re *Narayana Sadashiv Kale*, (1899) 23 Bom 657 (658): 1 Bom L R 92.

(5) *Damu Diga* v. *Vakrya Nathu*, (1920) 56 Ind Cas 455 (456): 44 Bom 767: 22 Bom L R 328; *Makundi Singh* v. *Parbhu Dayal*, 1926 All 169 (169, 170): 23 All L J 993: 90 Ind Cas 2: 48 All 97; *Bukharam* v. *Ramji*, (1914) 23 Ind Cas 878 (879): 10 Nag L R 39.

O. 9, R. 3. Notes 1—4

that the dismissal must be taken to be one under this rule read with S. 141.[6]

2. "**Appearance**".—*See* O. 9, R. 9 and O. 3, R. 1.

3. "**When the suit is called on for hearing**".—The hearing referred to is obviously the *first hearing* after the issue of the summons to the defendant,[1] and not necessarily a hearing of evidence.[2] But when read with O. 17, R. 2, *infra*, this rule may be applied to cases where the parties are absent at the *adjourned* hearings. Thus it may be applied where the parties are absent at a hearing after remand.[3]

But before there can be a dismissal under this rule it is essential that the suit should have been posted to a *specified day* for *hearing* and that the parties have notice thereof. Thus it is not proper to dismiss a suit on a date of which the parties had no previous notice[4] or at a place not notified[5] or on a day fixed for considering only an application for amendment of the issues.[6] Similarly when a day is fixed merely for the appearance of the guardian *ad litem* of a minor defendant[7] or for the attendance of the plaintiff only,[8] a dismissal of the suit on that day under this rule is not justified. A day fixed for judgment is not a day fixed for the hearing of the suit.[9] Where on a day fixed for the hearing of a preliminary issue, of proof of which the onus lies on the defendant and both the parties are absent, the Court ought not to dismiss the suit for default but should decide that issue against the defendant especially in a case where a portion of the claim is admitted.[10]

After a preliminary decree has been passed the suit cannot be dismissed for default of appearance; the reason is that on the passing of the decree the parties acquire rights or incur liabilities which become fixed unless and until the decree is varied or set aside.[11]

4. "**The Court may make an order that the suit be dismissed.**"—Under the old Code the expression used was "the suit shall be dismissed" and, the Judge was bound to dismiss the suit unless, for reasons to be recorded, he other-

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(6) *Lakhmi Chand* v. *Gatto Rai*, (1885) 7 All 542 (544): 1885 All W N 127.

Note 3.

(1) *Shaikh Abdul Rahman* v. *Shib Lal Sahu*, 1922 Pat 252 (254): 1922 Pat H C C 81: 6 Pat L Jour 650: 2 Pat L Tim 572: 63 Ind Cas 570: 4 U P L R (Pat) 13.

(2) *Ghulam Hyder* v. *Tek Chand*, (1919) 53 Ind Cas 560 (561): 13 Sind L R 149.

(3) *Raghoonath* v. *Ram Coomar*, (1870) 14 Suth W R 81 (82): 5 Beng L R App 64.

(4) *Lalba Koshti* v. *Kondu Kishnoo and Chintaman*, (1901) 14 C P L R 134 (134).

(5) *Sohna Mal* v. *Khuda Bakhsh*, (1913) 18 Ind Cas 280 (281): 165 Pun L R 1913: 90 Pun W R 1913; *Nand Lal* v. *Dit Raj*, 1904 Pun Re No 37.

(6) *Sukhdeo* v. *Judagi*, 1921 Pat 96 (97): 6 Pat L Jour 331: 2 Pat L Tim 760: 63 Ind Cas 746; *Lachiram* v. *Mt Almi*, 1927 Sind 228 (229): 102 Ind Cas 416.

(7) *Thakur Pathak* v. *Ragho Pathak*, (1923) 73 Ind Cas 559 (560) Pat.

(8) *Ishar Singh* v. *Sharaf*, 1925 Lah 96 (96): 78 Ind Cas 15; *Chanda Singh* v. *Ghulam Mahomed*, 1931 Lah 69 (70): 32 Pun L R 300: 130 Ind Cas 771; *Indar Singh* v. *Sheru*, 1921 Lah 320 (321): 27 Pun L R 1921: 60 Ind Cas 475.

(9) *Jiwanda Mal* v. *Md Ali*, 1901 Pun Re No 82; *Bura* v. *Tejah Singh*, 1927 Lah 888 (888): 9 Lah L Jour 178: 28 Pun L R 324: 100 Ind Cas 472.

(10) *Nathu Singh* v. *Chhutan*, 1929 Lah 830 (831). See also *Anandaraju* v. *Venkataraju*, (1914) 23 Ind Cas 519 (519): 1 Mad L W 428.

(11) *Lachmi Narain* v. *Balmukund*, 1924 P C 198 (200): 35 Mad L Tim 143: 5 L R P C 171: 47 Mad L Jour 441: 20 Mad L W 491: 4 Pat 61: 51 Ind App 321: 22 All L J 990: 26 Bom L R 1129: 40 Cal L Jour 439: 29 Cal W N 391: 1924 Mad W N 707: 5 Pat L Tim 623: 81 Ind Cas 747; *Chandra* v. *Amir*, 1927 All 439 (440): 25 All L J 437: 101 Ind Cas 676: 49 All 592 P C; *Ahmad Khan* v. *Gaura*, (1918) 43 Ind Cas 518 (519): 40 All 235: 16 All L J 143.

wise directed.[1] But under the present rule *a discretion* is given to the Court in the matter of dismissing the suit. O. 9, R. 3, Notes 4—6.

The Court has no power to *strike a case off its file* but can only make an order dismissing the suit.[2] Where, however, the parties state that the case is settled and at their request the case is struck off, it is not a dismissal for default under this rule.[3]

5. **Dismissal pending arbitration proceedings.**—When a suit is referred to arbitration and is pending before the arbitrator, the Court has no power to dismiss the suit for default under this rule unless an express order superseding the reference to arbitration is passed.[1]

6. **Appeal and review.**—A dismissal under this rule is not a decree within S. 2 (2) and, therefore, no appeal lies.[1] The use of the word "order" makes it clear beyond doubt that the dismissal is not a decree.

It has been held in the undermentioned case that such an order is not open to review.[2]

R. 4. [S. 99.] *Where* a suit is dismissed under *rule* 2 *or rule* 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or *he may apply for an order to set the dismissal aside, and if* he satisfies the Court that there was sufficient cause for his not paying the Court-fee *and postal charges* (*if any*) required within the time *fixed before the issue* of the summons, or for his non-appearance, as the case may be, the Court shall *make* an order *setting* aside the dismissal and *shall* appoint a day for proceeding with the suit. O. 9, R. 4.

Plaintiff may bring fresh suit or Court may restore suit to file.

[1877—Ss. 98 & 99; 1859—S. 110.]

Local Amendment.

BOMBAY.

Rule 4 shall be numbered Rule 4 (1) and the following sub-Rule (2) shall be added to it, namely:—

"(2) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

Synopsis.

1. Scope of the rule.
2. "Sufficient cause."
3. Application under R. 4, dismissed for default—If can be restored. See

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Note 4.

(1) *Ramanathan* v. *Karuppayee*, (1910) 8 Ind Cas 156 (157): 1910 Mad W N 753: 8 Mad L Tim 450.

(2) *Alwar* v. *Seshammal*, (1887) 10 Mad 270 (271).

(3) *Paykat Manakkal* v. *Theyyankaran*, (1916) 32 Ind Cas 624 (626): (1916) 1 Mad W N 171; *Deen Dyal Paramanick* v. *Ram Coomar Chowdhry*, (1868) 9 Suth W R 283 (284) [The suit can be restored to file].

Note 5.

(1) *Imam Din* v. *Jawahari*, 1899 Pun Re No 10.

Note 6.

(1) *Amrito Lal* v. *Ram Chandra*, (1902) 29 Cal 60 (62); *Lokenath Sahoo* v. *Tukeer Singh*, Marsh 630.

(2) *Kollash Kundal* v. *Nabadwip*, (1898) 2 Cal W N 318 (319); *Raj Narain* v. *Ananga*, (1899) 26 Cal 598 (600) [Obiter].

O. 9, R. 4, Notes 1—2.

Note 2 to R. 1.
4. Applicability of rule to execution proceedings. See Note 1, R. 1.
5. Applicability of the rule to applications in forma pauperis.
6. Applicability of the rule to insolvency proceedings.
7. Notice to defendant.
8. Appeal.
9. Revision.
10. Limitation.

Plaintiff's remedies. See Note 1, Pts. (1) and (2).

1. **Scope of the rule.**—Where a suit is dismissed under R. 2 or R. 3, or under O. 17, R. 2, read with these rules a *fresh suit* is not barred.[1] It may be brought notwithstanding the fact that no application for restoration has been made under this rule or even after an application under this rule has proved unsuccessful.[2] The two remedies are not mutually exclusive. But the period covered by the restoration proceedings under this rule cannot be excluded under S. 14 of the Limitation Act for the purpose of the suit.[3]

It is only the Court which passes the order of dismissal that can set it aside under this rule.[4] Unlike R. 7, 9 or 13 the present rule does not authorise the Court to impose any terms as to costs.[5] The effect of a restoration of the suit under this rule is to bring the suit back as regards parties to the same position in which it was at the time of dismissal.[6] Where there are more plaintiffs than one, the suit can be restored on the application of *anyone* of them.[7]

2. "**Sufficient cause**".—An order under this rule without giving the applicant an opportunity to show sufficient cause is *ultra vires*.[1] As to what is sufficient cause is a matter of discretion and no hard and fast rule can be laid down.[2] Where the plaintiff is prevented from attending Court due to unavoidable causes, *e.g.*, picketting by volunteers of Gandhi, it was held that

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Order 9, Rule 4—Note 1.

(1) *Daya Shankar* v. *Raj Kumar*, (1917) 39 Ind Cas 191 (191): 20 Oudh Cas 66; *Kamala Kanta* v. *Monaruddi*, (1920) 58 Ind Cas 203 (204) Cal; *Sheikh Baldar* v. *Sheikh Imam*, 1925 Nag 31 (31): 76 Ind Cas 46; *Bejoy Chand* v. *Satish Chandra*, (1911) 9 Ind Cas 842 (844) Cal; *Gulab Dai* v. *Jiwan Ram*, (1878-80) 2 All 318 (320); *Govind Prasad* v. *Har Kishen*, 1929 All 131 (131): 50 All 837: 26 All L J 776: 115 Ind Cas 118; *Fateh Chand* v. *Jagan Nath Prashad*, (1909) 2 Ind Cas 630 (631) All; *Haradhun* v. *Protap Narain*, (1870) 14 Suth W R 401 (402); *Pogku Mahtoon* v. *Gooroo Babon Ganesh Ram*, (1875) 24 Suth W R 114 (115); *Nabadwip Chandra Sarkar* v. *Kalinath Pal*, (1869) 3 Beng L R App 130; *Shankar Pratapsingh* v. *Motilal*, 1928 Nag 220 (221): 109 Ind Cas 387 [But see—Death of plaintiff—Fresh suit on the same cause of action by his Legal Representative after the period of 90 days allowed for bringing Legal Representatives on record, not maintainable].

(2) *Bhudeo* v. *Baikunthi*, (1921) 63 Ind Cas 239 (239) All; *Tulshi Singh* v. *Shrosaran Rai*, 1926 All 678 (678): 96 Ind Cas 187.

(3) *Chintaman* v. *Kisan*, 1929 Nag 219 (221): 25 Nag L R 99: 116 Ind Cas 509; *Janer* v. *Waris*, 1869 Pun Re No 39.

(4) *Lachman Das* v. *Devi Dial*, (1920) 56 Ind Cas 884 (885): 2 Lah L Jour 48: 19 Pun W R 1920: 100 Pun L R 1920.

(5) *Krishna* v. *Ganesh*, (1902) 26 Bom 201 (202): 3 Bom L R 734.

(6) *Kailash* v. *Hridoy*, 1924 Cal 814 (815): 39 Cal L Jour 367: 83 Ind Cas 958; *Dhirta* v. *Kesri*, (1909) 3 Ind Cas 484 (486): 1909 Pun Re No 31: 36 Pun W R 1909: 49 Pun L R 1909; *Mohammad Raziq Dad Khan* v. *Mohammad Zafaryab Khan*, 1930 All 168 (169): 1929 All L J 1103: 120 Ind Cas 560.

(7) *Kailas Chandra Ray* v. *Hridoy Chandra Das*, 1924 Cal 814 (815): 39 Cal L Jour 367: 83 Ind Cas 958.

Note 2.

(1) *Banechand* v. *Punja*, 1889 Bom P J 216.

(2) *Deen Dyal* v. *Ram Coomar*, (1868) 9 Suth W R 283 (284); *Dhunsook Doss* v. *Hurry Baboo*, 1865 Bourke, O C 115 [Illness of the plaintiff supported by a medical certificate is sufficient cause]; *Firm of Guranditta Ram* v. *Sukhu Ram*, 1927 Lah 911 (912): 9 Lah L Jour 19: 28 Pun L R 136: 100 Ind Cas 595 [Plaintiff's statement on oath that process fee was paid but apparently mislaid in Court is sufficient]; *Gokuldas* v. *Kissandas*, (1901) 3 Bom L R 130 (131) [Affidavit not necessary]; *Nanhum* v. *Jumma*, 1926 Lah 634 (634): 96 Ind Cas 881 [Absence not being intentional—Sufficient]; *Said Mahomed Shah* v. *Atma Ram*, 1930 Lah 70 (71): 31 Pun L R 335: 123 Ind Cas 834; *Lakshmi Chand* v. *Gatto Bai*, (1885) 7 All 542 (545) [Delay of a few minutes ought to be excused].

there was sufficient cause for non-appearance.[3] A *bona fide* mistake which is not unreasonable is a sufficient cause to order restoration.[4] But the mere fact that the summons has been returned unserved on the defendant is no ground for setting aside the order of dismissal.[5] (*See also* Notes under R. 9.) O. 9, R. 4, Notes 2—10.

3. **Application under R. 4 dismissed for default—if can be restored.** —*See* Note 2 to R. 1.

4. **Applicability of rule to execution proceedings.**—*See* Note 1, Rule 1.

5. **Applicability of the rule to applications in forma pauperis.**—It has been held by the High Court of Rangoon, applying the provisions of S. 141 of the Code, that where, at the hearing of an application to sue in *forma pauperis*, neither party appears and the application is dismissed, a fresh application to sue in *forma pauperis* is not barred under the provisions of this rule.[1] But if the dismissal instead of being one under R. 3 is one under R. 8, a fresh application will be barred.[2]

6. **Applicability of the rule to insolvency proceedings.**—It was held in the undermentioned cases[1] that where an insolvency petition was dismissed on the analogy of R. 2 for non-payment of process-fee, a fresh application for insolvency is not barred, by virtue of the provisions of this rule.

7. **Notice to defendant.**—Notice to defendant is not necessary for restoration under this rule.[1]

8. **Appeal.**—No appeal lies from any order passed under this Rule.[1]

9. **Revision.**—The High Court of Lahore has held in the undermentioned case that an order rejecting an application under this rule is not open to revision but that the High Court can interfere under its inherent powers.[1]

10. **Limitation.**—Under Article 163 of the Limitation Act 1908, the period of limitation prescribed for an application under this rule is thirty days from the date of dismissal. Time cannot be extended under S. 5 of the

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(3) *Mt Muratbati* v. *Lattoo Choudhury*, 1931 Pat 87 (88): 130 Ind Cas 542.

(4) *Hardatrai* v. *Victoria Finance and Bullion Association*, (1866) 3 Bom H C R O C 60; *Bishambar Das* v. *Bhori Lal*, 1929 Lah 882 (1), (882) [Mistake on the part of the plaintiff's agent as to the Court in which the case was to be heard]; *Bakshish Singh* v. *Biru*, 1932 Lah 176 (176): 135 Ind Cas 199: 33 Pun L R 53 [Mistake as to date of hearing]; *Damoodar Doss* v. *Choonee Bibee*, Cor 120 (123): 2 Hyde 216 [Absence owing to an understanding between the parties for an adjournment].

(5) *Sarba Sundari Dassi* v. *Panchanan Ray*, 1926 Cal 112 (112): 90 Ind Cas 675.

Note 5.

(1) *Ma Sein* v. *Ma Kya Hmyin*, 1926 Rang 200 (201): 4 Rang 245: 98 Ind Cas 26; *Maung Aung Tun* v. *Ma E Kin*, 1924 Rang 161 (1), (161): 2 Bur L Jour 217: 76 Ind Cas 785.

(2) *Chinnammal* v. *Papathi Ammal*, 1925 Mad 986 (988): 85 Ind Cas 982.

Note 6.

(1) *Chauthamal Bhagirath* v. *Khem Karan Das*, 1928 Pat 116 (117): 107 Ind Cas 842; *Abdul Aziz* v. *Habid*, (1919) 49 Ind Cas 229 (229) Cal.

Note 7.

(1) *Birj Lal* v. *Bua Ram*, (1912) 17 Ind Cas 292 (293): 10 All L J 399; *Ramji Lal* v. *Kesho Ram*, 1923 Oudh 55 (55): 9 Oudh L J 52: 64 Ind Cas 767: 24 Oudh Cas 347.

Note 8.

(1) *Ram Nandan Prasad* v. *Ramchandra Prasad*, (1917) 42 Ind Cas 613 (613): 2 Pat L W 172; *Ramji Das* v. *Bhagwan Das*, (1918) 43 Ind Cas 180 (182) All; *Pitambar Dhal* v. *Baidya Nath Sil*, (1918) 43 Ind Cas 374 (374): 27 Cal L Jour 117; *Rahmatunnessa* v. *Abdul Sobhan*, (1919) 49 Ind Cas 745 (745) Cal; *Babu Baij Nath Singh* v. *Gajraj Singh*, (1910) 6 Ind Cas 464 (464, 465): 7 All L J 675; *Alwar* v. *Seshammal*, (1887) 10 Mad 270 (271); *Wahidunnissa* v. *Kundanlal*, (1913) 20 Ind Cas 145 (145): 35 All 427: 11 All L J 615; *Shadi Lal* v. *Karm Din*, (1911) 9 Ind Cas 238 (238): 250 Pun W R 1911.

Note 9.

(1) *Nanakchand Ram Lal* v. *Ahmad Din*, 1930 Lah 440 (440): 129 Ind Cas 755.

O. 9, R. 4, Note 10. Limitation Act in the absence of any express provision made by the High Court under its rule-making powers.[1]

O. 9, R. 5, Note 1.

R. 5. [S. 99-A.] (1) *Where*, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from *the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers*, to apply for the issue of a fresh summons the Court shall *make an order that* the suit *be* dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons.

(*a*) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(*b*) such defendant is avoiding service of process, or

(*c*) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Synopsis.

1. Legislative changes after 1908.
2. "Period of three months"—Computation of.
3. Fresh summons, when granted.
4. Failure to take fresh summons does not discharge the defendant from any liability.
5. Appeal.

Fresh suit. See Note 4.
Order not decree. See Note 5.
Order under this rule—Whether res judicata. See Note 4, Pt. (1).

1. Legislative changes after 1908.

Sub-Rule (1) has been newly substituted for the old sub-rule by the Amending Act, XXIV of 1920, thus effecting the following important changes:—

(1) The period during which the plaintiff may remain without applying for fresh summons is reduced from one year to *three months*.

(2) The words "*shall* make an order" have been used in the place of the words '*may* make an order'.

(3) Provision has been made in sub-clause (*c*) for extension of time for making the application referred to.

Note 10.

(1) *Kali Prasad Tewari v. Parmeshwar Prasad Marwari*, 1929 All 127 (128): 1929 All L J 323: 113 Ind Cas 767: 51 All 487; *Koganti Veerayya v. Narra Sreesilam*, 1928 Mad 556 (557): 1928 Mad W N 299: 110 Ind Cas 47.

O. 9, R. 5, Notes 2—5.

2. "Period of three months"—Computation of.—Under the old Code the period fixed was one year[1] and it was calculated, not from the filing of the plaint, but from the return of the summons unserved.[2] The question also arose whether the period was to be calculated from the date of the return of the serving-officer or from the date of the return of the officer whose duty it was to certify to the Court the return of the serving-officer. It was held in the undermentioned case[3] that the period was to be calculated from the date of the return made by the latter officer. Effect has been given to that decision in the present rule.

3. Fresh summons, when granted.—The plaintiff must apply for fresh summons within the prescribed period, *i.e.*, three months, from the date of the return of non-service on the defendant.[1] If he wants an extension of time he has to apply to the Court within three months and satisfy the Court as to any of the circumstances mentioned in sub-clauses (*a*), (*b*) and (*c*).[2]

4. Failure to take fresh summons does not discharge the defendant from any liability.—Failure on the part of the plaintiff to take fresh summons and the consequent dismissal of the suit does not take away the liability of the defendant and does not operate as *res judicata* in a fresh suit against him.[1] Nor can a co-defendant plead that he is only a surety and that, as the other defendant who is the principal debtor is not served, he is not liable.[2] Where, however, the records of a suit were consigned to the record-room owing to the non-service of summons on one of the defendants, a subsequent suit against the same defendant on the same cause of action was held to be barred, on the ground that the suit must be deemed to be still pending.[3]

5. Appeal.—The words 'shall make an *order* that the suit be dismissed' in the place of "may dismiss the suit" occurring in the old Code make it perfectly clear that the dismissal under this rule is not appealable as a *decree*. This rule does not apply to appeals as O. 41 contains specific rules covering corresponding cases that arise in appeal.[1]

Order 9, Rule 5—Note 2.

(1) *Ramjiban* v. *Ahmed Khan*, (1910) 5 Ind Cas 537 (538) Cal [But Court was not bound to wait for the whole period as the Rule is only an enabling provision].

(2) *Jugalprasad* v. *Biscsur*, (1905) 7 Bom L R 928 (929).

(3) *Parsotam* v. *Abdul*, (1889) 13 Bom 500 (502).

Note 3.

(1) *Chatterjee Brahmin* v. *Durgadatt Agarwalla*, (1916) 34 Ind Cas 394 (395): 20 Cal W N 943: 23 Cal L Jour 436; *Byaharimal* v. *Satwa*, (1901) 8 Bom L R 402 (404); *Ishar Singh* v. *Bishan Singh*, 1931 Lah 655 (655): 132 Ind Cas 524: 32 Pun L R 836 [Case of want of correct address of defendant]; *Venkatarama Chettiar* v. *Marudhachala Goundan*, 1931 Mad 795 (797): 1931 Mad W N 1002: 135 Ind Cas 347 [Dismissal within three months wrong].

(2) *Rameshwar* v. *Soni*, (1909) 13 Cal W N 75-n; *Urquhart* v. *Gilbert*, 1 Ind Jur N S 224; *Ramkissen* v. *Luckeynarain*, (1878) 3 Cal 312 (313); *Gour Churn* v. *Peary Lall*, (1875) 15 Beng L R App 12 [Laches of plaintiff will disentitle him to fresh summons].

Note 4.

(1) *Sita Ram* v. *Pokhpal*, (1906) 28 All 749 (751): 3 All L J 576: 1906 All W N 233: 1 Mad L Tim 447.

(2) *Shaik Ali* v. *Mahomed*, (1890) 14 Bom 267 (269); *Nathubai* v. *Ranchod Lal*, (1915) 27 Ind Cas 165 (165): 39 Bom 52: 16 Bom L R 696; *Pestonji* v. *Lalya Lasha*, 1891 Bom P J 63 (63). But see *Maung Po U* v. *Maung Kyaw*, (1918) 44 Ind Cas 693 (693): (1917) 3 U P L R 62.

(3) *Nanak Chand* v. *Nur-Ud-din*, (1917) 40 Ind Cas 448 (449) Lah.

Note 5.

(1) *Babanna Sangappa* v. *Parava Ningbasappa*, 1927 Bom 68 (69): 50 Bom 815: 28 Bom L R 1446: 100 Ind Cas 147.

O. 9, R. 6, Note 1.

R. 6. [S. 100.] (1) *Where* the plaintiff appears and the defendant does not appear *when the suit is called on for hearing, then*—

Procedure *when only* plaintiff appears.

When summons duly served.

(*a*) if it is proved that the summons was duly served, the Court may proceed *ex parte*.

When summons not duly served.

(*b*) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

When summons served, but not in due time

(*c*) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) *Where* it is owing to the plaintiff's default that the summons was not *duly served or was not* served in sufficient time, the Court shall order *the plaintiff* to pay *the* costs occasioned by the postponement.

[1877—Ss. 100, 101; 1859—Ss. 111, 112, 113.]

Synopsis.

1. Scope of the rule.
2. Ex parte decree.
3. Remedies in the case of an ex parte decree.
4. Subsequent appearance of defendant pending suit. See R. 7 below.
5. Second summons—Cl. (b).
6. Sufficient time—Cl. (c).

Adjourned hearing—Applicability of rule to. See Note 1, Pt. (2).
Appeal. See Note 3.
Appears. See O. 3, R. 1.
Order 9, Rule 6 and O. 17, R. 2. See Note 1, Pts. (2) and (3).

1. Scope of the rule.—This rule contemplates the hearing of the suit on the day fixed in the summons whereas O. 17, R. 2 contemplates the hearing of the suit on some later date to which the hearing may be adjourned.[1] Thus if the defendant had already appeared in answer to the summons but fails to appear at the adjourned hearing the case falls under O. 17, R. 2,[2] though the procedure contemplated in either case is the same.[3] When an appearance

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Order 9, Rule 6—Note 1.

(1) *Mahant Damodar Das* v. *Raj Kumar Das*, 1922 Pat 485 (487-488): 1 Pat 188: 69 Ind Cas 837.

(2) *Enatulla* v. *Jiban Mohan Roy*, (1914) 23 Ind Cas 769 (770, 771): 41 Cal 956: 18 Cal W N 775: 19 Cal L Jour 535; *Jain-ulab-din* v. *Ahmed Raza Khan*, (1878-80) 2 All 67 (71): 5 Ind App 283: 3 Sar 879: 3 Ind Jur 186 P C; *Sadhu Ram* v. *Hoshnak*, 1866 Pun Re No 6; *Mazhar Husain* v. *Rafiq Husain*, 1925 Oudh 645 (647): 28 Oudh Cas 85: 87 Ind Cas 222: 1 Oudh W N 835; *Baldeo Singh* v. *Ohhaju Singh*, 1931 All 703 (2), (704): 1931 All L J 646: 133 Ind Cas 622.

(3) *Mahant Damodhar Das* v. *Raj Kumar Das*, 1922 Pat 485 (487, 488): 1 Pat 188: 69 Ind Cas 837.

under O. 9 is in question the word "hearing" means the *first day of the hearing*.[4]

The fact that the summons may have directed the defendant to file a written statement does not authorise the Court to proceed under O. 8, R. 10; if the defendant does not appear, the proper procedure is that prescribed under this rule.[5]

2. **Ex-parte decree.**—The plaintiff is not entitled to have the suit declared *ex parte* before the returnable date fixed in the summons.[1] Before proceeding *ex parte* the Court must be satisfied that there is due service of summons on the defendant.[2] An *ex parte* proceeding ought not to be taken on the basis of service effected by registered post.[3] The *onus* of proving due service is, of course, on the plaintiff.[4]

The Code does not prescribe any procedure to be followed in the case of an *ex parte* suit. The practice is that no issues are framed, though the plaintiff is called upon to prove his case.[5] The plaintiff is bound to prove his case to the satisfaction of the Court and his burden is not any the less lightened because the defendant is absent.[6] Except in suits relating to the Negotiable Instruments, as under O. 37, R. 2, evidence should be adduced by the plaintiff[7] and a *prima facie case* made out.[8] The Court is bound to consider the interests of the absent defendant and not to rely on evidence otherwise unreliable simply because the case is *ex parte*.[9]

3. **Remedies in the case of an ex parte decree.**—A defendant against whom an *ex parte* decree has been passed can—

(1) apply under R. 13, *infra*, to set aside the *ex parte* decree, or

(2) appeal from the decree under S. 96, or

(3) apply for a review under O. 47, R. 1.[1]

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(4) *Arunachalam Chettiar* v. *Sivalingam Chettiar*, 1927 Mad 799 (800): 26 Mad L W 76: 104 Ind Cas 371; *Hira Dai* v. *Hira Lal*, (1885) 7 All 538 (540): 1885 All W N 144.

(5) *Dhiraj Kumar* v. *Sarju Narain Singh*, 1925 Oudh 567 (568): 12 Oudh L J 532: 2 Oudh W N 391: 88 Ind Cas 540.

Note 2.

(1) *Dhirajlal Panachand* v. *Hormusji Edulji Bottlewala*, (1908) 32 Bom 534 (539): 10 Bom L R 301.

(2) *Fakhr-ud-din* v. *Ghapur-ud-din*, (1900) 23 All 99 (100): 1901 All W N 1; *Ram Lochun* v. *Nittya Kalee*, (1869) 12 Suth W R 210 (211, 212); *Kistodhone Dutt* v. *Nilmoney Singh*, Cor 3; *Suresh Chunder* v. *Jugut Chunder Deb*, (1887) 14 Cal 204 (212); *Taruck Nath Mullick* v. *Jeamut Nosya*, (1880) 5 Cal 353 (355): 5 Ind Jur 246; *Genu* v. *Bhagu*, 1890 Bom P J 136 (136).

(3) *Hardasmal Khub Chand* v. *Jagan Nath Jauhrimal*, 1926 Lah 579 (580): 95 Ind Cas 874.

(4) *Bhowanidas Ramgobind* v. *Pannachand Luchmiput*, 1925 Cal 801 (802): 52 Cal 458: 88 Ind Cas 929.

(5) *Mt Bhuriba* v. *Ishak Hussain*, 1923 Nag 83 (84): 69 Ind Cas 619.

(6) *Satyendra Nath* v. *Narendra Nath Gupta*, 1924 Cal 806 (808): 39 Cal L Jour 279: 81 Ind Cas 867; *Tilak Singh* v. *Sheo Nandan Misir*, 1929 All 612 (613): 118 Ind Cas 527; *Bhujangrao* v. *Baliram*, 1928 Nag 165 (166): 11 Nag L J 78: 108 Ind Cas 879.

(7) *J B Ross* v. *C R Scriven*, (1916) 34 Ind Cas 235 (238, 240, 242): 43 Cal 1001: 20 Cal W N 1192.

(8) *Amritnath Jha* v. *Baboo Roy Dhunpat Singh*, (1871) 15 Suth W R 503 (504): 8 Beng L R 44; *Monmatha* v. *Josada Lal*, 1924 Cal 647 (648): 28 Cal W N 300: 77 Ind Cas 551; *Ghulam Hussain* v. *Singer Sewing Machine Co*, 1926 Oudh 192 (193): 91 Ind Cas 119; *Satyes Chandra* v. *Monmohini*, (1914) 19 Cal L Jour 519: 25 Ind Cas 567; *Radha Lall* v. *Mokhum*, 1866 Pun Re No 85.

(9) *Sarabjit Singh* v. *Ramput Mathra Estate*, (1917) 37 Ind Cas 27 (29): 3 Oudh L Jour 468.

Note 3.

(1) *Mewa* v. *Bhujhun*, (1874) 22 Suth W R 213 (214): 13 Beng L R App 11 [Can apply for a review]; *Karuppan* v. *Ayathorai*, (1886) 9 Mad 445 (447) [Can appeal]; *Fakhr-ud-din* v. *Ghafur-ud-din*, (1900) 23 All 99 (100, 101): 1901 All W N 1 [Can appeal]; *Hunt* v. *Azizuddin*, (1916) 36 Ind Cas 277 (278): 39 All 143 [Can appeal].

O. 9, R. 6, Notes 3—6.

As to when a suit can be brought to set aside an *ex parte* decree, *see* Note 12 to R. 13. As to the limitation for applications under R. 13, *see* Note 28 thereto.

4. Subsequent appearance of defendant pending suit.—*See* R. 7, below.

5. Second summons—Cl. (b).—If it is not proved that there was due service, the Court is bound to order fresh summons for the defendant. If the non-service or failure to effect due service is due to plaintiff's *default* the Court is bound to order him to pay the costs of the postponement under sub-Rule 2.[1]

6. Sufficient time—Cl. (c).—The words '*duly served*' means served in sufficient time to enable the defendant to appear in person or by a pleader[1] and the Court is bound under sub-clause (*c*) to direct fresh summons if he is not served in sufficient time.

If the defendant though not served in sufficient time nevertheless appears and asks for time, the Court is not justified in refusing it and proceeding *ex parte*. By his appearing he should not be placed in a worse position than he would be in if he had not appeared at all.[2]

O. 9, R. 7, Note 1.

R. 7. [S. 101.] *Where* the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

[1877—Ss. 100, 101; 1859—S. 111.]

Synopsis.

1. Scope of the rule.
2. "Assigns good cause."

Rejection of application under this rule whether bar to application under R. 13. See Note 1, Pt. (3).

1. Scope of the rule.—The underlying principle of this rule is that until a suit is actually called and so long as an *ex parte* decree is not passed, the defendant is entitled to come in and defend the suit.[1] The Courts should

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Note 5.

(1) *Lallubhai Vajeram v. Bai Mangangavri*, (1894) 18 Bom 59 (60); *Kesho Prasad v. Ramraj Pandey*, 1931 Pat 420 (421): 12 Pat L Tim 644: 135 Ind Cas 99 [Plaintiff not bound to supply identifier to serve defendant—Plaintiff duly paying process fee—Non-service is not due to plaintiff's default—Suit ought not to be dismissed].

Note 6.

(1) *Ma Shwe Pon v. K K A R C Raman Chetty*, (1900-07) 1 L B R 226 (227); *Chanbasappa Bin Sangappa v. Mainaba Bin Mahadshet*, (1870) 7 Bom H C R 138.

(2) *Awlad v. Abdool*, (1872) 18 Suth W R 141 (142).

Order 9, Rule 7—Note 1.

(1) *Radhabai v. Anant Pandurang*, 1922 Bom 345 (345): 70 Ind Cas 762; *Newton v. Kurneedhone*, (1872) 9 Beng L R App 15; *Dulichand v. Dhondi*, (1880) 5 Bom 184 (188); *Bhagwat Prasad Tewari v. Mahomed Shibli*, 1922 All 110 (111): 20 All L J 270: 66 Ind Cas 892; *Rai Satiyendra Nath Sen Bahadur v. Narendra Nath Gupta*, 1924 Cal 806 (808): 39 Cal L Jour 279: 81 Ind Cas 867.

be liberal in construing this rule and should not take a stringent view of the defendant's absence.[2] O. 9, R. 7, Notes 1—2.

The rejection of an application under this rule is no bar to an application under R. 13 after the passing of an *ex parte* decree.[3]

2. "Assigns good cause".—If the defendant wants to set aside the order placing him *ex parte* and be relegated to the stage at which the suit was, when he absented himself, then he has to assign good cause for his previous absence. But if he merely wants to take part in the proceedings *at the stage* at which it is, when he appears, it is not necessary to get the previous order placing him *ex parte* set aside. The reason is that the rule is not intended to be penal and by the very fact of his appearance the proceedings cease to be *ex parte* thenceforth.[1]

Though the rule gives a discretion to the Court to impose terms, failure to do so is not an irregular or improper exercise of discretion such as to justify interference in revision.[2]

R. 8. [S. 102.] *Where* the defendant appears and the plaintiff does not appear *when the suit is called on for hearing*, the Court shall *make an order that* the suit *be dismissed* unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder. O. 9, R. 8.

Procedure where defendant only appears.

[1877—Ss. 102 and 103; 1859—S. 114.]

Synopsis.

1. Scope of the rule.
2. Appearance. See R. 9, infra.
3. "When a suit is called on for hearing."
4. More plaintiffs than one.
5. More defendants than one.
6. "Shall make an order that the suit be dismissed.
7. Unless the defendant admits.
8. Effect of dismissal under this rule.
9. Revision.

Appeal when lies. See Note 3, F.-N. (6); Note 6, Pt. (8); and Note 7, Pt. (4).
Dismiss the suit. See Note 3.
Procedure when the plaintiff dies. See Note 1, Pt. (1).
Shall pass a decree. See Note 7.

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(2) *Shankar Bakhsh Singh* v. *Maheshwar Dayal*, 1931 Oudh 159 (160): 8 Oudh W N 80: 131 Ind Cas 447.

(3) *Sankaralinga Mudali* v. *Ratnasabhapati Mudali*, (1898) 21 Mad 324 (326): 8 Mad L Jour 58; *Bhaoo Patel* v. *Naroo Kunbi*, (1897) 10 C P L R 45 (47); *Ashrufunnissa* v. *Lehareaux*, (1882) 8 Cal 272 (273, 274): 10 Cal L Rep 502.

Note 2.

(1) *Harba* v. *Chandra Bhaga*, 1931 Nag 122 (123): 27 Nag L R 50: 134 Ind Cas 268; *Kala Gella* v. *Shivji*, 1926 Sind 181 (184): 92 Ind Cas 493; *Arumugam Pillai* v. *Kandaswamy Pillai*, 1928 Mad 211 (212): 39 Mad L Tim 656: 106 Ind Cas 664; *Venkatasubbiah* v. *Lakshminarasimham*, 1925 Mad 1274 (1275): 49 Mad L Jour 273: 1925 Mad W N 647: 91 Ind Cas 545; *Pattanna* v. *Neeli Chetty*, 1927 Mad 1197 (1197): 1928 Mad W N 103: 27 Mad L W 361; *Mannu* v. *Tulshi*, 1922 All 33 (34): 20 All L J 39: 64 Ind Cas 958; *Mehraj Din* v. *Hans Raj*, 1931 Lah 616 (616): 32 Pun L R 633: 134 Ind Cas 1107 [*Ex parte* defendant appearing and not asking for re-hearing of prior proceedings—Court has no jurisdiction to order costs against him]. But see *Gangaram Samandas* v. *Deomal Nihal Chand*, 1929 Sind 46 (48): 115 Ind Cas 310; *Farzand Ali* v. *Ekadashi*, 1923 Oudh 177 (178): 26 Oudh Cas 10: 10 Oudh L J 36: 73 Ind Cas 591.

(2) *Ayya Nadan* v. *Thanammal*, (1920) 55 Ind Cas 945 (948): 11 Mad L W 289: 1920 Mad W N 241: 27 Mad L Tim 171; *Mazhar Husain* v. *Rafiq Husain*, 1925 Oudh 645 (647): 28 Oudh Cas 85: 87 Ind Cas 222: 1 Oudh W N 835.

O. 9, R. 8, Notes 1—3.

1. **Scope of the rule.**—This rule deals with the procedure to be followed when the plaintiff does not appear and the defendant alone appears. In such a case, the only thing that the defendant is entitled to claim is to have the plaintiff's suit dismissed. He is not entitled to call evidence to disprove charges of fraud, etc., made against him in the plaint.[1-a]

The Court has no power to dismiss a suit for default under this rule where the plaintiff *dies*. Such an order of dismissal is a nullity, the reason being that the rules applicable to a defaulter cannot be applied to a dead man.[1] Similarly a dismissal under this rule is not proper if the plaintiff has been adjudicated *insolvent* before the hearing, as there is none on the record who is bound to appear; the Court should, in such a case, act under O. 22, R. 8.[2]

Where a reference to arbitration in a suit provided that the arbitrator should hear evidence and determine the case and that if one of the parties failed to appear, he should have power to proceed *ex parte*, the arbitrator cannot, on failure of one of the parties to appear, act under the provisions of this rule.[3]

2. **Appearance.**—*See* Notes under the same heading in Rule 9, *infra*.

3. "**When a suit is called on for hearing.**"—The hearing of the suit may be either on the day named in the summons or a subsequent day to which the hearing may be adjourned.[1] The date fixed for the settlement of issues is as much a day fixed for the hearing as any other date fixed.[2]

A dismissal of a suit at an *adjourned hearing*, for default of plaintiff's appearance is under the provision of O. 17, R. 2 read with this rule.[3] As will be seen from the provisions of O. 17, *infra*, a dismissal under R. 2 of that order can be set aside under the provisions of O. 9 and the suit restored, while, if the dismissal is under R. 3 of that order the remedy of the party aggrieved is only

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Order 9, Rule 8—Note 1.

(1-a) *Kesri Chand Kothari* v. *National Jute Mills Co. Ltd.* (1912) 17 Ind Cas 87 (87): 40 Cal 119: 16 Cal W N 968.

(1) *Debi Baksh Singh* v. *Habib Shah*, (1913) 19 Ind Cas 526 (527, 528): 35 All 331: 40 Ind App 151: 16 Oudh Cas 194: 17 Cal W N 829: 11 All L J 625: 18 Cal L Jour 9: 15 Bom L R 640: 1913 Mad W N 566: 25 Mad L Jour 148: 14 Mad L Tim 33 P C; *Daulat Rai* v. *Jagat Ram*, (1918) 47 Ind Cas 962 (963): 96 Pun Re 1918; *Tirlochan Prasad Singh* v. *Bhagwati*, 1924 Oudh 114 (114): 73 Ind Cas 230; *Radhey Shiam* v. *Mohammad Nasir*, 1930 Oudh 3 (5): 6 Oudh W N 1002: 123 Ind Cas 855: 5 Luck 241.

(2) *Kissen* v. *Sukla*, 1927 Cal 76 (77): 53 Cal 844: 31 Cal W N 22: 98 Ind Cas 781.

(3) *Gopal Chandra Das* v. *Kshetra Mohun Bhuia*, (1918) 46 Ind Cas 195 (196): 22 Cal W N 933.

Note 3.

(1) *Conalammal* v. *Rungaswamy Iyengar*, (1868-69) 4 Mad H C R 56 (59).

(2) *Harchand Rai Anand Ram* v. *Ram Bahadur Singh*, (1918) 48 Ind Cas 192 (193): 1919 Pat H C C 32; *Bishun Narain Bhargava* v. *Abdul Manan*, 1925 Oudh 682 (682): 2 Oudh W N 574: 89 Ind Cas 64; *Velayutha* v. *Sundaram*, 1922 Mad 416 (416): 1922 Mad W N 483: 72 Ind Cas 482.

(3) *Rukam* v. *Tara Chand*, 1922 All 68 (68): 20 All L J 123: 65 Ind Cas 775; *Sagajirav* v. *Smith*, (1896) 20 Bom 736 (744); *Ram Rattan* v. *Ilyat Muhammad*, 1880 Pun Re No 41 (Civ); *Maharajah of Vizianagaram* v. *Lingam Krishna Bhupathi*, (1902) 12 Mad L Jour 473 (474); *Aisha* v. *Mt Chatta*, 1925 Oudh 433 (434): 2 Oudh W N 432: 89 Ind Cas 418; *Nagananda Iyer* v. *Krishnamurthi Iyer*, (1910) 6 Ind Cas 233 (234, 235): 34 Mad 97: 20 Mad L Jour 535: 8 Mad L Tim 60: 1910 Mad W N 213; *Ram Dani Panday* v. *Narayan Murti*, (1909) 5 L B R 75: 3 Ind Cas 683 (684); *Bhatiey* v. *Chakarpan*, (1917) 42 Ind Cas 945 (946) All; *Mahant Damodar* v. *Kumar*, 1922 Pat 485 (487): 1 Pat 188: 69 Ind Cas 837; *Ramaya* v. *Anumukunda Rangaya Nayudu*, (1884) 7 Mad 41 (42); *Shah Muhammad Mandood* v. *Rameshwar Singh Bahadur*, 1923 Pat 590 (531): 1 Pat L R 281: 74 Ind Cas 693; *Lalji Sahu* v. *Lachmi Narain Singh*, (1918) 47 Ind Cas 27 (28): 3 Pat L Jour 355; *Allahdino* v. *Nawalmal*, (1907) 1 Sind L R 224; *Nariunnissa* alias *Doman Bibi*, v. *Ramkalpa Gorain*, (1907) 34 Cal 235 (237, 239): 5 Cal L Jour 260; *Durga Kanta Sarma* v. *Anto Koch*, (1917) 42 Ind Cas 649 (650): 22 Cal W N 671; *Madan Gopal* v. *Budhu*, 1932 Lah 477 (478): 138 Ind Cas 200 [Default on date fixed for hearing objections to award]; *Mul Chand* v. *Piare Lal*, (1929) 116 Ind Cas 752 (752): 1929 Notes 39 (a): 1929 All L J 391.

by way of appeal or of review and not by an application for restoration under O. 9, R. 9.[4] O. 9, R. 8, Note 3.

A Court will not be justified in dismissing a suit under this rule where the evidence on record is sufficient to decree the claim of the plaintiff,[5] or where the evidence has been completely recorded and nothing remains to be done except to hear arguments,[6] or where the suit was adjourned in the course of arguments,[7] or for pronouncing judgment.[8] Similarly where part of the plaintiff's claim was fully determined by a preliminary order and the rest of the claim was abandoned, the Court is not justified in dismissing the suit for default.[9] A failure to amend the plaint as per order of Court and to pay costs of the adjournment does not justify a dismissal of the suit for default after the evidence is finished.[10]

It is not proper for the Court to dismiss the suit on a day not fixed for the hearing of the suit[11] as, for example, when the day was fixed for the appointment of a guardian *ad litem* of a minor defendant,[12] or on a day which is not duly notified to the parties[13] or on holidays.[14] Nor should the Court hastily dismiss a suit for non-appearance when the suit is pending reference to arbitration and when the arbitrator had applied for extension of time to make the award.[15] Where a commissioner has been appointed and he has not made his report the suit cannot be heard until the commissioner has finished his work and there can be no dismissal for default.[16] After a *decree has once been made* a suit cannot be dismissed for default.[17] Thus there can be no dismissal under this rule after a preliminary decree for partition and if an order is so

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(4) *Ryall* v. *Sherman*, (1877) 1 Mad 287 (288): 1 Ind Jur 446; *Mittadar Venkoba Royer* v. *Mittadar Kadiriappa Gounder*, (1914) 23 Ind Cas 614 (615): 1914 Mad W N 344. See *Kunwar Kalyan* v. *Mehinlal Kamdar*, 1926 All 729 (730): 96 Ind Cas 564.

(5) *Ningappa* v. *Gowdappa*, (1905) 7 Bom L R 261 (262); *Ram Dutt Pande* v. *Narain Murti*, (1909) 3 Ind Cas 683 (684): 5 L B R 75.

(6) *Raichand* v. *Mathura*, (1881) 3 All 292 (294) [Order appealable].

(7) *Irappa Channapa Arjangi* v. *Sidava Tukappa Arjangi*, 1931 Bom 111 (113): 32 Bom L R 1430: 128 Ind Cas 889.

(8) *Nand Lal* v. *Shanker*, (1911) 11 Ind Cas 842 (842): 254 Pun L R 1911: 165 Pun W R 1911.

(9) *Kanhaya Lal* v. *The National Bank of India, Ltd*, (1910) 6 Ind Cas 592 (594): 37 Cal 426: 37 Ind App 80: 12 Bom L R 430: 20 Mad L Jour 470: 1910 Mad W N 282: 8 Mad L Tim 1: 31 Pun W R 1911: 14 Cal W N 594: 11 Cal L Jour 449 P C.

(10) *Rahman* v. *Ahmad Din*, 1926 Lah 571 (571): 96 Ind Cas 312.

(11) *Mahesha Mal Dayal Das* v. *Muhammad Jamil*, 1929 Lah 374 (375): 106 Ind Cas 830; *Haradhun Chuckerbutty* v. *Protab Narani Chowdry*, (1870) 14 Suth W R 401 (402).

(12) *Debi Sahai* v. *Saraswati*, (1911) 10 Ind Cas 313 (314): 33 All 560: 8 All L J 612; *Balmokund Ram Marwari* v. *Madho Prasad*, 1924 Pat 714 (715): 5 Pat L Tim 424: 1924 Pat H C C 215: 78 Ind Cas 224; *Sheikh Abdul Rahman* v. *Shib Lal Sahu*, 1922 Pat 252 (254): 1922 Pat H C C 81: 6 Pat L Jour 650: 2 Pat L Tim 572: 63 Ind Cas 570: 4 U P L R (Pat) 13; *Thakur Pathak* v. *Ragho Pathak*, (1923) 73 Ind Cas 559 Pat.

(13) *Ishar Singh Dharam Singh* v. *Ram Das Karam Chand*, 1926 Jour 108 (4): 96 Ind Cas 245; *Sohna Mal* v. *Khuda Baksh*, (1913) 18 Ind Cas 280 (281): 165 Pun L R 1913: 90 Pun W R 1913; *Manikhankar*, Ex parte, (1864) 2 Bom H C R 381; *Durga Prasad* v. *Het Ram*, 1923 All 79 (80): 20 All L J 912: 77 Ind Cas 91; *Ramal Das* v. *Imam Baksh*, 1923 Lah 431 (432).

(14) *Saraf* v. *Mussamut Gurdei*, 1890 Pun Re No 86. See also *Umat-ul-Mughni Begum* v. *Salig Ram*, (1915) 29 Ind Cas 137 (138): 126 Pun L R 1915: 51 Pun W R 1915 [Hearing fixed on holiday—Case taken up on next day and dismissed —Dismissal not proper].

(15) *Mussamut Ram Kaur* v. *Seth Multani Chand*, (1910) 8 Ind Cas 224 (224): 154 Pun W R 1910: 29 Pun L R 1910.

(16) *Satindra Nath Banerjee* v. *Banwari Mukunda Dass*, (1920) 54 Ind Cas 568 (569) Cal.

(17) *Lachmi Narain Marwary* v. *Balmakund*, 1924 P C 198 (200): 35 Mad L Tim 143: 5 L R P C 171: 47 Mad L Jour 441: 20 Mad L W 491: 4 Pat 61: 51 Ind App 321: 22 All L J 990: 26 Bom L R 1129: 40 Cal L Jour 439: 29 Cal W N 391: 1924 Mad W N 707: 5 Pat L Tim 623: 81 Ind Cas 747 P C; *Lakshmi Narain* v. *Maharaj Din*, 1927 Oudh 49 (50): 3 Oudh W N 921: 98 Ind Cas 1029.

O. 9, R. 8, Notes 3—6.

made, it is passed without jurisdiction.[18] The Court should in such cases adjourn the suit *sine die* with liberty to the plaintiff to apply to restore the suit to the list on payment of costs.[19]

4. More plaintiffs than one.—This rule is meant to provide for a case where *a single* plaintiff does not appear or, where there are several plaintiffs, and *all* of them do not appear.[1] Cases where *some only* of several plaintiffs do not appear, are provided for, in R. 10, *infra*.

5. More defendants than one.—Under this rule there can be a partial or total dismissal for default.[1] As has been seen in the Notes to R. 3 *supra*, so far as the defendant or defendants who appear are concerned, the order of dismissal will be one under this rule and will bar a fresh suit against them. With regard to the defendants who are absent, the dismissal will be under R. 3 and a fresh suit is not barred.[2] Even if the defendant appears and applies for time, the dismissal would fall only under this rule and not under R. 3.[3]

6. "Shall make an order that the suit be dismissed".—These words were substituted under the present Code to make it clear that the dismissal is not a decree but only an *order* which is not appealable.[1] The earlier decisions[2] which held that the dismissal under this rule was a decree are now no longer law.

The Court has no option under this rule but to dismiss the suit and is not justified in enquiring into the merits of the case[3] or received evidence or record statement from the defendant.[4] Where, however, the plaintiff has already let in

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(18) *Lachmi Narayan Tewari* v. *Ramsuram Tewari*, 1925 Pat 433 (434): 6 Pat L Tim 152: 86 Ind Cas 785; *Yagammal* v. *Arulayee Ammal*, 1930 Mad 158 (159): 57 Mad L Jour 781: 30 Mad L W 979: 53 Mad 395: 124 Ind Cas 605.

(19) See *Polapragada Sreeramulu* v. *Polapragada Naghabhushanam*, 1928 Mad 963 (964): 1928 Mad W N 542: 28 Mad L W 496: 112 Ind Cas 19 [Where the decision in 1924 P C 198 was interpreted to lay down this proposition].

Note 4.

(1) *Kulendra* v. *Rai Kishori*, 1921 Cal 176 (176): 48 Cal 57: 62 Ind Cas 112. See also *Md Kanni Rowther* v. *Naina Md*, 1931 Mad 590 (591): 33 Mad L W 604: 60 Mad L Jour 659: 132 Ind Cas 289: 54 Mad 770 [Suit under O 1, R 8—Non-appearance of persons not plaintiffs *eo nomine*—No dismissal of suit].

Note 5.

(1) *Parbhu Dayal Singh* v. *Tirbhuwan Singh*, 1925 All 425 (426): 85 Ind Cas 788.

(2) *Makundi Singh* v. *Parbhu Dayal*, 1926 All 169 (170): 23 All L J 993: 90 Ind Cas 2: 48 All 97.

(3) *Bajit Lal* v. *Rameshwar Singh Bahadur*, 1928 Pat 335 (336): 7 Pat 333: 9 Pat L Tim 669: 109 Ind Cas 264.

Note 6.

(1) *Parbati* v. *Tulsi Koeri*, (1913) 20 Ind Cas 1 (1): 18 Cal L Jour 128: 18 Cal W N 604: *Amrito Lal Mukherjee* v. *Ram Chander Roy*, (1902) 29 Cal 60 (62): *The Mayor of Lyons* v. *The Advocate-General of Bengal*, (1877) 26 Suth W R 1 (2) F B; *Beejoy Gobind* v. *Radha Benode*, (1868) 10 Suth W R 348 (348); *Balram* v. *Mulla*, (1892) 5 C P L R 81 (82); *Gazanafar Ali Khan* v. *Ashraf Lal*, (1902) 5 Oudh Cas 294 (295); *R S Dantra* v. *Israil Khan*, 4 L B R 17 (23) F B; *Gosto Behary* v. *Hari Mohun*, (1904) 8 Cal W N 313; *Maharajah of Vizianagram* v. *Lingam Krishna*, (1902) 12 Mad L Jour 473 (474); *Dakshinamoorthy Pillai* v. *The Municipal Council of Trichinopoly*, (1908) 31 Mad 157 (159): 3 Mad L Tim 336; *Mohammad Taka Ullah* v. *Mt Gulkandi*, 1925 Oudh 485 (485): 28 Oudh Cas 124: 85 Ind Cas 393: 1 Oudh W N 854; *Kannaya Lal* v. *National Bank*, 1907 Pun Re No 121: 51 Pun W R 1907 F B.

(2) *Ablakh* v. *Bhagirati*, (1887) 9 All 427 (428): 1887 All W N 66; *Uluck Monee Chowdhrain* v. *Panchoo Coomar Chunder Chowdry*, (1874) 21 Suth W R 124 (124); *Kartick Chander Pal* v. *Sridhar Mondal*, (1886) 12 Cal 563 (566); *Radha Nath Singh* v. *Chandi Charan Singh*, (1903) 30 Cal 660 (664): 7 Cal W N 486 F B; *Gosto Behary Sardar* v. *Hari Mohan Adak*, (1904) 8 Cal W N 313 (315); *Bhaguan Singh* v. *Pari*, 1889 Pun Re No 32; *Pandit Ram Kant* v. *Pandit Rajdeo*, 1897 Pun Re No 60: 6 Pun L R 1900; *Peramanayagam* v. *Arunachalla*, (1891) 1 Mad L Jour 385 (387); *Jugeshar Rai* v. *Railal Bahadur*, (1918) 45 Ind Cas 189 (190): 4 Pun L W 366.

(3) *Daulat Singh* v. *Maharaja Keshoprasad Singh*, 1921 Pat 325 (325): 2 Pat L Tim 36: 57 Ind Cas 75; *Phul Kuar* v. *Hashmatullah Khan*, (1915) 29 Ind Cas 553 (553): 37 All 460: 13 All L J 679.

(4) *Raj Narain* v. *Akroor Chunder*, (1875) 24 Suth W R 141 (141); *Parbati* v. *Tulsi Koeri*, (1913) 20 Ind Cas 1 (1, 2): 18 Cal W N 604: 18 Cal L Jour 128; *Mata Bux Lal* v. *Brij Mohan*, (1920) 55 Ind Cas 966 (966) All.

evidence, *it may decide the suit on the merits on such evidence*.[5] While dismissing under this rule the Court has no jurisdiction to add any proviso in the order, as, for example, that the order shall not prejudice the interest of the minor plaintiff.[6] Striking off the suit is not a proper mode of dismissing a suit under this rule.[7]

A filed a suit against *B* for recovery of a certain amount of money which had been paid under protest, and also for damages for wrongful attachment. The Court framed a preliminary issue on the question whether the suit so far as the return of the money was concerned, disclosed a cause of action, and after hearing arguments dismissed that part of the claim with costs and directed the suit to proceed as regards the claim for damages. No decree was drawn up in respect of the portion dismissed. When the suit came on for hearing the plaintiff was absent and the Court dismissed the *whole* suit for default under this rule. It was held by the Privy Council that the dismissal for default under this rule was wrong so far as the recovery of money was concerned, inasmuch as a final decision had been passed thereon on the merits, and that, therefore, an appeal lay so far as such portion was concerned.[8]

7. **Unless the defendant admits.**—When the defendant admits the claim of the plaintiff either in whole or in part the Court cannot dismiss the suit but must pass a decree for the amount admitted.[1]

Where, however, the admission of the defendant is not in reality an admission of the claim of the plaintiff, *e.g.*, where the plaintiff claims to pre-empt on a payment of Rs. 1,500 and the defendant admits the right of the plaintiff to pre-empt but states that the price is Rs. 12,000 the Court, cannot pass a decree in favour of the plaintiff under this rule for pre-emption on payment of Rs. 12,000 but must, on default by the plaintiff, dismiss the suit.[2]

The word 'claim' is not necessarily synonymous with the amount sued for. It may refer to the right claimed irrespective of the amount stated in the relief column.[3] A decree passed on the admission of the defendant is appealable.[4]

8. **Effect of dismissal under this rule.**—Unlike the dismissal of a suit under R. 3, a dismissal under this rule precludes a fresh *suit* on the same cause of action.[1] But two other remedies are open to the plaintiff:—

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(5) *Kesri Chand* v. *National Jute Mills Co, Ltd.* (1912) 17 Ind Cas 87 (87): 40 Cal 119: 16 Cal W N 968.

(6) *Kirit Narayan* v. *Chanchal Das*, 1921 Pat 103 (1), (103): 6 Pat L Jour 317: 63 Ind Cas 736.

(7) *Khoob Lall* v. *Toolsie Singh*, (1872) 17 Suth W R 219 (220).

(8) *Kanhaiya Lal* v. *National Bank*, 1923 P C 114 (116): 50 Ind App 162: 4 Lah 284: 25 Bom L R 1248: 45 Mad L Jour 497: 33 Mad L Tim 349: 75 Ind Cas 7: 40 Cal L Jour 1: 28 Cal W N 689 P C.

Note 7.

(1) *Khemchand Daryanomal* v. *Menghomal Chuharmal*, 1921 Sind 50 (51): 15 Sind L R 172: 66 Ind Cas 789; *Sanahi Ram Kandhaya Lal* v. *Gulab Chand Kalu Ram*, 1925 Pat 712 (713): 3 Pat L R 249: 89 Ind Cas 614; *Abdul Majid* v. *Wahidullah*, 1926 All 284 (284): 92 Ind Cas 496. See also *Ismail Ebrahim* v. *Haji Jan Mahomed*, (1909) 3 Ind Cas 992 (993): 33 Bom 475: 10 Bom L R 1172.

(2) *Mehr Daim* v. *Shahamad*, (1921) 60 Ind Cas 724 (724) Lah.

(3) *Munisawmi Goudu* v. *Junjadu*, (1916) 35 Ind Cas 65 (66, 67) Mad.

(4) *Befoy Chand Mahatap* v. *Rakhal Chattoraj*, (1912) 15 Ind Cas 601 (602): 16 Cal L Jour 559.

Note 8.

(1) *Chinnammal* v. *Papathi Ammal*, 1925 Mad 986 (988): 85 Ind Cas 982; *Kalyan Singh* v. *Ram Gulam Singh*, (1915) 29 Ind Cas 902 (903) Cal.

O. 9, R. 8, Notes 8—9.

(1) to apply under the next rule for restoration of the suit, or

(2) to apply for a review of the order.[2]

It is not necessary that the plaintiff should apply under R. 9 before applying for a review[3] and there is nothing in the Code to limit the parties to one particular remedy. But a review will not lie except on the grounds mentioned in O. 47, R. 1. It has been held by the High Court of Bombay in the undermentioned case[4] that where a suit is dismissed under O. 9, R. 8 there could be no such grounds for review as those mentioned in O. 47, R. 1, inasmuch as the fact that the applicant was absent when the suit is called on for hearing is neither a discovery of any new and important matter, nor an error apparent on the face of the record, nor a ground analogous to any of those specified in the rule. There is a conflict of opinion as to whether the plaintiff who has failed to make an application within thirty days under O. 9, R. 9 can be allowed to prefer an application for review. The High Courts of Patna[5] and Lahore,[6] held that he cannot be allowed to do so, on the ground that the law of limitation should not be allowed to be evaded in that way. The High Courts of Madras[7] and Calcutta[8] on the other hand, have held that such an application would lie and that the fact that the plaintiff will get a longer period of limitation by the adoption of a particular remedy is no ground for refusing him relief.

9. **Revision.**—Where the Court refuses to act under this rule in a case to which the rule applies[1] or acts under this rule illegally or with material irregularity[2] or acts in excess of its jurisdiction under this rule,[3] a revision will lie.

O. 9, R. 9.

R. 9. [S. 103.] (1) W*here* a suit[6] is wholly or partly dismissed under rule 8, the plaintiff[7] *shall be precluded from bringing a fresh suit*[5] in respect of the *same cause of action*. But he may apply for an order to set the dismissal aside, and if *he satisfies the Court that there was sufficient cause*[8] *for his non-*

Decree against plaintiff by default bars fresh suit.

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(2) *Abdul Razak* v. *Muhammad Sharif*, 1925 Lah 517 (518): 86 Ind Cas 616; *Muthu Pillay* v. *Lakshminarayan*, 1928 Rang 177 (178): 6 Rang 254: 111 Ind Cas 80; *Velayutha Mudaliar* v. *Sundaresam Pillai*, 1922 Mad 416 (416): 1922 Mad W N 483: 72 Ind Cas 482; *Ram Sundar* v. *Ram Bandhan*, (1875) 7 N W P 126.

(3) *Raj Narain* v. *Ananga Mohan*, (1898) 26 Cal 598 (601); *Virupakshi Gowd* v. *Bandapa*, (1919) 50 Ind Cas 327 (327): 37 Mad L Jour 59: 9 Mad L W 311: 1919 Mad W N 246; *Ramanadhan* v. *Narayanan*, (1904) 27 Mad 602 (607): 14 Mad L Jour 321 [For review pending appeal].

(4) *Mahadeo* v. *Lakshminarayan*, 1925 Bom 521 (522): 27 Bom L R 1150: 90 Ind Cas 610: 49 Bom 839. See however *Pandurang* v. *Mohan Chhatrabhuj*, 1923 Bom 395 (395): 80 Ind Cas 178.

(5) *Deodip Singh* v. *Gopal Singh*, (1917) 38 Ind Cas 53 (53): 1 Pat L Jour 547: 3 Pat L W 66; *Rajah Sheoraj Nandan Singh* v. *Girijanand Singh*, (1920) 58 Ind Cas 191 (192): 1 Pat L Tim 573.

(6) *Abdul Razak* v. *Md Sharif*, 1925 Lah 517 (518): 86 Ind Cas 616; *Nur Muhammad* v. *Dina*, 1897 Pun Re No 15.

(7) *Virupakshi Gowd* v. *Bandappa*, (1919) 50 Ind Cas 327 (327): 37 Mad L Jour 59: 9 Mad L W 311: 1919 Mad W N 246 [Following 26 Cal 598: 16 Cal W N 643].

(8) *Raj Narain* v. *Ananga Mohan Bhandari*, (1899) 26 Cal 598 (601). But see *Koilash Mondal* v. *Nabadeip*, (1898) 2 Cal W N 318 (319).

Note 9.

(1) *Golab Kuer* v. *Bibi Saira*, (1919) 53 Ind Cas 41 (42) Pat.

(2) *Atra* v. *Jagta*, 1921 Lah 139 (139): 3 Lah L Jour 53.

(3) *Durga Prasad* v. *A H Forbes*, 1925 Pat 374 (375): 6 Pat L Tim 127: 1925 Pat H C C 109: 86 Ind Cas 787.

appearance when the suit was called on for hearing, the Court *shall make an order setting aside* the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. O. 9, R. 9, Note 1.

(2) No order shall be made under this *rule* unless notice of *the* application has *been* served *on the opposite party.*

[1877—Ss. 103, 108, 109, 588; 1859—S. 119. *See* O. 22, R. 9.]

Local Amendments.

LAHORE.

To Rule 9 (1) the following proviso was *added*:—

Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default.

BOMBAY.

The following shall be *added* as sub-Rule (3), namely:—

"(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

Synopsis.

1. Scope of the rule.
2. "Appearance," meaning of.
3. Appearance in person.
4. Appearance by pleader.
5. Bar of fresh suit.
6. Suit, meaning of.
7. Minor plaintiff.
8. "Sufficient cause."
9. Restoration in favour of one of several plaintiffs,—Whether can operate in favour of all.
10. Inherent power of Court to order restoration. See Note 3 to S. 151, ante.
11. Limitation.
12. Appeal.
13. Revision.

Applicability to other proceedings. See Notes 6 and 8, F.-N. (32).
Application to restore suit—Dismissal for default—Rule if applies. See R. 1, Note 2.
Letters Patent Appeal. See Note 12, Pt. (4).
Opposite party—Meaning. See O. 9, R. 14.
Rule applicable only when dismissal under R. 8. See Note 1.
Same cause of action. See Note 5, Pt. (2).
Whether rule applies to execution proceedings. See R. 1, Note 1.

1. **Scope of the rule.**—The remedy provided for by this rule is not open to a plaintiff whose suit has been dismissed for any reason, other than default of appearance under R. 8.[1] Hence, no application lies under this rule where the dismissal is under O. 17, R. 3[2] or O. 11, R. 21,[3] or where the

Order 9, Rule 9—Note 1.

(1) *Enatulla* v. *Jibban Mohan Roy*, (1914) 23 Ind Cas 769 (770): 41 Cal 956: 18 Cal W N 775: 19 Cal L Jour 535; *Jwala Prasad* v. *Bigalram*, (1915) 28 Ind Cas 905 (905) All; *Kandath* v. *Puthiyadath*, 1921 Mad 417 (418): 14 Mad L W 15: 1921 Mad W N 390: 63 Ind Cas 961 [Default under O 10, R 4 not covered by O 9]. See contra *Nandan Sahu* v. *Hari Shankar*, (1932) 138 Ind Cas 613 (614) All [Default under O 10, R 4 is covered by O 9].

(2) *Comalammal* v. *Rangasamy Ayyangar*, (1868-69) 4 Mad H C R 56 (59).

(3) *Maung Khant Gyi* v. *Ma Thet Hnin*, 1925 Rang 218 (218): 3 Rang 63: 88 Ind Cas 751.

O. 9, R. 9, Notes 1–5.

dismissal is due to a failure on the part of the plaintiff to adduce evidence,[4] or where the plaint is rejected under O. 7, R. 11 for failure to pay deficient Court-fees.[5] The rule applies only to suits and not to appeal.[6] It applies also to suits under S. 9 of the Specific Relief Act, 1877, which are dismissed for default. That section bars only a review and not an application for rehearing.[6-8] As to the restoration of appeals dismissed for default of appearance of the appellants, *see* O. 41, R. 19.

The Court cannot *suo motu* order a restoration without an application on the part of the plaintiff.[7] The word "plaintiff" has been held to include his legal representatives who can also therefore apply under this rule.[8] No fresh *vakalathnama* is necessary for an application under this rule.[9]

The effect of restoration under O. 9, R. 9 is to bring the suit, as regards parties to the exact position in which it was at the time of dismissal.[10]

2. **"Appearance.", meaning of.**—The term appearance has nowhere been defined in the Code and it must be understood in reference to the particular subject-matter to which it relates.[1] "Appearance" in O. 9 means either:

(*a*) by the party in person, or

(*b*) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some other person able to do so.[2]

For a full discussion, *see* O. 3, R. 1, *ante*.

3. **Appearance in person.**—*See* Note 4 to O. 3, R. 1.

4. **Appearance by pleader.**—*See* Note 6 to O. 3, R. 1.

5. **Bar of fresh suit.**—Where a suit is dismissed for default under this rule, it cannot be said to have been *heard* and decided on the merits and therefore cannot operate as *res judicata*.[1] But the plaintiff is, under the specific provisions of this rule barred from bringing a fresh suit on the *same cause of*

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(4) *Kartic* v. *Sridhar*, (1886) 12 Cal 563 (564); *Madhu Sudan Singh* v. *Krishna Prasad Singh*, (1917) 39 Ind Cas 946 (947): 1 Pat L W 790: 3 Pat L W 428; *Muhammad Azeem-ool-lah* v. *Ali Buksh*, (1873) 5 L W P H C R 74.

(5) *Rameshwardhari Singh* v. *Sadhu Saran Singh*, 1923 Pat 354 (354): 4 Pat L Tim 261: 72 Ind Cas 629: 2 Pat 504; *Karanath Kalati Manakkal Narayan* v. *Vellapalli Pocket Sankaran Nayar*, 1929 Mad 344 (345): 117 Ind Cas 789. See also *Brundaban* v. *Bandhu*, (1931) 133 Ind Cas 449 (449): 1932 Pat 11.

(6) *Ram Lal Choudhry* v. *Surdharee Jah*, 1864 Suth W R Mis 21 (21); *Umda* v. *Acowric*, (1867) 7 Suth W R 425 (426).

(6-a) *Anthony* v. *Dupont*, (1882) 4 Mad 217 (218).

(7) *Syed Sham Shad Mehdi* v. *Mahabub Khan*, 1925 Oudh 105 (106): 11 Oudh L J 573: 80 Ind Cas 75; *Nageshar* v. *Bhagy*, 1922 Oudh 160 (160): 25 Oudh Cas 67: 68 Ind Cas 246: 1922 Mad W N 483 (484).

(8) *Rampyare* v. *Rup Narain*, (1903) 6 Oudh Cas 34 (36); *Mamraj* v. *Ghandwa Mal*, 1891 Pun Re No 117.

(9) *Narayan* v. *Narayan*, 1890 Bom P J 124 (124).

(10) *Kailash Chandra Ray* v. *Hirdoy Chandra Das*, 1924 Cal 814 (815): 39 Cal L Jour 367: 83 Ind Cas 958; *Ashutosh Roy* v. *Anata Ram Bhatta Charji*, (1919) 50 Ind Cas 727 (728) Cal.

Note 2.

(1) *Seclay* v. *Evans*, (1838) 19 Wendell (N Y) 459 cited in 34 Cal 403: 11 Cal W N 284: 5 Cal L Jour 247 F B.

(2) *Sunder Lal* v. *Gourprasad*, (1899) 23 Bom 414 (421, 422): Chitty's S C C R 561 [S 38, Presidency Small Cause Courts Act]; *Namperumal Naidu* v. *Alwar Naidu*, 1928 Mad 831: 110 Ind Cas 377.

Note 5.

(1) *Sankar Nath* v. *Madan Mohan Das*, (1909) 5 Ind Cas 298 (300): 14 Cal W N 298: 11 Cal L Jour 61; *Bindraban* v. *Moti*, (1914) 22 Ind Cas 820 (821): 12 All L J 53; *Rangrav Ravji* v. *Sidhi Mahomad*, (1882) 6 Bom 482 (486); *Radha Prasad Singh* v. *Lal Sahab Rai*, (1891) 13 All 53 (62): 17 Ind App 150: 5 Sar 600. P C. See also Note 106 to S 11.

action[2] and the fact that the *mode of relief* claimed in the subsequent suit is different will not be a ground for not applying the bar under this rule.[3] Thus a suit on the basis of entries in the plaintiff's account book, in respect of the same sum of money for which a prior suit on a promissory note given therefor had been dismissed for default will be barred under this rule.[4] Similarly where a suit filed by the voluntary liquidator of a company against an alleged shareholder for the recovery of a sum of money due to the company is dismissed for default under this rule a subsequent application by the official liquidator to have the name of the defendant placed in the list of contributories in respect of the same claim is barred.[5]

O. 9, R. 9, Note 5.

Where the cause of action in the subsequent suit is *different* from that in the first suit this rule will not apply.[6] Thus a suit for partition dismissed for default under this rule does not bar a subsequent suit for partition. The reason is that the right to enforce partition is a *continuous* right which is a legal incident of a joint tenancy and which enures so long as the joint tenancy continues.[7] *See* Note 36 to S. 11, *ante*. As regards suits for redemption, it was held by the Privy Council in *Shanker Baksh* v. *Daya Shanker*[8] that where a first suit for redemption was dismissed for default under this rule, a second suit for redemption will be barred as being based on the same cause of action. The Allahabad[9] and Bombay[10] High Courts have, however, distinguished the said decision of the Privy Council on the ground that their Lordships did not consider the effect of S. 60 of the Transfer of Property Act, and that the effect of that section is not to bar a second suit for redemption.

The rule does not apply unless the plaintiff in the prior suit is the plaintiff in the subsequent suit.[11] Thus a dismissal for default of a suit by a

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(2) *Kalyan Singh* v. *Ram Gulam Singh*, (1915) 29 Ind Cas 902 (903) Cal; *Gobind Chunder* v. *Afzul Rabbani*, (1883) 9 Cal 426 (429): 12 Cal L Rep 29; *Ramchandra* v. *Bhikibai*, (1881-1882) 6 Bom 477 (478); *Purshottam* v. *Chatargir*, (1900) 25 Bom 82 (84, 85): 2 Bom L R 680 [Default of appearance in Mamlatdar's Court under S 13 of Bombay Act III of 1876—See now S 26 of Bombay Act II of 1906—Mamlatdars' Courts Act]; *Gopal Singh* v. *Ganpat Rai*, (1916) 35 Ind Cas 321 (322): 66 Pun Re 1916: 117 Pun W R 1916: 130 Pun L R 1916; *Gopi Ram Battica* v. *Jagarnath Singh*, 1929 Pat 685 (689, 693): 122 Ind Cas 801: 9 Pat 447: 11 Pat L Tim 505 [Suit for declaration of title dismissed for default—Subsequent suit for possession on the same facts barred].

(3) *Maung Ba Tu* v. *Ma Thet Su*, 1928 Rang 73 (74): 5 Rang 785: 108 Ind Cas 809; *Shankar Baksh* v. *Daya Shankar*, (1888) 15 Cal 422 (430, 431): 15 Ind App 66: 5 Sar 107: 12 Ind Jur 132: R & J 100 P C; *Mahomed Khan* v. *Mt Nekan*, 1926 Lah 562 (563): 96 Ind Cas 207.

(4) *Munder* v. *Baij Nath*, (1920) 54 Ind Cas 424 (425): 42 All 193: 18 All L J 81.

(5) *Rup Ram* v. *Fazal Din*, (1920) 57 Ind Cas 223 (223): 1 Pun L R 1921: 1 Lah 237.

(6) *Promotha Bhusan Deb Roy* v. *Narendra Bhusan Roy*, (1920) 56 Ind Cas 932 (934) Cal: *Raja Bahadur* v. *Syam Lal*, (1915) 30 Ind Cas 568 (569) All; *Balkisen* v. *Raghubar Dayal*, 1923 All 409 (410): 45 All 81: 74 Ind Cas 991; *Asia Bivi* v. *Mahomed Rowther*, (1921) 60 Ind Cas 201 (202): 39 Mad L Jour 412: 12 Mad L W 431; *Giribala Dasi* v. *Nitya Lal Sinha*, (1917) 41 Ind Cas 905 (906) Cal; *Bindrabun* v. *Moti*, (1914) 22 Ind Cas 820 (821): 12 All L J 53; *Gopal Lal Ray* v. *Taj Muhammad*, 1927 Pat 375 (376): 103 Ind Cas 615: 7 Pat 28: 8 Pat L Tim 789; *Udaram* v. *Gondu*, 1925 Nag 366 (368): 87 Ind Cas 35 [Even one different fact makes causes of action different]; *Ramachandra Jivaji Tilve* v. *Khatal Mahomed Ghori*, (1886) 10 Bom 28 (30).

(7) *Maung Ba Tu* v. *Ma Thet Su*, 1928 Rang 73 (74, 75): 5 Rang 785: 108 Ind Cas 809; *Madhura Gramani* v. *Thummala Sesha Reddi*, 1926 Mad 1018 (1018): 51 Mad L Jour 254: 24 Mad L W 298: 1926 Mad W N 815: 49 Mad 939: 97 Ind Cas 622; *Bisheshar Das* v. *Ram Prasad*, (1906) 28 All 627 (629): 3 All L J 379: 1906 All W N 142; *Madan Mohan* v. *Baikanta*, (1906) 10 Cal W N 839 (840).

(8) *Shankar Baksh* v. *Daya Shankar*, (1888) 15 Cal 422 (431): 15 Ind App 66: 5 Sar 107: 12 Ind Jur 132: R & J 100 P C. See also *Imdad Ali* v. *Harnat Ali*, (1905) Pun Re No 32: 39 Pun L R 1905: 29 Pun W R 1905; *Gurditta* v. *Narain Das*, 1907 Pun Re No 43: 169 Pun L R 1908: 101 Pun W R 1907.

(9) *Fatch Chand* v. *Jagannath Prashad*, (1909) 2 Ind Cas 630 (631, 632) All.

(10) *Shridar Sadba Powar* v. *Ganu Mahadu Kavade*, 1928 Bom 67 (67): 52 Bom 111: 30 Bom L R 34: 108 Ind Cas 22.

(11) *Ottapurakal Thazhate Soopi* v. *Cherichil Pallikal Uppathumma*, (1910) 5 Ind Cas 698 (699): 33 Mad 31; *Kanji* v. *Habib*, (1900) 2 Bom L R 206 (207); *Kora Mal* v. *Raghubir*

O. 9, R. 9, Notes 5—8.

Hindu widow in respect of her deceased husband's estate is no bar to a fresh suit by the reversioner in respect of the same matter.[12]

6. **Suit—Meaning of.**—According to the High Courts of Allahabad[1] and Calcutta[2] the rule is plainly intended to apply only to *suits* and not to *applications* such as applications for probate. But the High Court of Madras has held that the present rule applies to such applications which, under S. 83 of the Probate and Administration Act, are *treated as suits*.[3]

The bar under this rule does not apply to a fresh application for adjudication as insolvent after the dismissal of a prior application for default.[4] Nor does it apply to the annulment of an order of adjudication owing to default.[5] The reason is that S. 10, cl. (2) of the Provincial Insolvency Act itself provides for a remedy in such cases.

The rule does not apply to applications under S. 158 of the Bengal Tenancy Act.[6]

See also Note 5 to S. 2, sub-cl. (2) and Note 21 to S. 11.

7. **Minor plaintiff.**—A suit by a minor is liable to be dismissed for default of appearance on the part of the next friend[1] and the provisions of this rule cannot be nullified because the plaintiff happens to be a minor.[2] But where the next friend is guilty of *gross negligence* in the conduct of the suit, the minor can bring a fresh suit, notwithstanding this rule, either himself after attaining majority or through another next friend.[3] He can also apply under this rule for setting aside the order of dismissal.[4]

8. "**Sufficient cause**".—The only ground for restoring a suit under this rule is the existence of a sufficient cause for the non-appearance of the party at the time the suit was called on for hearing.[1] The term "sufficient cause" has not been defined anywhere.[2] It is a question of fact depending upon the

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Lania, 1929 All 861 (862) [Mortgagees fraudulently allowing suit to be dismissed for default—Attaching creditors are not bound by dismissal].

(12) *Virumal* v. *Mussamat Bhagwandevi*, 1884 Pun Re No 80.

Note 6.

(1) *Parma* v. *Nek Ram*, (1915) 29 Ind Cas 133 (134): 37 All 380: 13 All L J 441.

(2) *Ramani Debi* v. *Kumud Bandhu*, (1910) 7 Ind Cas 126 (129): 14 Cal W N 924: 12 Cal L Jour 185; *Suriya Kumar Deb Chaudhury* v. *Jagnarayan Deb*, 1926 Cal 1057 (1057): 53 Cal 578: 98 Ind Cas 374.

(3) *Rallabandi Veeramma* v. *Rallabandi Subba Rao*, (1919) 52 Ind Cas 639 (640) Mad.

(4) *Venkatagiri Rangappa* v. *Maddipatla Konappa*, 1927 Mad 579 (580): 1927 Mad W N 176: 101 Ind Cas 349: 39 Mad L Tim 118.

(5) *Venugopalachari* v. *Chinnulal*, 1926 Mad 942 (943): 51 Mad L Jour 209: 1926 Mad W N 674: 49 Mad 935: 97 Ind Cas 706.

(6) *Janki Ray* v. *Raja Kalanand Singh*, 1923 Pat 381 (382): 2 Pat 192: 4 Pat L Tim 705: 74 Ind Cas 464.

Note 7.

(1) *Gur Devi* v. *Raman Mal*, (1910) 8 Ind Cas 547 (547): 99 Pun L R 1910.

(2) *Vishindas* v. *Narumal*, 1921 Sind 200 (200): 17 Sind L R 41: 80 Ind Cas 985.

(3) *Lala Sheo Churn* v. *Ramnandan*, (1895) 22 Cal 8 (14).

(4) *Adayapadi Ramanna Udpa* v. *Krishna Udpa*, (1914) 25 Ind Cas 450 (451): 27 Mad L Jour 167; *Ramappa Nayudu* v. *Sambournathachi*, 1925 Mad 774 (775): 21 Mad L W 325: 87 Ind Cas 117.

Note 8.

(1) *Lakshmanan Chetty* v. *Yellayappa Chetty*, (1910) 4 L B R 221 (222) [The applicant must be, however, given an opportunity to adduce evidence in support of his allegations]. See *Amir Chand* v. *Naunit Ram*, (1928) 106 Ind Cas 821: 1928 Notes 34 (*f*); *Subhan Shah* v. *Karam Khan*, 1876 Pun Re No 113 [It is enough if he shows sufficient cause for *his* absence]; *Mahomed Ali* v. *Mehr Din*, (1929) 117 Ind Cas 382: 1929 Notes 37 (*c*) [Application to restore case dismissed for default—Duty of applicant to explain counsel's absence].

(2) *Khushi Muhammad* v. *Mst Barkat Bibi*, 1927 Lah 622 (624, 625): 103 Ind Cas 425: 28 Pun L R 554.

circumstances of each case[3] and is not subject to any hard and fast rule except that the Court must exercise a judicial discretion in the matter.[4] O. 9, R. 9, Note 8.

Absence of party.—A generous construction should be placed on the enactment to restore a suit dismissed for default,[5] and a party should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part.[6] The test to be applied as a general rule is to see whether the party applying, honestly intended to be present at the hearing of the suit and did his best to do so.[7] The High Court of Allahabad has, in the undermentioned case[8] held that even though the plaintiff was negligent enough to start for the last train and missed it, the suit ought to be restored, observing that negligence is human and not irreparable and can be amply compresented by costs. The following grounds have been held to be sufficient causes for the absence of the party within the meaning of this Rule 13.

(1) A *bona fide* mistake which is not unreasonable or for which the party is not responsible.[9] Thus where the Bench Clerk gave a wrong date of hearing[10] or where the suit is dismissed on a date not fixed for hearing[11] or where the day fixed for hearing is a holiday[12] or where the suit is transferred without notice to the parties[13] or where the suit is called on after 5 P.M.

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(3) *Khushi Muhammad* v. *Mst Barkat Bibi*, 632: 46 Mad 60: 68 Ind Cas 971. 1927 Lah 622 (624, 625): 103 Ind Cas 425: 28 Pun L R 554; *Shankar Das* v. *Crohan*, 1879 Pun Re No 26; *Damodar Das* v. *Raj Kumar Das*, 1922 Pat 485 (488): 1 Pat 188: 69 Ind Cas 837 [Suit to remove the defendant from Mahantship —Court appointing Receiver, but refusing to direct him to furnish defendant with funds—Held sufficient cause]; *Jesa Ram* v. *Thakar Das*, (1912) 13 Ind Cas 468 (468): 197 Pun W R 1911 [Petition dismissed in the early part of the day owing to the temporary absence of the party or pleader—Absence explained—The suit must be restored]; *Mst Sardar Begam* v. *Muhammad Said*, 1930 Lah 943 (943): 31 Pun L R 550: 129 Ind Cas 890 [Suit dismissed in the early part of the day—Party, pardanashin lady—Lower Court ought to have restored the suit]. See also *Faqir Chand* v. *Lala Harikishen Das*, 1929 All 599 (599): 117 Ind Cas 111: 51 All 908 [Plaintiff appearing on same day and satisfying Court for his non-appearance is a sufficient cause]; *Visheswar* v. *Jamshetji*, 1892 Bom P J 104 (104) [Misapprehension as to date of hearing—Sufficient cause].

(4) *Abdul Aziz* v. *Punjab National Bank, Ltd*, 1929 Lah 96 (99): 114 Ind Cas 76: 10 Lah 570: 30 Pun L R 628; *Manni Lal* v. *Sheobaran*, 1924 Oudh 389 (390): 27 Oudh Cas 103: 11 Oudh L J 412: 78 Ind Cas 157 [Court should not surrender its discretion to the dictation of parties]; *Currimbhai* v. *Moos*, 1929 Bom 250 (250): 31 Bom L R 468: 119 Ind Cas 187 [Dissenting from the view expressed in 1925 Bom 423 and 1924 Bom 392 that when a party arrives late on the same day, the suit must, as a *rule of practice*, be restored, on payment of costs. To the same effect is 1923 Bom 480].

(5) *Mittadar Venkoba Royar* v. *Mittadar Kadiriappa Goundar*, (1914) 23 Ind Cas 614 (615): 1914 Mad W N 344; *Partap Singh* v. *Narain Das*, 1905 Pun Re No 72: 159 Pun L R 1905: 114 Pun W R 1905; *Sarfaraz Khan* v. *Parbatia*, (1917) 41 Ind Cas 918 (918): 15 All L J 628.

(6) *Arunachala Ayyar* v. *Subbaramiah*, 1923 Mad 63 (64): 1922 Mad W N 600: 31 Mad L Tim 257: 16 Mad L W 583: 43 Mad L Jour

(7) *Arunachála Ayyar* v. *Subbaramiah*, 1923 Mad 63 (64): 1922 Mad W N 600: 31 Mad L Tim 257: 16 Mad L W 583: 43 Mad L Jour 632: 46 Mad 60: 68 Ind Cas 971 [The fact that by some human possibility the defendant could have been present in time does not affect his right to have the *ex parte* decree set aside]; *Aktar Hossain* v. *Hussain Begam*, (1932) 56 Cal L Jour 12 (14) [One hour late in bringing witnesses, though party did his best in muddle-headed way].

(8) *Anrudh Singh* v. *Mt Rupa Kunwar*, 1925 All 601 (601): 6 L R All (Civ) 221: 87 Ind Cas 118. See also *Amin Chand* v. *Karam Chand*, 1927 Lah 40 (41): 98 Ind Cas 868; *Malhar Rao* v. *Jagannath*, 1928 Nag 75 (76): 105 Ind Cas 842.

(9) *Rampertab* v. *Jakeeram*, (1896) 23 Cal 991 (995); *Hardatrai* v. *F & B Association*, (1865-67) 3 Bom H C R O J 60.

(10) *Wazir Chand* v. *B M Bharadwaza*, 1924 Rang 271 (272): 3 Bur L Jour 34: 83 Ind Cas 256; *Maung Pway* v. *Saya Pe*, 1927 Rang 46 (47): 4 Rang 408: 99 Ind Cas 717.

(11) *Kaleekristo* v. *Mohomad Kader*, (1869) 12 Suth W R 428 (429); *Raja Bala Dasi* v. *Jai Chand Lal Babu*, 1930 Cal 251 (251): 50 Cal L Jour 549: 126 Ind Cas 411.

(12) *Mst Umat-ul-Mughni Begum* v. *Salig Ram*, (1915) 29 Ind Cas 137 (138): 126 Pun L R 1915: 51 Pun W R 1915.

(13) *Ganga Ram* v. *Gujar Mal*, (1924) 84 Ind Cas 238 (239): 1923 Lah 444; *Md Sharif* v. *Din Md*, 1927 Lah 365 (365): 101 Ind Cas 203 [No knowledge of date of hearing]; *Anantha Laxmi* v. *Narasimhacharlu*, 1926 Mad 1210 (1211): 97 Ind Cas 687, (Do.); *Jamna Das* v. *Bishan Das*, (1917) 41 Ind Cas 889 (890): 1917 Pun L R 136: 1917 Pun W R 63 [Want of notice of date of hearing]; *Md Hussain* v. *Md Usman*, (1919) 53 Ind Cas 333 (334): 1920 Pun L R 52: 1919 Pun W R 87, (Do.). See *Baij Nath* v. *Wali Husan*, (1916) 32 Ind Cas 936 (937) All, (Do.).

O. 9, R. 9, Note 8.

on the day of hearing[14] or where the absence is due to some confusion regarding the observance of a local holiday[15] the suit was ordered to be restored.

(2) Where the plaintiff was prevented from appearing owing to a breach in the railway line.[16]

(3) Where the plaintiff was an in-patient in a dispensary.[17]

(4) Where the agent of the plaintiff left the Court after attending to some cases of the plaintiff under the *bona fide* belief that the plaintiff had no more cases that day.[18]

(5) Where the plaintiff was present but went away to answer imperative calls of nature.[19]

(6) Where the party is prevented from appearing owing to the fraud of the opposite party.[20]

(7) Where in a land acquisition case the Collector who was a party admitted receipt of notice of the proceeding but did not attend owing to pressure of work.[20-a]

The following have been held not to amount to sufficient cause within the meaning of this rule:—

(1) Where the non-appearance is wilful and deliberate.[21]

(2) Where the party deliberately takes the risk of not obtaining a carriage in time or fails to be in time to catch the train.[22]

(3) Where he leaves the Court-house to attend to his other business without instructing his pleader[23] or thinking that a part heard case will take some more time.[24]

(4) Illness of a near relation of the party.[25]

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(14) *H Bewis & Co* v. *Ram Prasad*, 1922 All 72 (73): 20 All L J 188: 66 Ind Cas 167: 44 All 325.

(15) *Krishan Dass* v. *Rama Ugra Singh*, 1923 All 549 (550): 21 All L J 500: 4 L R A All (Civ) 423: 74 Ind Cas 845.

(16) *Arunachala Iyer* v. *Subbaramiah*, 1923 Mad 63 (64): 1922 Mad W N 600: 31 Mad L Tim 257: 16 Mad L W 583: 43 Mad L Jour 632: 46 Mad 60: 68 Ind Cas 971; *Kirani Ahmedulla* v. *Subabhat*, (1880-81) 8 Bom 28 (31) [Sudden closing of telegraph communication—Inability to communicate with pleader].

(17) *Lachman Das* v. *Ramji Das*, 1926 Lah 541 (542): 95 Ind Cas 240; *Chandramathi* v. *Narayanasawmy*, 5 Ind Cas 23 (26): 19 Mad L Jour 760: 7 Mad L Tim 369: 33 Mad 241 [Illness of party].

(18) *S K S Krishnappa* v. *Jhanda*, 1929 Rang 224 (224): 122 Ind Cas 288.

(19) *Hakim Rai* v. *Rahim Baksh*, 1926 Jour 139 (4): 8 Lah L Jour 422: 27 Pun L R 431: 96 Ind Cas 402.

(20) *Denoo Paroye* v. *Chinta Monee Chowdhry*, (1872) 18 Suth W R 457 (457); *Damodur* v. *Choonee*, 2 Hyde 216.

(20-a) *M S Mahomed* v. *Collector of Toungoo*, 1927 Rang 150 (153): 5 Rang 80: 102 Ind Cas 379.

(21) *Gurdit Singh* v. *Sohan Singh*, 1905 Pun Re No 46: 173 Pun L R 1905: 32 Pun W R 1905; *Ramachandra* v. *Raju*, 1921 Mad 617 (618): 13 Mad L W 334: 62 Ind Cas 878; *Miran Baksh* v. *Rattam Chand*, 1890 Pun Re No 71.

(22) *Issarsingh* v. *Udhavdas*, 1921 Sind 55 (57): 17 Sind L R 105: 83 Ind Cas 749; *Kali Prosad Tewary* v. *Pundit Prayag Raj*, (1913) 19 Ind Cas 234 (234) Cal.

(23) *Charu Chandra Ghose* v. *Chandi Charan Roy*, (1915) 27 Ind Cas 492 (494): 19 Cal W N 25.

(24) *Manilal Dhunji* v. *Gulam Hussain Vazeer*, (1889) 13 Bom 12 (14, 15).

(25) *Rambhanjan Singh* v. *Pasupat Rai*, 1924 Pat 271 (272): 2 Pat 784: 74 Ind Cas 847; *Sreemutty Toolsy Money Dassee* v. *Sreemutty Prosad Money Dassee*, (1898) 2 Cal W N 490 (491). But see *Godhni* v. *Shyam Lal*, 1921 All 264 (265): 19 All L J 547: 63 Ind Cas 737 [Illness of daughter held sufficient cause].

O. 9, R. 9, Note 8.

Absence of pleader.—In the case of absence of the pleader, it should be considered whether there was a *bona fide* and reasonable attempt on the part of the vakil to put in appearance; and due regard must be had to the exigencies of his professional duties.[26] Thus where the pleader was sitting in the adjoining Court-room and did not hear the suit being called but soon after dismissal appeared and applied for restoration[27] or where the pleader was sitting in the Bar-room and by the time he could come up the case was called and dismissed[28] or when the suit was called for hearing the party or his agent went to fetch his pleader who was engaged in a different Court and the Court in the meantime dismissed the suit[29] it was held to be sufficient cause. Similarly when the pleader could not attend owing to illness and had no time to make fresh arrangements[30] or where the pleader who was ill, entrusted the brief to another pleader who was also unavoidably absent[31] it was held that there was sufficient cause for non-appearance. Where the absence of the vakil is due to a *bona fide* mistake, *e.g.*, where the vakil noted in his diary the date of hearing which was on the 23rd of March as 23rd of April[42] or where by the mistake of the pleader the party did not get intimation in time[33] the suit was ordered to be restored to file. But the mere absence of a party's pleader[34] or the fact that the pleader was engaged elsewhere[35] does not amount to sufficient cause. The fact that in the District Court pleaders take up cases in different Courts and cannot be present at one and the same time in all the Courts[36] or a mere misjudgment on the part of the counsel who does not state that he was engaged elsewhere[37] or the ignorance of the party as to what for the suit was posted on a particular day[39] or the mere fact that the agent or vakil was negligent[39] will not suffice.

The mere fact that a party is contemplating to file an appeal against the preliminary decree will be no sufficient ground for restoring the final decree passed *ex parte*.[40]

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(26) *Abdul Aziz* v. *Punjab National Bank, Ltd*, 1929 Lah 96 (99, 100): 114 Ind Cas 76: 10 Lah 570: 30 Pun L R 628.

(27) *Lachiram* v. *Mt Almi*, 1927 Sind 228 (229): 102 Ind Cas 416.

(28) *Khwaja Karamat Ali* v. *Harduwar Pande*, 1924 Oudh 405 (406): 11 Oudh L J 243: 78 Ind Cas 123.

(29) *Behari Lal* v. *Maqsood Ali*, 1923 All 189 (189): 71 Ind Cas 283; *Rama Shanker* v. *Iqbal Husain*, 1982 All 450 (451): 1932 All L J 480. *Bahawal* v. *Mohla*, 1926 Lah 650 (651): 96 Ind Cas 821; *Valliammal* v. *Malaiammi Ammal*, 1926 Jour 167 (1): 23 Mad L W 430: 93 Ind Cas 211; *Mt Kirpi* v. *Chuni Lal*, 1928 Lah 454 (454): 10 Lah L Jour 70: 111 Ind Cas 848.

(30) *Shrimant* v. *S Smith*, 1896 Bom P J 422 (423).

(31) *Behary Lal* v. *Nanda Lal*, (1907) 11 Cal W N 430 (432) [Proceedings under the Land Acquisition Act].

(32) *Oriental Financial Corporation* v. *Mercantile Credit Corporation*, (1864) 2 Bom H C R 267; *Fazal Ilahi* v. *Mahomed Ismail Khan*, 1929 Lah 69 (69): 110 Ind Cas 444.

(33) *Lakshmi Narayana* v. *Standard Oil Company of New York*, 1923 Mad 581 (581): 44 Mad L Jour 488: 17 Mad L W 627: 32 Mad L Tim 296: 72 Ind Cas 669.

(34) *Gangabai* v. *Ghansaram*, 1921 Nag 3 (4): 4 Nag L J 16: 62 Ind Cas 253.

(35) *Raj Narain* v. *Akroor Chunder*, (1875) 24 Suth W R 141 (141); *Chuni Lal* v. *Gandu Mal*, 1927 Lah 791 (791): 28 Pun L R 204: 9 Lah L Jour 80: 101 Ind Cas 444.

(36) *Bhagwan Baksh Singh* v. *Jagar Ali*, 1927 Oudh 211 (211): 4 Oudh W N 508: 101 Ind Cas 880.

(37) *Biru Ram* v. *Roda Mal*, 1927 Lah 224 (224): 100 Ind Cas 793.

(38) *Bishun Narayan Bhargava* v. *Abdul Manan*, 1925 Oudh 682 (682): 2 Oudh W N 574: 89 Ind Cas 64.

(39) *Amin Lal* v. *Shib Dayal*, 1929 Lah 148 (149): 112 Ind Cas 379.

(40) *Chhanga* v. *Tirhi*, 1928 All 192 (192): 26 All L J 87: 107 Ind Cas 581.

O. 9. R. 9, Notes 9—12.

9. Restoration of suit in favour of one of several plaintiffs—Whether can operate in favour of all.—An order under this rule restoring a suit dismissed for default on the application of one of several plaintiffs may if the Court so directs, operate in favour of all the plaintiffs though they have not applied for restoration.[1]

10. Inherent power of Court to order restoration.—*See* Note 2 to S. 151 *ante*.

11. Limitation.—An application for restoration under this rule should be made within 30 days of the order of dismissal for default (*see* Limitation Act, Article 163). The Court has no power inherent or otherwise to extend the period of limitation prescribed therefor,[1] and if the Court restores on application presented after time the High Court can interfere in revision as the order is one made without jurisdiction.[2] Section 5 of the Limitation Act, does not apply to this rule[3] unless the High Court has extended its application by a rule framed under Section 122. The Bombay High Court has added a proviso extending the application of S. 5 to this rule.[4]

A mere notice that an application is going to be moved on a future date will not prevent the running of limitation.[5]

12. Appeal.—A *dismissal* of an application under this rule is appealable under O. 43, R. 1, cl. (*c*)[1] but no appeal lies from an order *granting* an application.[2] Nor can the propriety of such an order be questioned in the regular appeal preferred against the decree eventually passed, as the order does not affect the merits of the case within the meaning of S. 105.[3]

An order made by a Judge on the Original Side of the High Court rejecting an application for restoration is a "judgment" within the meaning of cl. (15) of the Letters Patent, and is appealable,[4] whereas an order granting an application has been held not to be a "judgment" within that clause.[5]

Note 9.

(1) *Bishwambar Nath* v. *Girdhari*, (1920) 55 Ind Cas 481 (483): 23 Oudh Cas 18: 7 Oudh L J 1: 2 U P L R (Oudh) 46.

Note 11.

(1) *Sahib Ditta* v. *Roda*, 1902 Pun Re No 83: *Saba* v. *Dagaram*, 1928 Nag 91 (92): 23 Nag L R 183: 107 Ind Cas 193; *Samson* v. *Sitaram*, 1924 Rang 274 (275): 3 Bur L Jour 47: 82 Ind Cas 418; *Choudri Hiat* v. *Jai Kishan*, 1878 Pun Re No 32.

(2) *Madha Ram Gaonbura* v. *Mt Tupoo Rubhani*, (1930) 129 Ind Cas 778 (779): 1931 Cal 319: 52 Cal L Jour 23; *Jhalu Lal* v. *Ganouri Sahu*, (1918) 46 Ind Cas 176 (176): 3 Pat L Jour 376 [Vakil's clerk]; *Sheorajnandan* v. *Girjanand*, (1920) 58 Ind Cas 191 (192): 1 Pat L Tim 573 [Exercising powers under O 47, R 1 to get over limitation—Held to be without jurisdiction].

(3) *Sahib Ditta* v. *Roda*, 1902 Pun Re No 83; *Mahadeo Govind* v. *Lakshmi Narayan*, 1925 Bom 521 (521): 27 Bom L R 1150: 90 Ind Cas 610: 49 Bom 839.

(4) *Pandari Nath Kikalal* v. *Thakoredas Shankardas Vani*, 1929 Bom 262 (263): 31 Bom L R 484: 53 Bom 453.

(5) *Hinga Bibee* v. *Munna Bibee*, (1904) 31 Cal 150 (154): 8 Cal W N 97.

Note 12.

(1) *Maharaj Shib Charan Das* v. *Muhammad Zahur*, (1920) 57 Ind Cas 245 (245): 2 U P L R (All) 288; *Sheonandan* v. *Jamna*, 1887 All W N 65 (66); *Sheotahal* v. *Qasim*, (1912) 15 Ind Cas 34 (34): 10 All L J 41; *Manmatha Nath* v. *Jamini Nath*, 1926 Cal 246 (246): 90 Ind Cas 768.

(2) *Ngwe Hmon* v. *Ma Ro*, (1913) 20 Ind Cas 281 (282): 7 L B R 24: 6 Bur L Tim 87; *Jung Bahadur* v. *Mahadeo*, (1904) 31 Cal 207 (209): 8 Cal W N 160; *Hirdhmun* v. *Jinghoor*, (1880) 5 Cal 711 (712); *Meghraj* v. *Bidyabati Koer*, (1915) 28 Ind Cas 567 (568): 21 Cal L Jour 279.

(3) *Shewdatroy Bhissaur Dass* v. *Molla Tar*, (1897-1901) U B R, Vol II, 237.

(4) *Mathura* v. *Haran*, (1916) 34 Ind Cas 634 (635): 43 Cal 857: 23 Cal L Jour 443: 20 Cal W N 594.

(5) *Maharaj Kishore Khanna* v. *Kiran Shashi Dasi*, 1922 Cal 407 (407): 49 Cal 616: 69 Ind Cas 820.

13. Revision.—A revision lies to the High Court against an order granting an application under this rule.[1] Thus where a trial Court found that the grounds alleged were not sufficient but ordered restoration as a matter of grace[2] or where the order is one made without jurisdiction, or an erroneous refusal to exercise jurisdiction[3] or the order is made summarily without recording evidence[4] or reasons[5] it has been held that a revision lies. The question what is sufficient cause is a matter in the Court's discretion and the High Court will not ordinarily interfere in revision with the exercise of such discretion.[6] **O. 9, R. 9, Note 13.**

R. 10. [S. 105.] *Where* there *are* more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, *or make* such order as it thinks fit. **O. 9, R. 10, Note 1.**

Procedure in case of non-attendance of one or more of several plaintiffs.

[1877—S. 105; 1859—S. 116.]

Synopsis.

1. Non-attendance of Plaintiff.

1. Non-attendance of Plaintiff.—Under this rule the Court has a discretion to permit the suit to proceed in the same way as if *all* the plaintiffs have appeared.[1] Where the dismissal is in contravention of this rule, a revision lies.[2]

R. 11. [S. 106.] *Where* there *are* more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of *pronouncing* judgment, make such order as it thinks fit with respect to the defendants who do not appear. **O. 9, R. 11.**

Procedure in case of non-attendance of one or more of several defendants.

[1877—S. 106; 1859—S. 116.]

Note 13.

(1) *Ajodhya Pershad* v. *Chhabila Koer*, (1915) 29 Ind Cas 1004 (1005) All; *Abdul Aziz* v. *Punjab National Bank, Ltd*, (1928) 107 Ind Cas 395: 1928 Notes 22 (a); *Maung Khant Gyi* v. *Ma Thet Hnin*, 1925 Rang 218 (218): 3 Rang 63: 88 Ind Cas 751.

(2) *Manickam Pillai* v. *Mahudam Bhadhammal*, 1925 Mad 209 (210, 211): 20 Mad L W 829: 48 Mad L Jour 152: 85 Ind Cas 499; *Habib Shah* v. *Debi Bax Singh*, (1912) 14 Ind Cas 221 (224) Oudh [Also application presented out of time]. But see *Nalladaroo* v. *Hari Kissen*, (1918) 48 Ind Cas 961 (963) Cal.

(3) *Lalji Sahu* v. *Lachmi Narain Singh*, (1918) 47 Ind Cas 27 (28): 3 Pat L Jour 355; *Timmappa* v. *Narayen*, 1890 Bom P J 135 (135) [Refusal to decide question of sufficient cause].

(4) *Durga Kanta Sarma* v. *Anto Koch*, (1917) 42 Ind Cas 649 (650, 651): 22 Cal W N 671; *Suriyanarayana* v. *Yarudala Venkayya*, 1923 Mad 177 (178): 16 Mad L W 837: 1922 Mad W N 822: 70 Ind Cas 38.

(5) *Salamatullah* v. *Sahu Makhanlal*, (1919) 53 Ind Cas 69 (70): 1 U P L R (B R) 29; *Krishna Saroop* v. *Raj Bahadur*, 1931 All 452 (452): 132 Ind Cas 431: 12 L R All Rev 142: 1931 All L J 962 [No proof or finding as to sufficient cause].

(6) *Gopala Rao* v. *Maria*, (1907) 30 Mad 274 (276): 17 Mad L Jour 225; *Daryanomal* v. *Meughomal Chuharmal*, 1921 Sind 50 (50): 15 Sind L R 172: 66 Ind Cas 789; *Farida* v. *Kaira*, 1922 Lah 290 (290): 3 Lah 79: 77 Ind Cas 336; *Babu Ram* v. *Ram Dulari*, 1924 Oudh 30 (30): 26 Oudh Cas 194: 77 Ind Cas 701.

Order 9, Rule 10—Note 1.

(1) *Kulendra Kishore* v. *Rai Kishori Shaha*, 1921 Cal 176 (177): 48 Cal 57: 62 Ind Cas 112.

(2) *Sri Prabhu* v. *Dwarka Prasad*, (1919) 50 Ind Cas 323 (324): 4 Pat L Jour 152.

O. 9, R.11, Note 1.

Synopsis.

1. Non-attendance of defendants.

1. Non-attendance of defendants.—The rule contemplates that a decree may be a contested one as against some of the defendants and *ex parte* against the rest[1] but the decree is liable to be set aside on an application by the *ex parte* defendant or defendants.[2] The Court should, under this rule pass such order as it thinks fit against the absent defendants. Where no such order is passed against them but a decree is passed simply against some defendants, the decree is not *ex parte* against the absent defendants and cannot be re-opened under R. 13.[3]

The Court should not pass a decree in an *ex parte* case, without any proof whatever by the plaintiff; it should consider the interests of the absent party.[4]

O. 9, R.12, Note 1.

R. 12. [S. 107.] *Where* a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so ts appear, he shall be subject to all the provisions of the foregoing *rules* applicable to plaintiffs and defendants, respectively, who do not appear.

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

[1877—S. 107; 1859—S. 117. *See* Ss. 132, 133, O. 3, R. 1; O. 5, R. 3; O. 10, R. 4 and O. 29, R. 3.]

Synopsis.

1. Scope of the rule.
2. "Subject to all the provisions of foregoing rules."
3. Appeal.

Non-appearance on adjourned date—Effect. See Note 1, Pt. (6).

Sufficient cause for non-appearance. See Note 1, Pt. (5).

1. Scope of the rule.—The words "under the provisions of Section 66 or S. 436" after the words "appear in person" which occurred in the old Code have now been omitted. The result is that the rule applies *to all cases* where the Court has ordered a person to appear whether or not the Court is specifically empowered to do so.[1] Where there is a failure to attend on the part of a party, the fact that his pleader is present[2] or the party ordered to

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Order 9, Rule 11—Note 1.

(1) *Jadubansa Narain* v. *Mohunt Hari Charan Bharati*, (1907) 6 Cal L Jour 226 (231); *Lal Mohan Saha* v. *Tazi Maddin*, (1919) 49 Ind Cas 756 (757) Cal; *Doorga Churn Sett* v. *Shamanund Gossain*, (1869) 12 Suth W R 376 (377).

(2) *Sookh Moyee* v. *Nurmooda Dossee*, (1871) 15 Suth W R 210 (210).

(3) *Sheelabutty* v. *Tarinee Churn*, (1868) 9 Suth W R 597 (597).

(4) *Monmutha Kumar Roy* v. *Josuda Lal*, 1924 Cal 647 (648): 28 Cal W N 300: 77 Ind Cas 551.

Order 9, Rule 12—Note 1.

(1) *Rajagopala Pandarithar* v. *Muthukumarachettiar*, (1912) 17 Ind Cas 762 (762): 23 Mad L Jour 676: 13 Mad L Tim 19; *Sheik Wazir* v. *Mt Phulla*, (1893) 6 C P L R 83 (84); *Sheo Partabsingh* v. *Ghirrao Singh*, 1928 Oudh 262 (263): 5 Oudh W N 291: 111 Ind Cas 473.

(2) *Vaiyuntathammal* v. *Valliammani Ammal*, (1917) 41 Ind Cas 719 (721): 41 Mad 256: 6 Mad L W 337: 1917 Mad W N 743; *Chellam Iyer* v. *Subramania Iyer*, 1932 Mad 414 (414): 1932 Mad W N 423: 137 Ind Cas 792.

O. 9, R. 12, Notes 1—3.

appear happens to be the next friend of a minor plaintiff[3] will not prevent the Court from acting under this rule. But all the same, the dismissal for non-attendance being a highly penal matter, it ought not to be inflicted on a party unless there is a distinct order to attend and upon proof that the party had deliberately disobeyed the same.[4] An opportunity should be given to prove the cause of his non-appearance.[5] Thus when plaintiff was ordered to appear on a *particular day* and the case was not taken up that day, the Court ought not to dismiss the suit for failure of the plaintiff to appear on a subsequent day to which the case was adjourned.[6] Where one of several plaintiffs fails to appear in obedience to the order of Court, the suit cannot be dismissed as against other co-plaintiffs also.[7]

2. **"Subject to all the provisions of the foreign rules".**—These words indicate that the Court can act under the provisions of the foregoing rules, *i.e.*, dismiss the suit for default or proceed *ex parte*. The very fact that the Court is empowered to proceed under the foregoing rules also indicates that the party aggrieved has the corresponding right of applying for restoration either under R. 9 or R. 13 as the case may be.

3. **Appeal.**—A plaintiff whose suit is dismissed under this rule for failure to appear can apply under R. 9 for restoration of the suit but cannot appeal from the order of the dismissal as it is not a decree.[1]

SETTING ASIDE DECREES EX PARTE.

O. 9, R. 13.

R. 13. [S. 108.] In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was *passed* for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall *make* an order *setting* aside the decree *as against him* upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Setting aside decree *ex parte* against defendant.

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

[1877—Ss. 108, 109, 588; 1859—S. 119.]

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(3) *Ayya Nadan* v. *Thanammal*, (1920) 55 Ind Cas 945 (947): 11 Mad L W 289: 1920 Mad W N 241: 27 Mad L Tim 171. But see *Rajagopala Pandarithar* v. *Muthukumarachettiar*, (1912) 17 Ind Cas 762 (762): 23 Mad L Jour 676: 13 Mad L Tim 19.

(4) *Pearee* v. *Hurish Chunder*, (1872) 17 Suth W R 141 (142).

(5) *Rameshwar Baksh Singh* v. *Rasul Beg*, (1917) 38 Ind Cas 477 (478): 3 Oudh L J 712.

(6) *Sundar Nath* v. *Mallu*, (1917) 39 Ind Cas 631 (631): 39 All 476: 15 All L J 522.

(7) *Sri Prabhu* v. *Dwarka Prasad*, (1919) 50 Ind Cas 323 (324): 4 Pat L Jour 152; *Uttam Chand* v. *Goraya Mal*, 1926 Lah 577 (578): 95 Ind Cas 865 [Newly added co-plaintiff failing to appear. Suit cannot be dismissed against the original plaintiff].

Note 3.

(1) *Krishna Ram* v. *Gobind Prasad*, (1886) 8 All 20 (21): 1885 All W N 321.

O. 9, R. 13.

Local Amendments.

MADRAS.

Make the following amendments to Order 9, Rule 13:—

(1) *Re-number* Rule 13 as Rule 13 (1).

Insert the following as proviso to sub-Rule (1) of Rule 13 of Order 9:—

"Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

(2) *Add* the following as sub-Rule (2) to Rule 13—"(2) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to application under sub-Rule (1)."

ALLAHABAD.

Add the following further proviso:—

Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

BOMBAY.

Rule 13 shall be numbered as Rule 13 (1), and the following sub-rule shall be added to it, namely:—

"(2). The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule."

RANGOON.

Add the following as second proviso to Rule 13:—

"Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons, if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

Substitute "decree or order" *for* "decree" wherever this word occurs in Rule 13.

OUDH.

In Rule 13, *between* the words "was not duly served or that" and the words "he was prevented by any sufficient cause", *insert* the words "notwithstanding due service of the summons", and at the end of the rule *add* the following proviso:—

"Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

Explanation.—Where a summons has been served under Order 5, Rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule."

NAGPUR.

Order 9, *Rule* 13.

Add the following as an additional proviso:—

"Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

Explanation.—Where a summons has been served under Order 5, Rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule."

SIND.

O. 9, R. 13, Notes 1—2.

Add the following further proviso to Rule 13 in Order 9:—

Provided also that a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim.

N.-W. F. P.

Add "Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant knowledge of the date of hearing in sufficient time to appear on that date and answer the claim."

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Applicability to execution proceedings. See Notes to R. 1.
4. Decree passed by the Presidency Court of Small Causes.
5. Decree passed by the Provincial Court of Small Causes.
6. When a decree can be said to be ex parte.
7. Where written statement is filed.
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12. Suit to set aside an ex parte decree —Ex parte decree—Obtained by fraud.
13. Application to be made to the Court which passed the decree.
14. Fresh vakalatnamah, if necessary.
15. Who can apply to set aside.
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17. Grounds for setting aside an ex parte decree.
18. Summons not duly served.
19. Sufficient cause.
20. Minor defendant.
21. Decree having been satisfied.
22. "Upon such terms as to costs, etc."
23. Proviso to the rule.
24. Inherent power of Court to set aside an ex parte decree. See Note 3, to S. 151.
25. Effect of setting aside the ex parte decree.
26. Ex parte decree against a firm.
27. Dismissal of an application to set aside an ex parte decree if can be restored. See Note 1 to R. 1, supra.
28. Limitation.
29. Appeal.
30. Revision.

"Against him." See Note 23.

Applications under this rule how far proceedings in the suit. See Note 2, Pt. (3).

Service of summons on defendant decided —Fresh suit attacking it if barred. See Note 12, Pt. (16).

1. Legislative changes:—

The words "as against him" after the words "shall make an order setting aside the decree" have been newly added with a view to make it clear that the *ex parte* decree can only be set aside in favour of the defendant against whom it has been passed, unless it be that the proviso applies.[1]

The proviso to the rule is also new.

2. Scope of the rule.—The object of the rule is to ensure, within reasonable limits to public convenience, that every defendant shall have a

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Order 9, Rule 13—Note 1.

(1) See statement of objects and reasons.

O. 9, R. 13, Notes 2—4.

hearing,[1] and to place the successful applicant in the same position in which he would have been if no decree had been passed against him.[1-a] An application under this rule is not strictly speaking an application for a re-hearing although it may result in it.[2] The proceedings contemplated are not merely a branch of the suit which terminated when the *ex parte* decree was passed; the suit itself does not revive until after the proceedings in the application are terminated successfully.[3] The rule applies to suits[3-a] and not to appeals[4] in as much as, separate and corresponding provisions have been made in O. 41 therefor. This rule applies to orders passed *ex parte* in insolvency proceedings under the Provincial Insolvency Act, V of 1920, by virtue of S. 5 of that Act[5] and also to decrees in arbitration proceedings under Sch. II of the Code.[6]

3. Applicability to execution proceedings.—*See* Note under Rule 1 *supra.*

4. Decree passed by the Presidency Court of Small Causes.—S. 37 of the Presidency Small Causes Courts Act, XV of 1882, declaring the finality of small cause decrees, does not apply to an *ex parte* decree and an application will consequently lie under this rule to set it aside.[1] Where an application is made under this rule and is dismissed, an application cannot be made under S. 38 of that Act for a new trial.[2] It was held in the case noted below[3] that under the Rules framed by the Calcutta High Court, the *Registrar* of the Court of Presidency Small Causes had no jurisdiction to entertain an application under this rule.

Note 2.

(1) *Chintamani Dassi* v. *Ragoonath Sahoo*, 1895) 22 Cal 981 (984).

(1-a) *Valia Panga Achan* v. *Martha Veera Goundan*, (1908) 31 Mad 454 (456): 4 Mad L Tim 230: 18 Mad L Jour 543.

(2) *Parvati Shankar* v. *Iswardas*, (1894) 19 Bom 208 (210).

(3) *Hari Singh* v. *Muhammad Said*, 1927 Lah 200 (207): 8 Lah 54: 102 Ind Cas 523.

(3-a) **Proceedings resulting in final decree are continuation of and part of suits governed by this rule.** *vide* the following cases:—*Fahiman* v. *Awadh Behari Lal*, 1929 All 279 (280): 1929 All L J 376: 51 All 634: 119 Ind Cas 246; *Jasoda Dassi* v. *Rameswari Dassi*, (1911) 13 Ind Cas 374 (374): 14 Cal L Jour 603; *Sarat Chandra* v. *Mahamed Kalil*, (1910) 5 Ind Cas 387 (388): 11 Cal L Jour 501 [Final decree for mesne profits —Not execution proceedings]; *Abhay Churn* v. *Naba Kumar*, (1910) 6 Ind Cas 306 (307) Cal; *Kanakasundaram* v. *Somasundaram*, (1918) 48 Ind Cas 71 (72): 35 Mad L Jour 375; *Annaji* v. *Fakira*, 1922 Nag 175 (178): 67 Ind Cas 282: 6 Nag L J 27; *Babu Ram* v. *Mt Ram Dulari Debi*, 1924 Oudh 30 (30): 26 Oudh Cas 194: 77 Ind Cas 701 [A case under O 9, R 9].

Proceedings for personal decree in mortgage suits are also part, and in the nature of suits governed by this rule: *vide* the following cases:—*Babu Lal* v. *Raghu Nandan*, 1930 All 841 (843): 124 Ind Cas 729: 1930 All L J 1200: 52 All 839; *Ram Dayal* v. *Mahomed Ghouse*, (1905) 1 Nag L R 143 (145). But see *Gurdin Pandey* v. *Rai Gokul Chand Bahadur*, (1906) 9 Oudh Cas 288 (288).

(4) *Anonymous*, (1869) 1 Ind Jur O S 68: *Omda Bibee* v. *Acowrie Singh*, (1867) 7 Suth W R 425 (426).

(5) *Ayyaswami* v. *Official Receiver, Coimbatore*, 1932 Mad 63 (65): 61 Mad L Jour 719: 1931 Mad W N 924: 34 Mad L W 735: 135 Ind Cas 750; *Govinda Rao* v. *Official Receiver, Trichinopoly*, 1927 Mad 897 (898): 103 Ind Cas 381. See also *Mool Chand* v. *Sarjoog Pershad*, (1908) 7 Cal L Jour 268 (269). But see, *Surat Chandra* v. *Md Hossein*, (1904) 8 Cal W N 468 (469) [*Ex parte* order of adjudication as insolvent—Can be set aside only under inherent powers].

(6) *Selvarajan* v. *Amalorpavanadan*, 1928 Mad 969 (971): 55 Mad L Jour 262: 112 Ind Cas 691: 29 Mad L W 490; *Mahabir Prosad* v. *Bal Kishan*, 1922 Pat 376 (378): 1 Pat 48: 62 Ind Cas 927: 1922 Pat H C C 76: 3 Pat L Tim 29; *Nehal Singh* v. *Khushal Singh*, (1916) 33 Ind Cas 80 (81): 38 All 297: 14 All L J 332. See also, *Whitehouse* v. *Khan and Khan and Co.*, (1915) 27 Ind Cas 135 (136): 8 Sind L R 110 (2) [Under the Arbitration Act]. *See*, however, *Roshan Mal* v. *Firm of Bridhi*, 1924 Pat 603 (604): 1924 Pat H C C 170: 3 Pat 839: 83 Ind Cas 26: 6 Pat L Tim 212 [Decree itself not an *ex parte* decree]; *Ramesh Chandra* v. *Dinesh Chandra*, 1925 Cal 1010 (1011): 42 Cal L Jour 224: 90 Ind Cas 512, (Do.).

Note 4.

(1) *Roshan Lal* v. *Lachmi Narayan*, (1892) 17 Bom 507 (509).

(2) *Ananta Coomari Dassi* v. *Radharani Dasi*, (1905) 3 Cal L Jour 199 (201).

(3) *Haladhar Maeti* v. *Choytonna Maiti*, (1903) 30 Cal 588 (592): 7 Cal W N 547.

O. 9, R. 13, Notes 5—6.

5. **Decree passed by the Provincial Court of Small Causes.**—S. 17 of the Provincial Small Causes Courts Act (IX of 1887) requires the deposit of the decretal amount or the furnishing of security as a condition precedent to the entertaining of an application to set aside an *ex parte* decree.[1] The Court is however competent under S. 5 of the Limitation Act to excuse the delay in the matter of the deposit even though the *application* has been presented in time.[2]

6. **When a decree can be said to be ex parte.**—The present rule is limited to decrees made *ex parte* under the provisions of O. 9 and does not govern other decrees, though *ex parte*, unless O. 9 has been extended to those decrees by other provisions in the Code.[1] Thus where a suit is decided under O. 17, R. 3[2] or O. 11, R. 21[3] the decree is not *ex parte* so as to entitle the defendant to apply under this rule. The reason is that the Court is not *empowered* under those rules to proceed under O. 9. The decree referred to is clearly a decree passed either at the first hearing under R. 6 of this order[4] or at an adjourned hearing under O. 17, R. 2 read with R. 9.[5] Under O. 17, R. 2 specific provision is made for the Court to proceed under O. 9 and the aggrieved party is also entitled in such a case to the remedy provided for by this rule.[6] A decree passed on default of appearance of the defendant at the hearing of a remanded suit is nevertheless an *ex parte* decree.[7]

A decree cannot be *ex parte* when there is evidence already on record and the Court goes into the *merits* before decreeing the suit.[8] Thus where both

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Note 5.

(1) *Jagannath* v. *Chet Ram*, (1906) 28 All 470 (472): 3 All L J 318: 1906 All W N 93; *Suryanarayana* v. *Ramanna*, (1910) 6 Ind Cas 400 (400): 1910 Mad W N 279: 7 Mad L Tim 308: 34 Mad 88; *Hanooman Singh* v. *Luchman Sahoo*, (1904) 8 Cal W N 355 (356); *Nanke* v. *Harjas*, (1908) 5 All L J 295 (297): 1908 All W N 141; *Jamina Bibi* v. *Seri Chand Bhagat*, (1898) 2 Cal W N 693 (695); *Chhotelal* v. *Lakshmi Chand*, (1916) 34 Ind Cas 113 (114): 38 All 425: 14 All L J 549.

(2) *Sudailaimuthu* v. *Andi Reddiar*, 1922 Mad 186 (187): 15 Mad L W 494: 42 Mad L Jour 484: 45 Mad 628: 1922 Mad W N 266: 66 Ind Cas 104. Also 1923 Mad 354.

Note 6.

(1) *Kesharia Accomar Sreesungjee* v. *Potooah Sett*, (1898) 2 Cal W N 676 (679).

(2) *Ganga Ram* v. *Chiddu Singh*, (1912) 14 Ind Cas 119 (120): 9 All L J 763; *Akula Bakkayya* v. *Aluri Venkatanarasimham*, (1917) 39 Ind Cas 948 (949): 33 Mad L Jour 553: 1916 Mad W N 565; *Palaneappa Chetty* v. *Muthu Chetty*, (1911) 10 Ind Cas 770 (771): 4 Bur L Tim 67; *Sarju Prasad* v. *Gujadar Lal*, 1922 All 497 (499): 77 Ind Cas 527; *Majeti Nagaratnam* v. *Pachigolla Ramayya*, (1915) 27 Ind Cas 882 (883): 2 Mad L W 105; *Ram Kishen Lal* v. *Jatadhari Lal*, (1918) 46 Ind Cas 488 (489): 3 Pat L Jour 481: 1918 Pat H C C 236; *Rengasamy Mudelliar* v. *Sirangan Thandraya Gounden* v. *Sithiyan*, (1868-69) 4 Mad H C R 254 (257); *Comallammal* v. *Rungasawmy Iyengar*, (1868-69) 4 Mad H C R 56 (59); *S S Balakrishna Ayyar* v. *Muthammal*, 1925 Mad 316 (316): 82 Ind Cas 1028; *Kader Khan* v. *Juggeswar*, (1908) 35 Cal 1023 (1027).

(3) *Khushali Mal* v. *Pala Mal*, (1898) Pun Re No 43; *Chuni Lal* v. *Chaman Lal*, (1885) 7 All 159: (1884) All W N 313.

(4) *Kadir Bux* v. *Abdul Ali*, (1909) 2 Ind Cas 67 (68) Cal; *Raj Kumar* v. *Jugal*, (1896) 18 All 241 (245): 1896 All W N 47 [Appearance by pleader with vakalat signed by a third person—Applying for adjournment—Adjournment refused—Decree passed is *ex parte*].

(5) *Ram Charan Lal* v. *Raghubir Singh*, 1923 All 551 (552): 21 All L J 495: 45 All 618: 4 L R (All) Civ 294: 75 Ind Cas 387; *Doyal* v. *Kupoor Chund*, (1879) 4 Cal 318 (321): 3 Cal L Rep 482; *Jonardhan* v. *Ramdhone*, (1896) 23 Cal 738 (753, 756, 759) F B; *Enatulla* v. *Jibon Mohan Roy*, (1914) 23 Ind Cas 769 (770): 41 Cal 956: 18 Cal W N 775: 19 Cal L Jour 535; *Puttu Lal* v. *Must Chhutko*, 1925 Oudh 360 (360): 85 Ind Cas 528: 1 Oudh W N 636; *Asharfunnissa* v. *Lchareaux*, (1882) 8 Cal 272 (274): 10 Cal L Rep 502.

(6) *Hildreth* v. *Sayaji*, (1896) 20 Bom 380 (382); *Baldeo Sahai* v. *Manohar Lal*, (1895) Pun Re No 82; *Nagendra Kumar Bose* v. *Nabin Mandal*, (1909) 1 Ind Cas 741 (741): 36 Cal 189; *Jonarden Dobey* v. *Ramdhone Singh*, (1896) 23 Cal 738 (753, 756).

(7) *Mussammat Goojree* v. *Ruttun Chand Puree*, 1869 Pun Re No 3.

(8) *Bismilla Beg* v. *Azam Ali Beg*, (1916) 34 Ind Cas 865 (866): 3 Oudh L J 127; *Radha Mohan Dutt* v. *Abbas Ali Biswas*, 1931 All 294 (301) F B: 1931 All L J 377: 133 Ind Cas 129: 53 All 612 F B; *Anund Chunder Mookerjee* v. *Digamburee Dassee*, (1865) 2 Suth W R 1 (1); *Gora Chand Gosawmi* v. *Raghu Mandal*, (1869) 3 Beng L R App 121. See also, *Raghapa* v. *Parapa*, (1875-77) 1 Bom 217 (218) [Issues framed in presence of defendant's pleader—Plaintiff's witnesses also cross examined—Decree not *ex parte* though written statement was not filed].

O. 9, R. 13, Notes 6—8.

the parties have led in their evidence and nothing remains to be done except arguments, the Court ought not to proceed to pass an *ex parte* decree.[9] Similarly, where the defendant who has been summoned as a witness by the plaintiff fails to appear, the Court is not justified in passing an *ex parte* decree when the pleader for the defendant is ready to proceed with the case.[10] Where the defendant actually appears, a mere failure on his part to adduce *evidence* will not make the decree passed, an *ex parte* decree.[11]

Where a compromise decree is passed in a suit and a party applies to set it aside on the ground that the applicant was no party to the compromise and that he had given no authority to file the compromise, there is a conflict of opinion as to whether the application can be treated as one under this rule for which *see* the following cases.[11-a]

The recitals on the record are not conclusive as to the character of the decree[12] and the defendant is entitled to show that the decree is, as a matter of fact, *ex parte*.[13]

7. **Where written statement filed.**—Where the defendant has filed a written statement in the case but fails to appear when the suit is called on for hearing, the decree passed is nevertheless an *ex parte* decree and can be set aside under this rule.[1]

8. **Remedies in the case of an ex parte decree.**—A defendant against whom an *ex parte* decree has been passed has three courses open to him *viz.*:—

(1) to apply under this rule to set aside the *ex parte* decree[1] or

(2) to apply for a review[2] or

(3) to appeal from the decree[3]

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(9) *S. K. Baksh and Sons* v. *Gulam Qadir and Sons*, 1924 Lah 224 (224): 72 Ind Cas 900.

(10) *Balder Tribuvandas* v. *Balderdas, Divaralidas*, (1909) 3 Ind Cas 45 (45) Bom.

(11) *Raj Kumar Roy Choudhury* v. *Alimaddi*, (1912) 16 Ind Cas 911 (912): 17 Cal W N 827.

(11-a) *Basiruddin* v. *Sadhu Tanti*, (1918) 45 Ind Cas 690 (691): 22 Cal W N 571 [Yes]; *Bholai Naskar* v. *Alach Naskar*, (1906) 3 Cal L Jour 158 (159) [Yes]: *Dhamodar Misra* v. *Hirnashi Naik*, (1915) 27 Ind Cas 227 (228): 19 Cal W N 118 [No]; *Jadu Nath* v. *Asan Mandhal*, (1915) 27 Ind Cas 261 (261) [No]: *Hemmo Moyee Dayee* v. *Watson and Co*, (1870) 14 Suth W R 299 (300) [No].

(12) *Sham Lal Sahu* v. *Ram Kumar Lal*, (1913) 20 Ind Cas 67 (68) Cal; *Murli Dhar* v. *Dani Chand*, 1923 Lah 281 (281): 69 Ind Cas 368.

(13) *Bholai Naskar* v. *Allach Naskar*, (1897) 1 Cal W N cxxvii.

Note 7.

(1) *Muniappan Chetty* v. *Balappan Chetti*, (1909) 4 Ind Cas 1167 (1167): 31 Mad 505: 4 Mad L Tim 216: 19 Mad L Jour 222; *Purus Ram* v. *Jugnutee Pershad*, (1869) 1 N W P Ed 154; *Administrator-General of Bengal* v. *Lala Dyaram Das*, (1871) 6 Beng L R 688; *Maladeen* v. *Raghunath Prasad*, 1925 Oudh 717 (717, 718): 89 Ind Cas 187. But see *Pakaktar* v. *Jakriam Bhokath*, (1869) 11 Suth W R 5 (5): 2 Beng L R App 12; *Anantharama* v. *Madhava*, (1881) 3 Mad 264 (265): 5 Ind Jur 635.

Note 8.

(1) *Ramacharan Das* v. *Gadadhar Das*, 1929 Cal 322 (325): 56 Cal 21; *Jhanda Singh* v. *Lekhmi*, (1920) 56 Ind Cas 878 (879): 1 Lah 344: 2 Lah L Jour 623: 22 Pun W R 1920: 68 Pun L R 1920; *Mena Lal* v. *Bhujhun Jha*, (1874) 22 Suth W R 213 (214): 13 Bom L R App 11.

(2) *Mutto* v. *Rahi*, (1884) 6 All 65 (66): 8 Ind Jur 321; *Shavaksha Ruttonji Bomanji* v. *Hugh Hogarth and Sons*, (1910) 8 Ind Cas 616 (618): 12 Bom L R 886; *Harihur Prasad Narain Singh* v. *Buddu Prasad*, (1883) 13 Cal L Rep 254 (255); *Sadho Misser* v. *Golab Singh*, (1899) 3 Cal W N 375 (377); *Hakim Gir* v. *Basdeo*, (1911) 10 Ind Cas 894 (895): 17 Cal W N 631: 15 Cal L Jour 408; *Virupakshi* v. *Bandappa*, (1919) 50 Ind Cas 327 (327): 37 Mad L Jour 59: 9 Mad L W 311: 1919 Mad W N 246; *Ali Azim* v. *Ram Manik*, (1869) 12 Suth W R 195 (197); *Seth Bagwandas* v. *Shridhar*, (1907) 3 Nag L R 55 (65); *Debi Dass* v. *Narain Prasad*, (1909) 9 Oudh Cas 35 (37).

(3) *Anantharama Pattar* v. *Madhava Panikar*, (1881) 3 Mad 264 (265): 5 Ind Jur 635; *Kalee Churn Dutt* v. *Modhoo Soodhun Ghose*, (1866) 6 Suth W R 86 (87); *Zainul-Abdin Khan* v. *Amed Raza Khan*, (1878-80) 2 All 67 (71): 5 Ind App 283: 3 Sar 879: 3 Ind Jur 186 P C; *Jethalal* v. *Vareejlal*, (1922 Bom 267 (267): 46 Bom 184: 23 Bom L R 769: 63 Ind Cas 478.

(4) to institute a suit on the ground of fraud[4]

See also Note 12 to S. 96, *ante*.

9. Whether the remedies are concurrent.—As to whether and how far the remedies 1 and 3 referred to in Note 8, *ante* are *concurrent*, *see* Note 12 to S. 96.

The defendant may apply for a review without applying under this rule[1] or even after an application under this rule has been rejected.[2] According to the High Courts of Calcutta[3] and Madras[4] the fact that an application for a review is made at a time when an application under this rule would be barred by limitation, is no ground for refusing a review. But the High Court of Lahore[5] has held *contra*, namely that no review can be granted in such a case and that the defendant cannot be allowed to evade the law of limitation. It is submitted that the former view is correct. If the party is entitled to a review, he is equally entitled to apply for the same within the period of limitation prescribed *therefor* and not for any other application.

10. Hearing of application pending appeal.—As has been seen in Note 12 to S. 96 *ante*, the mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule. In fact, such an application ought to be presented to the Court which passed the decree[1] for, the decree continues to be the decree of the primary Court until it is reversed, confirmed or varied in appeal.[2] The proceedings under this rule and in an appeal are entirely distinct in their scope and purpose and there is no possibility of any conflict between the judgments to be pronounced in the two proceedings.[3]

Where a decree is *ex parte* against some defendants and contested against the rest, and the contesting defendants alone appeal without impleading the *ex parte* defendants as respondents, the application by the *ex parte* defendants ought to be made only to the trial Court.[4] Even if the *ex parte* defendants have been impleaded as *pro forma* respondents in appeal it has been held by the Allahabad[5] and Madras[6] High Courts that the proper Court to which appli-

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(4) *Golap Sundari Debi* v. *Indra Kumar*, (1909) 1 Ind Cas 86 (88): 13 Cal W N 493: 5 Mad L Tim 360: 9 Cal L Jour 367.

Note 9.

(1) *Chet Narain Sahi* v. *Rampal Manjhi*, (1912) 15 Ind Cas 554 (554): 16 Cal W N 643.

(2) *Poreshnath* v. *Khattromonee*, (1873) 20 Suth W R 284 (284).

(3) *Chet Narain Sahi* v. *Rampal Manjhi*, (1912) 16 Cal W N 643 (644): 15 Ind Cas 554.

(4) *Chokkalingam Chetty* v. *Lachumanan Chetty*, (1920) 55 Ind Cas 444 (445): 38 Mad L Jour 224: 11 Mad L W 217: 1920 Mad W N 228.

(5) *Santu* v. *Arjan Das*, (1912) 13 Ind Cas 318 (319): 131 Pun W R 1912; *Lal Devi* v. *Amar Nath*, (1920) 57 Ind Cas 15 (16): 2 U P L R (Lah) 128.

Note 10.

(1) *Palniappa Chetty* v. *Subramania Chetty*, 1921 Mad 568 (568): 44 Mad 731: 41 Mad L Jour 90: 30 Mad L Tim H C 151: 13 Mad L W 519: 1921 Mad W N 309: 62 Ind Cas 755; *Chenna Reddi* v. *Pedda Obi Reddi*, (1909) 32 Mad 416 (420) F B: 6 Mad L Tim 135: 2 Ind Cas 802: 19 Mad L Jour 388; *Firm of Seth Khuda Bakhsh* v. *Gulam Qadir*, 1924 Lah 224 (225): 72 Ind Cas 900 (2); *Damodar Manna* v. *Sarat Chandra Dhall*, (1909) 3 Ind Cas 468 (469): 13 Cal W N 846 [Mere filing an appeal does not preclude application under this rule]; *Kumud Nath* v. *Jatindranath*, (1911) 9 Ind Cas 189 (192): 38 Cal 394: 13 Cal L Jour 221: 15 Cal W N 399; *Shajan Bibi* v. *Safiruddin*, (1915) 26 Ind Cas 412 (413) Cal; *Sadaram* v. *Dular*, (1918) 43 Ind Cas 902 (904): 14 Nag L R 30.

(2) *Shajan Bibi* v. *Safiruddin*, (1915) 26 Ind Cas 412 (413) Cal.

(3) *Surat Chandra Dhal* v. *Dhamodar Manna*, (1908) 12 Cal W N 885 (887).

(4) *Abdul Ohad* v. *Amdali Gazi*, 1921 Cal 248 (249): 48 Cal 153; *Jageshar* v. *Ohuni Lal*, (1917) 39 Ind Cas 140 (141) All; *Ramachandra Mallaya* v. *Narayana Hegade*, (1917) 42 Ind Cas 972 (974): 7 Mad L W 10: 1917 Mad W N 808: 22 Mad L Tim 480.

(5) *Mirza Abdulla Beg* v. *Ramzan Kahan*, 1924 All 173 (175): 21 All L J 901: 5 L R All (Civ) 8: 79 Ind Cas 381.

(6) *Palaniappa Chetty* v. *Subramanian Chetty*, 1922 Mad 33 (34): 42 Mad L Jour 12: 66 Ind Cas 59: 14 Mad L W 609: 1921 Mad W N 796.

O. 9, R. 13, Notes 10—11.

cation ought to be made is the trial Court; the proper course in such a case is to get an adjournment of the hearing of the appeal to enable the party to apply to the trial Court, and not wait till the disposal of the appeal.

11. Hearing of application after disposal of appeal.—As has been seen already in Notes 2 and 12 to S. 96 where an *ex parte* decree has been confirmed in appeal, the Court of first instance has no jurisdiction to entertain or dispose of an application to set aside the decree, and if it does so its action is *ultra vires*.[1] The reason is the decree of the trial Court becomes superseded or *merged* in that of the appellate Court[2] and the result of allowing an application would be to interfere with the decree of a superior Court, *viz.*, the appellate Court.[3] The High Court of Madras has, however, held in two recent decisions[4] that even after the disposal of the appeal the trial Court has jurisdiction to entertain and dispose of such an application. It is submitted that this view is opposed to the decision of the Privy Council in *Brij Narain* v. *Tejpal Bikram*,[5] and is not correct on principle.

But where the decree of the trial Court is not superseded or does not get *merged* in the appellate decree, the trial Court has power to entertain and deal with the application to set aside the *ex parte* decree. Thus where the appeal is dismissed for *default*, there is no decree of the appellate Court which can be said to supersede the decree of the trial Court so as to prevent the defendant from applying to the trial court.[6] Similarly where the appeal is dismissed as having *abated by* reason of the omission of the appellant to implead the legal representatives of the deceased respondents there is no merger of the decree of the trial Court in the decree of the appellate Court.[7] Again when the *ex parte* defendants are not *impleaded as parties* to the appeal by other defendants, the decree of the appellate Court does not prevent them from applying to the trial Court under this rule.[8]

In the case of an application to set aside an *ex parte final* decree, it is only the original Court which passed the decree and not the appellate Court

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Note 11.

(1) *Patakdhari Rai* v. *Mankaran Rai*, (1910) 6 Ind Cas 205 (205): 7 All L J 598; *Sankara Bhatta* v. *Subbaraya Bhatta*. (1907) 30 Mad 535 (536): 17 Mad L Jour 436.

(2) *Mathura Prasad* v. *Ram Charan Lal*, (1915) 28 Ind Cas 261 (262): 37 All 208: 13 All L J 283: *Musst Ajodya Kuwar* v. *Durga Prasad*, 1923 Pat 331 (334, 336): 4 Pat L Tim 115: 1923 Pat H C C 145: 71 Ind Cas 383; *Girdhari Lal* v. *The Deputy Commissioner, Gonda*, 1929 Oudh 35 (35): 5 Oudh W N 1037: 114 Ind Cas 319: 4 Luck 201; *Mahabali Prasad* v. *Balbhadar Singh*, 1921 Oudh 141 (142): 24 Oudh Cas 282: 64 Ind Cas 303; *Vasudeo* v. *Chinba*, (1912) 15 Ind Cas 565 (566): 8 Nag L R 51; *Sayad Sakur-ul-Hussain* v. *Ganda Mal*, 1901 Pun Re No 4; *Mehdi* v. *Bahadur*, 1900 Pun Re No 30: 407 Pun L R 1900; *Murtaza Begum* v. *Jogendra Nath Roy*, 1926 Cal 344 (345): 90 Ind Cas 724; *Shyam Mandal* v. *Satinath*, (1917) 38 Ind Cas 493 (495): 44 Cal 954: 24 Cal L Jour 523: 21 Cal W N 776; *Raj Gobind Singh* v. *Behari Pathuk*, (1915) 30 Ind Cas 247 (248) Cal; *Dhanai Sardar* v. *Tarak Nath Chowdhuri*, (1910) 5 Ind Cas 525 (527): 12 Cal L Jour 53.

(3) *Biswambar Mirdha* v. *Sarup Chandra Gain*, (1909) 1 Ind Cas 136 (137) Cal.

(4) *Palaniappa Chetty* v. *Subramania Chetty*, (1922) 42 Mad L Jour 12 (14): 1922 Mad 33: 66 Ind Cas 59: 14 Mad L W 609: 1921 Mad W N 796. Also *Subramania Aiyar* v. *Varadarajulu Naidu*, 1927 Mad 722 (723, 724): 53 Mad L Jour 110: 26 Mad L W 19: 103 Ind Cas 146.

(5) (1910) 32 All 295: 37 Ind App 70 (77): 1910 Mad W N 392: 7 All L J 507: 14 Cal W N 667: 11 Cal L Jour 560: 20 Mad L Jour 587: 6 Ind Cas 669: 12 Bom L R 444: 8 Mad L Tim 57 P C.

(6) *Rifaqat Hussain* v. *Bibi Tawaff*, (1917) 39 Ind Cas 519 (520): 39 All 393: 15 All L J 286.

(7) *Kalimuddin Ahmad* v. *Esaba Kuddin*, 1924 Cal 830 (831, 835): 51 Cal 715: 28 Cal W N 795: 39 Cal L Jour 399: 83 Ind Cas 220; *Abdul Ohad* v. *Amdali Gazi*, (1920) 57 Ind Cas 969 (971): 1921 Cal 248: 48 Cal 153.

(8) *Brija Lal Singh* v. *Mahadeo Prasad*, (1911) 12 Ind Cas 669 (671): 17 Cal W N 133: 15 Cal L Jour 432; *Gajrajmati* v. *Swami Nath Ray*,

which confirmed the *preliminary* decree that has got the jurisdiction to entertain the application.[9]

12. Suit to set aside an ex parte decree—Ex parte decree obtained by fraud.—As has been seen in Note 61 to S. 9 fraud vitiates the most solemn transactions. A suit will, therefore, lie to set aside an *ex parte* decree on the ground of fraud.[1] Thus if the plaintiff suppresses the fact of a compromise effected and obtains an *ex parte* decree, the decree can be set aside by a separate suit.[2] If the decree is tainted with fraud, any sale which has taken place in pursuance of the decree can also be set aside.[3] But the fraud alleged *must be extraneous* to everything which has been adjudicated upon by the Court and the defendant cannot be allowed to get round the rule of *res judicata* by simply proving that the *ex parte* judgment is wrong.[4]

In a suit to set aside the *ex parte* decree on the ground of fraud the *onus* lies on the party suing to show that there was some fraud in relation to the proceedings of the Court.[5] The mere fact that a decree is *ex parte* does not show that there has been no service of summons. On the other hand, the presumption is that the Court was satisfied as to due service of summons before proceeding *ex parte*.[6]

A suit is maintainable notwithstanding the fact that it has not been preceded by an application under this rule[7] or that an application was filed under this rule and proved infructious.[8] But no suit can be entertained where the only question submitted is one that could, and should have been dealt with under this rule.[9] For instance, where the only fraud alleged is *bare non-service*

(1916) 36 Ind Cas 307 (316, 317): 39 All 13: 14 All L J 853; *Hedlot Khasia* v. *Karan Khasiani*, (1912) 13 Ind Cas 377 (380): 15 Cal L Jour 241; *Abdul Jalil Sheikh* v. *Bama Charan Chatterji*, (1932) 36 Cal W N 747 (750). See also *Raghunandan* v. *Bhuaal Tewari*, 1932 All 340 (341): 1932 All L J 257 [Case where defendant was made a party in appeal but was not served with *ex parte* notice of appeal].

(9) *Badier Rahman Chowdry* v. *M A R R M R M Chetty Firm*, (1916) 35 Ind Cas 288 (289): 8 L B R 450: 9 Bur L Tim 245.

Note 12.

(1) *Godar Ram* v. *Ahmad Yar Khan*, (1920) 55 Ind Cas 412 (412) Lah; *Indian Provident Co* v. *Gobinda Chandra*, 1923 Cal 425 (426): 27 Cal W N 359: 65 Ind Cas 318; *Lakshmi Charan Shaha* v. *Nur Ali*, (1911) 11 Ind Cas 626 (627): 38 Cal 936: 15 Cal W N 1010; *Ibrahim Harun Jaffer* v. *Jusuf Hussain Jaffer*, (1920) 57 Ind Cas 551 (552): 22 Bom L R 798; *M A Maistry* v. *Abdul Aziz Rahman*, 1927 Rang 281 (281): 6 Bur L Jour 148: 104 Ind Cas 313: 5 Rang 471; *Kinkhede* v. *Mohanya*, 1926 Nag 388 (389): 94 Ind Cas 56; *Devji* v. *Thommadara*, 1926 Bom 63 (63): 27 Bom L R 1494: 92 Ind Cas 555.

(2) *Debendra Nath Bhattacharjee* v. *Prasanna Kumar Chakkravarti*, (1907) 5 Cal L Jour 328 (331); *Ram Narain* v. *Shew Bhunjan*, (1900) 27 Cal 197 (201).

(3) *Legadapati Chinnayya* v. *Kotla Ramanna*, 1913 Mad W N 387 (389): 38 Mad 203: 13 Mad L Tim 421: 19 Ind Cas 579: 25 Mad L Jour 228.

(4) *Subba Aiyar* v. *Kallapian Pillai*, (1914) 22 Ind Cas 500 (500) Mad; *Rajmohan* v. *Gourmohan*, (1854-57) 8 Moo Ind App 91 (102): 4 Suth W R 46 P C.

(5) *Mahanth Krishna Dayal Gir* v. *Lakshmi Narain*, (1920) 56 Ind Cas 270 (271): 1 Pat L Tim 486; *Kure* v. *Jhinguria*, (1916) 35 Ind Cas 847 (849) All; *Manindra Nath* v. *Hari Mondal*, (1920) 54 Ind Cas 626 (628): 24 Cal W N 133; *Muhammad Din* v. *B D Berry & Co*, 1926 Lah 86 (86, 87): 89 Ind Cas 736.

(6) *Harnarayan Pandey* v. *Nandkeshwar Pandey*, 1923 Pat 406 (407): 1 Pat L Rep 127: 71 Ind Cas 573.

(7) *Nga Yein* v. *Nga So*, (1916) 34 Ind Cas 264 (265): (1916) 2 U B R 106: 10 Bur L Tim 10; *Abdulla Rahman Audy* v. *Syed Alabi*, 1925 Rang 200 (201): 4 Bur L Jour 18: 3 Rang 65: 86 Ind Cas 537; *Nagendra Nath Basu* v. *Parbati Charan Koyal*, (1916) 35 Ind Cas 339 (341): 20 Cal W N 819.

(8) *Bal Kishen Lal* v. *Tapeswar Singh*, (1912) 14 Ind Cas 845 (846): 17 Cal W N 219: 15 Cal L Jour 446; *Maharani Janki Kuer* v. *Babu Thakur Rai*, 1924 Pat 241 (242): 1923 Pat H C C 336: 5 Pat L Tim 37: 75 Ind Cas 343: *Radha Raman* v. *Pran Nath*, (1901) 28 Cal 475 (478): 5 Cal W N 757; *Dwaraka Prasad* v. *Lachhoman Das*, (1899) 21 All 289 (290): 1899 All W N 67; *Golap Sundari Debi* v. *Indra Kumar Hazara*, (1909) 1 Ind Cas 86: 13 Cal W N 493: 9 Cal L Jour 367: 5 Mad L Tim 360.

(9) *Khushiram Pohumal* v. *Ghanshamdas*, (1911) 25 Ind Cas 946 (947): 8 Sind L R 81; *Maung Ngwe Ya* v. *Allagappa Chetty*, (1910) 8 Ind Cas 599 (600): 3 Bur L Tim 15.

O. 9, R. 13, Note 12.

of summons, no suit can succeed.[10] It is quite a different matter, however, where the *whole suit* is attacked on the ground of fraud and the incident of improper or defective service is relied on as *one* of the *indicia* of fraud.[11] As the Judicial Commitee observed in *Khagendra Nath* v. *Pran Nath* (29 Cal. 395 P.C.) O. 9, R. 13 assumes the existence of a real suit and has no application where the suit itself is attacked on the ground of fraud and the fraudulent and violent incidents of its progress *e.g.*, at the stage of service is treated as parts and *indicia* of a whole. A fraudulent suppression in the matter of the service of summons can afford a sufficient ground for setting aside the *ex parte* decree.[12] Thus where the plaintiff got summons served on a wrong person suppressing the father's name of the real defendant, and knowing full well that the defendant was not a partner. got him impleaded as a partner, it was held that the decree was tainted with fraud.[13] Similarly where the plaintiff falsely and intentionally represented to the Court that the defendant was away in a distant place and got substituted service effected, the decree passed in the case was held to be vitiated by fraud.[14]

The mere fact that the *ex parte* decree has been procured by *false or perjured evidence* is no ground for setting it aside. Something more should be proved in support of the allegation of fraud.[15]

Where the very question of fraud has been already in issue and agitated between the same parties and decided upon in an application under this rule, the decision will operate as *res judicata* in a separate suit.[16]

The question whether the original suit itself is revived after the *ex parte* decree in that suit has been set aside in a subsequent suit, depends on the

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(10) *Damodar Prasad* v. *Ram Sarup*, 1923 Pat 327 (328): 4 Pat L Tim 102: 1923 Pat H C C 137: 1 Pat L R 252: 71 Ind Cas 843; *Lakshmi Narayan* v. *Fazil Mahomed*, (1910) 7 Ind Cas 163 (163) Cal; *Puran Chand* v. *Sheo Dat Rai*, (1907) 29 All 212 (213): 4 All L J 51: 1907 All W N 31; *Ramdhani Misir* v. *Parmeswar Kurmi*, (1912) 16 Ind Cas 5 (6) All; *Narsingh Das* v. *Bibi Rafikan*, (1910) 5 Ind Cas 198 (199, 200): 37 Cal 197: 11 Cal L Jour 250: 14 Cal W N 507; *Ghullamally & Sons* v. *Firm of Gammeter*, 1930 Sind 298 (299): 24 Sind L R 232: 128 Ind Cas 682.

(11) *Saldeo Narain* v. *Ramayan Tewari*, 1923 Pat 242 (244): 2 Pat 335: 4 Pat L Tim 147: 71 Ind Cas 705; *Mohan Krishna Dar* v. *Har Prasad*, (1917) 40 Ind Cas 2 (10) Pat; *Khagendra Nath* v. *Pran Nath*, (1902) 29 Cal 395 (400): 29 Ind App 99: 4 Bom L R 363: 6 Cal W N 473: 8 Sar 266 P C.

(12) *Narasingh* v. *Rafikhan*, (1910) 5 Ind Cas 198 (199, 200): 37 Cal 197: 11 Cal L Jour 250: 14 Cal W N 507; *Abdul Mazumdar* v. *Mahomed Gazi Chowdhry*, (1894) 21 Cal 605; *Panna Lal* v. *Tarakanta*, (1921) 63 Ind Cas 778 (779) Cal; *Chiranjib* v. *Daulta*, (1917) 41 Ind Cas 677 (678): 2 Pat L W 20; *Jawahir* v. *Nekiram*, (1915) 28 Ind Cas 502 (503): 37 All 189: 13 All L J 190.

(13) *Shiram* v. *Firm of Dataram Munshiram*, 1922 Sind 20 (21): 16 Sind L R 109: 70 Ind Cas 852.

(14) *Mela Ram* v. *Ralla Ram*, (1914) 22 Ind Cas 549 (550): 65 Pun Re 1914: 75 Pun L R 1914: 40 Pun W R 1914.

(15) *Ram Narain Lal Shaw* v. *Tooki Sao*, (1920) 58 Ind Cas 182 (183): 5 Pat L Jour 259: 1 Pat L Tim 119: 1920 Pat H C C 98: 2 U P L R (Pat) 51; *Kasiswar* v. *Amiruddin*, (1918) 47 Ind Cas 14 (16): 23 Cal W N 183; *Nalini Kanta Mukerji* v. *Hari Nikari*, 1925 Cal 663 (664): 41 Cal L Jour 281: 29 Cal W N 325: 86 Ind Cas 779; *Kedar Nath Das* v. *Hemanta Kumari Dasi*, (1914) 22 Ind Cas 709 (710): 18 Cal W N 447; *Mukta Mala Dasi* v. *Ram Chander De*, 1927 Cal 84 (86): 97 Ind Cas 879: 31 Cal W N 258; *Kadirvelu Nainar* v. *Kuppusawmi Naiker*, 45 Ind Cas 774 (778): 41 Mad 748: 34 Mad L Jour 590: 23 Mad L Tim 372: 8 Mad L W 103: 1918 Mad W N 514 F B; *Ajudhia Prasad* v. *Gur Dayal*, (1919) 52 Ind Cas 101 (2), (103): 22 Oudh Cas 60: 1 U P L R (Oudh) 70.

(16) *Khirode Chandra Ray* v. *Srimati Ashtullabee*, (1916) 35 Ind Cas 557 (561): 20 Cal W N 845; *Chandra Kumar* v. *Aswini Kumar*, (1918) 45 Ind Cas 250 (251) Cal; *Yogamba Boi Ammani* v. *Arunuga Mudaliar*, (1916) 36 Ind Cas 128 (128): 3 Mad L W 572: 20 Mad L Tim 126: (1916) 2 Mad W N 63; *Ramrup Goshain* v. *Mahabir Shah*, 1924 Pat 238 (239): 2 Pat 883: 5 Pat L Tim 66: 2 Pat L R 65: 74 Ind Cas 825; *Niadarmal* v. *Ranak Hussin*, (1907) 29 All 608 (612): 1907 All W N 191: 4 All L J 668; *Jangal Chaudhury* v. *Laljit Pasban*, 1921 Pat 12 (13): 6 Pat L Jour 1: 1921 Pat H C C 3: 60 Ind Cas 124: 1 Pat L Tim 735: 3 U P L R (Pat) 1; *Mahabir Prasad Choudhury* v. *Chhedi Singh*, 1924 Pat 769 (770): 1924 Pat H C C 155: 81 Ind Cas 1035; *Prannath* v. *Mohesh*, (1897) 24 Cal 546 (549, 550).

issues and the actual decision in the later suit.[17]

O. 9, R. 13, Notes 12—15.

If the *ex parte* decree be not set aside it is final and will operate as *res-judicata*.[18]

(*See also* Note 19 to Section 11).

13. Application to be made to the Court which passed the decree.—The application under this rule ought to be made to the Court which passed the decree though the presiding judge may be different.[1] Where, however, by reason of territorial re-adjustment, the Court itself becomes different, the defendant is not debarred from applying to the Court which is seized of the matter.[2]

According to the undermentioned cases of the High Court of Madras[3] an application should be made only to the trial Court even after *disposal* of the appeal against the *ex parte* decree. This view, as has been seen in Note 11 above, cannot be accepted as correct.

In an earlier decision of the same High Court[4] it was held that the High Court can, in second appeal, entertain an application for setting aside an *ex-parte* decree passed by the trial Court.

14. Fresh vakalatnamah, if necessary.—A pleader who had duly appeared in the suit is not obliged to file a fresh *vakalatnama* for the purpose of an application under this rule.[1]

15. Who can apply to set aside.—The application under this rule is not limited to the case of a *sole* defendant who has not appeared or, where there are more defendants than one, none of them had appeared; *any one of several defendants* against whom the decree is *ex parte* can apply.[1] But a person who is not a party though he may be interested in the suit is not entitled to apply under this rule.[2] Nor can a person who though a formal party but against whom nothing is said in the operative portion of the decree[3] or who has been expressly exempted from the decree, apply under this rule.[4] It follows that a person against whom the suit is dismissed cannot apply.[5]

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(17) *Nirsan Singh* v. *Kishuni Singh*, 1931 Pat 204 (205): 132 Ind Cas 355: 12 Pat L Tim 493: 10 Pat 516.

(18) *Ganga Bishan* v. *Mehar Ilahi Khan*, (1914) 25 Ind Cas 224 (227): 12 All L J 1011; *Dial Singh* v. *Allah Ditta*, (1910) 8 Ind Cas 232: 47 Pun L R 1910; *Hara Chandra Bairagi* v. *Bepin Behary Das*, (1910) 6 Ind Cas 860 (860): 13 Cal L Jour 38; *Abbas Khan* v. *Nur Khan*, (1921) 60 Ind Cas 496 (496) Lah.

Note 13.

(1) *Rughoo Mohinee* v. *Kasheenath Roy*, (1868) 10 Suth W R 156 (157); *Kutab-ud-dia* v. *Rupa*, 1890 Pun Re No 158.

(2) *Srinivasa Rao* v. *Hanumant Rao*, 1922 Mad 10 (12): 65 Ind Cas 727: 42 Mad L Jour 344: 15 Mad L W 458: 1922 Mad W N 349: 31 Mad L Tim 79: 40 Mad 1.

(3) *Subramania Aiyar* v. *Varadharajalu Naidu*, 1927 Mad 722 (723, 724): 53 Mad L Jour 110: 26 Mad L W 19: 103 Ind Cas 146; *Palaniappa Chetty* v. *Subramanian Chetty*, 42 Mad L Jour 12 (14): 1922 Mad 33: 66 Ind Cas 59: 14 Mad L W 609: 1921 Mad W N 796.

(4) *Sadaya Konan* v. *Annamalai Udayan*, (1915) 29 Ind Cas 458 (458): 2 Mad L W 529. See also *Zinatunnissa* v. *Muddun Mohun*, (1874) 22 Suth W R 537 (537) [In the case of an appellate decree *ex parte*, application should be made to the Appellate Court]; *Khoob Lall Sahoo* v. *Kadir Buksh*, (1871) 15 Suth W R 431 (432).

Note 14.

(1) *Bachubai Jhirad* v. *Ibrahim Isak*, 1922 Bom 207 (209): 24 Bom L R 744: 47 Bom 11: 69 Ind Cas 169.

Note 15.

(1) *Cooke* v. *Equitable Coal Co, Limited*, (1906) 8 Cal W N 621 (624).

(2) *Susil Chandra Guha* v. *Gouri Sundari Devi*, 1926 Cal 1015 (1015): 92 Ind Cas 946.

(3) *Nand Ram* v. *Ram Dayal*, (1904) 1 All L J 470 (472).

(4) *Ajodha Prasad* v. *Katori*, (1921) 61 Ind Cas 484 (485): 3 U P L R (All) 29.

(5) *Babu Ram* v. *Emperor*, (1911) 11 Ind Cas 141 (142): 8 All L J 674; *Matte Narayana-*

O. 9, R. 13, Notes 15—17.

The Court cannot *suo motu* set aside an *ex parte* decree without there being an application by the party.[6]

16. Application by the legal representative of the defendant.—When a defendant dies after an *ex parte* decree is made against him, his legal representative can apply under this rule to set it aside.[1] The reason is the legal representative enjoys the same rights and liabilities as the original defendant. The contrary view expressed by the High Court of Madras in the undermentioned case[2] that the section only authorises applications by the *defendant against whom* an *ex parte* decree was passed is not correct under the present Code having regard to S. 146.

Where proceedings under this rule have been already initiated by the defendant his legal representative is entitled to continue the same.[3] *See also* S. 146 Notes 2 and 7 for fuller discussion.

17. Grounds for setting aside an ex parte decree.—In an application under this rule, the Court has to satisfy itself (a) whether the summons has not been duly served or (b) whether the applicant has been prevented by sufficient cause from appearing.[1] The words in the rule are imperative and if either of these conditions are satisfied, the Court is bound to set aside the *ex-parte* decree and cannot refuse it on any other ground.[2] Thus the fact that the defendant did not take out summons to his witnesses is no ground for refusing the application if otherwise the conditions of this rule are satisfied.[3] Conversely, where either of these conditions are not satisfied the Court has *no jurisdiction* to grant the application for any other reason.[4]

The Court should decide upon evidence[5] or proper affidavits[6] and come to a definite finding as to the facts alleged in the application.[7] An application under this Rule in rent suits under the Bengal Tenancy Act,[8] and the Orissa

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murthi v. *Parankusum Venkatayya*, 1927 Mad 227 (228): 25 Mad L W 57: 98 Ind Cas 501: 38 Mad L Tim 194 [Some defendants sailing with plaintiff—Withdrawal ordered in their absence—Petition by them to set it aside and allow them to continue the suit—Not sustainable].

(6) *Amar Singh* v. *Buta Shah*, 1927 Lah 372 (372): 101 Ind Cas 617.

Note 16.

(1) *Mt Banoo* v. *Hardwari Lal*, 1923 All 30 (30): 83 Ind Cas 601; *Ganoda Prasad Roy* v. *Shib Narain Mukerjee*, (1902) 29 Cal 33 (35); *Mussammat Jas Kaur, Mahtab Singh*, 1903 Pun Re No 36: 88 Pun L R 1903; *Venkata Subbier* v. *S Krishnamurthi*, (1913) 21 Ind Cas 568 (569): 38 Mad 442: 1913 Mad W N 899: 14 Mad L Tim 396 [Executor of a deceased defendant can apply]; *Mt. Deoki* v. *Jugal Kishore*, 1925 Oudh 370 (371): 27 Oudh Cas 299: 85 Ind Cas 529: 1 Oudh W N 699 [Legal representative can apply though not brought on record]. But see *Janki Prasad* v. *Sukhrani*, (1899) 21 All 274 (276): 1899 All W N 58 [Doubted in 1923 All 30].

(2) *Sambasica Chetty* v. *Veeraperumal Mudali*, (1905) 28 Mad 361 (362).

(3) *Beli Jeo* v. *Sham Bihari Lal*, (1907) 29 All 574 (575): 1907 All W N 176: 4 All L J 480.

Note 17.

(1) *Mohla* v. *Kahnun*, 1925 Lah 577 (577): 7 Lah L Jour 408: 26 Pun L R 600: 91 Ind Cas 798.

(2) *Jatindra* v. *Raja Srinath Roy*, (1899) 26 Cal 267 (272): 3 Cal W N 261; *Baldeodas Lohia* v. *Subkarandas Goenka*, 1925 Cal 627 (628): 52 Cal 179: 88 Ind Cas 508; *Doorgaranee* v. *Jadub Chander*, (1866) 5 Suth W R Mis 11 (12).

(3) *Malhar Rao* v. *Jagannath*, 1928 Nag 75: 105 Ind Cas 842.

(4) *Kadir Bi Bi* v. *Mahomed Gani*, 1930 Rang 152 (152): 127 Ind Cas 176; *Radha Mohan Dutt* v. *Abbas Ali*, 1931 All 294 (296): 1931 All L J 377 F B; *Arunachalam Chetty* v. *Kodandapani Pillai*, (1915) 27 Ind Cas 789 (790): 2 Mad L W 1. *Venkatarama Iyer* v. *Nataraja Iyer*, (1913) 18 Ind Cas 360 (362): 24 Mad L Jour 235: 1913 Mad W N 165: 13 Mad L Tim 140.

(5) *Hathoor Gramathil U M Okkilikara Siddayya* v. *Ambu Nair*, 1925 Mad 1264 (1265): 49 Mad L Jour 379: 22 Mad L W 487: 90 Ind Cas 577.

(6) *Nithianunda Muthusami Monigaran* v. *Viswanatha Monigaran*, (1913) 21 Ind Cas 457 (457): 1913 Mad W N 857.

(7) *Sant Bakhsh* v. *Oudh Ram*, 1926 Oudh 118 (119): 90 Ind Cas 745; *Ramesh Prasad* v. *Gulab Chaudhry*, (1920) 54 Ind Cas 965 (966): 1 Pat L Tim 69.

(8) The Bengal Tenancy Act (VIII of 1885), S 153-A; *Chandra Chur* v. *Bhola Rai*, 1921 Pat 284 (286): 1921 Pat H C C 301: 2 Pat L Tim 372: 62 Ind Cas 80. See also *Dhabamayi* v. *Tarracharan*, (1871) 16 Suth W R 17 (18): 7 Beng L R 207; *Oodwunt* v. *Bidhee*, (1872) 18 Suth W R 207 (208): 18 Beng L R 216 Note.

Tenancy Act[9] must contain a statement of the injury sustained by the applicant by the *ex parte* decree, and must in the case of the former Act, also be accompanied by a deposit in Court of the amount of rent admitted due by the applicant unless the Court otherwise directs.

O. 9, R. 13, Notes 17—18.

18. Summons not duly served.—The *onus* of proving that the summons has not been duly served is upon the applicant claiming the benefit of this rule.[1] If he makes out, that the necessary proof of due service required by R. 6 was not given before the Court proceeded *ex parte*, the decree ought to be set aside.[2] But a mere assertion of ignorance on the part of the defendant is not enough to prove want of due service.[3] The Court must decide the matter upon enquiry and upon evidence.[4]

Although in the first instance the *onus* lies on the applicant to prove due service, it will shift to the opposite party where the service is not on the defendant personally but on his *gumastah*, and he must show that the provisions of O. 5, R. 12 or 13 were complied with.[5] It is necessary in each case for the Court to see that the serving officer has used all due and reasonable diligence with a view to find out the defendant before affixing the summons.[6]

The word "duly served" would appear to relate to the *method* of service.[7] Where the summons has not been served because it contained the wrong name of the defendant's father;[8] or where the summons is served, not upon the defendant, but on his brother;[9] or where the service is by registered post, and the defendant denies receipt of the same;[10] or where, in the case of a substituted service, there is nothing on record to show that the provision of O. 5, Rr. 19 and 20 were complied with;[11] or where the defendant is not served in sufficient time to enable him to appear and defend[12] the Court is justified in setting aside the *ex parte* decree. The unrebutted oath of the applicant that he was not served has been held to be sufficient proof of non-service.[13]

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(9) The Orissa Tenancy Act (II of 1913), S 205.

Note 18.

(1) *Nageshar Bux Rai* v. *Biseshwar Dayal Singh*, 1924 Pat 446 (447): 3 Pat 286: 2 Pat L R 58: 78 Ind Cas 889: 5 Pat L Tim 576; *Venkatachalam* v. *Subbayya*, 1928 Mad 655 (655): 54 Mad L Jour 448: 108 Ind Cas 889; *Torab Ali* v. *Chooramun*, (1875) 24 Suth W R 262 (262); *Balkisandas* v. *Jainarayan*, 1928 Nag 80 (80): 22 Nag L R 166: 107 Ind Cas 666.

(2) *Fakhruddin* v. *Chafuruddin*, (1901) 23 All 99 (101): 1901 All W N 1.

(3) *Doraiswami Aiyar* v. *Balasundaram Aiyar*, 1926 Mad 558 (559): 23 Mad L W 319: 94 Ind Cas 420; *Subramania Iyer* v. *Krishnaswami Naidu*, (1928) 108 Ind Cas 753: 1928 Notes 7 (*e*).

(4) *Dallo* v. *Sibta Kuar*, (1911) 9 Ind Cas 31 (32) All; *Karuthan Ambalam* v. *Doraisawmy Iyengar*, 1923 Mad 27 (28): 16 Mad L W 444; *Khudeerum* v. *Chutterdharee*, (1874) 21 Suth W R 242 (243); *Karoona Moyee Dossee* v. *Nubo Kishore Sein*, (1866) 6 Suth W R Mis 36 (37).

(5) *Nagaru Ramappa Shetti* v. *Namburi Venkataratnam*, (1913) 21 Ind Cas 922 (923): 1913 Mad W N 1028: 14 Mad L Tim 535.

(6) *Baldeodas* v. *Shubchurndas*, 1926 Mad 327 (330, 333): 30 Cal W N 104: 91 Ind Cas 965; *Nihala* v. *Khazan Singh*, 1924 Lah 233 (233): 73 Ind Cas 34; *Champat Singh* v. *Mahabir Prasad*, (1918) 43 Ind Cas 632 (634); *Balakhidas* v. *Hargoven*, 1891 Bom P J 39 (39).

(7) *Balgobind* v. *Sheo Kumar*, 1924 All 818 (823): 22 All L J 791: 5 L R All (Civ) 545: 82 Ind Cas 184: 46 All 864.

(8) *Gurunath* v. *Virupaksha*, 1891 Bom P J 142.

(9) *Sankara Bhatta* v. *Subbaraya Bhatta*, (1911) 9 Ind Cas 763 (763): (1911) 2 Mad W N 186: 9 Mad L Tim 358.

(10) *Sunder Spinner* v. *Makan Bhula*, 1922 Bom 377 (1), (377): 46 Bom 130: 64 Ind Cas 386: 23 Bom L R 908.

(11) *Panju Ram* v. *Uttam Chand*, 1928 Lah 799 (800); *Ram Kishen* v. *Mula*, 1924 Lah 191 (191): 69 Ind Cas 467; *Ghulam Muhammad* v. *Mehr Din*, 1930 Lah 560 (560): 128 Ind Cas 55: 31 Pun L R 272.

(12) *Chanbasappa* v. *Mainaba*, (1870) 7 Bom H C R A C 138; *Mc Carron* v. *Welti*, (1905) 27 All 192 (194): 1904 All W N 227: 1 All L J 697; *Basarmal* v. *Khemchand*, (1911) 11 Ind Cas 433 (434) Sind; *Haradhan* v. *Proteb*, (1870) 14 Suth W R 401 (402); *Mirza Ally* v. *Hyder Hussain*, (1877-78) 2 Bom 449 (452): 2 Ind Jur 718.

(13) *Maung Shwe Hla* v. *Soolay Naidu*, 1924 Rang 336 (336): 3 Bur L Jour 101: 82 Ind

O. 9, R. 13, Notes 18—20.

Appearance before the registration of suit in a proceeding for the appointment of a guardian *ad litem* does not dispense with the service of suit summons.[14] Where the summons has not been duly served the fact that the defendant *knew* of the suit, will be no ground for not restoring the suit.[15] Where, however, the defendant has refused the summons[16] or has wilfully or carelessly failed to appear after due service[17] the *ex parte* decree cannot be set aside. Similarly, a mere *irregularity* in service of summons on a co-defendant[18] or on the defendant himself, where he had *waived* the irregularity by accepting the summons, are not sufficient to set aside the *ex parte* decree.[19]

The summons referred to is the first summons issued to the defendant giving him notice of suit and not of any *application* made during the course of the suit.[20]

See also O. 5 generally.

19. Sufficient cause.—*See* Notes under the same heading in R. 9 "sufficient cause". It may, among other things, include a fraudulent suppression of summons from the knowledge of the defendant.[1]

20. Minor defendant.—If a minor defendant *is properly represented* in the suit an *ex parte* decree is as binding upon him as a decree in a contested suit,[1] and cannot be set aside on the ground that he has not been served with the notice of the intention to appoint a Court-Officer as guardian *ad litem*.[2] As to whether a minor can apply to set aside an *ex parte* decree where *he has not been properly represented*, there is a conflict of judicial opinion. The High Court of Madras[3] and the Judicial Commissioner's Court of Nagpur[4] have held that the minor in such a case cannot be regarded as a *party* to the suit at all, that the decree passed is, in effect, a *nullity* and the Court cannot re-open the suit under this rule. On the other hand, the High Courts of Allahabad,[5] Bombay,[6] Calcutta,[7] Patna,[8] and the Chief Court of Oudh[9] have held that he

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Cas 812; *Anund Moyee Dassee* v. *Anund Soondur Mozoomdar*, (1870) 13 Suth W R 237 (239).

(14) *Gulabchanda* v. *Shanker Lal*, (1913) 18 Ind Cas 711 (712): 35 All 163: 11 All L J 135.

(15) *Kasim Ebrahim Sulcji* v. *Johurmull Khemka*, (1916) 34 Ind Cas 799 (803): 43 Cal 447: 23 Cal L J 183: 20 Cal W N 173; *Sudhansu* v. *Chairman, Patna Municipality*, 1932 Pat 150 (152): 12 Pat L Tim 911: 135 Ind Cas 110.

(16) *Vishwa Nath* v. *Baijnath*, 1925 Nag 356 (357): 88 Ind Cas 46.

(17) In the matter of the petition of *S J Leslie*, (1873) 10 Beng L R 68: 18 Suth W R 474.

(18) *Ewing Co* v. *Gosidas*, (1869) 3 Beng L R App 7.

(19) *Manjula* v. *Shankar*, (1915) 26 Ind Cas 830 (831): 10 Nag L R 144.

(20) *Panjab Rao* v. *Baltram*, 1923 Nag 13 (15): 69 Ind Cas 549.

Note 19.

(1) *Nirsan Singh* v. *Kishnin Singh*, 1931 Pat 204 (205): 132 Ind Cas 355: 12 Pat L Tim 493: 10 Pat 516 F B.

Note 20.

(1) *Indra Deo Narayana Singh* v. *Matuk Dhari Singh*, (1917) 37 Ind Cas 389 (390) Pat.

(2) *Pritam Ram* v. *Dharo Ram*, 1924 Pat 772 (773): 1924 Pat H C C 216: 78 Ind Cas 613; *Sundararama Reddi* v. *Pattabhirama Reddi*, (1917) 42 Ind Cas 421 (423): 6 Mad L W 272: 1917 Mad W N 495.

(3) *Arumuga Goundan* v. *Periavanjippa Goundan*, 1924 Mad 489 (1): 46 Mad L Jour 348 (360): 19 Mad L W 233: 34 Mad L Tim 94: 1924 Mad W N 289: 78 Ind Cas 76; *Eda Punnayya* v. *Jangalla Kama Koottayya*, (1919) 53 Ind Cas 184 (185, 186): 37 Mad L Jour 399: 26 Mad L Tim 327: 10 Mad L W 471: 1920 Mad W N 1.

(4) *Seth Paramanand* v. *Lakhmi Chand*, 1922 Nag 249 (250): 18 Nag L R 138: 66 Ind Cas 460.

(5) *Peare Lal* v. *Ashraf Khan*, 1923 All 213 (214): 21 All L J 185: 71 Ind Cas 456: 4 L R All (Civ) 137.

(6) *Hanmantapa* v. *Jivubai*, (1900) 24 Bom 547 (552): 2 Bom L R 478.

(7) *Raghubar Dyal* v. *Bhikya Lal*, (1886) 12 Cal 69 (76); *Kesho Pershad* v. *Hirday Narain*, (1880) 6 Cal L Rep 69 (70).

(8) *Dulbin Binodini Debi* v. *Parmeshar Dayal Singh*, 1925 Pat 512 (514): 1925 Pat H C C

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is entitled to apply under this rule. The Allahabad High Court has also held that the fact that the minor is not properly represented, is itself a sufficient cause for setting aside the decree.[10] But the mere fact that the guardian did not appear or that the Court guardian failed to appear owing to want of instructions[11] or that there are mere irregularities in the matter of the appointment of a guardian[12] is not a sufficient ground for setting aside the *ex parte* decree.

It is however open to the minor to impeach an *ex parte* decree got against him by a *separate suit* in cases where he can show that the guardian has been guilty of *fraud* or gross negligence[13] and if his interests were prejudiced thereby.[14] The fact that he has not applied under this rule is no bar to the suit.[15]

21. Decree having been satisfied.—The fact that an *ex parte* decree has been satisfied does not disentitle the defendant from applying under this rule.[1]

22. "Upon such terms as to costs etc".—The Court has a wide discretion in imposing such terms on the applicant as it thinks fit before setting aside the *ex parte* decree; thus it may order him to deposit the decretal amount in Court especially when the *bona fides* of his defence are not free from doubt[1] or it may order the payment of costs.[2] It may also impose a condition that the applicant should find a surety who would be responsible for any amount that may be found due by him under any decree that may be subsequently passed[3] and direct that the security should be in cash or in property.[4] Where the conditions are not strictly carried out the order becomes inoperative and the *ex parte* decree will remain valid.[5] The Court can extend the time fixed for payment of the costs or of the decree amount either under S. 148 or under its inherent powers.[6] The Court ought not, however, to impose very onerous

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180: 88 Ind Cas 987: 6 Pat L Tim 855. But see *Abhey Ram Jha* v. *Kandarp Narayan Jha*, (1919) 50 Ind Cas 783 (788) Pat.

(9) *Shiam Bahadur* v. *Seth Brij Kishore*, 1927 Oudh 173 (174): 4 Oudh W N 356: 101 Ind Cas 632.

(10) *Peare Lal* v. *Ashraf Khan*, 1923 All 213 (214): 21 All L J 185: 71 Ind Cas 456: 4 L R All (Civ) 137.

(11) *Ajodhya Prasad Singh* v. *Sheo Pershad Sahu*, (1901) 5 Cal W N 58 (59); *Vishnu* v. *Dattu*, (1907) 9 Bom L R 1099 (1101). See *Kesho Prasad* v. *Hirday Narain*, (1880) 6 Cal L Rep 69 (70, 71).

(12) *Pokhpal Singh* v. *Chhidu Singh*, (1912) 15 Ind Cas 903 (905): 9 All L J 653; *Ram Rekha Singh* v. *Ganga Prasad Mukaraddhwaj*, 1926 All 545 (545): 24 All L J 970: 97 Ind Cas 514 F B.

(13) *Cursandas* v. *Ladkavahu*, (1895) 19 Bom 571 (577); *Vithoba* v. *Shego*, (1918) 45 Ind Cas 882 (884) Nag; *Hanumantappa* v. *Jivu Bai*, (1900) 24 Bom 547 (552): 2 Bom L R 478.

(14) *Suryaprakasa Rao* v. *Sreeramulu*, 1931 Mad 6 (7, 8): 32 Mad L W 662: 59 Mad L Jour 918: 129 Ind Cas 249.

(15) *Bhagvan Dayal* v. *Param Sukh Das*, (1915) 27 Ind Cas 623 (624): 37 All 179: 13 All L J 179.

Note 21.

(1) *Zendoolal* v. *Kishorilal*, (1899) 23 Bom 716 (718): 1 Bom L R 213.

Note 22.

(1) *David Sassoon and Co, Ltd* v. *Shivjiram Devidas*, 1926 Sind 50 (51): 90 Ind Cas 236; In the matter of an application by *Sharoda Charan*, (1903) 7 Cal W N 59 n.

(2) *Shyam Lal* v. *Ram Narain*, (1920) 57 Ind Cas 300 (301): 5 Pat L Jour 420: 1 Pat L Tim 443: 2 U P L R (Pat) 154; *Bhi Khari Das* v. *Jawahir Lal*, (1892) All W N 216 (217).

(3) *Sonatun Shaha* v. *Dino Nath Shaha*, (1899) 26 Cal 222 (224): 3 Cal W N 228.

(4) *Sita Ram* v. *Lalta*, 1924 Oudh 181 (181): 73 Ind Cas 219.

(5) *Ghulam Muhammad* v. *Tulsi Ram*, 1904 Pun Re No 60; *Sukhai* v. *Binda Baksh*, 1922 Oudh 14 (15); *Surajpal Singh* v. *Deokali*, 1926 Oudh 481 (482): 94 Ind Cas 973.

(6) *Chandra Goundan* v. *Palniappa Goundan*, (1917) 42 Ind Cas 961 (962): 1917 Mad W N 870: 23 Mad L Tim 7; *Jagarnath Sahi* v. *Kamta Prasad*, (1914) 23 Ind Cas 138 (139): 36 All 77: 12 All L J 38.

O. 9, R.13, Notes 22—23.

terms on the applicant.[7]

An order giving time to pay the decree amount under this rule does not of itself operate as a stay of execution of the *ex parte* decree.[8]

23. Proviso to the rule.—It cannot be laid down as an inflexible rule that whenever an order is made under this rule its effect is to set aside the *whole* decree. The true test is whether the suit as framed can be maintained and a decree made in favour of the plaintiff even if the other defendant or defendants against whom the decree has been made *ex parte* were not impleaded as parties.[1] Thus, where *A* filed a suit for rent under the Bengal Tenancy Act against *X*, *Y* and *Z* and a decree was passed *ex parte* against all the defendants, *but Z* applied to have the *ex parte* decree set aside on the ground that she was not duly served with summons, it was held that the whole decree should not be set aside inasmuch as a decree for the *whole rent* could have been passed against *X* and *Y* alone without impleading *Z*.[2]

But where the decree is of such a nature that it cannot be set aside against only the defendant applying under this rule, it may be set aside wholly against all the defendants including those who have not applied or even those against whom a decree has been passed on the merits. The following are some of the classes of cases in which the decree cannot be set aside only as against the defendant applying without setting it aside as against the other defendants also:—

1. *Where the decree is joint and indivisible.*[3]

Illustration.

A, *B* and *C*, who are co-parceners of a joint Hindu family together execute a mortgage to *X*. *X* files a suit against all of them. *C* alone is served, but none of them appear and an *ex parte* decree is passed against all. *A* and *B* alone apply under this rule for setting aside the decree. Here the decree being *one and indivisible* it ought to be set aside as against *C* also.[4]

Where the decree is not joint and indivisible[5] as *e.g.*, where the suit is to obtain possession of separate items of properties from separate sets of defendants[6] or where the decree itself is divisible and each of the defendants have separate defences the whole decree need not be set aside.[7]

2. *Where the decree proceeds on a ground common to all the defendants.*[8]

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(7) *Indar Singh* v. *Gurdayal Singh*, 1924 Oudh 229 (229): 74 Ind Cas 86; *Maung Sein* v. *Arumugam Chetty*, 14 Bur L R 214.

(8) *Subramania Aiyar* v. *Arunachalam Chettiar*, (1916) 32 Ind Cas 731 (732): 3 Mad L W 35.

Note 23.

(1) *Jadubansa Narain* v. *Mohunt Hari Charan Bharati*, (1907) 6 Cal L Jour 226 (231, 232); *Ali Ahmad Khan* v. *Brown*, (1912) 15 Ind Cas 260 (262): 17 Cal W N 142.

(2) *Keshab Chandra Chowdhury* v. *Joyful Nessa Bibi*, 1928 Cal 397 (398): 32 Cal W N 507.

(3) *Jadubansa Narain* v. *Mohunt Hari Charan Bharati*, (1907) 6 Cal L Jour 226 (227, 231); *Meenakshisundaram Pillai* v. *Chandrakasa Naicker*, 1927 Mad 550 (550): 38 Mad L Tim 315: 1927 Mad W N 294: 101 Ind Cas 98.

(4) *Ajodhya Pershad* v. *Sheo Pershad*, (1900) 5 Cal W N 58 (59).

(5) *Thirumalachariar* v. *Athimoola Karayalar*, 1926 Mad 256 (257): 22 Mad L W 695: 1926 Mad W N 112: 92 Ind Cas 776.

(6) *Narayanaswamy Iyer* v. *Doraisawmy Pathar*, 1921 Mad 451 (451): 1921 Mad W N 795: 65 Ind Cas 343; *Valia* v. *Marutha Veera*, (1908) 31 Mad 454 (456): 4 Mad L Tim 230: 18 Mad L Jour 543.

(7) *Mohim Chandra Guha* v. *Annada Charan Dutt*, (1902) 6 Cal W N 109 (110).

(8) *Dooknee Khan* v. *Rajessure Ranee*, (1871) 15 Suth W R 371 (371).

O. 9, R.13, Note 23.

Illustration.

A sues *B* and *C* on a promissory note. *B* is the principal-debtor and *C* is the surety. An *ex parte* decree is passed against both. *B* alone applies to set aside the decree and shows sufficient cause for his absence. The decree ought to be set aside against *C* also as the liability of both is based on a common ground.[9]

Where, however, the decree does not proceed on a common ground [10] and the defence of the several defendants are distinct or peculiar to each of them,[11] the whole decree ought not to be set aside. Thus where *A* sues *B* and *C* on a promissory note, on the allegation that *B* is the executant of the promissory note and that *B* and *C* (his nephew), are members of an undivided Hindu family of which *B* is the manager, and after the passing of an *ex parte* decree against both, *C* alone applies to set aside the decree, the proper course is to set aside the decree only as against *C* and not as against *B* also inasmuch as his liability is based on the ground that he executed the promissory note while the liability of *C* is based on the distinct ground that the debt was binding upon him and his defence is peculiar and not common to that of *B*.[12]

3. *Where it is necessary that the whole decree should be re-opened in the interests of justice*[13] *or, in other words, where the relief to which the applicant is entitled to cannot effectively be given except by setting aside the decree against the other defendants also.* Thus in the case of an *ex parte* decree against several mortgagors it has been held that the better course would be to set aside the decree against all the defendants.[14]

Illustration.

A files a suit against *B*, *C* and *D* on a mortgage bond and gets an *ex parte* decree against all of them. *B* alone applies to set aside the decree. Neither in the mortgage bond nor in the plaint nor in the decree is there any specification of the shares and liabilities of the several defendants. The decree ought to be set aside against all the defendants.[15]

4. *When the suit would result in two inconsistent decrees if the* ex parte *decree be not set aside against the other defendants also.*[16]

Illustration.

(*i*) *X* sues *A* and *B*, two joint executants of a promissory note for the recovery of the amount due thereunder. *B* has, as a matter of fact, paid the amount due to *X*. *B* is not served and does not appear and *A*, who is served also does not appear and an *ex parte* decree is passed against both. *B* applies to set aside the decree. Can the decree be set *aside against A also?* Yes. The reason is that, if *B* succeeds at the hearing in proving the payment, the result of not setting aside the decree against *A* also would be two *inconsistent* decrees.[17]

(*ii*) *A* sues *B* and *C* alleging that they are in joint possession of a certain immoveable property and asking for a declaration that he is in joint possession with

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(9) *Munshi Ram* v. *Malava Ram*, (1917) 40 Ind Cas 400 (401) Lah; *Muhammad Raja* v. *Musammat Barka*, (1914) 24 Ind Cas 115 (115) Oudh.

(10) *Gopalu Chetty* v. *Subbier*, (1903) 26 Mad 604 (606): 13 Mad L Jour 308.

(11) *Pitamshah* v. *Bhog Nath*, 1925 Oudh 181 (182): 81 Ind Cas 520; *Jadukans Narain* v. *Hari Charan*, (1907) 6 Cal L Jour 226 (232).

(12) *Gopalu Chetti* v. *Subbier*, (1903) 26 Mad 604 (606): 13 Mad L Jour 308.

(13) In re *Hari Das Karmakar*, (1907) 5 Cal L Jour 202 (203).

(14) *Ashfaq Husain* v. *Gauri Sahai*, (1911) 9 Ind Cas 975 (976): 33 All 264: 38 Ind App 37: 15 Cal W N 370: 8 All L J 332: 13 Cal L Jour 351: 9 Mad L Tim 380: 13 Bom L R 367: 4 Bur L Tim 121: 21 Mad L Jour 1140: (1911) 2 Mad W N 177 P C; *Braja Nath Pal* v. *Surendra Nath Krishna Roy*, (1917) 41 Ind Cas 181 (183) Cal.

(15) *Bala Baksh Bhararia* v. *Amiruddin Mian*, 1930 Cal 700 (701): 34 Cal W N 679: 128 Ind Cas 182.

(16) *Bhura Mal* v. *Har Kishan Das*, (1902) 24 All 383 (388): 1902 All W N 76.

(17) *Bhura Mal* v. *Har Kishen Das*, (1902) 24 All 383 (388): 1902 All W N 76.

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them. *B* alone is served but not *C* and there is an *ex parte* decree against both. *C* applies for a re-hearing under this rule. The decree ought to be set aside against *B* also because if *C* establishes at the hearing that *A* has no title whatsoever to the property, the result will be two *inconsistent* decrees one against *B* and another against *C*.[18]

The principles above referred to equally applies to cases where the decree is *ex parte* against some of the defendants and *contested* against the rest.[19] Thus where the decree is one and indivisible, it can be set aside against all;[20] but where it is divisible it can be set aside only as against the defendant applying.[21] The undermentioned cases[22] which lay down that the whole decree cannot be set aside where some defendants contest the suit, are, it is submitted, not correct.

24. Inherent power of Court to set aside an ex parte decree.—*See* Note 2, S. 151.

25. Effect of setting aside the ex parte decree.—The effect of setting aside the *ex parte* decree is to restore the parties to the position they previously occupied[1] and the Court should proceed to decide the suit as it stood before the decree.[2] The trial of the suit should commence *de novo* as against the persons in whose favour the decree was set aside and the evidence that had been taken in the *ex parte* proceedings should not be used against them.[3] Any attachment that has been issued[4] or any sale that has taken place in pursuance of the *ex parte* decree[5] becomes null and void and the Court can also order restitution except as against a stranger auction-purchaser of anything taken in execution of the decree.[6]

But, the setting aside of an *ex parte final* decree does not have the effect of vacating the preliminary decree.[7]

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(18) *Bhura Mal* v. *Har Kishen Das*, (1902) 24 All 383 (388): 1902 All W N 76.

(19) *Mahomed Hamidulla* v. *Johurunnissa*, (1898) 25 Cal 155 (157): 1 Cal W N 652 [Decree means whole decree as can be seen from the words "The Court shall appoint a day for proceeding with the *suit*"]; *Samodh Dhar Dube* v. *Bhuladhar Dube*, (1910) 5 Ind Cas 284 (285) All; *Bhura Mal* v. *Har Kishan Das*, (1902) 24 All 383: 1902 All W N 76 F B. See *Cooke* v. *The Equitabe Coal Co, Ltd.* (1904) 8 Cal W N 621 (625).

(20) *Jadubansa Narain* v. *Mohunt Hari Charan Bharati*, (1907) 6 Cal L Jour 226 (229, 231); *Raghubar Chowdhury* v. *Ramasary Prasad Chowdhury*, 1924 Pat 771 (772): 1924 Pat H C C 252: 78 Ind Cas 408; *Mahomed Hamidulla* v. *Toherinnissa Bibi*, (1898) 25 Cal 155 (157, 160): 1 Cal W N 656 [Suit on a pro-note against several heirs of a deceased executant].

(21) *Monomohini Chowdrain* v. *Nara Narayan Roy Chowdhry*, (1900) 4 Cal W N 456 (458) [Suit for declaration of *title* against *A* and for *possession* against *B*].

(22) *Lalji* v. *Mt Amtul Bashir*, (1902) 15 C P L R 179 (183); *Manaku* v. *Sitaram Atmaram Vagh*, (1894) 18 Bom 142 (143); *Brojonath Surmah Chukker Butty* v. *Anund Moyee Debia Chowdhrain*, (1867) 7 Suth W R 237 (237); *Huro Krishno Dass* v. *Motecchand Baboo*, (1867) 8 Suth W R 260 (261); *Shewaram Chandria* v. *Punjab Electric Co*, 1927 Sind 245 (246): 104 Ind Cas 216; *Ghanna Mal* v. *Sant Das*, (1913) 18 Ind Cas 327 (327): 91 Pun L R 1913: 67 Pun W R 1913 [This was however, a case in which the proviso did not apply]; *Kunja Behari Ghose* v. *Durgamoni Dassi*, (1907) 3 Cal L Jour 160 (163).

Note 25.

(1) *Dharmidhar Aditya* v. *Hemanga Chandra Jana*, (1917) 41 Ind Cas 956 (957): 21 Cal W N 1087: 27 Cal L Jour 592; *Selvarayan* v. *Amalorpavanadham*, 1928 Mad 969 (2) (971): 55 Mad L Jour 262: 112 Ind Cas 691 [Proceedings during non-appearance of defendant are not binding, when an *ex parte* decree is set aside].

(2) *K V R M M Raman Chettiar* v. *Meer Kari Mohideen Sahib*, (1907) 17 Mad L Jour 81 (82).

(3) *Solanalai Mudaliar* v. *Vadamalai Muthirian*, (1912) 16 Ind Cas 96 (97): 23 Mad L Jour 273: 12 Mad L Tim 122; *Rambuksh Lal* v. *Kisharee Mohan Shaha*, (1869) 12 Suth W R 130 (131): 2 Beng L R A C 273.

(4) *Chettiattil Muhammad* v. *Kunhi Karu*, (1906) 29 Mad 175 (176); *Lala Jayat Narayan* v. *Tulsiram*, (1868) 1 Beng L R A C 71: 10 Suth W R 99.

(5) *Daya Moyee* v. *Sarat Chundra*, (1908) 25 Cal 175 (178): 1 Cal W N 656; *Sobhanadri Appa* v. *Govindarajulu Seetharamiah*, (1915) 31 Ind Cas 305 (305): 2 Mad L W 1066; *Abdul Hakim* v. *Panchi*, (1916) 32 Ind Cas 849 (850) Cal; *Raghunandan Singh* v. *Jagdis Singh*, (1909) 3 Ind Cas 30 (31): 14 Cal W N 182.

(6) *Sarado Prasad* v. *Soudamani*, (1906) 3 Cal L Jour 181 (182).

(7) *Athamsa Rowther* v. *Ganesan*, 1924 Mad 890 (890, 891): 47 Mad L Jour 641: 35 Mad

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26. Ex parte decree against a firm.—An *ex parte* decree passed against a firm after it has been served in the manner contemplated by O. 30 cannot be set aside on the application of a partner who alleges that he has not been duly served; it can never be said that a decree against a firm is *ex parte* against one of its partners because he has not appeared.[1] Where, however, the applicant denies that he is a partner of the firm along with other defendants the Court can enquire into the matter and set aside the decree.[2]

27. Dismissal of an application to set aside an ex parte decree—If can be restored.—*See* Note 2 to R. 1, *supra*.

28. Limitation.—In an application under this rule the Court has first of all to see that the application is presented within the prescribed period of limitation.[1] The article applicable is 164 of the Indian Limitation Act IX of 1908, under which the defendant can apply within thirty days *from the date of the decree* or, where the summons is not duly served, within thirty days from the date of his *knowledge* of the decree.[2] The Court has no power inherent or otherwise to enlarge the period of limitation.[3] S. 5 of the Limitation Act is not applicable to this rule unless the High Court under its rule making powers extends its application.[4] The Madras High Court has added a proviso to this rule, extending S. 5 of the Limitation Act to applications under this rule.[5] S. 22 of the Limitation Act does not apply to this rule.[6] Nor can the time spent in prosecuting an application under this rule be excluded in computing the period of limitation for appeals.[7]

The *onus* of proving that the application is within thirty days of the knowledge of the decree is upon the applicant.[8] But a *vague* knowledge that some decree has been passed by some Court is not enough to start limitation against the applicant.[9] In the case of an application to set aside an *ex parte*

L Tim 131: 1924 Mad W N 884: 20 Mad L W 954: 85 Ind Cas 808.

Note 26.

(1) *Adiveppa Shidlingappa* v. *Pragji Mahanji*, 1924 Bom 366 (367): 26 Bom L R 388: 80 Ind Cas 773.

(2) *Chokalingam Chetty* v. *Subramanian Chetty*, (1910) 8 Ind Cas 448 (449): 3 Bur L Tim 59.

Note 28.

(1) *Mohla* v. *Kahnun*, 1925 Lah 577 (577): 7 Lah L Jour 408: 26 Pun L R 600: 91 Ind Cas 798; *Pearee Mohun Dutt*, In the matter of (1869) 11 Suth W R 310 (310): 2 Beng L R App 45; *Chowdri Hiat* v. *Jai Kishen*, 1878 Pun Re No 32; *Janki Prasad* v. *Parmeswar Din Pandey*, (1915) 29 Ind Cas 975 (976): 13 All L J 482; *Harihar Prasad Singh* v. *Edul Singh*, 1921 Pat 69 (71, 72): 1921 Pat H C C 100: 2 Pat L Tim 11: 5 Pat L Jour 460: 57 Ind Cas 333. See also *Shama Prasad Ghose* v. *Taki Mullick*, (1901) 5 Cal W N 816 (817) [Application presented in time—Represented after time—Not barred].

(2) *Tara Shankar* v. *Nasaruddi*, (1915) 29 Ind Cas 476 (477): 19 Cal W N 970: 22 Cal L Jour 589. See also *Sankara* v. *Subbaraya*, (1907) 30 Mad 535 (536): 17 Mad L Jour 436.

(3) *Anoragee Koer* v. *Abdulla Khan*, (1877) 26 Suth W R 99 (100); *Ajodhya Mahton* v. *Mt Phul Kuer*, 1922 Pat 479 (480): 1 Pat 277: 1922 Pat H C C 61: 65 Ind Cas 341.

(4) *Sennimalai Goundan* v. *Palani Goundan*, (1916) 32 Ind Cas 975 (975): 40 Mad 105: 30 Mad L Jour 222; *Ma Nana* v. *Somasundaram Chetty*, 1925 Rang 187 (188): 2 Rang 655: 85 Ind Cas 324.

(5) *Krishnamachariar* v. *Sri Rangammal*, 1925 Mad 14 (17): 47 Mad L Jour 409: 20 Mad L W 332: 35 Mad L Tim 43: 1924 Mad W N 682: 80 Ind Cas 877: 47 Mad 824.

(6) *Chandrika Roy* v. *Ramkuer*, 1923 Pat 88 (88): 1922 Pat H C C 75: 6 Pat L Jour 463: 2 Pat L Tim 771: 62 Ind Cas 536.

(7) *Ardha Chandra Rai Chowdhry* v. *Matangini Dassi*, (1896) 23 Cal 325 (327).

(8) *Karam Singh* v. *Barkat Ram*, (1928) 109 Ind Cas 82: 1928 Notes 19 (c); *The Firm of Maghi Mal Khairatti Ram* v. *The Firm of Gopi Ram Ramchand*, 1924 Lah 603 (604): 75 Ind Cas 1020; *Mode Narain Singh* v. *Bikram Singh*, 1921 Pat 36 (36): 4 Pat L Tim 345: 84 Ind Cas 1028.

(9) *Bapurao Sakhuram* v. *Sadhu Bhirba Ghalap*, 1923 Bom 193 (193): 47 Bom 485: 25 Bom L R 74: 72 Ind Cas 130; *Chintaman* v. *Panna Lal*, 1931 Nag 119 (120): 27 Nag L R 53: 134 Ind Cas 279; *Isram* v. *Gangia*, 1916 Jour 164 (4): 92 Ind Cas 295; *Syed Muhammad Sahib* v. *A P R L Allagappa Chettiar*, 1926 Mad 31 (32): 49 Mad L Jour 445: 22 Mad L W 423: 90 Ind Cas 1042.

O. 9, R. 13, Notes 28—29.

final decree it has been held that limitation starts from the *date of the decree* as it is not necessary to give a fresh notice before the passing of the final decree.[10]

"*Duly served*" in Article 164 means served in such a manner as to give the defendant information of the proceedings taken against him.[11] In the case of a *substituted* service, time begins to run from the *date of the decree* as the service is deemed to be due service,[12] unless the defendant can show the circumstances under which substituted service could legally be ordered did not exist.[13]

Under the Limitation Act of 1877, the period prescribed was thirty days from the date of executing any process for enforcing the judgment.[14] [As to how the thirty days was computed, *see* the undermentioned cases.[15]]

The law applicable after 1st January, 1909, is Article 164 of the Limitation Act of 1908 and not that of 1877, even though the *ex parte* decree was passed when the Act of 1877 was in force.[16] Where the right to apply is barred under the Act of 1877 and the bar arose before the Act of 1908 came into force the provisions of the latter Act cannot revive the right so barred.[17]

29. Appeal.—The rule contemplates 3 classes of order:—[1]

(1) Order *setting aside the* ex parte.

(2) Order *setting aside* the *ex parte* decree on certain *terms*.

(3) Order *rejecting* the application to set aside the decree.

No appeal lies from an order falling under cl. 1.[2] As to whether an *error, defect* or *irregularity* in passing such an order can be made a ground of objection under S. 105 of the Code in an appeal from the final decree, *see* Note 6 to S. 105, *supra*. But when the order was passed without *jurisdiction*

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(10) *Baldev Singh* v. *Krishnan*, 1931 Lah 268 (269): 135 Ind Cas 42.

(11) *Kesar Chand Keshowji* v. *Lakhamsi Raisi*, (1917) 42 Ind Cas 611 (612): 11 Sind L R 71; *Gyanammal* v. *Abdul Hussein*, 1931 Mad 813 (817): 34 Mad L W 496: 1931 Mad W N 1069: 61 Mad L Jour 920: 134 Ind Cas 1202. See also *Doraiswami Iyer* v. *Balasundaram Iyer*, 1927 Mad 507 (508): 52 Mad L Jour 477: 38 Mad L Tim 275: 102 Ind Cas 243.

(12) *Ditta Ram* v. *Nawab*, 1925 Lah 639 (639): 7 Lah L Jour 448: 26 Pun L R 704: 92 Ind Cas 272.

(13) *Habibulla* v. *Karanju*, (1913) 19 Ind Cas 425 (426): 9 Nag L R 35.

(14) *Suraj Kauri* v. *Ambica Prasad Singh*, (1884) 6 All 144 (147): 1884 All W N 1.

(15) *Shib Chunder Bhadoore* v. *Lackee Debia Chowdhurain*, (1866) 6 Suth W R Mis 51 (51); *Mamoola* v. *Ram Gopal*, 1871 Pun Re No 59; *Moolah Singh* v. *Wasahwa Singh*, 1869 Pun Re No 94; *Baba Bruhm Purgash* v. *Dumree Lall*, (1869) 1 N W P H C R 133; *Hanmat* v. *Shanker*, (1907) 31 Bom 303 (307): 9 Bom L R 323; *Shaikh Gulam Ahyah* v. *Sham Soondur*, (1867) 7 Suth W R 375 (375); *Sirdar Gurbaksh Singh* v. *Hurburns*, (1879) Pun Re No 152; *Radha Binode* v. *Digamburee*, (1868) 9 Suth W R 236 (238): Beng L R Sup Vol 947; *Radha Binode Chowdhuri* v. *Madhoo Sudan, Sircar*, (1867) 7 Suth W R 198 (198); *P Chunder Koondu* v. *Prasanno Coomar Sikdar*, (1876-77) 2 Cal 123 (124); *Baba Bruhm Purgash* v. *Dumree Lall*, (1869) 1 N W P 133; *Gurunditta* v. *Ziada*, (1905) Pun L R No 110; *Bhaobunnessury* v. *Judobendra Narain*, (1883) 9 Cal 869 (870); *Kalee Prasad* v. *Digumber Chatterji*, (1876) 25 Suth W R 72 (73); *Shumboo Chunder Holdar* v. *Ram Lall Ghose*, (1870)) 13 Suth W R 436 (438); *Punchanon* v. *Hurroo Lall*, (1898) 2 Cal W N CCL; *Sookh Moyee Dossee* v. *Durmoda Dossee*, (1891) 15 Suth W R 210 (211).

(16) *Jai Bibi* v. *Ilahi Baksh*, (1915) 30 Ind Cas 573 (574): 37 All 597: 13 All L J 837.

(17) *Nepal Chandra* v. *Niroda Sundari*, (1912) 15 Ind Cas 551 (552): 39 Cal 506.

Note 29.

(1) *Narayan Putopa Chandragatgi* v. *Vaikunt Subaya Sonde*, 1927 Bom 1 (3): 28 Bom L R 1245: 51 Bom 67: 99 Ind Cas 384 F B.

(2) *Sham Das* v. *Harbans Singh*, (1889) 16 Cal 426 (427); *Gulab Singh* v. *Lahman Das*, (1875-78) 1 All 748 (750) F B; *Bura Ram* v. *Mitha Ram*, 1905 Pun Re No 103: 1906 Pun L R 45: 1905 Pun W R 19; *Bhagwan Dai* v. *Hira*, (1897) 19 All 355 (356): 1897 All W N 89; *Ujagar Sing* v. *Sohan Singh*, 1927 Lah 775 (776): 26 Pun L R 163: 105 Ind Cas 610; *Benaik Rao* v. *Putain Singh*, (1919) 52 Ind Cas 901 (901): 17 All L J 1052.

it was held in the undermentioned cases under the Code of 1877, that it could be objected to in appeal.[3]

O. 9, R. 13, Notes 29—30.

In the *second class* of cases where the Court passes a conditional order, *e.g.*, where, on the failure of the applicant to comply with certain terms, it is ordered that the petition will stand dismissed, the question arises whether the order by itself is appealable. It has been held by the High Courts of Bombay and Madras that the rejection in O. 43, R. 1, cl. (*d*) signifies an *immediate rejection* and not a conditional or prospective rejection[4] and, therefore, it is only the *final order* passed on failure to fulfil the conditions imposed, that is appealable. The High Court of Allahabad has, however, taken a contrary view.[5]

In the *third class* of cases the order is appealable under O. 43, R. 1, cl. (*d*)[6] whether the rejection is on the merits or on default.[7] The appellate Court may in such an appeal remand the application for enquiry.[8] The fact that a final decree has been passed in the case is no ground for refusing to entertain an appeal from an order rejecting an application to set aside an *ex parte* preliminary decree as, in the present Code the two decrees are independent and separate.[9] As to whether the propriety of the order of rejection can be questioned in an appeal from the *ex parte decree*, *see* Note 12 to S. 96.

30. **Revision.**—An order setting aside an *ex parte* decree not being appealable a revision will lie therefrom if the conditions of S. 115 of the Code are satisfied.[1] Where the order of the lower Court is passed in defiance of the provisions of this rule,[2] *e.g.*, where the Court refuses to set aside the

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(3) *Rungllal Misser* v. *Tokhun Misser*, (1876-77) 2 Cal 114 (116); *Toolsee* v. *Doorga Churn Paul*, (1871) 15 Suth W R 175 (176); *Keshavram Hirachand* v. *Ramachandra Trimbak*, (1871) 8 Bom H C (A C) 44; *Rung Lall Misser* v. *Tokhun Misser*, (1876) 25 Suth W R 304 (305); *Bimola* v. *Kaleee Kishen*, (1874) 22 Suth W R 5 (6); *Lukhee Monee Dossee* v. *Bhoobun Mohar Bose*, (1875) 23 Suth W R 147 (148); *Boro Khosiah* v. *Jota Sirdhar*, (1871) 15 Suth W R 315: 8 Beng L R 78 [But the objection will be too late in special appeal].

(4) *Venkatasawmi Nayudu* v. *Shunmugam Pillai*, (1918) 43 Ind Cas 1 (1): 6 Mad L W 757: 1917 Mad W N 815 [Setting aside on Letters Patent Appeal, 32 Ind Cas 984]; *Raja Gopalachari* v. *Narasimha Thatha Charryar*, 1925 Mad 1182 (1183): 88 Ind Cas 196; *Narayan* v. *Vaikunt*, 1927 Bom 1 (3): 28 Bom L R 1245: 51 Bom 67: 99 Ind Cas 384 [Overruling 1926 Bom 353].

(5) *Nand Lal* v. *Kishori*, (1915) 26 Ind Cas 895 (896): 12 All L J 1270.

(6) *Luckmi Das* v. *Ebrahim*, (1878) 2 Bom 644 (649); *Ram Kristo Roy* v. *Naick Tara Doss*, (1883) 12 Cal L Rep 449 (450); *Aubinash Chunder* v. *Martin*, (1882) 8 Cal 832 (833).

(7) *Mufti Reauzuddin* v. *Lala Mahashanad*, 1929 Pat 529 (530): 8 Pat 533: 10 Pat L Tim 211: 117 Ind Cas 317; *Musammat Bodha* v. *Ram Chandra*, 1927 Pat 240 (241): 101 Ind Cas 753: 8 Pat L Tim 604: 6 Pat 474; *Kumud Kumar Bose* v. *Hari Mohan Samadar*, (1915) 30 Ind Cas 45 (46): 21 Cal L Jour 632; *Sheik Sacheeni* v. *Sheik Kanta Hazi*, (1916) 36 Ind Cas 798 (798) Cal; *Pahari Praminik* v. *Surat Sundari Debya*, (1917) 37 Ind Cas 835 (835) Cal; *Bahadur Singh* v. *Wasawa Singh*, 1924 Lah 281 (281): 69 Ind Cas 713; *Sheo Narain* v. *Atma Ram*, 1927 Lah 883 (884): 102 Ind Cas 754.

(8) *Rai Radha Kishen* v. *Collector of Jaunpur*, (1901) 23 All 220 (226): 28 Ind App 28: 3 Bom L R 78: 5 Cal W N 153: 11 Mad L Jour 65: 7 Sar 800 P C; *Gyanammal* v. *Abdul Hussein*, 1931 Mad 813 (817, 820): 34 Mad L W 496: 1931 Mad W N 1069: 61 Mad L Jour 920: 134 Ind Cas 1202.

(9) *Kasinath Ghose* v. *Himmat Ali Choudury*, 1928 Cal 720 (721): 48 Cal L Jour 28: 32 Cal W N 858. But see *Johendra Narayan Das* v. *Satyandra Chandra Goshe*, 1925 Cal 790 (791): 29 Cal W N 640: 90 Ind Cas 380. See also *Roshan Bepari* v. *Collector of Dacca*, 1926 Cal 816 (816): 94 Ind Cas 330 [Order refusing to set aside an *ex parte* decree in a reference under the Land Acquisition Act—Not appealable]: *Rajendra Nath* v. *Kemal Krishna*, 1932 Cal 558 (561): 36 Cal W N 352: 138 Ind Cas 748, (Do.): *Badiur Rahman* v. *Mokram Ali*, 1932 Cal 687 (688): 36 Cal W N 540 [Bengal Tenancy Act (1885), S 153—Application under O 9, R 13, in suit for rent of less than Rs. 50 rejected—No appeal]: *Hira Lal* v. *Jhunni Lal*, 1922 All 50 (50): 20 All L J 208: 65 Ind Cas 967 [Small cause decree *ex parte*—Successor not empowered—Decree is final].

Note 30.

(1) *Ram Sarup* v. *Gaya Prasad*, 1925 All 610 (611): 6 L R A Civ 601: 90 Ind Cas 180: 24 All L J 56: 48 All 175; *Karuppayee* v. *Chinnammal*, (1914) 25 Ind Cas 191 (191): 1 Mad L W 537: 16 Mad L Tim 101.

(2) *Radha Mohan* v. *Abbas Ali*, 1931 All 294 (302): 1931 All L J 377: 133 Ind Cas 129: 53 All 612; *Vishwanath* v. *Vaijnath*, 1925 Nag 356 (357): 88 Ind Cas 46; *Vijiaragava Reddi* v. *Komarappa Reddi*, (1912) 15 Ind Cas 367 (368): 22 Mad L Jour 409: (1912) 1 Mad W N 410: 11 Mad L Tim 199; *Ramesh Prasad* v. *Gulab Chaudhury*, (1920) 54 Ind Cas 965 (966): 1

O, 9, R.13, Note 30.

ex parte decree even though the summons has not been properly served[3] or where the lower Court refuses to exercise its jurisdiction[4] or where it decides the application on an erroneous view of the law of limitation[5] or where it has not given a finding as to sufficient cause[6] or did not make any enquiry,[7] a revision will lie.

But a revision is not competent where there are other remedies open to the aggrieved party.[8] Thus the High Court will not interfere on a finding of fact as to sufficient cause or otherwise[9] or interfere with any of the conditions imposed by the Court in the exercise of its discretion.[10] Similarly where the party has acquiesced in the order of the trial Court by accepting costs he cannot apply for a revision.[11]

A dismissal of an application under this rule cannot be said to be a denial of the right of fair trial so as to justify the interference of the High Court under S. 107 of the Government of India Act.[12]

O. 9, R.14.

No decree to be set aside without notice to opposite party.

R. 14. [S. 109.] No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

[1877—S. 109.]

Pat L Tim 69 [On a consideration of the merits of the decree]: *Subramania Ayyar* v. *Varadharajulu Naidu*, 1927 Mad 722 (724): 53 Mad L Jour 110: 103 Ind Cas 146: 39 Mad L Tim 66 [When decree against several defendants was set aside on application by some, without finding that decree was indivisible]: *Monmohini Chowdhurani* v. *Nara Narayan Roy Chowdhri*, (1900) 4 Cal W N 456 (457), (Do.); *Mahomed Hamidulla* v. *Tohurennissa Bibi*, (1897) 25 Cal 155 (158): 1 Cal W N 652, (Do.). See however, *Ali Ahmed Khan* v. *Brown*, (1912) 15 Ind Cas 260 (262): 17 Cal W N 142.

(3) *Wazir Khan* v. *Naqui Jawar*, (1909) 1 Ind Cas 163: (163): 6 All L J 45.

(4) *Ganesha Lal Har Narayan* v. *Debi Das*, 1925 All 267 (268, 270): 47 All 140: 6 L R A Civ 79: 85 Ind Cas 470; *Sonaulla Sarkar* v. *Beakal Mandal*, (1908) 7 Cal L Jour 379 (380).

(5) *Sidharath Rai* v. *Anantaram*, (1901) 8 Bom L R 567 (569). See also *Firm of Sughru Malharcharandas* v. *Firm of Sham Lal*, 46 Ind Cas 777 (778): 1918 Pun W R 146 [Erroneous view on burden of proof as to want of knowledge].

(6) *Vaithi Chetti* v. *Govindan Pillai*, 1931 Mad W N 239 (240); *Karuppayee* v. *Chinnammal*, (1914) 25 Ind Cas 191 (192): 1 Mad L W 537: 16 Mad L Tim 101; *Janki Prasad* v. *Parmeshwar Din Pandey*, (1915) 29 Ind Cas 975 (976): 13 All L J 482; *Ramesh Prashad* v. *Gulab Chaudhuary*, (1920) 54 Ind Cas 965 (966): 1 Pat L Tim 69.

(7) *Nga Tha Din Mi Tin* v. *Ngo Po Chan*, (1906) U B R Civ Pro Code 42. See also *Sheo Charan* v. *Baij Nath*, (1920) 57 Ind Cas 563 (563, 564): 23 O C 104 [Ground taken by defendant not gone into but disposal on ground not taken]. See also *Doraiswami Ayyar* v. *Balasundaram Ayyar*, 1927 Mad 507 (508): 52 Mad L Jour 477: 38 Mad L Tim 275: 102 Ind Cas 243; *Narayanan Prosad* v. *Jolindra Nath*, (1914) 25 Ind Cas 79 (79): 19 Cal L Jour 258.

(8) *Kandaswami Koundan* v. *N M L Subramaniam Chettiar*, (1928) 113 Ind Cas 409: 1928 Notes 90 (e); *Hassan Ali Shah* v. *Salig Ram*, 1892 Pun Re No 125; *Hummi* v. *Azizuddin*, (1916) 36 Ind Cas 277 (278): 39 All 143: 14 All L J 1226; *V R Jagannatha Mudaliar* v. *Vathair Appaswamy Mudaliar*, (1914) 24 Ind Cas 782 (782): 1 Mad L W 233.

(9) *Nandram* v. *Bhopal Singh*, (1912) 16 Ind Cas 1 (2): 34 All 592: 10 All L J 130; *Shamsher Narain Singh* v. *Mahomed Sale*, 1926 Pat 29 (30): 90 Ind Cas 329; *Bhaichand Fulchand* v. *Haji Dawood Ayub*, 1924 Pat 816 (816): 76 Ind Cas 60.

(10) *Ahmad Hussain Khan* v. *Hardial*, 1926 All 142 (143): 24 All L J 120: 6 L R All (Civ) 586: 90 Ind Cas 243: 48 All 199; *Firm Rup Chand* v. *Hardayal Mal*, 1927 Lah 55 (58): 8 Lah L Jour 273: 27 Pun L R 458: 96 Ind Cas 420.

(11) *Burden & Co* v. *Army Canteen Board*, 1926 Lah 637 (637): 96 Ind Cas 782; *Narayanamurthy Somayajulu* v. *Mahomed Assam Sahib*, (1928) 110 Ind Cas 528: 1928 Notes 45 (*b*); *Debi Charan* v. *Deo Mukhi*, 1925 Oudh 621 (622): 2 Oudh W N 702: 90 Ind Cas 272.

(12) *Jagdip Sing* v. *Harker Singh*, 1926 Pat 37 (38): 89 Ind Cas 863. See also *Brindaban Chander* v. *Gour Chandra*, (1920) 56 Ind Cas 155 (157): 1 Pat L Tim 467: 1920 Pat H C C 56 [The High Court, while refusing to interfere with an order of refusal to set aside an *ex parte* decree, set aside a portion of the *ex parte* decree itself which was manifestly wrong].

Local Amendment.

O. 9, R.14, Note 1.

BOMBAY.

The following shall be *added* as Rule 15:—

"In the application of this order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant a respondent, and the word 'suit' an appeal."

Synopsis.

1. Notice to opposite party.

1. Notice to opposite party.—The rule is imperative that no *ex parte* decree can be set aside without notice to the opposite party so as to give him an opportunity to be heard.[1] A mere oral notice given to a pleader who appeared in execution proceedings in connection with the same decree but who was different from the pleader who appeared in the suit[2] or a service on plaintiff's pleader in the absence of any order of the Court,[3] or a service on plaintiff's *chela*[4] has been held to be not sufficient.

The word "*opposite party*" means such of the persons to the suit as are interested in opposing the application. It does not include a Court auction-purchaser[5] or an attaching decree-holder who has attached the *ex parte* decree[6] or a co-defendant in a case.[7]

ORDER X.

Examination of Parties by the Court.

O. 10, R.1.

R. 1. [S. 117.] At the first hearing of the suit the Court shall ascertain from *each party* or his pleader whether he admits or denies *such* allegations of fact *as are* made in the plaint *or* written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Ascertainment whether allegations in *pleadings are* admitted or denied.

[1877—S. 117.]

Synopsis.

1. "Shall ascertain."
2. Effect of statements by party or his pleader.

Admission or denial, express or implied. See O. 8, R. 5, Notes.

Order 9, Rule 14—Note 1.

(1) *Sheo Charan Das* v. *Baij Nath Singh*, (1920) 57 Ind Cas 563 (564): 23 Oudh Cas 104: *Nga Tha* v. *Nga Po*, (1906) U B R C P C 42.

(2) *Yerrakantla Subbiah* v. *Delavar Khan*, (1913) 19 Ind Cas 241 (242): 24 Mad L Jour 482: 1913 Mad W N 340: 13 Mad L Tim 344.

(3) *Mohamad Jamil* v. *Bibi Tufailan*, (1921) 63 Ind Cas 47 (48) Pat.

(4) *Sheo Charan Das* v. *Baij Singh*, (1920) 57 Ind Cas 563 (564): 23 Oudh Cas 104.

(5) *Jotindra Mohan Poddar* v. *Srinath Roy*, (1899) 26 Cal 267 (271): 3 Cal W N 261.

(6) *Sevugan Chetty* v. *Obla Munisami Aiyar*, (1910) 7 Ind Cas 66 (66): 20 Mad L Jour 524: 8 Mad L Tim 237: 1910 Mad W N 394.

(7) *Sushil Kumar Chowdhury* v. *Ananda Prasanna Lahiri*, 1927 Cal 692 (693): 31 Cal W N 906: 103 Ind Cas 860.

O. 10, R. 1, Notes 1—2.

1. **"Shall ascertain".**—The powers which this order vests in the Civil Courts are mainly intended to draw by *viva voce* examination, the real points in controversy between the parties and thus prevent the real matter in dispute remaining undecided or left out of consideration.[1] The proper way of clearing up the pleadings after the plaint and the written statement are filed is, that provided by this rule, the provisions of which are peremptory.[2] Permitting parties to file a series of written statements against each other is not justified under this rule.[3] An examination under this rule is not necessary or proper where the pleadings on the record are complete and clear.[4]

2. **Effect of statements by party or his pleader.**—The party or his pleader is bound to answer questions put by the Court; but he can properly refuse to make admissions about matters not directly involved in the suit especially when the questions were put at the suggestion of the opposite party whose object was to get useful answers for a contemplated litigation.[1]

The admission of a party is conclusive against him[2] but is not evidence against the opposite party.[3]

The Court must *record* the admissions or denials made under this rule[4] but cannot act upon the answers recorded and pass final judgment in the suit without *framing issues* in the case.[5]

As to the effect of admissions by pleader, *see* O. 3, R. 4, *ante*.

O. 10, R. 2.

R. 2. [S. 118.] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

Oral examination of party or companion of party.

[1877—Ss. 118, 119; 1859—S. 125.]

Order 10, Rule 1—Note 1.

(1) *Balaji Vinayak Bute* v. *Vithoba*, 1924 Nag 191 (195): 79 Ind Cas 614.

(2) *Anjuman-un-nissa* v. *Ashiq Ali*, 1922 Oudh 178 (188, 189): 66 Ind Cas 222: 8 Oudh L J 439: 3 U P L R (O) 65.

(3) *Anjuman-un-nissa* v. *Ashiq Ali*, 1922 Oudh 178 (188, 189): 66 Ind Cas 222: 8 Oudh L J 439: 3 U P L R (O) 65; *Dulichand* v. *Ajudhia Pershad*, (1896) 9 C P L R 11 (11) [A remand was made on this ground]; *Raghunath Singh* v. *Dhonde Singh*, 1922 Oudh 30 (31): 64 Ind Cas 771: 9 Oudh L J 31: 24 Oudh Cas 348; *Chinawa* v. *Gangawa*, 1929 Bom 413 (413): 31 Bom L R 1118.

(4) *Lakshmichand* v. *Mutka Pershad*, 1926 Jour 121 (2): 92 Ind Cas 1006: 8 Lah L Jour 67: 27 Pun L R 136; *Sardar Balwant Singh* v. *Sardar Kirpal Singh*, (1909) 4 Ind Cas 632 (637): 48 Pun W R 1909: 2 Pun L R 1909 [Examination of a party after closing of the case condemned].

Note 2.

(1) *Sansar Chand* v. *Uygar Sain*, 1930 Lah 229 (230): 116 Ind Cas 717.

(2) *Abdul Aziz* v. *Maryam Bibi*, 1926 All 710 (710): 97 Ind Cas 176: 25 All L J 48.

(3) *Dagar Mal* v. *P A Pleader*, 1930 Lah 947 (948): 1930 Cr C 1043: 129 Ind Cas 301: 31 Pun L R 913: 32 Cr L J 303.

(4) *Anjuman-un-nissa* v. *Ashiq Ali*, 1922 Oudh 178 (188, 189): 8 Oudh L J 439: 66 Ind Cas 222: 3 U P L R (O) 65.

(5) *Nakched Singh* v. *Jhagru*, (1905) 25 All W N 170 (170); *Lalla Sheo Prasad* v. *Jaggernath*, (1882) 13 Cal L Rep 266 (271): 4 Sar 446: 10 Ind App 74 P C; *Davarayan Chetty* v. *Moideen Koonjee Kaka*, (1892-96) U B R Vol II, 245 (248) [A case under Upper Burma Civil Justice Regulation].

Synopsis.

1. Oral examination.

O, 10, R. 2, Note 1.

Admissions or statements by pleader. See O. 3, R. 4, Notes.
Non-filing of a written statement—Immaterial. See Note 1, Pt. (5).
Object of the rule. See Note 1, Pts. (1) to (3-a).

1. Oral examination.—The object of the examination under this rule is to ascertain the *matters in dispute* and not to take evidence or to ascertain what is to be the evidence in the case.[1] It is not intended to be a substitute for a regular examination on oath[2] but is intended to help the elucidation of what is *obscure and vague* in the plaint; the allegations of facts contained in the oral examination under this rule cannot be read into the plaint and thus enlarge its scope.[3] "The power under this rule is intended to be used by the judge only where he finds it necessary to obtain from a party, information, on any *material questions relating to the suit* and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in O. 18."[3-a] A statement made by a party under this rule is binding on him to the same extent as the statement made by a pleader would be binding on him. But a statement made by a person who accompanies the pleader to look after the case on behalf of the party would not necessarily bind the party on whose behalf he appears.[4]

Where a defendant appears by a pleader the fact that he does not file a written statement does not warrant the trial of the suit *ex parte*. The judge should proceed under this rule and ascertain what are the matters in dispute and then proceed with the suit.[5]

See also the undermentioned cases under the old Code of 1859.[6]

R. 3. [S. 119.] The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

O. 10, R. 3 Note 1.

Substance of examination to be written.

[1877—S. 119; 1859—125.]

Synopsis.

1. Applicability to Chartered High Courts.

Oral admissions or statements by pleader. See O. 3, R. 4, Notes.

1. Applicability to Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or Extraordinary

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Order 10, Rule 2—Note 1.

(1) *Gunga Narain Gupta* v. *Tiluckram Chowdhry*, (1888) 15 Cal 533 (537): 15 Ind App 119: 5 Sar 168: 12 Ind Jur 254 P C; *Surajmal* v. *Mt Chhote*, 1926 All 411 (412): 94 Ind Cas 1003; *Janki Prasad* v. *Arku Lal*, (1905) 2 All L J 777 (778).

(2) *Suraj Mal* v. *Mt Chhote*, 1926 All 411 (412): 94 Ind Cas 1003; *Janki Prasad* v. *Arku Lal*, (1905) 2 All L J 777 (778).

(3) *Kashinath Biswas* v. *Ram Niranjan Chaube*, 1902 All W N 35 (38).

(3-a) *Manmohan Das* v. *Ram Del*, 1931 P C 175 (176): 35 Cal W N 925: 34 Mad L W 7: 1931 All L J 550: 8 Oudh W N 936: 1931 Mad W N 931: 33 Bom L R 1251: 134 Ind Cas 669 P C.

(4) *Suraj Mal* v. *Mt Chhote*, 1926 All 411 (412): 94 Ind Cas 1003; *Janki Prasad* v. *Arku Lal*, (1905) 2 All L J 777 (778).

(5) *Sivarajdhani Nilakantham* v. *Kuppa Gantulu Ramiah*, (1865) 2 Mad H C R 311 (312).

(6) *Joy Prokash Singh* v. *Meghraj Singh* alias *Gunga Singh*, (1869) 12 Suth W R 207 (208).

O. 10, R. 3, Note 1. Original Civil Jurisdiction. *See* O. 49, R. 3, cl. (2). The applicability of this rule has been excluded by the undermentioned special and local laws.[1]

O. 10, R. 4, Notes 1—2.

R. 4. [S. 120.] (1) *Where* the pleader of any party who appears by a pleader *or any such person accompanying a pleader as is referred to in rule* 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

Consequence of refusal or inability of pleader to answer.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may *pronounce judgment* against him, or make such order in relation to the suit as it thinks fit.

[1877—S. 120; 1859—S. 127. *See* O. 5, R. 3.]

Synopsis.

1. Scope of the rule.
2. Order for personal appearance.
3. Refusal or inability of pleader to answer. See Note 4, below.
4. Effect of non-attendance without lawful excuse.
5. Effect of dismissal under this rule.
6. Appeal.

Rule applies to "material questions". See Note 2, Pt. (1).

1. **Scope of the rule.**—The intention of the rule is to enable the Court not only to get obscure points cleared up by obtaining information from either of the parties, but also, if possible, to get admissions so as to narrow down the issues.[1]

2. **Order for personal appearance.**—An order under this rule directing a party to appear in person can be passed only where the Court finds that there is a *material question* relating to the suit that has to be answered by such party or his pleader, and the pleader refuses or is unable to answer such question.[1]

The order should be specific and sufficiently explicit[2] and must state the reasons therefor. A mere statement that "it is necessary that the defendant

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Order 10, Rule 3—Note 1.

(1) The Oudh Courts Act (IV of 1925), S 16; The N-W F Province Law and Justice Regulation (VII of 1901), S 46; The Rangoon Small Cause Courts Act (VI of 1920), S 111. See also O 50, Civil Procedure Code as to Provincial Small Cause Courts generally.

Order 10, Rule 4—Note 1.

(1) *Bhima Rao* v. *Venkat Rao*, (1903) 5 Bom L R 687 (688).

Note 2.

(1) *Sadeshwar Narain* v. *Qadir Baksh*, (1918) 48 Ind Cas 269 (269): 21 Oudh Cas 252; *Satu* v. *Hanmantrao*, (1899) 23 Bom 318 (320); *Obhoy Churn* v. *Pearee Dossee*, (1874) 22 Suth W R 270 (271); *Bhimrao* v. *Venkat Rao*, (1903) 5 Bom L R 687 (688); *Nimkar* v. *Nimkar*, (1864-66) 2 Bom H C R 340. See also *Walli Md* v. *Jamal Bhai*, 1932 Nag 135 (136): 28 Nag L R 146 [Personal appearance of plaintiff can be ordered only under this rule or O 5, R 3].

(2) *Pearee Mohan Bose* v. *Hurishchunder*, (1872) 17 Suth W R 141 (142); *Duswandi* v. *Busjeet Tewaree*, (1873) 20 Suth W R 165 (166).

should appear in person'' is not sufficient.[3] The Court has, however, a discretion to decide which of the parties ought to answer the question.[4]

3. Refusal or inability of pleader to answer.—*See* Note 2 above and Note 4 below.

4. Effect of non-attendance without lawful excuse.—Where the party directed to appear by the Court under this rule fails to appear in person *without lawful excuse*, the Court may pronounce judgment against him.[1] Where one party has failed to appear without lawful excuse but others have appeared, the Court cannot pronounce judgment against the persons who have so appeared.[2] It has been held by the High Court of Madras that this rule is a self-contained one applicable to all cases where a party has been ordered to attend for his examination under this rule and that where a judgment is pronounced against a party for failure to attend as directed, the order must be taken to have been made only under this rule, and not under the provisions of O. 9, even though the Court purported to pass the order under those provisions.[3] On the other hand the High Court of Allahabad has held that where the party directed to appear, and his pleader are both absent on the day appointed, the Court dismissing the suit must be taken to have acted only under the provisions of O. 9, even though it purported to act under this rule.[4] The reason given is that where the party and his pleader are both absent it could not be said that the party failed to attend *without lawful excuse*, and unless it could be said so, the Court cannot act under this rule.[4-a]

A person exempted under the Code from appearance in Court has a lawful excuse for not appearing in Court as directed.[5]

The Court is not bound to pass a decree against the defaulting party but may pass any order in relation to the suit as it deems fit.[6]

In a suit for rent defendant pleaded discharge but was prepared to withdraw the plea if the plaintiff would himself depose that there was no discharge. The Court ordered her appearance under this rule. It was held that the proper procedure would have been to take the defendant's evidence of the discharge and decide on the merits and that the Court had no reason to summon the plaintiff under this rule.[7]

See also the undermentioned cases under the Code of 1859.[8]

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(3) *Abdul Jalil* v. *Humera Bibi*, (1909) 2 Ind Cas 463 (464) 6 All L J 340.

(4) *Bhimrao* v. *Venkatrao*, (1903) 5 Bom L R 687 (688).

Note 4.

(1) *Nilmonee Singh Deo* v. *Ram Huree*, (1865) 2 Suth W R 161 (161); *Satu* v. *Hanmantrao*, (1898) 23 Bom 318 (320); *Bhimrao* v. *Venkatrao*, (1903) 5 Bom L R 687 (688, 689).

(2) *Prosunno Coomar* v. *Gooroo Pershad*, (1864) 1 Suth W R 25 (25); *Benode Ram Sein* v. *Brohmo Moyee Debia*, (1864) 1 Suth W R 168 (169, 170).

(3) *Kandath Puthiyadath Chengaru Chandu* v. *Puthiyadath Chengara Raman Nair*, 1921 Mad 417 (418): 14 Mad L W 15: 1921 Mad W N 390: 63 Ind Cas 961.

(4) *Bhatiley Chunnilal* v. *Chakarapan*, (1917) 42 Ind Cas 945 (946) All. See also *Nandan Sahu* v. *Hari Shankar*, (1932) 138 Ind Cas 613 (614): 1932 All L J 726 [Court can dismiss suit for default of plaintiff's appearance under this rule—Such suit can also be restored under O 9, R 9].

(4-a) *Deochand* v. *Bhawani*, 1896 Bom P J 628 (628).

(5) *Juggud Indur Bunwaree* v. *Surj Coomar Chowdhry*, Marsh 627.

(6) *Roop Narain* v. *Kasheeram*, (1870) 2 N W P H C R 67.

(7) *Krishnammal* v. *Paruvathan Chetty*, 1926 Jour 175 (1).

(8) *Damoodur Bhoosun* v. *Raghunath Panja*, (1869) 12 Suth W R 242 (242); *Ishan Chunder*

O. 10, R. 4, Notes 5—6.

5. **Effect of dismissal under this rule.**—A dismissal of a suit under this rule operates as *res judicata* in the subsequent suit on the same subject-matter.[1] A dismissal of a suit for *redemption* under this rule does not, however, according to the High Court of Bombay, bar a subsequent suit for redemption of the same mortgage inasmuch as the relationship of the mortgagor and the mortgagee continues and is not extinguished by the fact of the dismissal of the suit.[2] As to whether and when a decision in a suit for redemption bars a subsequent suit for redemption generally, *see* S. 11, Note 40.

6. **Appeal.**—Under the old Code there was a conflict of view with regard to the appealability of the order under para. 1 of S. 120 of old Code which corresponded to sub-Rule (1) of this rule.[1]

Under the present Code an appeal lies from an order pronouncing judgment under sub-Rule (2) of this rule (*vide* O. 43, R. 1, cl. (*a*).

But an order *striking off the defence* of one of the defendants for his failure to appear in person when ultimately the Court passed a final order decreeing the suit against all the defendants is not open to appeal.[2]

ORDER XI.

DISCOVERY AND INSPECTION.

O. 11, R. 1.

R. 1. [S. 121.] *In any suit the plaintiff or defendant* by leave of the Court[12] may deliver interrogatories[1] in writing for the examination of the opposite parties[11] or any one or more of such parties, *and such interrogatories when delivered shall have* a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same *party* without *an order for that purpose*: *Provided also that interrogatories which do not relate to any matters in question*[5] *in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination*[4] *of a witness.*

Discovery by **interrogatories.**

[R. S. C., O. 31, R. 1.]

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v. *Hurish Chunder*, (1869) 12 Suth W R 369 (370); *Thakoor Lal* v. *Brohmo Moyee*, (1871) 15 Suth W R 253 (254); *Raj Chookun Duswandi* v. *Busjeet Tewaree*, (1873) 20 Suth W R 165 (166).

Note 5.

(1) *Punamchand* v. *Mollision*, (1911) 11 Ind Cas 986 (986): 13 Bom L R 658.

(2) *Kashiram* v. *Maheswar*, 1929 Bom 116 (119): 30 Bom L R 1089: 113 Ind Cas 384.

Note 6.

(1) *Abdul Jalil* v. *Humera Bibi*, (1909) 2 Ind Cas 463 (464): 6 All L J 340 [Yes]; *Ram Charan* v. *Lala Shambhu Nath*, (1900) 3 Oudh Cas 31 (32).

(2) *Madhava Surendra Sahi* v. *Bithal Das*, (1917) 39 Ind Cas 151 (152): 39 All 450: 15 All L J 410.

Synopsis.

1. Discovery and inspection—General.
2. Scope of the rule as to interrogatories.
3. Interrogatories and pleadings.
4. Interrogatories and cross-examination.
5. Interrogatories must be as to relevant facts.
6. Interrogatories as to evidence or witnesses.
7. Names of persons.
8. Interrogatories on questions of law.
9. Time for the delivery of interrogatories.
10. Against whom interrogatories may be allowed.
11. Opposite parties—A minor or lunatic.
12. Leave of Court.
13. Impleading party for discovery.
14. Probate proceedings.
15. Land acquisition and other proceedings.

Interrogatories as to foreign law. See Note 8, Pt. (2).
Interrogatories to a company. See R. 5, infra.
Object of interrogatories. See Note 2.
Points on which interrogatories may be allowed. See Note 2, Pts. (2) and (4) and Notes 3 and 7.

1. **Discovery and inspection—General**—After the issues have been framed and the suit is posted for trial, each party naturally begins to ask himself how he shall prove his case. For the purpose of *maintaining his own case* or for *destroying the case of the adversary* he may require information from the latter as to facts, or as to documents in the possession or power of such adversary, relevant to the issue. Where information is wanted as to *facts*, the party is allowed to administer to his adversary a string of questions to be answered by him. The questions are called "*interrogatories*". The Judge goes through the proposed questions first to see if they are proper at that stage of the proceedings and if they are, compels the other party to answer them on oath before trial. This is called *discovery* of facts by the adversary. If the party wants information from his adversary as to documents material to the issues, he may apply for an order compelling the other party to make a list of all documents which are in his possession or power, and, in certain circumstances, to permit him to inspect and take copies of these documents before the trial. This disclosure is known as *discovery of documents*. Discovery of facts and documents often tends to save expense and shorten litigation.

2. **Scope of the rule as to interrogatories.**—The main object of interrogatories is to save expense by enabling a party to obtain from his opponent information as to facts material to the questions in dispute between them, and to obtain admissions of any facts which he has to prove on any issue which is raised between them.[1] As a general rule, interrogatories will be allowed whenever the answers to them will serve either to *maintain the case* of the party administering them or to *destroy the case* of the adversary.[2] An *admission* of the adversary will serve to maintain the case of the party administering the interrogatory, or the answer might be destructive of his own case. But can an interrogatory be allowed which merely is intended to ascertain the *nature of*

Order 11, Rule 1—Note 2.

(1) *Attorney-General* v. *Gaskill*, (1882) 25 Ch D 519: 51 L J Ch 870: 46 L T 180: 30 W R 558 (C A); *Krishna Aiyar* v. *Madhava Panikkar*, 1921 Mad 381 (382): 30 Mad L Tim 26: 63 Ind Cas 258; *Waghji Thackersey* v. *Khatao Rowji*, (1886) 10 Bom 167 (172).

(2) *Hennessy* v. *Wright*, 24 Q B D 445 (447); *Plymouth Mutual Co-operative Society* v. *Traders Publishing Association*, (1906) 1 K B 403 (416).

O. 11, R. 1, Notes 2—5.

the opponent's case for the purpose of meeting such case beforehand? In the undermentioned cases under the old Code[3] it was held that it cannot. The reason given was that, where the pleadings were vague and case of the parties not clear, there were other provisions of the Code such as O. 8, R. 7 and O. 14, Rr. 1 and 2 under which the Court could clear up the position and that it was not therefore permissible for the opposite party to obtain such information by *discovery*. Under the present Code, however, it has been held that in view of the fact that the present order is now the same as O. 31 of the rules of the Supreme Court, interrogatories can be administered in the same manner as is done in England, even for discovering the *nature* of the opponent's case.[4]

3. **Interrogatories and pleadings.**—From what has been said before it is clear that interrogatories as to the truth or untruth of statements of facts made in the pleadings are admissible.[1] A party is entitled to interrogate his opponent with a view to ascertain what case he has to meet and the facts relied on, and to limit the generality of the pleadings and find out what is really in issue.[2] But the interrogatories are not like pleadings, confined to the material facts on which the parties intend to rely. Either party may interrogate as to any link in the chain of evidence necessary to support his own case, inasmuch as the question is relevant as leading up to a matter in question in the suit.[3] Thus if a defendant denies that he wrote a material document he may be asked if other documents produced to him are not in his handwriting though such documents have nothing to do with the suit but will be used for comparison of handwriting.[4] Similarly a defendant is entitled to ask the plaintiff in a suit on a Hundi which the defendant denies, to state in what form the consideration for the Hundi was paid, the particulars of the place where the defendants drew or accepted the Hundi and where and by whom the Hundi was presented for payment.[5]

4. **Interrogatories and cross-examination.**—Interrogatories can be allowed only where they relate to any *matters in question in the suit*... In interrogatories, therefore, which are really in the nature of cross-examination, such as questions put only to test the credibility of the party interrogated will not be allowed.[1]

5. **Interrogatories must be as to relevant facts.**—Interrogatories must be confined to facts which are relevant to the matters in question in the suit.

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(3) *Ali Kadar* v. *Govind Dass*, (1890) 17 Cal 840 (847, 848); *Nittomoye Dassee* v. *Soobul Chunder*, (1895) 23 Cal 117 (124, 125).

(4) *Baijnath* v. *Raghunath Prasad*, (1914) 24 Ind Cas 765 (765): 41 Cal 6.

Note 3.

(1) *Attorney-General* v. *Gaskill*, (1882) 20 Ch D 519 (527): 51 L J Ch 870: 46 L T 180: 30 W R 558 (C A); *Bidder* v. *Bridges*, (1885) 29 Ch D 29; 54 L J 798: 52 L T 455: 33 W R 792 (C A).

(2) *Saunders* v. *Jones*, (1877) 7 Ch D 435 (C A): 47 L J Ch 440: 37 L T 769: 26 W R 226 (C A); *Ashley* v. *Taylor*, (1878) 38 L T 44 (C A).

(3) *Attorney-General* v. *Gaskill*, (1882) 20 Ch D 519: 51 L J Ch 870: 46 L T 180: 30 W R 558 (C A).

(4) *Jones* v. *Richards*, 15 Q B D 439.

(5) *Baijnath Kedia* v. *Raghunath Prasad*, (1914) 24 Ind Cas 765 (766): 41 Cal 6.

Note 4.

(1) *Bhagwandas* v. *Burjorji*, (1912) 17 Ind Cas 152 (154): 37 Bom 347: 14 Bom L R 807; *Kennedy* v. *Dodson*, (1895) 1 Ch 334: 64 L J Ch 257: 72 L T 172: 43 W R 259: 12 R 92 (C A); *Steward* v. *Lonsdale*, (1879) 5 C P D 47: 42 L T 54: 28 W R 324: 42 L T 172 (C A); *Althusen* v. *Labouchere*, (1878) 3 Q B D 654 (C A): 47 L J Q B 819: 29 L T 207: 27 W R 12 (C A); *Parker* v. *Wells*, (1881) 18 Ch D 477 (C A): 45 L T 517: 30 W R 392 (C A).

O. 11, R. 1, Notes 5—7.

They are not confined to facts *directly in issue*.[1] Where however the issue was on what terms the defendant and *A* had purchased certain properties, interrogatories as to the terms on which they had purchased *other properties* are irrelevant and will not be allowed.[2] Similarly in a suit seeking to charge defendants as agents, where the existence of the agency is the real issue, interrogatories as to *private transactions* are irrelevant.[3]

6. **Interrogatories as to evidence or witnesses.**—"The purpose of interrogatories is not to enable a litigant to come into Court knowing how his opponent is going to prove his case: He is not entitled to ask what his opponent's evidence is going to be".[1] Interrogatories therefore, as to the *evidence* which a party intends to adduce in support of his case, or the contents of his brief or as to the names of his witnesses are not permissible.[2] Thus, where in a suit for damages, the defendant wanted the plaintiff to "state how your estimate of damages to the amount of Rs. 13,000 mentioned in the 8th paragraph of the plaint is arrived at" it was held that the plaintiff was not bound to answer it.[2-a] Similarly, questions as to the names of the persons in whose presence this or that event took place will not be allowed.[3] The reason is that the allowing of such questions would enable the other party to tamper with the witnesses or to manufacture evidence in contradiction and so shape the case as to defeat justice.[4]

7. **Names of persons.**—As has been seen in the previous note questions as to the names of the persons in whose presence an event has taken place will not generally be allowed but where the name and address of a person is a *material fact* it must be disclosed, although the party may thereby have to disclose the names of his witnesses.[1] Thus in actions for the infringement of trade-marks or patents, the defendant is entitled to discovery of the names of "diverse persons" alleged in the plaint to have been induced to purchase the defendant's goods as the plaintiff's".[2] But in an action for damages arising

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Note 5.

(1) *Marriott* v. *Chamberlain*, (1886) 17 Q B D 154 (C A): 55 L J Q B 448: 54 L T 714: 34 W R 783, cited in 12 Cal L Jour 505; *Nash* v. *Layton*, (1911) 2 Ch 71 (76, 83) (C A): 80 L J Ch 636: 104 L T 634 (C A); *Osram Lamp Works, Ltd* v. *Gabriel Lamp Co.* (1914) 2 Ch 129 (130) (C A): 83 L J Ch 624: 111 L T 99: 58 Sol J 535 (C A).

(2) *Kennedy* v. *Dodson*, (1895) 1 Ch 334: 64 L J Ch 257: 72 L T 172: 43 W R 259: 12 R 92 (C A).

(3) *Great Western Colliery Co* v. *Tucker*, 1874 L R 9 Ch 376: 43 L J Ch 518: 30 L T 731.

Note 6.

(1) *Knapp* v. *Harvey*, (1911) 2 K B 725 (732): 80 L J K B 1228: 105 L T 473 (C A) [Per Buckley, L J].

(2) *Bidder* v. *Bridges*, (1885) 29 Ch D 29: 54 L J Ch 798: 52 L T 455: 33 W R 792 (C A); *Knapp* v. *Harvey*, (1911) 2 K B 725: 80 L J K B 1228: 105 L T 473 (C A): *Upendra* v. *Sarada Sundari*, (1916) 36 Ind Cas 883 (883) Cal. See also *Bhagwandas* v. *Burjorji*, (1912) 17 Ind Cas 152 (154): 37 Bom 347: 14 Bom L R 807.

(2-a) *Neckram Dobay* v. *Bank of Bengal*, (1887) 14 Cal 703 (706).

(3) *Eade* v. *Jacobs*, (1877) 3 Ex D 335: 47 L J Ex 74: 37 L T 621: 26 W R 159 (C A) [More fully reported in 37 L T 621]; *Johns* v. *James*, (1879) 13 Ch D 370; *Lyon* v. *Tweddell* (1879) 13 Ch D 375.

(4) *Benbow* v. *Low*, (1880) 16 Ch D 93: 50 L J Ch 35: 44 L T 119: 29 W R 265 (C A), cited in 38 Cal 237; Re *Strachan*, (1895) 1 Ch 439 (447, 448): 64 L J Ch 321: 72 L T 175: 43 W R 369: 60 J P 36: 12 R 148 (C A).

Note 7.

(1) *Marriott* v. *Chamberlain*, (1886) 17 Q B D 154 (C A): 53 L J Q B 448: 54 L T 714: 34 W R 783 (C A), cited in 12 Cal L Jour 505; *Osram Lamp Works, Limited* v. *Gabriel Lamp Co.* (1914) 2 Ch 129: 83 L J Ch 624: 111 L T 99: 58 Sol J 535 (C A).

(2) *Birch* v. *Mather*, (1883) 22 Ch D 629: 52 L J Ch 292: 31 W R 362.

O. 11, R. 1, Notes 7—11.

from the bite of a dog, the Court refused to allow interrogatories to be put to the plaintiff as to persons alleged to have been previously bitten.[3]

Interrogatories with a view to ascertain whether *some person other than the defendant is liable*, will not be allowed.[4]

8. **Interrogatories on questions of law.**—Interrogatories must be as to questions of *fact* and must not ask for conclusions of law, inferences of facts, or construction of documents.[1] A question relating to *foreign law* will not be allowed unless the party ordered to answer is an expert in that law.[2]

9. **Time for the delivery of interrogatories.**—Interrogatories, will not as a general rule, be allowed until after the defence is filed as, until then, it is not known what are the matters in dispute.[1] In the Chancery Division of the High Court of England a plaintiff was formerly often allowed to deliver interrogatories with his statement of claim.[2] This is, however, not the practice now.

10. **Against whom interrogatories may be allowed.**—The general rule is the right to deliver and the liability to answer interrogatories are confined to the *parties* to the suit.[1] But a person who is not *actually* a party, if in *substance*, a party, may be asked to answer interrogatories.[2] Thus in a suit by an *agent*, an order may be obtained against the *principal* who is the real plaintiff provided the agent has no individual interest of his own in the suit.[3] A stranger to the suit, however, cannot be compelled to answer an interrogatory.[4] Thus no interrogatories can be administered to a witness.[5] As to the procedure where a party is a corporation, *see* R. 5, *infra*.

11. **Opposite parties—A minor or lunatic.**—The words "Opposite Parties" mean parties between whom there is some right to be adjusted in the action or proceeding.[1] Thus a defendant may deliver interrogatories to another co-defendant if there is some question or issue between them.[2]

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(3) *Knapp* v. *Harvey*, (1911) 2 K B 725 (C A): 80 L J K B 1228: 105 L T 473 (C A).

(4) *Sebright* v. *Hanbury*, (1916) 2 Ch 245 (249).

Note 8.

(1) *Nittomoye Dassee* v. *Soobul Chunder*, (1896) 23 Cal 117 (123); *Flight* v. *Robinson*, (1844) 8 Beav 22 (23); *Hoffmann* v. *Postill*, (1869) L R 4 Ch App 673: 20 L T 893: 17 W R 901; *Whately* v. *Crowter*, (1855) 5 E & B 709 [Matter of law].

(2) *Perlak Petroleum Maatchappij* v. *Deen*, (1924) 1 K B 111 (C A): 93 L J K B 138: 130 L T 234: 68 Sol L J 81 (C A).

Note 9.

(1) *Mercier* v. *Cotton*, (1876) 1 Q B D 442 (C A): 46 L J Q B 184: 35 L T 79: 24 W R 566 (C A) [Plaintiff]; *Disney* v. *Longbourne*, (1876) 2 Ch D 704: 45 L J Ch 532: 35 L T 301: 24 W R 663 [Defendant].

(2) *Harbord* v. *Monk*, (1878) 9 Ch D 616: 27 W R 164.

Note 10.

(1) *Straker* v. *Reynolds*, (1889) 22 Q B D 262 (265): 58 L J Q B 180: 60 L T 107: 37 W R 379; *Hadley* v. *Mc Dougall*, (1872) L R 7 Ch App 312 (313): 41 L J Ch 504: 26 L T 379: 20 W R 393 (C A).

(2) *James Nelson & Sons, Ltd* v. *Nelson Line Liverpool, Ltd*, supra.

(3) *Wills & Co* v. *Baddeley*, (1892) 2 Q B 324 (C A): 61 L J Q B 769: 67 L T 206: 40 W R 579 (C A).

(4) *Williams* v. *Ingram*, (1900) 10 T L R 434 (451) (C A): 16 T L R 451

(5) *Attorney-General* v. *Gaskill*, (1882) 20 Ch D 519 (530): 51 L J Ch 870: 46 L T 180: 30 W R 558 (C A); *Roopchand and Mela Ram* v. *The Church Missionary Trust Association*, 1923 Lah 282 (282): 69 Ind Cas 417 [Refusal to issue interrogatories—No revision].

Note 11.

(1) *Shaw* v. *Smith*, (1886) 18 Q B D 193: 56 L J Q B 174: 56 L T 40: 35 W R 188 (C A); *Molloy* v. *Kilby*, (1880) 15 Ch D 162 (C A): 29 W R 127 (C A).

(2) *Shaw* v. *Smith*, (1886) 18 Q B D 193 (198, 200) (C A): 56 L J Q B 174: 56 L T 40: 35 W R 188 (C A); *Moloy* v. *Kilby*, (1880) 15 Ch D 162 (C A): 29 W R 127 (C A); *Brichall* v. *Birch*, (1913) 2 Ch 375 (C A).

Similarly where *A* and *B* are co-defendants in a suit but *B* colludes with the plaintiff, he may be regarded as a "party opposite" to *A* and the latter can, therefore, deliver interrogatories to *B*.[3] But *B* cannot in such a case be regarded as a party opposite to the *plaintiff* though he is a defendant; the plaintiff cannot, therefore, deliver interrogatories to *B*.[4] No interrogatories can be served on an *ex parte* defendant.[5] O. 11, R. 1, Notes 11—14.

Where a party to a suit is a minor or lunatic, interrogatories may be served on his next friend or guardian *ad litem* as the case may be. *See* R. 23 below.

12. Leave of Court.—This rule contemplates: 1. Leave to interrogate, and 2. The service of the interrogatories through the Court. It is the duty of the Court to determine whether the applicant should be allowed to interrogate the other side, but not to determine at that stage *what questions* the party interrogated should be compelled to answer. An application for leave should be made like other applications, and the order should be "that the applicant be at liberty to interrogate".[1] An order granting leave to deliver interrogatories is not an order to *answer* interrogatories, that is, an order requiring the other party to answer them; that party may have good grounds for refusing to answer them or some of them.[2] He has a right to come into Court and ask that the order be re-considered, and, if found to have been wrong, set aside. If the interrogatories are scandalous, or in any way an abuse of the process of the Court, the Court may interfere at any stage. In other cases, the party might omit to answer the interrogatories to which he objects at his perill, or he may file his affidavit in answer, stating in it his objections to answer such questions as he objects to; and in this case an interrogating party, if dissatisfied, can apply under R. 11, *infra*.[3]

13. Impleading party for discovery.—A person should not be made a party to an action merely for the purpose of getting discovery, however important, the discovery might prove to be.[1]

14. Probate proceedings.—This order applies to probate proceedings by virtue of S. 266 of the Succession Act, XXXIX of 1925. The Judge can direct an executor on delivery of interrogatories to make a full discovery of the assets of the deceased. Strictest relevancy may not be required and the Judge has got power to exclude anything which is offensive or improper.[1]

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(3) *Anandrao Vithal Varadi* v. *Budra Malla*, 5 Cal 707 (709): 5 Cal L Rep 509. (1893) 17 Bom 384 (388).

(4) *Krishna Ayyar* v. *Madhava Panikkar*, 1921 Mad 381 (381): 30 Mad L Tim 26: 63 Ind Cas 258.

(5) *Krishna Ayar* v. *Madhava Panikkar*, 1921 Mad 381 (381, 382): 30 Mad L Tim 26: 63 Ind Cas 258. See also *Spokes* v. *Grosvenor and West End Hotel Co*, (1897) 2 Q B 124: 66 L J Q B 598: 76 L T 677: 45 W R 545: 13 T L R 426 (C A); *Brown* v. *Watkins*, (1886) 16 Q B D 125: 55 L J Q B 126: 53 L T 726: 34 W R 293 (C A), cited at 17 Bom 384; *Shaw* v. *Smith*, (1886) 18 Q B D 193: 56 L J Q B 174: 56 L T 40: 35 W R 188 (C A); *Molloy* v. *Kilby*, (1880) 15 Ch D 162 (C A): 29 W R 127 (C A).

Note 12.

(1) *Sham Kishore Mundle* v. *S Biswas*, (1880) (2) *Prem Sukh Chunder* v. *Indro Nath Banerjee*, (1891) 18 Cal 420 (421).

(3) *Sham Kishore Mundle* v. *Shoshi Bhoosun Biswas*, (1880) 5 Cal 707 (710): 5 Cal L Rep 509.

Note 13.

(1) *Rahimbhoy* v. *C A Turner*, (1893) 17 Bom 341 (348): 20 Ind App 1: 6 Sar 256: 17 Ind Jur 40 P C; *Waghji Thackersey* v. *Khatao Ravji*, (1886) 10 Bom 167 (170) P C; *Benchand* v. *Macfarlane*, (1891) 2 Q B 241 (247); *Wilson* v. *Church*, (1878) 9 Ch D 552 (555): 39 L T 413: 26 W R 735.

Note 14.

(1) *Anila Bala Dasi* v. *Rajendra Nath Dalal*, (1916) 34 Ind Cas 227 (227, 228): 43 Cal 300: 23 Cal L Jour 480.

O. 11, R. 1, Note 15.

15. Land acquisition and other proceedings.—This order applies to proceedings under the Land Acquisition Act, I of 1894, by virtue of section 53 of that Act[1] and to enquiries into election matters by commissioners under the Indian Elections Offences and Inquiries Act XXXIX of 1920 (S. 5). Some of the rules of this order have been excluded from application to proceedings under the undermentioned Local Acts.[2]

O. 11, R. 2, Note 1.

Particular interrogatories to be submitted.

R. 2. [*New.*] *On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.*

[R. S. C., O. 31, R. 2.]

Synopsis.

1. **"As the Court shall consider necessary."**

Application for leave—Practice in England. See Note 1, Pts. (2) to (6).
Effect of leave. See Note 1, Pt. (7).
Extent of Court's powers. See Note 1, Pt. (1).
Interrogatories in running down cases. See Note 1, Pt. (4).
Order neither appealable nor revisable. See Note 1, Pt. (8).

1. **"As the Court shall consider necessary".**—The Court under this rule has no power to *settle* the interrogatories but to state merely *what interrogatories* should be administered.[1]

The practice in England is that it is obligatory to draw up the proposed interrogatories and to deliver a copy of them to the opposite party with notice. It is necessary also to give a copy for the master to consider and initial. The Judge or the master has a discretion to allow or refuse leave to interrogate,[2] and the master's discretion will not be interfered with unless he acts on a wrong principle.[3] He will also consider any offer to deliver particulars or to make admissions or produce documents that may be made. If he decides to allow interrogatories at all, the master will consider the particular interrogatories sought to be delivered and will hear arguments on both sides for and against

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Note 15.

(1) *British India Steam Navigation Co* v. *Secretary of State*, (1910) 8 Ind Cas 107 (113): 38 Cal 230: 12 Cal L Jour 505: 15 Cal W N 87 [An order for discovery of documents made].

(2) The Bengal Tenancy Act (VIII of 1885), S 148 [Suits for recovery of rent]; the Orissa Tenancy Act (II of 1913), S 198, (Do.); the Madras Estates Land Act (I of 1908), S 192.

Order 11—Rule 2—Note 1.

(1) *Toy* v. *Willoughby*, 38 Sol Jo 338 [Per Chitty, J]; *Anila Bala Dasi* v. *Rajendra Nath*, (1916) 34 Ind Cas 227 (227): 43 Cal 300: 23 Cal L Jour 480.

(2) *Codd* v. *Delap*, 1906 W N 57.

(3) *Grichart* v. *Morris*, (1920) 1 K B 659 (C A).

allowing any particular question. In running down cases, interrogatories relating to the details of the accident are not ordinarily necessary and will not be allowed except under special circumstances for the purpose of disposing fairly of the suit or for saving costs.[4] The opposite party need not be served personally;[5] it is sufficient if his solicitor is served.[6] O. 11, R. 2, Note 1.

The grant of leave to one party to deliver interrogatories to another does not, as has been seen in Note 12 to R. 1, *ante*, amount to an order requiring the other party to answer them. It is not a decision which has to be obeyed. The party may have good grounds of objections under R. 6.[7]

An order disallowing interrogatories is not a decree and is not open to appeal. Nor is it revisable inasmuch as the party adversely affected has a remedy by way of appeal from the final decision of the Court.[8]

R. 3. [S. 123.] In adjusting the costs of the suit *inquiry* shall at the instance of any party be made into the propriety of *exhibiting* such interrogatories, and if it *is the opinion of the taxing officer or of the Court, either with or without an application for inquiry,* that such interrogatories have been *exhibited* unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be *paid in any event* by the party in fault. O. 11, R. 3, Note 1.

Costs of interrogatories.

[R. S. C., O. 31, R. 3.]

Synopsis.

1. Costs.

1. Costs.—Ordinarily the costs of an application will be dealt with on the application and be costs in the suit. This rule makes a special provision for ordering the party at fault to pay costs in *any event* irrespective of the result of the suit. *See* S. 35.

The Court has power to order under the corresponding English rule that costs of a *viva voce* examination under R. 11 be paid by the party examined in any event,[1] but the costs of an oppressive *vive voce* examination may be ordered to be paid by the party delivering the interrogatory.[2]

R. 4. [*New.*] *Interrogatories shall be in Form No. 2. in Appendix C, with such variations as circumstances may require.* O. 11, R. 4.

Form of interrogatories.

[R. S. C., O. 31, R. 4.]

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(4) *Griebart* v. *Morris*, (1920) 1 K B 659; *Jones* v. *London Road Car & Co.* 1883 W N 196.

(5) *Little* v. *Roberts*, (1874) 30 L T 367.

(6) Re *Mulcaster*, (1878) 47 L J Ch 609.

(7) *Prem Sukh Chunder* v. *Indro Nath Bennerjee*, (1891) 18 Cal 420 (421); *Ramapat Saran* v. *Habib Ullah Khan*, 1926 All 553 (553): 24 All L J 589: 96 Ind Cas 16.

(8) *Yusifally Alibhoy* v. *Haji Mahomed*, (1920) 58 Ind Cas 721 (726, 729): 14 Sind L R 28.

Order 11. Rule 3—Note 1.

(1) *Vicary* v. *G N Ry Co*, (1882) 9 Q B D 168: 51 L J Q B 462.

(2) *Litchfield* v. *Jones*, (1884) 54 L J Ch 207.

O. 11, R. 5. Note 1.

R. 5. [S. 124.] *Where* any party to a suit *is* a *corporation* or *a* body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

Corporations.

[R. S. C., O. 31, R. 5.]

Synopsis.

1. Corporations and companies.

Form of the order under this rule. See Note 1, F.-N. (2).

Liquidator's discovery from a contributory. See Note 1, F.-N. (1).

1. **Corporations and companies.**—The Secretary of a Corporation or Company, is, as a rule, the person to be interrogated.[1] But the Court may issue delivery of interrogatories to be answered by any other officer of the company.[2] Before issuing such an order, however, the Judge must be satisfied that the officer selected by the party has a competent knowledge of the facts and the means of answering the questions.[3] The officer interrogated is bound to answer only with reference to knowledge acquired in the course of his employment and on inquiries of other officers who have acquired their knowledge in the same way.[4] There is no obligation on the part of the officer either to disclose his knowledge or to obtain or disclose the knowledge of other agents or servants of the company acquired by him or them *otherwise than in the course of his or their employment.*[5]

The answer of the officer is the answer of the company and can be read as admissions which binds the company.[6]

A foreign state has been held to be a corporation for the purposes of this rule.[7]

O. 11, R. 6.

R. 6. [S. 125.] *Any objection* to *answering* any interrogatory on the ground that it is *scandalous* or irrelevant or *not exhibited bona fide* for the purpose of the suit, or that the *matters* inquired

Objections to interrogatories by answer.

Order 11, Rule 5—Note 1.

(1) In re, *Alexandra Palace Co,* (1880) 16 Ch D 58 [Liquidator's discovery from a contributory].

(2) *Chaddock* v. *British South Africa Co,* (1896) 2 Q B 153 C A: 65 L J Q B 635: 74 L T 755: 44 W R 658 (C A) [Form of the order under this rule]: *Att-Gen* v. *North Metropolitan Tramways Co,* (1892) 3 Ch 70: 61 L J Ch 693: 67 L T 283.

(3) *Berkeley* v. *Standard Dis Co,* (1879) 13 Ch D 97 C A: 49 L J Ch 1: 41 L T 388: 28 W R 128 (C A).

(4) *Welsbach Co* v. *New Sunlight Co,* (1900) 2 Ch 1: 69 L J Ch 546: 83 L T 58: 48 W R 595 (C A); *Southwark Co* v. *Quick,* 3 Q B D 315 (321): 47 L J Q B 258: 26 W R 341 (C A), Ref; 10 Bom L R 796.

(5) *Welsbach Co* v. *New Sunlight Co,* (1900) 2 Ch 1: 69 L J Ch 546: 83 L T 58: 48 W R 595 (C A).

(6) *Chaddock* v. *British South Africa Co,* (1896) 2 Q B 153 C A: 65 L J Q B 635: 74 L T 755: 44 W R 658 C A.

(7) *Republic of Costaa Rica* v. *Erlanger,* (1875) 1 Ch D 171: 45 L J Ch 145: 33 L T 632: 24 W R 151 (C A). Ref; 22 Cal 757; 16 All 259; 17 Cal L Jour 316: 17 Cal W N 889: 19 Ind Cas 793.

into are not sufficiently material at that stage, or on any other ground, *may be taken in the affidavit in answer.* O. 11, R. 6, Notes 1–3.

[1877—S. 125, R. S. C., O. 31, R. 6.]

Synopsis.

1. Scope of the rule.
2. Scandalous interrogatories.
3. Irrelevant interrogatories.
4. Not exhibited bona fide.
5. "Not sufficiently material at that stage."
6. "Any other ground."
7. Fishing interrogatories.
8. Wagering contracts.
9. Defamation.

Interrogatories as to accounts. See Note 5, F.-N. (2).
Objections not affected by prior leave under R. 2, supra. See R. 1, Note 12, Pt. (2) and R. 2, Note 1, Pt. (7).
Objections optional. See Rule 1, Note 12, Pt. (3).

1. Scope of the rule.—This rule enables the party interrogated to file his objections, and indicate the grounds of objection which he might take.[1] The party taking such objection is entitled to have it adjudicated upon by the Court and a clear and specific order passed directing him to answer such of the interrogatories as the Court holds to be relevant. The mere fact that he could apply, under R. 7, to have the interrogatories, set aside or struck out does not take away his right to have his objection adjudicated upon.[2]

2. Scandalous interrogatories.—Questions irrelevant to the matters in issue and taken for the purpose of abusing, insulting or degrading the opposite party are scandalous interrogatories and are not permissible. But nothing can be scandalous which is *relevant*[1] even though tending to criminate the person interrogated.[2]

3. Irrelevant interrogatories.—As a general rule, the question taken must be *relevant* to the matter in issue[1] though it need not be *confined* to the *facts in issue*.[2] Thus interrogatories asking plaintiff whether similar charges as that made in the suit, had not been made against him previously in a newspaper, and, whether he had contradicted them or taken any notice of them on that occasion, are clearly irrelevant.[3] Similarly in a suit by *A* for a declaration that he and the defendant purchased a certain land as co-partners, interrogato-

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Order 11, Rule 6—Note 1.

(1) See *Nittomoye* v. *Soobul*, (1896) 23 Cal 117 (124); *Shamkishore* v. *Soshibhusun*, (1880) 5 Cal 707 (710): 5 Cal L Rep 509; *Gobind Chunder Roy* v. *Sib Nath Shah*, (1880) 5 Cal L Rep 171 (171) [Where interrogatories have been administered for the examination of a witness by one party, the other party, if he objects to any of the questions must make his objections on the face of his cross interrogatories].

(2) *Bhagwandas* v. *Ram Kumar*, (1918) 46 Ind Cas 660 (661, 662): 16 All L J 762.

Note 2.

(1) *Kemble* v. *Hope*, (1894) 10 Times L R 254 (371) C A; *Fisher* v. *Owen*, (1878) 8 C D 645 (653): 47 L J Ch 681: 38 L T 577: 26 W R 581 C A; Ref 14 Cal W N 153.

(2) *Allhusen* v. *Labouchere*, (1878) 3 Q B D 654 C A: 47 L J Q B 819: 29 L T 207: 27 W R 12 C A; *National Association* v. *Smithies*, 1906 A C 434 (437): 75 L J K B 861: 95 L T 71: 22 T L R 678; *Fisher* v. *Owen*, (1878) 8 C D 645 (653) C A: 47 L J Ch 681: 38 L T 577: 26 W R 581 C A; Ref 14 Cal W N 153; *Harvey* v. *Lovekin*, (1884) 10 P D 122 C A: 54 L J P 1: 33 W R 188 C A; *Greenfield* v. *Reay*, (1875) L R 10 Q B 217: 44 L J Q B 81: 31 L T 756: 23 W R 732.

Note 3.

(1) *Kennedy* v. *Dodson*, (1895) 1 Ch 334 (338, 340): 64 L J Ch 257: 72 L T 172: 43 W R 259: 12 R 92 C A.

(2) *Harriott* v. *Chamberlain*, 17 Q B D 154: 55 L J Q B 448: 54 L T 714: 34 W R 783 C A; Ref 12 Cal L Jour 505 [Confirmed in the C A in *Nash* v. *Layton*, (1911) 2 Ch 71 (76, 83) question *re* previous money-lending transactions].

(3) *Pankhurst* v. *Hamilton*, 2 Times L R 682.

O. 11, R. 6, Notes 3—6.

ries relating to the arrangements under which *other purchases* had been made by them together are irrelevant.[4] In no case will interrogatories be allowed if the defence at which they aim would be no defence in law to the suit.[5]

4. Not exhibited bona fide.—Where the questions, though relevant are not put *bona fide* for the purposes of the present action but for other and ulterior objects, *e.g.*, in view of a future litigation, they will be disallowed by the Court.[1]

5. "Not sufficiently material at that stage".—The word "material" means more than relevant. A fact may be *relevant* but not *material at a particular stage*.[1] The question of materiality must be tested by reference to the case made by the pleadings and to what will be in issue at the hearing. Generally "the Court is unwilling before *the right to relief* is established to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief."[2] Compare R. 20, which makes a provision for the postponement of discovery till after determination of issue or question. Nevertheless the Court has a discretion to order discovery at once on other grounds.[3]

6. "Any other ground".—These words mean grounds *ejusdem generis* with those specified.[1] They will include the following grounds:—

(*a*) that the questions are criminatory;

(*b*) that they relate to privileged communications between the party and his legal advisers;

(*c*) that they relate to a party's evidence; and

(*d*) that they are injurious to public interests.

In general, questions excluded by Ss. 121-129 of the Evidence Act and which could not be asked if the party were in the witness-box cannot also be taken as interrogatories.[2] Questions relating to communications made for the purpose of litigation between third persons and the legal adviser of a party or between third persons and the party for the purpose of submission to the adviser,[3] or questions offending against a rule of public policy may also be

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(4) *Kennedy* v. *Dodson*, (1895) 1 Ch D 334: 64 L J Ch 257: 43 W R 259: 72 L T 172; *Blair* v. *Haycock Cadle Co*, 1917 W N 319: 34 T L R 39: 62 Sol J 68.

(5) *Rogers & Co* v. *Lambert & Co*, (1890) 24 Q B D 573: 59 L J Q B 259: 62 L T 694: 38 W R 542: 54 J P 501: (1891) 1 Q B 318: 60 L J Q B 187: 64 L T 406: 39 W R 114: 55 J P 452 C A.

Note 4.

(1) *Edmundson* v. *Birch & Co, Ltd*, (1905) 2 K B 523 (526) C A: 74 L J K B 777: 93 L T 462: 54 W R 52: 21 T L R 657 C A; *Heugh* v. *Garrett*, (1875) 44 L J 305 C A; *Chapman* v. *Leach*, (1920) 1 K B 836: 89 L J K B 455: 122 L T 421: 64 Sol J 207 C A.

Note 5.

(1) *Neckram Dobay* v. *Bank of Bengal*, (1887) 14 Cal 703 (706).

(2) *Parker* v. *Wells*, (1881) 18 Ch D 477 [Suit for breach of trust—Denial of trust—Question as to account of profits of trust premature]; *Fennessy* v. *Clark*, (1887) 37 Ch D 184: 57 L J Ch 398: 58 L T 289 C A [Amount of damages].

(3) *Sutherland* v. *Singhee Churn Dutt*, (1884) 10 Cal 808 (814); *The Secretary of State* v. *Jehangir*, (1902) 4 Bom L R 342 (348).

Note 6.

(1) *Fisher* v. *Owen*, (1878) 8 Ch D 645 C A: 47 L J Ch 681: 38 L T 577: 26 W R 581 C A, cited in 14 Cal W N 153.

(2) *Ryrie* v. *Shivshanker*, (1890) 15 Bom 7 (10).

(3) *Vishnu Yeshawant* v. *New York Life Assurance Co*, (1905) 7 Bom L R 709 (711, 712).

objected to.[4] But even if no objection is taken by the party it is the duty of the Court to consider whether a rule of public policy does not prevent the disclosure of the documents or of the information sought.[5] O. 11, R.6, Notes 6—9.

7. **Fishing interrogatories.**—The questions asked must not be "fishing" that is to say they must refer to some definite and existing state of circumstances and must not be put merely in the hope of discovering some flaw in the opponent's case[1] or with the object of filling up blanks in the interrogators' own pleadings.[2] Thus where the plaintiff was charged with having used certain blasphemous words, interrogatories tending to show that, if he did not use those words on the particular occasion, still he had on other occasions said something very much like it, are merely "fishing" interrogatories and will be disallowed.[3]

8. **Wagering contracts.**—In cases where the defence of wager is set up, the Court will refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in the suit; the reason is that it will be "manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case".[1]

9. **Defamation.**—Where, in a plaint in an action for slander, publication to one named-person and also to various other persons unnamed is alleged, it is not permissible to ask the defendant whether he spoke the words complained of to any person or persons *other* than the person named and the names of other persons if any. Such an interrogatory is a fishing interrogatory the object of which is to find out some cause of action or defence other than that specifically alleged.[1] So also the defendant in a libel case will not, as a rule, be allowed before he has given particulars to interrogate or get discovery for the purpose of finding out whether he has a defence or not.[2]

R. 7. [*New.*] *Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.* O. 11, R.7.

Setting aside and striking out interrogatories.

[R. S. C., O. 31, R. 7. (annulled in 1917).]

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(4) *Hennessy* v. *Wright*, (1888) 21 Q B D 509 (521): 57 L J Q B 530: 59 L T 323: 4 T L R 511 (597), cited in 27 Bom 189.

(5) *Secretary of State* v. *Jehangir*, (1902) 4 Bom L R 342 (350).

Note 7.

(1) *Ali Kadar* v. *Gobind Das*, (1890) 17 Cal 840 (848, 849); *Hennessy* v. *Wright (No 2)*, (1888) 24 Q B D 445 (448): 36 W R 879: 4 T L R 662 C A; *Barham* v. *Lord Huntingfield*, (1913) 2 K B 193 (197, 199): 82 L J K B 752: 108 L T 703 C A.

(2) *Baijnath* v. *Raghunath*, (1914) 24 Ind Cas 765 (765, 766): 41 Cal 6.

(3) *Pankhurst* v. *Hamilton*, (1886) 2 T L R 682.

Note 8.

(1) *Bhagwandas* v. *Burjorji*, (1913) 17 Ind Cas 152 (154): 37 Bom 347: 14 Bom L R 807.

Note 9.

(1) *Barham* v. *Huntingfield*, (1913) 2 K B 193: 82 L J K B 752: 108 L T 703 C A.

(2) *Tuerenbery* v. *Labouchere*, (1893) 2 Q B 183 C A; *Arnold* v. *Bottomley*, (1908) 2 K B 151: 77 L J K B 584: 98 L T 777: 24 T L R 365 C A.

O. 11, R. 7, Note 1.

Synopsis.

1. Setting aside or striking out interrogatories.

Irrelevancy no ground under this rule. See Note 1.
Objections when and how to be raised. See R. 1, Note 12, Pt. (3), supra.
Oppressive interrogatories. See Note 1, Pts. (1) to (4).
Relief under this rule not affected by prior leave, ex parte or otherwise. See Note 12, Pt. (3) of R. 1.
Relief under this rule not affecting R. 6, supra. See Note 1, Pt. (2) of R. 6, supra.

1. Setting aside or striking out interrogatories.—Interrogatories must not be oppressive or exceed the legitimate requirements of the particular occasion.[1] Thus interrogatories as to profits requiring a search through business books of several years when it is absolutely irrelevant in a suit for a declaration[2] or as to an *innuendo* and the names of all the persons to whom the libel had been published in a libel action[3] or as to a secret manufacturing process, have all been held to be vexatious and oppressive.[4] The mere *irrelevancy* of the interrogatory is no ground for setting aside the interrogatory under this rule. The party has to proceed under R. 6.

O. 11, R. 8 Note 1.

Affidavit in answer, filing.

R. 8. [S. 126.] Interrogatories shall be answered by affidavit to be filed within ten days, or within such *other* time as the *Court* may allow.

[1877—S. 126, R. S. C., O. 31, R. 8. *See* R. 9. below.]

Synopsis.

1. Matters within the knowledge of party's agent or servant.

1 Matters within the knowledge of party's agent or servant.—The party interrogated cannot escape giving an answer by saying that he has no *personal* knowledge as to matters inquired into.[1] He is bound to obtain the information from his agents or servants, if such knowledge has been acquired by them in the ordinary course of their employment. He can, however, show that it would be unreasonable to require him to do so in any particular case, as for instance where either his agents or servants have left his employment or where it would occasion unreasonable expense or an unreasonable amount of delay or the like to get such information.[2] A party's banker or solicitor is his agent within the meaning of this rule.[3] As has been seen in

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Order 11, Rule 7—Note 1.

(1) *Oppenheim* v. *Sheffield*, (1893) 1 Q B 5: 62 L J Q B 167: 4 R 111: 67 L T 606: 41 W R 65 C A; *Grumbrecht* v. *Parry*, (1884) 32 W R 558 C A, affirming 49 L T 570: 5 Asp M C 176.

(2) *Parker* v. *Wells*, (1881) 18 Ch D 477 C A.

(3) *Heaton* v. *Goldney*, (1910) 1 K B 754.

(4) *Ashworth* v. *Roberts*, (1890) 45 Ch D 623.

Order 11, Rule 8—Note 1.

(1) *Foakes* v. *Webb*, (1884) 28 Ch D 287; *Hoffman* v. *Porhill*, (1869) L R 4 Ch 683; *Southwark Water Co* v. *Quick*, (1878) 3 Q B D 315: 47 L J Q B 258: 26 W R 341 C A, cited at 15 Bom 7.

(2) *Bolckow Vaughan & Co* v. *Fisher*, (1882) 10 Q B D 161 C A: 52 L J Q B 12: 47 L T 724: 31 W R 235 C A; *Rasbotham* v. *Shropshire Union Railways and Canal Co*, (1883) 24 Ch D 110 (113): 53 L J Ch 327: 48 L T 902: 32 W R 117.

(3) *Alliott* v. *Smith*, (1895) 2 Ch 111: 64 L J Ch 684: 72 L T 789: 43 W R 597: 13 R 586.

the Notes to Rule 5, *ante* a party need not disclose matters that have come to the knowledge of his agents or servants otherwise than in the ordinary course of their employment.[4]

O.11, R 8, Note 1.

Form of affidavit in answer.

R. 9. [New.] *An affidavit in answer to interrogatories shall be in Form No. 93 in Appendix C, with such variations as circumstances may require.*

O, 11, R.9, Note 1.

[R. S. C., O. 31, R. 9.]

Synopsis.

1. Affidavit in answer.

1. Affidavit in answer.—As a rule, the answers should be divided into paragraphs numbered consecutively and each interrogatory should be dealt with separately in a separate paragraph.[1]

R. 10. [New.] *No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.*

O.11, R.10.

No exception to be taken.

[Cf. R. S. C., O. 31, R. 10—annulled in 1917.]

R. 11. [S. 127.] *Where* any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

O.11, R.11. Note 1.

Order to answer or answer further.

[1877—S. 127, R. S. C., O. 31, R. 11.]

Synopsis.

1. Scope of the rule.
2. "Answers insufficiently."
3. Further answer may be declined on the ground of privilege.
4. Viva voce examination.

Contents of application. See Note 1, Pts. (3) and (4).

1. Scope of the rule.—It is only under this rule that the Court is to decide whether the party interrogated must answer or not and to pass an *order* requiring him to answer or to answer further, as the case may be, the interro-

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(4) *Welsbach Incandescent Gas Lighting Co* v. *New Sunlight Incandescent Co*, (1900) 2 Ch 1 (10-11): 69 L J Ch 546: 83 L T 58: 48 W R 595 C A.

(1) *Dalgleish* v. *Lowther*, (1899) 2 Q B 590.

O.11, R.11, Notes 1—4.

gatories delivered to him.[1] In the absence of such an order under this rule, no action can be taken against the defaulting party under R. 21.[2]

The application for further answer to interrogatories ought to *specify* the interrogatories or parts of interrogatories to which further answers are required.[3] When the answers to all interrogatories are properly objected to a further answer in respect of all of them can be asked for.[4]

2. "Answers insufficiently".—The general rule is that the person answering must answer *sufficiently*. Sufficiency and not the *truth* of the answer is the point to be considered at this stage.[1] The answer must be confined to answering the question put. Any necessary or reasonable explanation or qualification without which the answer would be unfair or incomplete or misleading may be added.[2] Thus, if a party is asked whether he did not make a particular affidavit, he may answer that he did, but that he has since found out that it was inaccurate.[3] But an addition of an irrelevant or otherwise objectionable matter may make the answer embarrassing and prevent the party who asks for it from using it without having thrust upon him irrelevant matters as part of it; the answer in such a case will be considered insufficient and a further answer will be ordered.[4]

3. Further answer may be declined on the ground of privilege.—The privilege must be one which can be properly claimed in law; the Court will not require a further answer to be put in unless it is clearly satisfied either from the nature of the subject-matter for which privilege is claimed or from statements in the answer itself or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated. The mere existence of reasonable suspicion which is sufficient to justify the Court in requiring a *further affidavit of documents* is not enough in the case of a claim for *privilege*.[1]

4. Viva voce examination.—An order may be made requiring the party to further answer the interrogatories by *viva voce* examination. This procedure is, however, adopted only in exceptional cases.[1] A roving examination should not be allowed in such *viva voce* examination.[2]

Order 11, Rule 11—Note 1.

(1) *Ramapat* v. *Habib*, 1926 All 553 (553): 24 All L J 589: 96 Ind Cas 16.

(2) *Ramapat* v. *Habib*, 1926 All 553 (553): 24 All L J 589: 96 Ind Cas 16; *Pandit Bakht Narain* v. *Bhoga Singh*, (1905) 8 Oudh Cas 172 (172, 173).

(3) *Anstey* v. *North & South Woolwich Subway Co*, (1879) 27 W R 575: 48 L J Ch 776: 11 Ch D 439: 40 L T 393; *Chesterfield and Boythorpe Colliery Co* v. *Black*, (1876) 24 W R 783.

(4) *Furber* v. *King*, (1881) 50 L J Ch 496: 29 W R 536.

Note 2.

(1) *Lyell* v. *Kennedy*, (1884) 27 Ch D 1: 53 L J Ch 937: 50 L T 730 C A; *Field* v. *Bennet*, (1885) 2 T L R 122.

(2) *Lyell* v. *Kennedy* (*No* 4), (1884) 33 W R 44; *Lyell* v. *Kennedy* (*No* 3), (1884) 27 Ch D 1: 53 L J Ch 937: 50 L T 730 C A.

(3) *Lyell* v. *Kennedy*, (1884) 27 Ch D 1 (14): 53 L J Ch 937: 50 L T 730 C A.

(4) *Lyell* v. *Kennedy*, (1884) 27 Ch D 1 (16): 53 L J Ch 937: 50 L T 730 C A; *Peyton* v. *Harting*, (1873) L R 9 C P 9: 43 L J C P 10: 29 L T 478: 22 W R 61.

Note 3.

(1) *Lyell* v. *Kennedy*, (1884) 27 Ch D 1 (21): 53 L J Ch 937: 50 L T 730 C A.

Note 4.

(1) *Vicary* v. *G N Ry Co*, (1882) 9 Q B D 168: 51 L J Q B 462.

(2) *Litchfield* v. *Jones*, (1884) 51 L T 572: 54 L J Ch 207: 33 W R 251.

O. 11, Rr. 12 &13.

R. 12. [S. 129 Para. 1] Any party[14] may, *without filing any affidavit,*[2] apply to the Court for an order *directing any other party*[13] *to any suit* to *make discovery on oath of the* documents which are or have been in his possession[11] or power, relating to any matter in question[11] *therein. On the hearing of such application the Court may either refuse*[1] *or adjourn the same*[2], *if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents,*[1] *as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.*

Application for **discovery of documents.**

[1877—S. 129, R. S. C., O. 31, R. 12.]

R. 13. [S. 129 Para. 2.] *The* affidavit *to be* made *by a party against whom such order as is mentioned in the last preceding rule has been made*, shall specify which (if any) of the documents therein-mentioned *he* objects to produce, *and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.*

Affidavit *of documents.*

[R. S. C., O. 31, R. 13.]

Synopsis.

1. Scope of the rules.
2. Application for discovery of documents may be made without affidavit.
3. Grounds of objection to discover documents.
4. Professional or legal privilege.
5. Documents relating solely to the case of the party giving discovery.
6. Documents not in the sole possession of the party.
7. Documents held in possession as agent of third party.
8. Documents incriminating a party.
9. Where production of public official documents is injurious to public interests.
10. Court may inspect a privileged document.
11. Contents of affidavit of documents.
12. Sufficient description of documents.
13. Against whom order for discovery may be made.
14. Any party.
15. Benamidar.
16. Corporation.
17. Crown.
18. Foreign Prince or State.
19. Several defendants and plaintiffs. See Note 11.
20. Next-friend of minor or lunatic.
21. Advocate-General.
22. Official liquidator.
23. Marine insurance.
24. Affidavit of documents if conclusive—Further affidavit.
25. Effect of non-disclosure of documents.
26. Right to seal part of documents.

Affidavit in the case of several plaintiffs or defendants. See Note 11, Pts. (9) and (10).

Court's discretion under the rule. See Note

O. 11, Rr. 12 & 13, Notes 1—2.

2, Pt. (2).
Discovery from a co-defendant or co-plaintiff. See R. 1, Note 11, Pts. (1) and (2), supra, see also Note 13, Pt. (3).
Documents in possession of a party either jointly with others or with no proprietory interest. See Note 11, Pt. (7).
"Document"—Meaning of. See Note 11, Pt. (2).
Duties of attorneys in re-affidavit of documents. See Note 11, Pt. (12).
Inspection of subject-matter of a suit. See O. 39, R. 7, sub-R. (1), cl. (a) and Notes thereto.
"Matter in question"—Meaning of. See Note 11, Pts. (3) to (6).
"Not necessary at that stage of the suit." See R. 6, Note 5, supra.
Party not to be impleaded for discovery. See R. 1, Note 13, Pt. (1), supra.
Possession of agent. See Note 6, Pt. (4).
Production of documents. See Note 1, Pts. (3) and (4).
Time for discovery or interrogatories. See R. 1, Note 9, supra.

1. Scope of the rules.—These rules deal with the second branch of discovery, *viz.*, the discovery of *documents*. They enable a party to apply to the Court for the purpose of compelling his opponent to disclose the documents he has in his possession or power.[1] and the object of this procedure is two-fold, (1) to secure as far as possible that all material documents are disclosed by putting the opposite party on oath as to the documents in his possession or power with the consequent penalties attaching to a false oath, and (2) to put an end to what might otherwise lead to a protracted inquiry as to the material documents actually in the possession or under the control of the opposite party.[2]

The right to have the *existence* of a document disclosed in the affidavit of documents under these rules does not necessarily involve any right to have it produced for *inspection*; nor is a protection from *production for inspection* a sufficient reason for not disclosing its *existence*. The rule does not alter the principles relating to the production of documents but gives the Court a discretion to refuse the discovery of documents when there is no reasonable prospect of its being of any use[3] or to limit the nature and extent of the discovery.[4]

These rules do not preclude an application under R. 18, sub-R. 2.[5]

2. Application for discovery of documents may be made without affidavit.—An application under Rule 12, need not be supported by an affidavit as is generally required in the case of other applications.[1] The Court has power either to refuse or adjourn the application and, in exercising its discretion, it is guided by the pleadings and the nature of the action. The party who applies must, where there is contest, show that he has a good cause of action and that the documents are relevant to the case.[2]

Order 11, Rules 12 & 13—Note 1.

(1) *Nittomoyee Dassee* v. *Soobul Chunder Law*, (1895) 23 Cal 117 (125).

(2) *Rameshwar Narayan Singh* v. *Rikhanath*, (1920) 58 Ind Cas 281 (285): 5 Pat L Jour 550: 1 Pat L Tim 668.

(3) *Downing* v. *Falmouth United Sewerage Board*, (1887) 57 L J Ch 234: 37 Ch D 234: 58 L T 296: 36 W R 437 C A.

(4) *Downing* v. *Falmouth*, (1887) 37 Ch D 231: 57 L J Ch 234: 58 L T 296: 36 W R 437 C A.

(5) *Basanta* v. *Kumuddini*, (1911) 12 Ind Cas 12 (13): 38 Cal 428: 16 Cal W N 81.

Note 2.

(1) *Nittomoye Dassee* v. *Soobulchunder Law*, (1895) 23 Cal 117 (125): *Kedar Nath* v. *Bishwanath*, 1924 All 510 (511): 46 All 417: 22 All L J 299: 5 L R A (Civ) 225: 80 Ind Cas 787; *The Municipal Board, Agra* v. *Ashraf Lal*, 1922 All 1 (4): 44 All 202: 20 All L J 1: 65 Ind Cas 984; *Downing* v. *Falmouth United Sewerage Board*, (1887) 37 Ch D 234: 57 L J Ch 234: 58 L T 296: 36 W R 437 C A.

(2) *Amarendra Nath Chatterjee* v. *Kally Kissen Tagore*, (1897) 2 Cal W N 17 (18).

O. 11, Rr. 12&13, Notes 3–4.

3. Grounds of objection to discover documents.—A party against whom an order for discovery of documents has been made by the Court cannot object to *specify* the existence of the documents.[1] He is also, as a general rule, bound to *produce* every document in his possession or power which is material or relevant to the suit, unless it is covered by some established privilege.[2] The fact that a document was written on a privileged occasion, in the special sense in which that term is used in actions of defamation, is no reason for refusing to produce it; it is not, on that ground, privileged from inspection.[3] But there are several classes of documents which have been recognised as being privileged from production. These may be dealt with in the following order.—

(1) Documents protected by professional or legal privilege.

(2) Documents relating solely to the case of the party giving discovery.

(3) Documents not in the sole possession of the party giving discovery.

(4) Documents in the possession of a party only as agent or on behalf of another.

(5) Documents tending to criminate or expose to forfeiture.

(6) Documents protected on the ground of the public policy.

4. Professional or legal privilege.—A communication between parties and their legal advisers has always been protected from disclosure even at the risk of the possibility of truth being concealed thereby.[1] The object of the rule is to enable persons to obtain legal advice safely and effectually.[2] A party is thus not bound to produce any confidential communication between him and his legal advisers.[3] It is necessary, however, to distinguish between documents and communications that are privileged irrespective of whether litigation was contemplated or was pending and those that are privileged only where litigation was contemplated or was pending at the time when they came into existence. The first class of cases will cover the following documents:—

(1) Letters and communications passing between a party, or his predecessors-in-title, and his, or their, legal advisers provided they are *confidential* and written to, or by the solicitor or legal adviser in his professional capacity for the purpose of getting legal advice or assistance.[4] If the communications are not made

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Note 3.

(1) *Swanston* v. *Lishman*, (1881) 45 L T 360 (361).

(2) *Anderson* v. *Bank of Br. Columbia*, (1876) 2 Ch D 644 (656): 45 L J Ch 449: 35 L T 76: 24 W R 624 C A, cited at 6 Bom 572.

(3) *Webb* v. *East*, (1880) 5 Ex D 108: 49 L J Q B 250: 41 L T 715: 28 W R 336: 44 J P 200 C A.

Note 4.

(1) Halsb. Vol 11, p. 72.

(2) *Wheeler* v. *Le Marchant*, (1881) 17 Ch D 675 (681, 682): 50 L J Ch 793: 44 L T 632: 45 J P 728: 30 W R 235 C A; *Bullivant* v. *Attorney-General*, 1901 A C 196 (200): 70 L J K B 645: 84 L T 737: 50 W R 1: 17 T L R 457.

(3) *Ryrie* v. *Shivshankar*, (1891) 15 Bom 7 (10); *Central India Spinning, Weaving and Manufacturing Company* v. *G I P Railway*, 1927 Bom 367 (367, 368): 29 Bom L R 414: 102 Ind Cas 423.

(4) *O'Shea* v. *Wood*, 1891 P 286 C A: 60 L J P 83: 65 L T 30; *Gardner* v. *Irvin*, (1878) 4 Ex D 49 (53) C A: 27 W R 442 C A: 48 L J Ex 223: 40 L T 357; *Kennedy* v. *Lyell*, (1883) 23 Ch D 387 (404) C A; *Southwark Co* v. *Quick*, (1878) 3 Q B D 315 [Statement of facts drawn up by the client for submission to his solicitor and documents prepared by him for the purpose of providing the solicitor with evidence and information for the conduct of his case]: *Birmingham and Midland Motor Omnibus Co* v. *London & North-Western Ry Co*, (1913) 3 K B 850, (Do.); *Feuerheerd* v. *London General Omnibus Co*, (1918) 2 K B 565, (Do.); *Munchershaw*

O. 11, Rr. 12&13, Note 4.

confidentially there is no privilege.[5]

(2) Such letters and communications made *through a clerk or agent* employed by the legal adviser or the client for the purpose of conveying information to or from the legal advisers.[6]

(3) Letters and communications between a solicitor and his partner or professional agent[7] but not between solicitors for opposite parties.[8]

(4) Instructions and briefs to counsel and counsel's briefs and notes.[9]

The second class of documents will cover the following:—

(1) Communications between a solicitor and a *non-professional* agent or a third party, directly or through an agent and made with a view to pending or contemplated litigation and for the purpose of getting or giving advice or for obtaining or collecting evidence.[10]

(2) Communications between the client and a *non-professional* agent or third party, which are made in answer to inquiries made by the party as the agent for or at the request or suggestion of his solicitor, or without any such request, but *for the purpose of being laid before the legal adviser* for the purpose of *advice in respect of a pending or contemplated litigation*.[11] But a mere communication between a principal and agent, though confidential is not privileged[11-a] even after litigation has commenced and legal advice has been taken as to its course.[12] Similarly the reports made by a servant to his master are not privileged though they may relate to the subject-matter of the suit.[13]

(3) Communications between co-plaintiffs or co-defendants.[14] Where one of the trustees of a will is a solicitor and acts as a solicitor for the trustees, communications between him and his co-trustees, which would be privileged if he were not a co-trustee, are privileged.[15]

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v. *Dhurumsey Spinning and Weaving Co*, (1879-80) 4 Bom 576 (582) [Statements laid by clients before counsel for the purpose of obtaining legal advice]; *Ward* v. *Marshal*, (1888) 3 Times Rep 578 [Entries in the solicitor's diary of communications between himself and his client].

(5) *Original Hartlepool Collieries Co* v. *Moon*, (1874) 30 L T 193; affir. 30 L T 585; *Hajee Haroon* v. *Abdul Karim*, (1879) 3 Bom 91 (93): 3 Ind Jur 516; *Framji* v. *Mohan Singh*, (1894) 18 Bom 263 (272); *Emperor* v. *Rodrigues*, (1903) 5 Bom L R 122 (123)

(6) *Wheeler* v. *Le Marchant*, (1881) 17 Ch D 675 (682, 684) C A: 50 L J Ch 793: 44 L T 632: 45 J P 728: 30 W R 235.

(7) *Mostyn* v. *West Mostyn Co*, (1876) 34 L T 531; *Hughes* v. *Biddulph*, (1827) 4 Russ 190: 28 R R 46.

(8) *Gore* v. *Harris*, (1851) 15 Jur 1168: 21 L J Ch 10; *Ford* v. *Tennant*, (1862) 32 Beav 162: 32 L J Ch 465: 7 L T 732: 9 Jur (N S) 292: 11 W R 324.

(9) *Mostyn* v. *West Mostyn Coal Co*, (1876) 34 L T 531; *Curtis* v. *Beaney*, 1911 P 181.

(10) *Anderson* v. *Bank of British Columbia*, (1876) 2 Ch D 644 (650): 45 L J Ch 449: 35 L T 76: 24 W R 624 C A, cited at 6 Bom 572.

(11) *Anderson* v. *Bank of British Columbia*, (1876) 2 Ch D 644 (648, 650): 45 L J Ch 449: 35 L T 76: 24 W R 624 C A, cited at 6 Bom 572.

(11-a) *Wallace* v. *Jafferson*, (1878) 2 Bom 453 (456): 2 Ind Jur 720; *Bipro* v. *Secretary of State for India*, (1885) 11 Cal 655 (657).

(12) *Ryrie* v. *Shivshankar*, (1891) 15 Bom 7 (10); *Umbica Churn* v. *Bengal S & W Co*, (1895) 22 Cal 105 (111).

(13) *Central India Spinning and Weaving Co* v. *G I P Ry*, 1927 Bom 367 (367, 368): 29 Bom L R 414: 102 Ind Cas 425.

(14) *Hull* v. *Haileybury College*, (1888) 4 T L R 277 C A [Co-plaintiffs]; *Hamilton* v. *Nott*, (1873) L R 16 Eq 112: 42 L J Ch 512 [Co-defendant].

(15) *Whitworth*, In re, (1919) 1 Ch 320: 88 L J Ch 560: 120 L T 519 C A.

O. 11, Rr. 12&13, Notes 4—5.

No privilege attaches to communications between a client and his legal adviser made in furtherance of a fraudulent or illegal purpose which is definitely alleged in the pleadings or in the affidavits.[16] The privilege is confined to *legal advice* and does not extend to communications between a party and his medical[17] or spiritual[18] adviser or non-professional friend or adviser.[19]

See sections 126 to 129 of the Evidence Act.

5. Documents relating solely to the case of the party giving discovery. —A party will not be compelled to produce for inspection documents which he swears relate to his own case, and do not relate to or tend to support the case of his opponent, and do not impeach his own case.[1] Thus he need not produce any document which he can swear, relate solely to his own *title* to any real property and to contain nothing which tends to establish the title of his opponent.[2]

Documents disclosing party's evidence.—A party cannot be compelled to produce documents which form the *exclusive evidence* of his own case or title.[3] But they must not, in any way, tend to prove or support the adversary's title;[4] if they are necessary to support the adversary's case[5] or may be evidence for the adversary as well,[6] their production cannot be refused. In order to claim this privilege the party may state in his affidavit that the document constitutes evidence of his own case or title, that they contain nothing *supporting or tending to support the adversary's case or title* and that they contain nothing *impeaching his own case or title*.[7] But a party is not confined to the affidavit in which the claim is first set up; he is entitled to put in and use a further affidavit in support of his claim of privilege.[8]

Opinions upon, or steps taken in reference to, a suit in which the plaintiff and defendant are putting forward opposing contentions cannot be said to relate solely to the case of the plaintiffs.[9]

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(16) *Bullivant* v. *Attorney-General*, 1901 A C 196 (200, 201): 70 L J K B 645: 84 L T 737: 50 W R 1: 17 T L R 457; *Whitworth*, In re, (1919) 1 Ch 320 (335-338): 88 L J Ch 560: 120 L T 519 C A.

(17) *Wheeler* v. *La Marchant*, (1881) 17 Ch D 675 (681) C A: 50 L J Ch 793: 44 L T 632: 45 J P 728: 30 W R 235 C A.

(18) *Anderson* v. *Bank of British Columbia*, (1876) 2 Ch D 644 (650) C A: 45 L J Ch 449: 35 L T 76: 24 W R 624, cited at 6 Bom 572.

(19) *Smith* v. *Daniell*, (1874) L R 18 Eq 649 (654): 30 L T 752, cited at 4 Bom 576.

Note 5.

(1) *Beutick* v. *Graham*, (1881) 7 Q B D 400: 50 L J Q B 396: 44 L T 371: 29 W R 436 C A; *Budden* v. *Wilkinson*, (1893) 2 Q B 432: 63 L J Q B 32: 69 L T 427: 41 W R 657: 4 R 525 C A.

(2) *Egremont Burial Board* v. *Egremont Iron Ore Co*, (1880) 14 Ch D 158: 49 L J Ch 623: 42 L T 179: 28 W R 594; *Someshwari Prasad Narain Deo* v. *Maheshwari Prasad Narain Deo*, 1931 Pat 426 (428): 10 Pat 630.

(3) *Budden* v. *Wilkinson*, (1893) 2 Q B 432: 63 L J Q B 32: 69 L T 427: 41 W R 657: 4 R 525 C A; *Frenkenstein* v. *Gavins Co*, (1897) 2 Q B 62; *Central India Spinning and Weaving Co* v. *G I P Ry*, 1927 Bom 367 (367): 29 Bom L R 414: 102 Ind Cas 425.

(4) *Vinayakrao Dhunderaj* v. *Narotam Anandji*, (1893) 17 Bom 581 (584).

(5) *Sutherland* v. *Singhee Churn*, (1884) 10 Cal 808 (814).

(6) *Combe* v. *London Corporation*, (1842) 1 Y & C Ch Cas 631: 4 Y & C Ex 139: 6 Jur 571.

(7) *Attorney-General* v. *Emerson*, (1882) 10 Q B D 191: 52 L J Q B 67: 48 L T 18: 31 W R 191 C A, cited at 15 Bom 7; *Attorney-General* v. *Newcastle*, (1899) 2 Q B 478: 68 L J Q B 1012: 81 L T 311: 48 W R 38: 15 T L R 495 C A; *Balmoney* v. *Ramaswami Chettiar*, (1907) 30 Mad 230 (231): 17 Mad L Jour 79: 2 Mad L Tim 88.

(8) *Umbika Churn* v. *Bengal Spinning Co, Ltd.* (1894) 22 Cal 105 (110); *M Corquodale* v. *Bell*, L R 1 C P D 471.

(9) *W D Ryrie* v. *Shivshankar*, (1891) 15 Bom 7 (11); *Bustio* v. *White*, (1876) L R 1 Q B D 423: 45 L J Q B 642: 34 L T 835, 24 W R 721 C A, cited at 15 Bom 7; *Attorney-General* v. *Emerson*, (1882) L R 10 Q B D 191: 52 L J Q B 67: 48 L T 18: 31 W R 191 C A, cited at 15 Bom 7.

O. 11, Rr. 12&13, Notes 6—9.

6. Document not in the sole possession of the party.—The rule of the Court of Chancery in England is thus laid down by Lord Cottenham in *Taylor* v. *Rundell*.[1] "If a defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it and this, for two reasons, the one is that a party will not be ordered to do that which he cannot or may not be able to do, the other is that another party not present has an interest in the document which the Court cannot deal with". Thus it was held that a partner or his agent cannot be asked to produce documents belonging to partnership where the other partners are not before the Court.[2] But in a similar case in the High Court of Bombay,[3] Sir Charles Sargent, C. J., held that the case before him did not fall within either of the reasons mentioned above, that the defendants (partners), physically speaking, could produce the document and that legally speaking they *represented the other partners* for the purpose of production of documents as there was no other person having an interest distinct from their own interest.

For the purpose of the disclosure of the existence of documents, "possession" includes possession by an agent of the party giving the discovery.[4]

7. Documents held in possession as agent of third party.—No party can be compelled to produce documents of which he is not the owner but of which he has the custody as the agent of a third party who is not a party to the action as where the documents are in the possession of a party as a trustee or as a mortgagee regarding title-deeds of mortgagor, etc.[1]

8. Documents incriminating party.—It is a good ground of privilege that the document, if *produced*, would tend to criminate the party producing them. But this objection does not apply to the *discovery* of the documents.[1]

See, however, S. 132 of the Evidence Act.

9. Where production of public official document is injurious to public interests.—Public official documents need not be produced when an objection is taken in the affidavit of documents by the head of the department or by some responsible officer;[1] the mere fact that the documents are official or confidential is not enough to protect them; in case of doubt the Judge may, in his discretion, adjourn the question to the trial.[2] But, as a general rule, if the objection is taken by the proper person, the Court will not go behind it, the foundation of the rule being that the information cannot be disclosed without injury to the public interest. *See also* the Indian Evidence Act, Ss. 123

Note 6.

(1) *Taylor* v. *Rundell*, (1841) 5 Jur 1129: 1 Yard C Ch 128: 1841 Cr & Ph 104 cited at 1 Bom 496; *Halley* v. *Macdougall*, L R 7 Ch App 312.

(2) *Taylor* v. *Rundell*, (1841) 5 Jur 1129: 1841 Cr & Ph 104 cited at 1 Bom 496; *Reid* v. *Langlois*, (1849) 11 Jur 467: 19 L J Ch 337: 1 Mach and G 627: 2 H and Tw 59 cited at 1 Bom 496.

(3) *Haji Jakaria* v. *Haji Casim*, (1876) 1 Bom 496 (499): 1 Ind Jur 517.

(4) *Swanston* v. *Lishman*, (1881) 45 L T 360 at p 361.

Note 7.

(1) *Few* v. *Guppy*, (1836) 13 Beav 457.

Note 8.

(1) *Spokes* v. *Grosvenor Hotel Co*, (1897) 2 Q B 124 C A: 66 L J Q B 598: 76 L T 677: 45 W R 545: 13 T L R 426; *National Etc* v. *Smithies*, (1906) A C 434 (437): 75 L J K B 861: 95 L T 71: 22 T L R 678.

Note 9.

(1) *Jahangir* v. *Secretary of State*, (1904) 27 Bom 189 (216): 5 Bom L R 30: 6 Bom L R 131; *Hennessy* v. *Wright*, (1888) 21 Q B D 509: 57 L J Q B 530: 59 L T 323: 4 T L R 511.

(2) *Asiatic Petroleum Co* v. *Anglo-Persian Oil Co*, (1916) 1 K B 822: 85 L J K B 1075: 114 L T 645: 32 T L R 367: 60 Sol J 417.

and 124 and the undermentioned case of the Privy Council.[3]

O. 11, Rr. 12&13, Notes 9—11.

10. Court may inspect a privileged document.—Where privilege is claimed by a party, the Court may inspect the document to decide whether the privilege claimed is proper and valid.[1] *See* R. 19, sub-R. (2).

11. Contents of affidavit of documents.—A party who is ordered under R. 12 to make discovery on oath should set forth in his affidavit all documents which *are* or *have been* in his possession or power relating to the matter in question.[1] A document may be described as a writing or printing capable of being read, no matter what the material is upon which it is impressed or inscribed.[2] The expression "matter in question" means a question or issue in dispute in the action, and not the thing about which question or issue arises; thus in an action to recover possession of land it means the plaintiff's alleged title and not the land.[3] Every document which will throw any light on the case is a document relating to a matter in dispute in the suit.[4] It is not confined to such as would be *admissible in evidence*[5] but includes all documents containing information which may either directly or indirectly enable the party seeking discovery, either to advance his own case or damage that of his adversary, or which may fairly lead him to a train of inquiry which may have either of these two consequences.[6] Every such document must be included in the affidavit of documents even if the party is in possession thereof *jointly with others* or even if he has therein no property at all, provided they are in his corporeal possession. As regards documents which are not, but *have been* in the party's possession, he must state what has become of them. It is always desirable to adopt the form given in the Code as otherwise an affidavit may be regarded as insufficient.[7] When the affidavit is insufficient, a summons may be taken to consider its sufficiency.[8]

Where there are several plaintiffs all of them must ordinarily join in the affidavit.[9] It is possible on a proper case being made out that the order may be limited to a particular party.[10] In the case of a *purdanashin* lady it is doubtful if a verification is necessary.[11] It is the duty of an attorney to be very careful in ascertaining from his client who has to make an affidavit of documents exactly what materials and documents are in his possession. It is further his duty the moment he finds that there are other documents which

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(3) *Henry Greer Robinson* v. *State of South Australia*, 1931 P C 254 (257, 258): 34 Mad L W 575: 35 Cal W N 1121: 61 Mad L Jour 943: 135 Ind Cas 625 P C.

Note 10.

(1) *Mülbank* v. *Mülbank*, (1900) 1 Ch 376 C A: 69 L J Ch 287: 82 L T 63: 48 W R 339; *Henry Greer Robinson* v. *State of South Australia*, 1931 P C 254 (259, 261): 34 Mad L W 575: 35 Cal W N 1121: 61 Mad L Jour 943: 135 Ind Cas 625 P C.

Note 11.

(1) *Kalian* v. *Safdar*, (1886) 8 All 265 (267).

(2) *R* v. *Daye*, (1908) 2 K B 333: 72 J P 269: 77 L J K B 659: 99 L T 165. *See also* S 3 (16) of the General Clauses Act.

(3) *Phillips* v. *Phillips*, (1879) 40 L T 815 (821).

(4) *Hutchinson* v. *Glover*, (1875) 1 Q B D 138: 45 L J Q B 120: 33 L T 605: 24 W R 185 affirmed 33 L T 834

(5) *Compagnie Financiere* v. *Peruvian Guano Co*, (1882) 11 Q B D 55 (62, 63): 52 L J Q B 181: 48 L T 22: 31 W R 395 [Per Brett, L J].

(6) *Compagnie Financiere* v. *Peruvian Guano Co*, (1882) 11 Q B D 55 (63): 52 L J Q B 181: 48 L T 22: 31 W R 395 (C A).

(7) *Amarendra* v. *Kallykissen*, (1898) 2 Cal W N 17 (17).

(8) *Kenelly* v. *Wyman*, (1875-76) 1 Cal 178 (179).

(9) *Ryrie* v. *Shivshankar*, (1890) 15 Bom 7 (9); *Fendall* v. *O'Connell*, (1885) 29 Ch D 899: 54 L J Ch 756: 52 L T 553: 33 W R 15.

(10) *W D Ryrie* v. *Shivshankar*, (1890) 15 Bom 7 [*Obiter*].

(11) *Kalian* v. *Safdar Husain*, (1886) 8 All 265 (267).

O. 11, Rr. 12 & 13, Notes 11—15.

have not been disclosed, at the very earliest moment, to bring those documents to the notice of his opponent and give him an opportunity of inspecting them.[12]

12. Sufficient description of documents.—It is necessary that there should be a *sufficient description* of documents in the schedule annexed to the affidavit of documents. It is sufficient, however, if the documents are described in such a manner as to enable enforcement of production, if ordered.[1] Where a party claims to withhold documents or letters on the ground of privilege, a less degree of particularity will suffice; it is not necessary to give such description as will enable the opponent to know its *contents*.[2]

If the documents are not numerous the most advisable course is to set out each of them separately and number them in the margin of the schedule. But if there are numerous documents of the same class or description, it is not necessary to number each of them separately; it will be proper to tie them up in bundles, and number the documents or otherwise ear-mark them in such a way that the other party may ask for those which he wants to inspect.[3]

13. Against whom order for discovery may be made.—As a general rule discovery is confined to the parties only[1] and does not apply to third parties.[2] The words "any party" and "any other party" in R. 12 contemplate *opposite parties* within the meaning of R. 1.[3] *See* Note 11 to R. 1, and Notes 14 to 21 below.

14. Any party.—In a suit brought by a nominal plaintiff, the persons really interested may be ordered to give discovery and the suit may be stayed unless they give such discovery.[1] So also where a principal residing abroad is the real plaintiff, but is suing through his agent, the defendant is entitled to have the action stayed until such discovery is made as the real plaintiff would have been obliged to make, had he been the plaintiff on the record.[2]

15. Benamidar.—Where a person uses the name of another as a nominal plaintiff only for the purpose of bringing an action in which he alone is really interested, the *real* plaintiff may be called on to give discovery.[1] But the nominal plaintiff also will be liable to make an affidavit of documents.[2]

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(12) *In the matter of an Attorney*, 1921 Cal 267 (269): 25 Cal W N 99: 61 Ind Cas 908 [No action was taken under the Legal Practitioners Act].

Note 12.

(1) *Taylor* v. *Batten*, (1878) 4 Q B D 85 C A: 45 L J Q B 72: 39 L T 408: 27 W R 106; *Budden* v. *Wilkinson*, (1893) 2 Q B D 432: 63 L J Q B 32: 69 L T 427: 41 W R 657: 4 R 525 (C A).

(2) *Kain* v. *Farrer*, (1877) 37 L T 469 (470); *Gardner* v. *Irvin*, (1878) 4 Ex D 49 C A: 48 L J Ex 223: 40 L T 357: 27 W R 442 (C A) [Letters—Dates and names of writers not necessary].

(3) *Hill* v. *Hart Davis*, (1884) 26 C D 470 (472): 53 L J Ch 1012: 51 L T 279 (C A); *Walker* v. *Poole*, (1882) 21 C D 835 (836): 51 L J Ch 840; *Oriental Bank Corporation* v. *Brown*, (1886) 12 Cal 265 (267); *Cooke* v. *Smith*, (1891) 1 Ch 509: 60 L J Ch 573: 64 L T 484: 39 W R 273 (C A).

Note 13.

(1) *James Nelson and Sons* v. *Nelson Line*, (1906) 2 K B 217: 75 L J K B 895: 95 L T 180.

(2) *Williams* v. *Ingram*, (1900) 16 T L R 434 (451) affirmed 16 T L R 451 (C A).

(3) *Gopaldas Modi* v. *Hansraj*, 1932 Cal 72 (72, 73): 58 Cal 1091 [No contest between co-defendants—Not opposite parties].

Note 14.

(1) *James Nelson and Sons* v. *Nelson Line*, (1906) 2 K B 217: 75 L J K B 895: 95 L T 180; *Willis* v. *Baddeley*, (1892) 2 Q B 324 C A: 61 L J Q B 769: 67 L T 206: 40 W R 577 (C A).

(2) *Willis* v. *Baddeley*, (1892) 2 Q B 324: 61 L J Q B 769: 67 L T 206: 40 W R 577 (C A).

Note 15.

(1) *Willis* v. *Baddeley*, (1892) 2 Q B 324 (C A).

(2) *Wilson* v. *Raffalovitch*, (1881) 7 Q B 553 C A cited in 15 Bom 7.

16. Corporation.—The Court has power to order an officer of a company or corporation to give discovery.[1] A public body cannot burke discovery on the ground that there are a large number of papers, the production of which would flood the Court.[2]

17. Crown.—The Crown has a right of discovery as against a subject but cannot be compelled to give discovery[1] though as a matter of practice it does give discovery by way of a list of documents in the same way as a subject would be bound to give, unless some principle of public interest is involved.[2]

18. Foreign Prince or State.—A foreign Sovereign or State is also bound to give discovery like any other suitor[1] and the suit will be stayed until a proper person is named to give it.[2]

19. Several defendants and plaintiffs.—*See* Note 11.

20. Next friend of minor or lunatic.—The next friend of a minor or lunatic may be called upon to file an affidavit of documents, *see* R. 23 below.

21. Advocate-General.—The Advocate-General cannot be called upon to make discovery on oath in a suit filed by him at the instance of relators under S. 92, Civil Procedure Code. But an affidavit of documents may be required from the *latter*.[1]

22. Official Liquidator.—As an Officer of the Court, the Official Liquidator must not ordinarily be compelled to make an affidavit of documents in his possession. The proper course is to apply to him for inspection in the first instance, and on his refusal, to apply to the Court.[1] The same rule would seem to apply to the Official Receiver and Assignees under the Insolvency Acts.

23. Marine Insurance.—In actions on policies of Marine Insurance, the defendant underwriters are entitled to apply for and obtain, as a matter of course, an order for the production of all material documents and papers relating to the insurance, not only from the *plaintiff* and all persons interested in the proceedings but *all other persons* who are in possession of such documents or papers.[1] This does not, of course, include the underwriters themselves; but in an action at the suit of a mortgagee it includes a mortgagor who has sailed the ship as the managing owner.[2] The practice extends to all actions

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Note 16.

(1) *Cooke* v. *Oceanic Steam Co*, 1875 W N 220; *Dykes* v. *Stephens*, (1885) 30 Ch D 189.

(2) *Municipal Board, Agra* v. *Asharfi Lal*, 1922 All 1 (4): 44 All 202: 20 All L J 1: 65 Ind Cas 984.

Note 17.

(1) *Attorney-General* v. *Newcastle Corporation*, (1897) 2 Q B 384 C A: 66 L J Q B 593: 77 L T 203 (C A); Re *Societe Les Affreteurs Reunis and Shipping Controller*, (1921) 3 K B 1.

(2) *Attorney-General* v. *Newcastle Corporation*, (1897) 2 Q B 384 (395): 66 L J Q B 593: 77 L T 203 C A.

Note 18.

(1) *South African Republic* v. *Compagnie Franco-Belge*, (1898) 1 Ch 190: 67 L J Ch 92: 77 L T 555: 46 W R 151: 14 T L R 65; *United States of America* v. *Wagner*, (1867) 2 Ch App 582: 36 L J Ch 624: 16 L T 646: 15 W R 1026: *Liberia Republic* v. *Imperial Bank*, (1873) L R 16 Eq 179.

(2) *Costa Rica Republic* v. *Erlanger*, (1875) 1 Ch D 171: 45 L J Ch 145: 33 L T 632: 24 W R 151 (C A); *Peru Republic* v. *Weguelin*, (1875) L R 20 Eq 140: 44 L J Ch 583.

Note 21.

(1) *Advocate-General* v. *Adamji Mahomeddi*, (1906) 30 Bom 474 (476): 8 Bom L R 565.

Note 22.

(1) *Mutual Society*, in re, (1883) 22 Ch D 714: 52 L J Ch 621: 48 L T 651: 31 W R 872 (C A).

Note 23.

(1) *China Traders Insurance Co* v. *Royal Exchange Assurance Corporation*, (1898) 2 Q B 187 (191, 192, 193) C A: 67 L J Q B 736: 78 L T 783: 46 W R 497: 8 Asp M C 409: 14 T L R 423 (C A); *Teneria Moderna Franco Espanola* v. *New Zealand Insurance Co*, (1924) 1 K B 79: 93 L J K B 169: 130 L T 139: 16 Asp M L C 236 (C A).

(2) *West of England Bank* v. *Canton Insurance Co*, (1877) 2 Ex D 472.

O. 11, Rr. 12&13 Notes 23—24.

on policies which are substantially marine policies whether on a ship or cargo.[8]

24. Affidavit of documents if conclusive—Further affidavit.—The affidavit of documents filed by a party against whom an order for discovery has been passed, is conclusive, and, must be accepted by the party seeking discovery as true, both with regard to the documents that are, or has been in the possession or power of the party making discovery,[1] and as to their relevancy unless there is something like an answer in cross-examination or some other documentary evidence showing conclusively that there are other documents.[2] They are also conclusive as to the grounds stated in support of a claim for privilege from production.[3] The party seeking discovery cannot, for the purpose of obtaining a further affidavit or inspection of documents for which privilege is claimed, adduce evidence or otherwise show that the affidavit of documents is insufficient or untrue.[4] Nor, as a rule, can he interrogate with a view to show that the affidavit is untrue.[5] There are two cases, however, where the affidavit of the document can be controverted:—

(1) Where, from the *affidavit itself*, or from the document referred to therein, or from admissions made either in pleadings or otherwise, it appears that the party making discovery has or has had other relevant documents in his possession or power.[6]

(2) Where the basis on which the first affidavit has been made turns out to have been wrong; in other words, where the party making the affidavit has misconceived his case so that the Court is practically certain that if he had conceived properly and acted on a correct view of the law he would have disclosed further documents.[7]

In a suit for ejectment the Court will not as a rule go behind the affidavit and where, in such a suit either party claims to refuse production on the ground that the documents relates solely to his own title and do not in any way tend to prove or support the title of the opposite party, the Court cannot

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(3) *China Traders Insurance Company* v. *Royal Exchange Assurance Corporation*, (1898) 2 Q B 187 (191): 67 L J Q B 736: 78 L T 783: 46 W R 497: 8 Asp M C 409: 14 T L R 423 (C A).

Note 24.

(1) *Gardner* v. *Irvin*, (1878) 4 Ex D 49 C A: 48 L J Ex 223: 40 L T 357: 27 W R 442 (C A): *Kedar Nath* v. *Bishwanath*, 1924 All 510 (511): 46 All 417: 22 All L J 299: 5 L R A (Civ) 225: 80 Ind Cas 787: *Rameswar Narayan Singh* v. *Rikhanath Koeri*, (1920) 58 Ind Cas 281 (286): 5 Pat L Jour 550: 1 Pat L Tim 668.

(2) *Budden* v. *Wilkinson*, (1893) 2 Q B 432 C A: 63 L J Q B 32: 69 L T 427: 41 W R 657: 4 R 525 (C A): *Moghul Steamship Co* v. *McGregor & Co*, (1885) 2 T L R 752 C A: 15 Q B D 476: 54 L J Q B 540: 53 L T 268: 49 J P 646: 5 Asp M C 467: 15 Cox C C 740 cited at 46 Cal 1001.

(3) *Budden* v. *Wilkinson*, (1893) 2 Q B 432 C A: 63 L J Q B 32: 69 L T 427: 41 W R 657: 4 R 525 (C A); *Bewicke* v. *Graham*, (1881) 7 Q B D 400 C A: 50 L J Q B 396: 44 L T 371: 29 W R 436.

(4) *Gardner* v. *Irvin*, (1878) 4 Ex D 49 C A: 48 L J Ex 223: 40 L T 357: 27 W R 442: *Morris* v. *Edwards*, (1889) 23 Q B D 287 C A: 58 L J Q B 545: 61 L T 149: 37 W R 721 (C A) cited at 17 Bom 581: *Nicholl* v. *Wheeler*, (1886) 17 Q B D 101: 55 L J Q B 231: 34 W R 425 (C A): *Hall* v. *Truman*, (1885) 29 C D 307: 54 L J Ch 717: 52 L T 586.

(5) *Nicholl* v. *Wheeler*, (1886) 17 Q B D 101 C A: 55 L J Q B 231: 34 W R 425 (C A).

(6) *Jones* v. *Monte Video Gas Co*, (1880) 5 Q B D 556 C A: 49 L J Q B 627: 42 L T 639: 28 W R 758 C A; *Campagnie Financiere* v. *Peruvian Guano Co*, (1882) 11 Q B D 55 C A: *Hall* v. *Truman*, (1885) 29 C D 307: 54 L J Ch 717: 52 L T 586; *Wright* v. *Pitt*, L R 3 Ch App 809 referred in 1 Cal 178: *Noel* v. *Noel*, 1 D J & S 468: 2 Jur N S 589: 32 L J Ch 676; *Kenelly* v. *Wyman*, (1875-76) 1 Cal 178 (179) cited at 1 Cal 178; *Anandrao* v. *Budra*, (1893) 17 Bom 384 (388) [More suspicion not sufficient]; *Kent Coal Concessions* v. *Duguid*, (1910) 1 K B 904: 79 L J Q B 423: 102 L T 225: 26 T L R 345 (C A).

(7) *British Association Glass Bottle Manufacturers Ltd* v. *Nettlefold*, (1912) 1 K B 369 C A [Affirmed in H L 1912 A C 709]; *Amarendra Nath Chatterjee* v. *Kally Kissen Tagore*, (1897) 2 Cal W N 17 (18).

go behind the affidavit and enquire whether his statement is true or not.[8] But in a suit for the recovery of the price of materials supplied to the defendant in which the defence was that the materials were defective the Court ordered the production of the Engineer's report referred to in his pleadings, where his statement showed that the report was not of the character described by the defendant.[9]

25. Effect of non-disclosure of documents.—Where no application is made under this rule, a party is not bound to produce any document. He is entitled to refrain from producing any document which he considers irrelevant and no adverse presumption can be drawn against the party from its non-production[1] except where, from the nature and circumstances of the case it is the imperative duty on his part to produce them,[2] but where an order is made against a party for discovery and he alleges, as to some of the documents that they have been destroyed or may have perished, he is bound to give evidence of diligent search for them. In the absence of such evidence a presumption that, if produced, they will be unfavourable to that party will arise.[3]

26. Right to seal part of documents.—A party may seal up such portions of the documents produced by him as he swears are privileged. He must, however, specify what parts of the documents referred to he claims to seal up and the grounds upon which the claim is based.[1] The rule is the same with regard to portions of documents which do not relate to the matters in question.[2] The party making discovery has the option either to disclose such portions in his affidavit or to disclose the whole and state that such portion alone is relevant and to seal up the rest.[3] When the right of the party to seal up parts of the document is contested, the Court will appoint an officer to whom the party desiring inspection is to state in confidence why he wants to inspect any portion of the documents sealed, and the officer, after looking at the documents as to whether and in what way the part noted or desired to be noted is material to the case should make a report for the orders of the Court.[4] The Court can, also, order the sealed parts to be unfastened for its personal inspection.[5]

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(8) *Vinayakrao* v. *Narotam*, (1893) 17 Bom 581 (583, 584); *Morris* v. *Edwards*, (1889) 23 Q B D 287; affirmed in 15 App Cas 309; *Roberts* v. *Oppenheim*, (1884) 26 Ch D 724 [Reference in the pleadings does not alter the position].

(9) *Umbica Churn* v. *Bengal S & W Co.* (1895) 22 Cal 105 (110, 111).

Note 25.

(1) *Bilas Kunwar* v. *Desraj*, 1915 P C 96 (98): 37 All 557: 42 Ind App 202: 13 All L J 991: 17 Bom L R 1006: 22 Cal L Jour 516: 19 Cal W N 1207: 29 Mad L Jour 335: 18 Mad L Tim 248: 2 Mad L W 830: 1915 Mad W N 757: 30 Ind Cas 299 P C.

(2) *Murugesam* v. *Manickavasaka*, 1917 P C 6 (8): 40 Mad 402: 44 Ind App 98: 15 All L J 281: 19 Bom L R 456: 25 Cal L Jour 589: 21 Cal W N 761: 32 Mad L Jour 369: 21 Mad L Tim 288: 5 Mad L W 759: 1917 Mad W N 487: 1 Pat L W 457: 39 Ind Cas 659 P C.

(3) *Moti Lal* v. *Kundan Lal*, (1917) 19 Bom L R 471 (476): 1917 P C 1 (4): 15 All L J 329: 25 Cal L Jour 581: 21 Cal W N 929: 32 Mad L Jour 468: 22 Mad L Tim 10: 6 Mad L W 92: 1917 Mad W N 464: 1 Pat L W 490: 39 Ind Cas 964 P C.

Note 26.

(1) *Jaduh Lall Shaw* v. *Kanai Lall Shaw*, (1893) 20 Cal 587 (589).

(2) *Horendra Nath Mukerjee* v. *Girendra Kumar Dutt*, (1897) 3 Cal W N 495 (497).

(3) *Kettlewell* v. *Barstow*, (1872) 7 Ch 686; *Pickering* v. *Pickering*, (1883) 25 Ch 247; *Jones* v. *Andrews*, (1888) 58 L T 601.

(4) *Nittomoye Dassee* v. *Soobul Chunder Lal*, (1895) 23 Cal 117 (126); *Heera Lall Rukhit* v. *Ram Suran Lall*, (1879) 4 Cal 835 (836).

(5) *Gurmuk Roy* v. *Tularam*, (1901) 28 Cal 424 (426).

O.11, R.14, Note 1.

R. 14. [S. 130.] *It shall be lawful for* the Court, at any time during the pendency of any suit, *to* order the production by any party thereto, *upon oath*, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court *shall* think right ; and the Court may deal with such documents, when produced, in such manner as *shall* appear just.

Production of documents.

[1877—S. 130.] [R. S. C., O. 31, R. 14.]

Synopsis.

1. Scope of the rule.
2. "Possession or power."
3. "Relating to any matter in question in such suit."
4. Effect of Ss. 163 and 164 of the Indian Evidence Act.
5. Waiver of privilege.
6. Partner.
7. Copies of documents produced, if can be taken. See R. 15, infra.
8. Revision.

Court's powers as to production. See Note 1, Pts. (9), (10), (12) and (13).
Effect of non-production. See Note 4, F.-N. (1).
Mere production not evidence. See Note 1, Pt. (6).
"Production" distinguished from "discovery or inspection". See Note 1, Pt. (1).
Third person not a party to the suit. See Note 1, Pt. (4) and R. 12, Note 13, Pt. (2).

1. Scope of the rule.—An order for *production* of documents under this rule is quite different from an order for *discovery* under Rule 12 or an order for *inspection* under R. 18, *infra*,[1] or for an order for answering *interrogatories* under R. 11, *ante*.[2] A party must set out every document in his possession or power where an order of discovery has been passed against him; but he is not bound to produce them unless an order for production has been passed against him.[3] An order for production can only be made after an order for discovery has been made under R. 12.[4] The mere production of the documents does not give an immediate and indefeasible right of inspection to the other party.[5] Nor such document become *ipso facto* a piece of evidence in the case.[6]

Under this rule the Court acts of its own motion and not on the application of any party.[7] It cannot, however, delegate the exercise of the power

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Order 11, Rule 14—Note 1.

(1) *Nithamalli Subbayyar* v. *Ramanathan Chettiar*, 1924 Mad 582 (583): 46 Mad L Jour 350: 19 Mad L W 355: 34 Mad L Tim 23: 1924 Mad W N 340: 77 Ind Cas 766 [R 21 inapplicable]; *Kripa Ram Charan* v. *Jawahir Lal*, 1928 Notes 76 (a): 26 All L J 1376: 112 Ind Cas 285; *Abdul Karim* v. *Abdus Subhan*, (1912) 14 Ind Cas 51 (52) All.

(2) *The Lyalpur Sugar Mills & Co* v. *Ramchandra Gur Sahai Cotton Mills & Co*, 1922 All 235 (237): 20 All L J 422: 67 Ind Cas 73: 44 All 566 [R. 21 inapplicable and defence not to be struck off].

(3) *Swanston* v. *Lishman*, (1881) 45 L T 360 (361).

(4) *Baidya Nath* v. *Bhola Nath*, 1923 Pat 337 (338): 1923 Pat H C C 143: 1 Pat L R 233: 76 Ind Cas 991: 5 Pat L Tim 413.

(5) *Ramachari* v. *Krishnamachari*, 1924 Mad 846 (846, 847): 47 Mad 934: 47 Mad L Jour 460: 20 Mad L W 533: 1924 Mad W N 863: 80 Ind Cas 604.

(6) Consult *Jugal Kishore* v. *Attra*, 1921 Lah 328 (330): 4 Lah L Jour 385.

(7) *Munna Lal* v. *Tara*, 1929 All 83 (88): 115 Ind Cas 464; *Sohara* v. *Mt Jainab*, 1889 Pun Re No 80.

under this rule to a commissioner.[8] No order should be made against a party unless he has directly or indirectly admitted the document to be in his possession or power[9] and unless such documents are in *existence*.[10] The words "at any time during the pendency of the suit" shows that an order for production can be made even *before the issues are framed*.[11]

It was held in the undermentioned case[12] of the Bombay High Court that a Court has no discretion to refuse production unless the documents are privileged. But in a later case of the same High Court it has been held that the Court *has* a discretion in compelling production of documents even though they are privileged.[13] An order for production must be a *written summons* on the party for such production and not a mere *verbal* order.[14] It must not be a general order that all the documents in the defendants' possession should be produced[15] except where the general description is sufficient for the identification of the documents or books sought to be produced.[16]

Where the documents are produced in obedience to the order of the Court, the Court can deal with them in such manner as appears to it to be just.[17]

The power to compel the production of documents has been extended to tribunals acting under various local Acts.[18]

2. "Possession or Power".—The words "possession or power" as a general rule mean *exclusive* possession.[1] They also mean *legal possession*,[2] *i.e.*, a right and power to deal with the documents.[3] There is no power to compel a party to produce documents not in his control or possession, or documents, the possession of which he has parted with before the date of the application. A person who claims a lien upon a deed has generally the right to refuse production thereof.[4]

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(8) *Gobind* v. *Kunja*, (1909) 4 Ind Cas 364 (367): 14 Cal W N 147: 10 Cal L Jour 407.

(9) *Kumar Rameshawar* v. *Rani Rikhnath*, (1920) 58 Ind Cas 281 (285): 5 Pat L Jour 550: 1 Pat L Tim 668.

(10) *Hans Raj* v. *Jhanda Mal*, 1892 Pun Re No 59.

(11) *Gobind Mohan* v. *Kunja Behary*, (1909) 4 Ind Cas 364 (366): 14 Cal W N 147: 10 Cal L Jour 407.

(12) *Wallace* v. *Jafferson*, (1878) 2 Bom 453 (456): 2 Ind Jur 720.

(13) *Vishnu Yeshwant* v. *New York Life Insurance Co*, (1905) 7 Bom L R 709 (711).

(14) *Doorga Monee* v. *Benode Monee*, 1864 Suth W R (Gap No) 164 (165); *Jaisukh* v. *Dina Nath*, 1898 Pun Re No 58.

(15) *Jaisukh* v. *Dina Nath*, 1898 Pun Re No 58.

(16) *Ram Nath* v. *Prabhu Dayal*, (1922) 65 Ind Cas 661 (664) Lah.

(17) *Balamoney* v. *Ramaswami Chettiar*, (1907) 30 Mad 230 (230): 17 Mad L Jour 79: 2 Mad L Tim 88; *Jai Sukh* v. *Dina Nath*, 1898 Pun Re No 58.

(18) *See* Bengal Land Registration Act (VII of 1876), S 53; Bengal Sanitary Drainage Act (VIII of 1895), S 29; Bengal Survey Act (V of 1875), S 50; the Calcutta Improvement Act (V of 1911), S 71 (*c*); the Chota Nagpur Tenancy Act (Bengal Act VI of 1908), S 265 (3); the Broach and Kaira Incumbered Estates Act (Bombay Act XXI of 1881), S 35; the Bombay Local Boards Act (VI of 1923), S 128 (2); the Sindh Incumbered Estates Act (Bombay Act XX of 1896), S 37; the Burma Boundaries Act (V of 1880), S 15; the Burma Forest Act (IV of 1902), S 9 (1) (*b*); the Orissa Tenancy Act (II of 1913), S 67 (10); the Oudh Taluqdars' Relief Act (XXIV of 1870), S 14; the Sikh Gurdwaras and Shrines Act (Punjab Act VI of 1922), S 24 (4); the Bundelkhand Encumbered Estates Act (U P Act I of 1903), S 31; the U P Town Improvement Act (II of 1914), S 58 (*c*).

Note 2.

(1) *Hadley* v. *Mac Dougall*, (1872) L R 7 Ch App 312: 41 L J Ch 504: 26 L T 379: 20 W R 393, cited at 1 Bom 496.

(2) *Read* v. *Langlois*, (1849) 1 Mac & G 627 (636): 2 H & T W 59: 19 L J Ch 337: 14 Jur 467, cited at 1 Bom 496.

(3) *Kearsley* v. *Phillips*, (1883) 10 Q B D 465 (467): 52 L J Q B 269: 48 L T 468: 31 Suth W R 467, cited at 9 Bom L R 569; *Murray* v. *Walter*, (1839) Cr & Ph 114: 3 Jur 719: 54 R R 232, cited at 1 Bom 496.

(4) *Griffith* v. *Ricketts*, 7 Hare 305: cited in 5 B H C R O 152; *Rea Hie* v. *Jetha Dungarsi*, (1868-69) 5 B H C (O C) 152.

O.11, R.14. Notes 3—6.

3. **"Relating to any matter in question in such suit."**—The order under this rule is to be limited to such documents alone as relate to the *matters in dispute* and the Court must, before it makes the order, determine, for the purpose thereof, what are the matters in question in the suit.[1] Every document which will throw any light on the case comes within the meaning of these words.[2] In a suit for accounts, the Court cannot under this rule call upon the defendant to show, in detail, the income and expenditure of the estate in suit until the decision of the suit. In other words, a Judge cannot invoke the aid of this rule for the purpose of *bringing into existence* a document which may be useful for the case.[3]

4. **Effect of Ss. 163 and 164 of the Indian Evidence Act.**—These sections appear in the chapter dealing with the examination of witnesses at the trial of the suit. Under S. 163 when a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the former party he is bound to give it as evidence if the latter party requires him to do so. Under S. 164, when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court. In the undermentioned case[1] the High Court of Madras raised, but did not decide, the question whether S. 163 was applicable to documents produced under the discovery procedure enacted in this rule or where it only applied to documents produced after the trial had begun.

5. **Waiver of privilege.**—A party may waive his privilege, and produce the documents for which he can claim exemption.[1] Such waiver may be either with reference to the *whole* document or to a *portion* thereof.[2] Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit and then sets up these facts by way of answer to the plaintiff's claim, he cannot afterwards contend that the documents are confidential and intended merely for his legal advisers or for the purpose of evidence in the case,[3] but the fact that a portion of a privileged document is read to the plaintiff's solicitor by the defendant's solicitor does not amount to a waiver of the privilege as regards the parts not so read.[4]

6. **Partner.**—One partner of a firm represents the other partners for the purpose of production of documents[1] and a notice to one is notice to all

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Note 3.

(1) Relating to any matter in question in such suit: *Gobind Mohun Dose* v. *Kunja Behary Dose*, (1909) 4 Ind Cas 364 (366): 14 Cal W N 147: 10 Cal L Jour 407; *Campagnie* v. *Peruvian Guano Co*, 11 Q B D 62; *Abdul Karim* v. *Abdus Subhan*, (1912) 14 Ind Cas 51 (52) Cal.

(2) *Compagnie Financiere* v. *Peruvian Co*, (1882) 11 Q B D 55 (62).

(3) *Abdul Karim* v. *Abdus Subhan*, (1912) 14 Ind Cas 51 (52) Cal.

Note 4.

(1) *Rajagopala Ayyangar* v. *Ramanuja Ayyangar*, 1923 Mad 607 (608): 1923 Mad W N 292: 18 Mad L W 165: 72 Ind Cas 459.

Note 5.

(1) *Calcraft* v. *Guest*, (1898) 1 Q B 759 (761): 67 L J Q B 505: 78 L T 283: 46 W R 420 C A.

(2) *Lyell* v. *Kennedy*, (1884) 27 Ch D 1 (24) C A.

(3) *Umbika Churn* v. *Bengal Spinning Co. Ltd*, (1895) 22 Cal 105 (111).

(4) *Kay* v. *Poorunchand*, (1880) 4 Bom 631 (634): 5 Ind Jur 479.

Note 6.

(1) *Haji Jakaria* v. *H Casim*, (1876) 1 Bom 496 (499): 1 Ind Jur 517; *Ramnath* v. *Prabhu Dyal*, (1922) 65 Ind Cas 661 (664).

the defendants when they are sued as a firm.[2]

O.11, R.14, Notes 6—8.

7. **Copies of documents produced if can be taken.**—*See* Rule 15 *infra.*

8. **Revision.**—Orders granting[1] or refusing[2] production are discretionary orders which will not be interfered with in revision except where the lower Court has not understood the provisions of the rule[3] or makes the order without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants.[4]

O.11, R.15.

R. **15.** [S. 131.] *Every* party to a suit *shall be entitled* at any time *to* give notice to any other party, *in whose pleadings or affidavits reference is made to any document*, to produce *such* document for the inspection of the party giving *such* notice, or of his pleader, and to permit *him or them* to take copies thereof; *and any* party *not* complying with such notice shall *not* afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he *shall* satisfy the Court that such document relates only to his own title, *he being a defendant to the suit*, or that he had some other cause *or excuse which the Court shall deem* sufficient for not complying with such notice, *in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.*

Inspection of documents referred to in *pleadings or affidavits.*

[1877—S. 131, R. S. C., O. 31, R. 15. *See* R. 16.]

Synopsis.

1. Scope of the rule.
2. "At any time."
3. Documents referred to in the pleadings or affidavits.
4. Who can inspect under this rule.
5. Copies of documents produced, if can be taken.

Order not revisable. See Note 1, F.-N. (1) and Note 2, F.-N. (1).

Right to seal a portion. See Note 3, Pt. (14).

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(2) *Ramnath* v. *Prabhu Dyal*, (1922) 65 Ind Cas 661 (664) Lah.

Note 8.

(1) In re *Nizam of Hyderabad*, (1886) 9 Mad 256 (257); *Hari Singh* v. *Ram Chand*, (1911) 12 Ind Cas 506 (507): 256 Pun L R 1911: 185 Pun L R 1911.

(2) *Nagaraja* v. *Vythinatha*, (1911) 9 Ind Cas 672 (672): 21 Mad L Jour 484: 9 Mad L Tim 273: 2 Mad W N 369; *Balamoney* v. *Ramasami*, (1907) 30 Mad 230 (230): 17 Mad L Jour 79: 2 Mad L Tim 88.

(3) *Ramachari* v. *Krishnachari*, 1924 Mad 846 (846): 47 Mad 934: 47 Mad L Jour 460: 20 Mad L W 533: 1924 Mad W N 863: 80 Ind Cas 604.

(4) *Gobind Mohun* v. *Kunja Behary*, (1909) 4 Ind Cas 364 (367): 14 Cal W N 147: 10 Cal L Jour 407.

O.11, R.15, Note 1.

1. Scope of the rule.—Rules 15 to 18 deal with inspection of documents. Documents may, for the purposes of inspection, be divided into two classes:—

(1) Documents *referred to in the pleadings or affidavits* of the parties.

(2) Other documents in the possession or power of the party but *not so referred to.*

As regards the *first* class of documents a party may, without the intervention of the Court, give notice to the party in whose pleadings they are referred to, to produce such documents for his inspection (R. 15). The party to whom such notice is given should, within ten days from the receipt of such notice, give notice to the party claiming such inspection stating the time and place at which the documents may be inspected and stating his objections, if any, to the production of any of the documents (R. 17). If he fails to do so in the manner required by R. 17, the other party may apply to the Court for an *order* for such inspection [R. 18, sub-R. (1)], and the Court should grant such inspection unless the documents are privileged in law or relate exclusively to the case of the party producing them and contain nothing supporting or tending to support the opponent's case.[1]

As regards the *second* class of documents the party desiring the inspection can only proceed by way of *an application to the Court* along with an *affidavit showing the relevancy* of the documents.[1-a]

A Court has no jurisdiction to order inspection of documents except as provided in Rr. 15 to 18.[1-b] The privilege of inspection by a party of his adversary's documents is not a matter of routine but is to be permitted or refused only on *judicial considerations* and so as to result in as little harm as possible to the parties who are entitled to have the protection of the Court in carrying on their lawful pursuits.[2] The object of the rule is to give the opposite party the same advantage as if the documents had been fully set out in the pleadings.[3]

By refusing to produce a document in his pleadings, a party does not lose the privilege that he might have claimed in respect of the document. The only penalty for not producing such documents according to the notice, is that he cannot afterwards put them in evidence. Even in such a case, the Court may, if sufficient cause is shown by the defaulting party, allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.[4] Where documents are objected to on the ground of immateriality the Court will, if necessary, order them to be produced for its own inspection in order to judge of their materiality.[5]

Order 11, Rule 15—Note 1.

(1) *Balamony* v. *Ramasami*, (1907) 30 Mad 230 (231): 17 Mad L Jour 79: 2 Mad L Tim 88 [Order refusing inspection not revisable]. See Note 1 to Rule 18.

(1-a) See *Khetsidas* v. *Narotum*, (1908) 32 Bom 152 (154): 9 Bom L R 1084.

(1-b) *Secretary of State* v. *Jehangir*, (1902) 4 Bom L R 342 (350).

(2) *Ramachari* v. *Krishnamachari*, 1924 Mad 846 (847): 47 Mad 934: 47 Mad L Jour 460: 20 Mad L W 533: 1924 Mad W N 863: 80 Ind Cas 604.

(3) *Sutherland* v. *Singhee*, (1884) 10 Cal 808 (813, 814); In the goods of *Balkrishna*, (1862-65) 1 Bom H C R 114 [Case of next-of-kin entitled to succeed but for the will]; *Mitchell* v. *Oriental Gas Co*, 1 Ind Jur N S 323.

(4) *Venayakrao Dhunderaj* v. *Narotam Anandji*, (1893) 17 Bom 581 (584); *Dhapi* v. *Ram Pershad*, (1887) 14 Cal 768 (777).

(5) *Gurmuk Roy* v. *Tularam*, (1901) 28 Cal 424 (426).

O.11, R.15, Notes 2—3.

2. **"At any time."**—Where a document is referred to in the pleadings or affidavits of a party, the opposite party is entitled as of right to claim inspection thereof[1] even before the filing of the written statement.[2] But no inspection will, as a general rule, be ordered of documents other than those referred to in the pleadings or affidavits, till after written statement is filed.[3]

3. **Documents referred to in the pleadings or affidavits.**—Pleadings include particulars[1] and affidavits will include an affidavit of documents,[2] affidavit of answers to interrogatories[3] and exhibits forming part of the affidavit[4] as also an affidavit intended to be filed but not filed and of which a copy has been given to the other side.[5]

The documents need not have been identified or particularly described in such pleadings or affidavits; it is enough if they have been referred to generally.[6] But a party is not entitled to inspect the documents incidentally referred to in the pleadings of the opposite party if they are *not material* for the case of either party.[7] There is a difference of opinion as to whether a document referred to in the plaint in the list attached thereto under the provision of O. 7, R. 14, sub-R. (2), is one that can be said to be *referred to* in the pleadings. It has been held by the High Courts of Bombay[8] and Madras[9] following the English case of *Quilter* v. *Heatley*[10] that such a document *is* one referred to in the pleadings. The High Court of Calcutta[11] has held that the list annexed to the plaint is not part of the plaint itself and, consequently, documents referred to in such list cannot be said to be referred to in the pleadings.

Where entries in a book are referred to in the pleadings inspection will be limited to those entries.[12] The rule does not apply to *copies* of documents referred to though they may be in the possession of the party.[13] Where the plaintiff has made an affidavit of documents at the instance of one defendant and another defendant desires to inspect them he is entitled to do this subject to the right of the plaintiff to seal up such portions of the documents as do not relate to the matters in issue or to the case of the defendant applying.[14] Under

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Note 2.

(1) See *Chandmull* v. *Dhanraj*, (1920) 56 Ind Cas 457 (458): 24 Cal W N 302 [Where the point is implied]; *Hari Singh* v. *Ram Chand*, (1911) 12 Ind Cas 506 (507): 1911 Pun L R 256: 1911 Pun W R 185 [Document put in sealed cover—Order for inspection not revisable].

(2) *Ram Dayal* v. *N Balakrishna*, (1894) 18 Bom 368 (369).

(3) *Khetsidas* v. *Narotumdas*, (1907) 32 Bom 152 (153): 9 Bom L R 1084.

Note 3.

(1) *Cass* v. *Fitzgerald*, 1884 W N 18; *Milbank* v. *Milbank*, (1900) 1 Ch 376. *Vide* R 18 (2).

(2) *Pardy's Mozambique Syndicate* v. *Alexander*, (1903) 1 Ch 191. See also *Basanta Kumar Goswami* v. *Kumidini Dassee*, (1911) 12 Ind Cas 12 (12, 13): 38 Cal 428: 16 Cal W N 81.

(3) *Moore* v. *Peachey*, (1891) 2 Q B 707.

(4) Re *Hinchliffe*, (1895) 1 Ch 177; *Hunder* v. *Dublin etc. Ry Co*, (1891) 28 L R Ir 489 C A.

(5) Re *Feaner and Lord*, (1897) 1 Q B D 667.

(6) *Smith* v. *Harris*, (1883) 48 L T 869.

(7) *Rapaport* v. *Hirachand*, 1923 Bom 73 (74): 46 Bom 866: 66 Ind Cas 8: 23 Bom L R 1255.

(8) *Ram Dayal* v. *Nurhurry Balkrishna*, (1894) 18 Bom 368 (369): *Khetsidas* v. *Narotumdas*, (1908) 32 Bom 152 (153): 9 Bom L R 1084.

(9) *Ramanathan Chettiar* v. *Raja Sir Annamalai Chettiar*, 1931 Mad 825 (826): 1931 Mad W N 984: 34 Mad L W 654: 61 Mad L Jour 704: 135 Ind Cas 745.

(10) *Kuilter* v. *Heatley*, (1883) 23 Ch D 42.

(11) *Chandmul Ganeshmal* v. *Dhanraj Ganapat Roy*, (1920) 56 Ind Cas 457 (458): 24 Cal W N 302.

(12) *Quilter* v. *Heatley*, (1883) 23 Ch D 42.

(13) *Quilter* v. *Heatley*, (1883) 23 Ch D 42.

(14) *Pardy's Mozambique Syndicate* v. *Alexander*, (1903) 1 Ch 191.

O.11, R.15, Notes 3—5.

the Original Side rules of the Madras High Court a defendant is entitled to be furnished with a copy of the document sued on and which is deposited with the plaint.[15]

4. **Who can inspect under this rule.**—The party, his authorised agent, and his pleader, can inspect the documents under this rule.[1] But a former employee of a party-in-charge of his books cannot be engaged by the opposite party for such purpose. The Court will not ordinarily allow such persons to inspect.[2] The term "agent" does not include a professional accountant appointed for the purpose[3] though, in proper cases, the Court will allow inspection by an accountant or other expert.[4] Inspection by a witness is not usually allowed.[5] The costs of inspection is to be paid by the party inspecting though under exceptional circumstances such costs may be made costs in the cause.[6]

5. **Copies of documents produced, if can be taken.**—The right to inspection includes a right to take copies of documents produced,[1] unless they relate exclusively to the case of the party producing them and contain nothing to support his adversary's case.[2] The right to take copies is confined to all relevant and unprivileged documents.[3] In a proper case, the Court will order photographs to be taken.[4]

O.11, R.16, Note 1.

R. **16.** [New.] *Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.*

Notice to produce.

[R. S. C., O. 31, R. 16. *See* R. 15.]

Synopsis.

1. Notice to produce.

1. **Notice to produce.**—Form No. 7 in Appendix C is identical with Form No. 9 of Appendix B of the English Rules of the Supreme Court. It has been held under these rules that the Form must be followed as closely as possible, but that it is not necessary to use the very words thereof.[1] The same observation applies to Form No. 6 also.[2]

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(15) *Hajee Mohummad* v. *Subba Naidu*, (1898) 21 Mad 490 (491).

Note 4.

(1) *Williams* v. *Prince of Wales Life Insurance Co*, (1857) 23 Beav 338; *Costa Rica Republic* v. *Erlanger*, (1875) 44 L J Ch 402 C A.

(2) *Enamul* v. *Ekramul*, (1898) 25 Cal 294 (297); *K V Ramachari* v. *K V Krishnamachari*, 1924 Mad 846 (847): 47 Mad 934: 47 Mad L Jour 460: 20 Mad L W 533: 1924 Mad W N 863: 80 Ind Cas 604.

(3) *Draper* v. *Manchester etc Ry Co*, (1861) 30 L J Ch 236.

(4) *Swansea Vale Railway Co* v. *Budd*, (1866) L R 2 Eq 274.

(5) *Boyd* v. *Petue*, (1868) 3 Ch App 818.

(6) *Fatma Bai* v. *Hajee Cassam*, (1909) 2 Ind Cas 422: 11 Bom L R 402; *Peru* v. *Wegurlin*, (1872) 7 C P 352.

Note 5.

(1) *Ormerod* v. *St George's Iron Works, Ltd*, (1905) 1 Ch 505; *Pratt* v. *Pratt*, (1882) 47 L T 249; *Bevan* v. *Webb*, (1901) 2 Ch D 724; *Gobind Mohan* v. *Kunja Behari*, (1909) 4 Ind Cas 364 (367): 14 Cal W N 147: 10 Cal L Jour 407; *Balamony* v. *Ramaswami Chettiar*, (1907) 30 Mad 230 (231): 17 Mad L Jour 79: 2 Mad L Tim 88.

(2) *Balamony* v. *Ramaswami Chettiar*, (1907) 30 Mad 230 (231): 17 Mad L Jour 79: 2 Mad L Tim 88.

(3) *Siddely Deasy Motor Car Co* v. *Thomson*, (1916) 140 L T Jour 374.

(4) *Lewis* v. *The Earl of Londesborough*, (1893) 2 Q B 191.

Order 11, Rule 16—Note 1.

(1) Re *Credit Co*, (1879) 11 Ch D 256 (260): 48 L J Ch 221: 27 W R 380.

(2) See *Lyalpur Sugar Mills* v. *R C G Sahai Cotton Mills*, 1922 All 235 (237): 20 All L J 422: 67 Ind Cas 73: 44 All 565.

O.11, R.17, Notes 1—3.

R. **17**. [S. 132.] The party to whom such notice is given shall, within ten days from the receipt *of such notice*, deliver to the party giving the same a notice stating a time within three days from *the* delivery *thereof* at which the documents, or such of them as he does not object to produce, may be inspected at *the* office of his pleader, or *in the case of bankers' books* or *other books of account* or *books in constant use for the purposes of any trade or business, at their usual place of custody*, and stating which (if any) of the documents he objects to produce, and on what ground. *Such notice shall be in Form No.* 8 *in Appendix C, with such variations as circumstances may require.*

Time for inspection when notice given.

[R. S. C., O. 31, R. 17.]

Synopsis.

1. Scope of the rule.
2. "Usual place of custody."
3. Banker's books.

"Documents" contemplated by the rule. See Note 1, Pt. (1).

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1. Scope of the rule.—This rule only comes into operation after a notice under R. 15 has been given. It applies to all documents mentioned in R. 15.[1] In *Dhapi* v. *Ram Pershad*[2] it has been held by the High Court of Calcutta that the correct rule of procedure is that if a party does not desire to produce documents he should refrain from delivering the notice under the rule but wait to see if the plaintiff applies under R. 18. It has also been held that, when the notice was served at a time when the suit was stayed, the ten days' time begins, to run only from the date the suit is revived.

2. **"Usual place of custody."**—This rule clearly specified the place of inspection with regard to Banker's books and Business books. The words in the old Code "some other convenient place" gave room for discussion and controversy which has now been removed. Where, in a suit instituted in Bombay for breach of a contract to gin cotton in the defendant's mill at Broach, the plaintiff applied for inspection of the defendant's account books in Bombay but the defendant offered to give inspection in Broach, it was held that the latter place was the place where the books were kept and was the proper place for inspection.[1]

3. **Banker's books.**—*See* O. 7, Rr. 17 and 18 below.

Order 11, Rule 17—Note 1.

(1) Re *Funner and Lord*, (1897) 1 Q B 667 (669, 670).

(2) (1887) 14 Cal 768 (777): 12 Ind Jur 97.

Note 2.

(1) *Kevaldas* v. *Pestonji*, (1881) 5 Bom 467 (469).

O.11, R. 18 Note 1.

Order for inspection.

R. **18**. [Ss. 133, 134.] (1) *Where the* party served with notice under *rule* 15 omits to give *such* notice of *a* time for inspection or objects to give inspection, *or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit : Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.*

(2) *Any* application *to inspect* documents, except *such as are* referred to in the *pleadings, particulars* or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the *other* party. *The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.*

[1877—Ss. 133, 134, R. S. C., O. 31, R. 18.]

Synopsis.

1. Scope of the rule.
2. Discretion of Court.
3. Convenient place for inspection. See R. 17, above.
4. Appeal.
5. Bankers' Book Evidence Act.

Denial of possession or power conclusive. See Note 1, Pts. (3) and (4).
Notice prior to order under sub-R. (2). See Note 1, Pts. (3) and (5).
Order not revisable. See R. 15, Note 1, F.N. (1) and Note 2, F.-N. (1) above.

1. Scope of the rule.—Sub-Rule 1 of this rule deals with inspection of documents referred to in the pleadings or affidavits of the parties. Sub-R. 2 deals with inspection of documents *other* than those mentioned in sub-R. 1. The difference between the two cases is that, in the case of documents not mentioned in the pleadings or the affidavits, *an affidavit has to be filed* by the applicant satisfying the Judge that the document is relevant to the case.[1] In the case of documents so mentioned, the relevancy is *admitted* while in the other case, the relevancy has to be *proved*.[1-a] The filing of the affidavit under sub-R. 2 is, however, not always necessary, when the Judge is satisfied as to

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Order 11, Rule 18—Note 1.

(1) *Gobardhan* v. *Jai Devi*, 1931 All 221 (222): 1931 All L J 94: 130 Ind Cas 7: 53 All 442; *Nittomoye Dassee* v. *Soobul Chunder Law*, (1896) 23 Cal 117 (125). See also *Chunni Lal* v. *Messrs Ralli Bros*, 1905 All W N 62 (62).

(1-a) *Gobardhan Das* v. *Jai Devi*, 1931 All 221 (222): 1931 All L J 94: 130 Ind Cas 7: 53 All 442.

O.11, R.18, Notes 1—4.

the relevancy of the document; at any rate, the want of an affidavit cannot invalidate an order passed under this rule.[2] On the other hand, the filing of an affidavit does not entitle a party *immediately* to an order for inspection.[2-a] The Court should give the opposite party an opportunity of replying by an affidavit, the application for inspection and if the opposite party swears an affidavit that the documents are not in his possession or power, the Court will regard this as final and conclusive.[3] This is in consonance with the general rule that the Courts will not go behind the oath of the party against whom inspection is sought.[4]

An order under sub-R. 1 cannot be made unless notice has been given under the provisions of R. 15[5] and no party is entitled to an inspection of documents not referred to in the pleadings or affidavits without an *order* under sub-R. 2.[6] Nor is he entitled to a roving commission into papers belonging to the other side; the inspection must be restricted only to such *specific* documents as the applicant names and which are relevant to his case.[7]

Where parties require the inspection or production of telegraphic messages, it is for them and not the Court to obtain the necessary sanction from Government.[8]

2. Discretion of Court.—Under sub-Rule 1, the Court has a discretion limited to the terms of the proviso, in making an order for inspection and the *onus* rests on the party resisting an order, to show that it should not be made in the special circumstances of the case; but it would not be a proper exercise of discretion to refuse inspection on the general ground that it was sought before the written statement was filed; nor can the mere number of the documents afford any guide to the exercise of discretion.[1]

3. Convenient place for inspection.—*See* R. 17 above.

4. Appeal.—No appeal lies under the Code from an order for inspection under this rule; nor does it lie under Cl. 15 of the Letters Patent as an order directing inspection to be given is not a "Judgment".[1]

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(2) *Gobardhan* v. *Jai Devi*, 1931 All 221 (222): 1931 All L J 94: 130 Ind Cas 7: 53 All 442. See however *Lyalpur Sugar Mills* v. *R C G Sahai Cotton Mills*, 1922 All 235 (237): 20 All L J 422: 67 Ind Cas 73: 44 All 565 [Court cannot order inspection under sub-rule 2 without affidavit].

(2-a) *K Rameswar Narayan* v. *R Rikhanath*, (1920) 58 Ind Cas 281 (285): 5 Pat L Jour 550: 1 Pat L Tim 668.

(3) *Nittomoye* v. *Soobul*, (1896) 23 Cal 117 (127); *K Rameswar Narayan* v. *R Rikhanath*, (1920) 58 Ind Cas 281 (285): 5 Pat L Jour 550: 1 Pat L Tim 668; *Kedar Nath Durga Prasad* v. *Bishwanath Lakshmi Chand*, 1924 All 510 (511): 16 All 417: 22 All L J 299: 5 L R All (Civ) 225: 80 Ind Cas 787; *Basanta Coomar* v. *Kumudini*, (1911) 12 Ind Cas 12 (13): 38 Cal 428: 16 Cal W N 81 [But he cannot merely rely on his previous affidavit of documents in answer to an application under this sub-rule]. See also in the matter of *Amarendra Nath Chatterjee* v. *Kally Kissen Tagore*, (1898) 2 Cal W N 17 (18) [Falsity of denial of possession can be elicited at trial and then inspection ordered].

(4) *Wiedemann* v. *Walpole*, (1890) 24 Q B D 537.

(5) *Firm of Lalchand Gobindram* v. *Firm of Tejbhandas Jagannath*, 1926 Sind 272 (272): 96 Ind Cas 1003; *Dhapi* v. *Rampershad*, (1887) 14 Cal 768 (776, 777): 12 Ind Jur 97; *Mohendronath* v. *Ishun Chunder*, (1884) 10 Cal 56 (58): 8 Ind Jur 191.

(6) *Abdul Karim* v. *Abdus Subhan*, (1912) 14 Ind Cas 51 (52) All.

(7) *Secretary of State for India* v. *Muthu Alagappa Chettiar*, 1928 Mad 1093 (1094); *Narpat Rai* v. *Devi Das*, (1912) 14 Ind Cas 371 (372): 13 Pun W R 1911 [Exposure of trade secrets].

(8) *Leckraj* v. *Palee Ram*, (1870) 2 N W P 210.

Note 2.

(1) *Ramanathan Chettiar* v. *Raja Sir Annamalai Chettiar*, 1931 Mad 825 (828): 1931 Mad W N 984: 34 Mad L W 654: 61 Mad L Jour 701: 135 Ind Cas 539. See also *Ramakrishniah* v. *Satyanandan*, 1932 Mad 284 (285, 286, 287): 1932 Mad W N 93: 62 Mad L Jour 226: 35 Mad L W 302: 137 Ind Cas 636 [Inability to particularise instances of fraud or error under O 6, R 4 no ground for refusing inspection of accounts of opposite side—Nor lateness of application which can be met by order of costs if there is no prejudice].

Note 4.

(1) *Sonbai* v. *Ahmedbhai*, (1872) 9 Bom H C

O.11, R.18, Note 5.

5. **Bankers' Book of Evidence Act.**—The main object of the Act is to enable evidence to be procured and given[1] and to relieve bankers from attendance in Court with their books.[2] The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted.[3]

O.11, R.19.

Verified copies.

R. **19.** [New.] (1) *Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.*

(2) *Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.*

(3) *The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.*

[R. S. C., O. 31, R. 19-A.]

R 398; *Ahmed* v. *Ayeshbai*, (1909) 2 Ind Cas 167 (167): 11 Bom L R 248.

Note 5.

(1) *Emmott* v. *Star News Paper Co*, (1892) 62 L J Q B 77; *R* v. *Bono and another*, (1913) 29 T L R 635.

(2) *Parnell* v. *Wood*, 1892 P 137, cited at 5 Bom L R 865; *Waterhouse* v. *Barker*, (1924) 2 K B 759: 93 L J K B 897: 132 L T 15: 40 T L R 805: 69 Sol J 51 C A.

(3) *Waterhouse* v. *Barker*, (1924) 2 K B 759.

Synopsis.

1. Scope of the rule.
2. Inspection by the Judge—Sub-R. (2).
3. Specific documents—Sub-R. (3).

O.11, R.19, Notes 1—3.

1. Scope of the rule.—Sub-rule (1) applies particularly to Bankers books.[1]

2. Inspection by the Judge—Sub-R. 2.—This rule gives the Court power to inspect any document for which privilege is claimed so as to decide whether the claim is justified[1] the object being that such claims ought to be decided at once in proper cases.[2] The power exists even in respect of state documents and official communications and notwithstanding a certificate from a Minister of State claiming protection, provided of course that such power be exercised so as not to destroy the protection of the privilege in any case in which it may be found to exist.[3] The word "document" includes also a sealed up portion of a document.[4]

3. Specific documents—Sub-R. 3.—The rule enlarges the power to order discovery.[1] In order to justify an application under this sub-rule, the affidavit must name and specify the document in such a manner as to identify them; an affidavit in a general form containing an argument that the document must be in the possession or power of the opposite party is not sufficient.[2] A *prima facie* case of relevancy and possession of a specific document is, however, sufficient to entitle the applicant to the order.[3]

O.11, R.20.

Premature discovery.

R. **20**. [S. 135.] *Where* the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to *the* discovery or inspection *sought* depends on the determination of any issue or question *in dispute in the suit*, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that *such* issue or question be determined first, and reserve the question as to the discovery or inspection.

[1877—S. 135. R. S. C., O. 31, R. 20.]

Synopsis.

1. Scope of the rule.

Order 11, Rule 19—Note 1.

(1) *Vide* Halsbury's Laws of England, Vol II, p 91.

Note 2.

(1) *Birmingham etc Motor Omnibus Co, Ltd* v. *L & N W Railway Co*, (1913) 3 K B 850 C A: 109 L T 64: 57 Sol J 752.

(2) *Ehrmann* v. *Ehrmann*, (1896) 2 Ch 826: 65 L J Ch 889: 75 L T 243.

(3) *Henry Greer Robinson* v. *State of South Australia*, 1931 P C 254 (259): 34 Mad L W 575: 85 Cal W N 1121: 61 Mad L Jour 943: 135 Ind Cas 625 P C.

(4) *Ehrmann* v. *Ehrmann*, (1896) 2 Ch 826: 65 L J Ch 889: 75 L T 243.

Note 3.

(1) *Kent Coal Concessions* v. *Duguid and others*, (1910) 1 K B 915.

(2) *White* v. *Spafford & Co*, (1901) 2 K B 241: 70 L J K B 658: 84 L T 574 C A; *Graves* v. *Heinemann and Armstrong*, (1901) 18 T L R 115; *Huntly* v. *Backworth Collieries*, 1911 W N 34: 45 L J N C 90: 130 L T Jo 386 C A.

(3) *Ormerod* v. *St George's Ironworks*, (1907) 95 L T 694 [A case of a letter produced referring to another letter].

O.11, R.20, Note 1.

1. **Scope of the rule.**—The general principle of discovery is that discovery should not be granted beyond the exigency of the question in issue. It is also desirable to obviate the necessity of a troublesome inspection and discovery which would very much increase the costs of the suit. This rule empowers the Court to determine an issue for the exclusive purpose of deciding the right to discovery of documents which is to be used at the trial.[1] The Court has also a discretion to postpone discovery or inspection until some issue in the suit is determined.[2] The rule, however, does not apply where discovery is wanted for the determination of the issue in the suit.[3] An order under this rule is not a 'judgment' and no appeal lies therefrom.[4]

O.11, R.21, Note 1.

R. **21**. [S. 136.] *Where* any party fails to comply with any order to answer interrogatories, or for discovery or inspection *of documents*, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not *defended*, and the party interrogating or seeking discovery or inspection may apply to the Court for *an order* to that effect, and *an order* may *be made* accordingly.

Non-compliance with order for discovery.

[1877—S. 136. R. S. C., O. 31, R. 21. *See*. Rr. 11, 12 and 18.]

Synopsis.

1. Scope of the rule.
2. Committal for contempt.
3. Appeal.
4. Review.
5. Order if can be set aside under O. 9, R. 9, or R. 13.

Conditions needed for order under this rule. See Note 1.
Leave under R. 2 not an "order to answer". See R. 2, Pt. (7) also Note 1, F.-N. (1).
Non-applicability of the rule to production of documents. See Note 1, Pts. (2) to (4).
"Order to answer." See R. 11, Note 1, Pt. (2).

1. **Scope of the rule.**—There are only three grounds upon which a trial Court is justified, under this rule, in striking off the defence of the defendant or dismissing the suit of a plaintiff, namely:—

(1) The refusal to answer interrogatories under R. 11;

(2) The refusal to make discovery of documents under R. 12; and

(3) Refusal to permit inspection of documents under R. 18.

In the absence, therefore, of an order under Rr. 11, 12 or 18 and the disobedience thereof by the party against whom the order is made, the

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Order 11, Rule 20—Note 1.

(1) *Ahmedbhoy* v. *Vullebhoy*, (1881-82) 6 Bom 572 (577, 578); *Parkar* v. *Wells*, (1881) 18 Ch D 477: 45 L T 517: 30 W R 392 C A.

(2) *British India Steam Navigation Co* v. *Secretary of State*, (1910) 8 Ind Cas 107 (113): 38 Cal 230: 12 Cal L Jour 505: 15 Cal W N 87; *Tasmanian Main Line Co* v. *Clark*, (1879) 27 Eng W R 677; *Whyte* v. *Ahrens*, (1884) 26 Ch D 721 C A.

(3) *Leitch* v. *Abbott*, (1886) 31 Ch D 374 C A: 55 L J Ch 460: 54 L T 258: 34 Suth W R 506: 50 J P 441 C A.

(4) *Secretary of State* v. *Jehangir*, (1902) 4 Bom L R 342 (347).

Court cannot act under this rule.[1] An order for *production* of documents under R. 14 is not one of the orders mentioned in this rule, the word "production" which occurred after the word "discovery" in S. 136 of the old Code having been omitted in the present rule. There is, however, a difference of opinion as to whether a disobedience of an order for *production* under R. 14 would empower the Court to take action under this rule. The High Court of Allahabad[2] and Madras[3] have held that the Court has no such power while an opinion in the nature of *obiter dictum* has been expressed by the High Court of Lahore in the undermentioned case[4] that the Court has such power. The Court cannot strike out the defendant's defence for his failure to file a *written statement* as directed by the Court[5] or to *appear for examination as a witness* for the opposite side.[6] Nor can it be struck off for failure of the legal representative of a deceased defendant to comply with an order against the said defendant.[7]

O.11, R.21, Note 1.

The Court cannot, under this rule, act *of its own motion,* but can only do so on the application of the parties.[8] And even where the parties apply for an order under this rule the Court should not impose the penalty except in extreme cases and as a last resort.[9] It should be ordered only where the Court is satisfied that party is avoiding a fair discovery[10] or is guilty of wilful default.[11] The word "wilfully" means that the act is done deliberately and

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Order 11, Rule 21—Note 1.

(1) *Lyalpur Sugar Mills* v. *Ram Chandra*, 1922 All 235 (237): 20 All L J 422: 67 Ind Cas 73: 44 All 565; *Kripa Ram Charan* v. *Jawahir Lal*, 1928 Notes 76 (*a*): 26 All L J 1376: 112 Ind Cas 285; *Rai Satyendra Nath Sen* v. *Narendra Nath Gupta*, 1924 Cal 806 (807): 39 Cal L Jour 279: 81 Ind Cas 867; *Mankolam Vasudevan* v. *Mankolam Sankaran*, (1911) 12 Ind Cas 719 (719): 10 Mad L Tim 451: 22 Mad L Jour 60: (1912) 1 Mad W N 546; *Banshi Singh* v. *Palit Singh*, (1908) 7 Cal L Jour 295 (298); *Twycroft* v. *Grant*, 1875 W N 201; *Twycross* v. *Grant*, 1875 W N (Eng) 229; *Hartley* v. *Owen*, 1876 W N (Eng) 193: 34 L T 752 [Failure to answer an interrogatory]; *Ramapat Saran* v. *Habib Ullah Khan*, 1926 All 553 (553): 24 All L J 589: 96 Ind Cas 16; *Pandit Bakht Narain* v. *Bhoga Singh*, (1905) 8 Oudh Cas 172 (173) [Acting under this rule without an order for discovery, etc., is wrong]; *Kishan Lal* v. *Sultan Singh*, (1915) 30 Ind Cas 525 (526): 38 All 5: 13 All L J 831, (Do.); *Dev Karan* v. *Sangidas*, 1925 Bom 386 (386, 387): 27 Bom L R 694: 89 Ind Cas 215, (Do.); *Lalchand Gobindram* v. *Tejbhandas*, 1926 Sind 272 (272): 96 Ind Cas 1003, (Do.); *Bhagvan Das* v. *Ram Kumar*, (1918) 46 Ind Cas 660 (661): 16 All L J 762, (Do.); *Dhapi* v. *Ram Pershad*, (1887) 14 Cal 768 (777) [Do. A strict compliance of the terms of R 18 (2) is necessary]; *Premsukh* v. *Indronath*, (1891) 18 Cal 420 (421) F B [Do. Leave granted under R 2 is not an order to answer]; *Jwala Prasad Sahu* v. *Bingalram Mandwari*, (1915) 28 Ind Cas 905 (905) All [Suit can be dismissed for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleading or affidavits].

(2) *Lyalpur Sugar Mills Co* v. *Ram Chandra Gursahai Cotton Mills Co*, 1922 All 235 (237): 44 All 565: 20 All L J 422: 67 Ind Cas 73: L R 3 All 317; *Firm Kripa Ram Charan Ram* v. *Firm Jawahir Lal Narshing Das*, 1928 Notes 76 (*a*): 26 All L J 1376: 112 Ind Cas 285; *Munnu Lal* v. *Tara*, 1929 All 83 (83): 115 Ind Cas 464.

(3) *Subbayyar* v. *Ramanathan Chettiar*, 1924 Mad 582 (583): 46 Mad L Jour 350: 19 Mad L W 355: 84 Mad L Tim 23: 1924 Mad W N 340: 77 Ind Cas 766.

(4) *Ramnath* v. *Parabhu Dayal*, (1922) 65 Ind Cas 661 (664) Lah.

(5) *Hans Raj* v. *Jhanda Mal*, 1892 Pun Re No 59.

(6) *Vasudevan* v. *Sankaran*, (1911) 12 Ind Cas 719 (719): 22 Mad L Jour 60: 1912 Mad W N 546: 10 Mad L Tim 451.

(7) *Dev Karan Bhola Ram* v. *Sangidas*, 1925 Bom 386 (387): 27 Bom L R 694: 89 Ind Cas 215.

(8) *Sohara* v. *Mt Zainab*, 1889 Pun Re No 80; *Hans Raj* v. *Jhanda Mal*, (1892) Pun Re No 59; *Lala Das* v. *A Spratt*, (1910) 8 Ind Cas 245 (245): 1910 Pun W R 185: 84 Pun L R 1910.

(9) *Khaja Assenoola Joo* v. *Khaja Abdool Aziz*, (1883) 9 Cal 923 (925): 8 Ind Jur 84; *Mt Wazir Begam* v. *Mt Piyari Begam*, 1898 Pun Re No 50; *Ram Nath* v. *Parabhu Dayal*, (1922) 65 Ind Cas 661 (664) Lah; *Rameswar Narayan* v. *Rikhnath Koeri*, (1920) 58 Ind Cas 281 (285): 5 Pat L Jour 550: 1 Pat L Tim 668; *Sham Kishore* v. *Shoshi Bhooxun Biswas*, (1880) 5 Cal 707 (710): 5 Cal L Rep 509; *Allahabad Bank, Ltd, Lahore* v. *Ganpat Rai*, 1929 Lah 750 (751): 11 Lah 209: 121 Ind Cas 421; *Sobha Ram* v. *Sardar Singh*, (1897) All W N 140 (141).

(10) *Jagannath Moti Lal* v. *Bala Prasad Arjundas*, 1925 Cal 166 (168): 78 Ind Cas 859.

(11) *Banshi Singh* v. *Palit Singh*, (1908) 7 Cal L Jour 295 (298); *Heigh* v. *Haigh*, (1885) 31 Ch D 478; *Farden* v. *Richter*, (1889) 23 Q B D 124; *Jennay* v. *Mackintosh*, (1889) 61 L T 108; *Devakaran Bholaram* v. *Sangidas Jesiram*, 1925 Bom 386 (387): 27 Bom L R 694: 89 Ind Cas 215; *Allahabad Bank* v. *Ganpat Rai*, 1929 Lah 750 (753): 121 Ind Cas 421: 11 Lah 209; *Banshi Singh* v. *Palit Singh*, (1908) 7 Cal L Jour 295 (299).

O.11, R.21, Note 1.

intentionally and not by accident or inadvertence.[12] Thus where the time allowed by law to answer interrogatories (ten days) has not expired and the defendant asks for further time, an order striking off the defence is improper.[13] Similarly, the failure to produce one out of many books ordered to be produced,[14] or the non-production of account books by a minor defendant[15] or the failure to produce documents by a *purdanashin* lady[16] or where the plaintiff is not in a position to make an affidavit of documents as ordered, the Court should not inflict the penalty under this rule.[17]

On an application made for taking action under this rule, the Court should give an opportunity to the other side to put in his reply; an order dismissing the suit or striking off the defence without giving such opportunity is improper.[18]

The terms of the rule contemplate *two* orders; *first* an order under Rr. 11, 12, or 18, and *secondly*, upon the failure to comply therewith, a *further* order dismissing the suit or the striking off the defence.[19] But a conditional order for dismissal of the suit or for striking off the defence on failure of the orders for interrogatories, discovery, or inspection cannot said to be without jurisdiction.[20] Where the defendant fails to comply with an order for discovery, an order allowing him to defend the suit but shutting out all his evidence is not a proper order; the case should be dealt with under this rule and the defence struck out.[21] The infliction of the penalty imposed by this rule after the *whole trial is closed* is improper;[22] nor can a Court of appeal punish a party under this rule where the Court of first instance has not taken any action thereunder.[23] Where a suit has been referred to arbitration and the arbitrators call upon a party to produce certain documents, the proper remedy of the party seeking discovery is to apply to the Court to have the proceedings stayed or the suit dismissed or the defence struck out; the arbitrators are not bound, of their own initiative, to refuse to proceed until the order is complied with.[24]

The last paragraph of S. 136 of the old Code which made the defaulting party liable to a prosecution under S. 188 of the Penal Code[25] has now been omitted. A disobedience of an order for production or inspection can now be

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(12) *Allahabad Bank Ltd, Lahore* v. *Ganpat Rai*, 1929 Lah 750 (753): 121 Ind Cas 421: 11 Lah 209.

(13) *Pandit Bakht Narain* v. *Bhoga Singh*, (1905) 8 Oudh Cas 172 (173).

(14) *Ram Nath* v. *Phrabhu Dayal*, (1922) 65 Ind Cas 661 (663, 664) Lah. See also *Chuni Lall* v. *Ralli Bros*, 1905 All W N 62 (63).

(15) *Kamta Prasad* v. *Kamta Nath*, 1896 All W N 156 (157).

(16) *Kalian Bibi* v. *Sufdar Husain*, (1886) 8 All 265 (267).

(17) *Wilson* v. *Rafalovitch*, (1881) 7 Q B D 553 (561).

(18) *Firm of Kedar Nath Durga Prasad* v. *Firm of Bishwanth Lakshmi Chand*, 1924 All 510 (511): 46 All 417: 22 All L J 299: 5 L R A (Civ) 225: 80 Ind Cas 787; *Devakaran* v. *Sangidas*, 1925 Bom 386 (387): 27 Bom L R 694: 89 Ind Cas 215; *Rai Satyendra Nath* v. *Narendra Nath Gupta*, 1924 Cal 806 (808): 39 Cal L Jour 279: 81 Ind Cas 867.

(19) *Jagannath Motilal* v. *Bala Prasad Arjundas*, 1925 Cal 166 (168): 78 Ind Cas 859.

(20) *Khajah Assenoollajoo* v. *Khajah Abdool Aziz*, (1883) 9 Cal 923 (925): 8 Ind Jur 84; *Twycroft* v. *Grant*, 1875 W N Eng at p 201.

(21) *Chattra Kumari Devi* v. *Mohan Bikram Shah*, 1931 Pat 114 (122): 121 Ind Cas 337.

(22) *Dinbai* v. *Fromroz*, (1918) 43 Ind Cas 71 (73) Nag.

(23) *Amir Chand* v. *Tirkha*, 1900 Pun Re No 36: 400 Pun L R 1900.

(24) *Khunj Lall* v. *Banwari Lall*, (1918) 48 Ind Cas 711 (718): 4 Pat L Jour 394.

(25) *Sohara* v. *Musst Zainab*, 1889 Pun Re No 80.

dealt with only in the manner prescribed by this rule and is not punishable under the Penal Code.[26] O.11, R.21, Notes 1—4.

A Registrar of the High Court has no power under the High Court rules to dismiss a suit under this rule.[27]

2. Committal for contempt.—The Chartered High Courts, have, under powers conferred on them by the Letters Patent, power to commit a party to a suit filed in such High Court who has failed to obey an order for discovery or inspection, for contempt of Court.[1] According to the High Court of Bombay an appeal lies from an order of committal for contempt.[2] According to the High Court of Allahabad no such appeal lies.[3]

3. Appeal.—Under the old Code, an order under this rule was appealable as a *decree*.[1] Under O. 43, R. 1 (*f*) of the present Code such an order is appealable only as an *order*.[2] An order under this rule includes an order dismissing a suit or striking off a defence as well as an order *refusing* to dismiss the suit or to strike off the defence; in either case it is open to appeal.[3] But where the Court acts without *jurisdiction* in passing an order under this rule, as where it dismisses a suit for failure to comply with an order to *produce documents* under R. 14, the order cannot be said to be one passed under this rule; the dismissal in such a case will be a decree and will be appealable as such.[4] Again where an order though purporting to be passed under this rule, is really and in substance under O. 6, R. 5, no appeal lies therefrom.[5]

Where a party appealed from an order under this rule in ignorance of the fact that a decree had been passed in the suit itself. the proper procedure is to treat the appeal as one from the decree itself.[6]

4. Review.—Where a suit is dismissed for want of prosecution under this rule, the remedy of the aggrieved party is by appeal or by review under the provisions of O. 47.[1] Where, however, the provisions of O. 47 do not apply to the particular order in question, the Court cannot review it under its inherent powers under S. 151 of the Code.[2]

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(26) *Ram Chand* v. *Emperor*, (1910) 6 Ind Cas 623 (624): 1910 Pun W R 15 (Cr): 15 P R 1910 (Cr).

(27) *Kamalakhy* v. *Jotindra*, (1907) 6 Cal L Jour 374 (378).

Note 2.

(1) *Sudhir* v. *Raseswari*, 1929 Cal 117 (118): 55 Cal 1110: 115 Ind Cas 189; *Hassonbhoy* v. *Cowasji*, (1883) 7 Bom 1 (3, 4); *Navivahoo* v. *Narotam Das*, (1883) 7 Bom 5 (13).

(2) *Navivahoo* v. *Narotam*, (1883) 7 Bom 5 (12, 15).

(3) *Godu* v. *Suraj Mal*, (1905) 27 All 380 (381): 2 All L J 18: 1905 All W N 10.

Note 3.

(1) *Khushali Mal* v. *Pala Mal*, 1898 Pun Re No 43; *M M Shri Mansingi* v. *M H Narharram*, (1895) 19 Bom 307 (308); *Chunni Lal* v. *Chamman Lal*, (1885) 7 All 159 (160): 4 All W N 313; *Dabee Pershad* v. *Santo Pershad*, (1884) 10 Cal 505.

(2) *Maung Khant Gyi* v. *Ma Thet Hnin*, 1925 Rang 218 (218): 3 Rang 63: 88 Ind Cas 751.

(3) *Jnanada Prosad* v. *G M Falkner*, 1930 Cal 426 (427): 34 Cal W N 220: 126 Ind Cas 781.

(4) *Munna Lal* v. *Tara*, 1929 All 83 (84): 115 Ind Cas 464.

(5) *Vasudavan Nambiyar* v. *Nedungathiripad*, 1932 Mad 316 (318): 1932 Mad W N 301: 137 Ind Cas 842 [Mere use of word 'interrogatory' will not make an application one under this rule if really it falls under O 6, R 5].

(6) *Navana Chini Madar* v. *A L M M*, (1912) 14 Ind Cas 637 (638, 639): 5 Bur L Tim 30.

Note 4.

(1) *Maung Khant Gyi* v. *Ma Thet Hnin*, 1925 Rang 218 (218): 3 Rang 63: 88 Ind Cas 751: See also *Mohan Lal & Co* v. *Yolibai*, 1932 Bom 271 (272): 34 Bom L R 714: 138 Ind Cas 248 [Court can also set aside under S 151 of the Code.

(2) *Asutosh* v. *Indu Bhusan*, 1927 Cal 158 (158, 159): 98 Ind Cas 70.

O.11, R.21, Note 5.

5. **Order if can be set aside under O. 9, R. 9 or R. 13.**—An order under this rule cannot be set aside under the provisions of O. 9.[1]

O.11, R.22, Note 1.

R. **22**. [*New.*] *Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last mentioned answers ought not to be used without them, it may direct them to be put in.*

Using answers to interrogatories at trial.

[R. S. C., O. 31, R. 24.]

Synopsis.

1. Using interrogatories at the trial.

1. **Using interrogatories at the trial.**—The answers to interrogatories are only affidavits and are not by themselves evidence.[1] The party wishing to use them must put them in evidence in the ordinary way.[2] They are, when so put, evidence against the party answering them, though great caution should be exercised in using them as such.[3]

O.11, R.23, Note 1.

R. **23**. [*New.*] *This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.*

Order to apply to minors.

[R. S. C., O. 31, R. 29.]

Synopsis.

1. Application of order to minors and lunatics.

1. **Application of order to minors and lunatics.**—This rule is new. Under the old Code, there was a conflict of decisions as to whether the sections corresponding to this Order applied to minors and lunatics.[1] This rule has now made it clear that the Order does apply to them also.

Note 5.

(1) *Maung Khant Gyi* v. *Ma Thet Hnin*, 1925 Rang 218 (218): 3 Rang 63: 88 Ind Cas 751; *Kesharia* v. *Pottoah*, (1898) 2 Cal W N 676 (679). See also *Mohan Lal & Co* v. *Yolibai*, 1932 Bom 271 (272): 34 Bom L R 714: 138 Ind Cas 248 [Court can act under S 151 of the Code].

Order 11, Rule 22—Note 1.

(1) *Gosto Behary Pal* v. *Johur Lall Pall*, (1879) 4 Cal 836 (837): 4 Cal L Rep 164.

(2) *Waghji Thackersey* v. *Khatavo Rowji*, (1886) 10 Bom 167 (171).

(3) *Narayana Bharatigal* v. *Ittuli Amma*, (1917) 39 Ind Cas 893 (898) Mad; *Nash* v. *Layton*, (1911) 2 Ch 71: 104 L T 834: 80 L J Ch 636.

Order 11, Rule 23—Note 1.

(1) *Nathumull Narsingdas* v. *Malharrao Holkar*, (1895) 19 Bom 350 (352) [Yes]; *Waghji Thackersey* v. *Khatavo Rowji*, (1886) 10 Bom 167 (171, 172) [No]; *Duncan* v. *Bhoyro Prosad*, (1895) 22 Cal 891 (896, 897) [No].

ORDER XII.

Admissions.

O. 12, R 1, Note 1.

Notice of admission of case.

R. 1. [New.] *Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.*

[R. S. C., O. 32, R. 1.]

Synopsis.

1. Scope of the rule.
2. Kinds of admissions.
3. Admission by minor.
4. Withdrawal of admissions. See R. 2, infra.
5. Costs. See Rr. 2, 4 and 9.

Erroneous admissions. See O. 3, R. 4.

1. Scope of the rule.—Under S. 58 of the Evidence Act, facts admitted need not be proved. The adoption of the procedure provided in this Order would result in saving the costs of such proof and in cheapening and shortening litigation.[1] Further, admissions are the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission.[2]

Admissions must be taken *as a whole* or not at all.[3] If made subject to a condition, they must be accepted with that condition.[4] But where one portion of a claim is admitted and the other portion denied, the plaintiff is entitled to ask for a judgment on the admitted portion and proceed to trial on the other; there is no rule that he should accept *both* the admission and the denial or must ignore the admission and proceed to trial.[4-a] The value of an admission is however, limited by its *relevancy* under the Evidence Act, and a judgment based upon irrelevant material will not be upheld.[5] Where the lower Court, in its judgment makes a statement that certain admissions were made, the Appellate Court will not lightly doubt the statement.[6] The question whether there is a *cause of action* does not depend upon the admission of the defendant, but when the plaint discloses a cause of action, the plaintiff is entitled to get a decree on the admissions of the defence.[7]

Order 12, Rule 1—Note 1.

(1) Statement of Objects and Reasons.

(2) *A W F L A S Ltd* v. *N M L A A Ltd*, 1914 P C 220 (223) P C.

(3) *Sreedharam Valia Rajah* v. *Narayana*, 1921 Jour 20 (1): 41 Mad L Jour 525: 1921 Mad W N 639: 71 Ind Cas 270; *Krishna Bai* v. *Dhondo Ramchandra*, 1924 Nag 129 (131): 20 Nag L R 63: 78 Ind Cas 542.

(4) *M M Essabhoy* v. *M Haridas*, 1915 P C 2 (4): 39 Bom 399: 42 Ind App 103: 13 All L J 529: 17 Bom L R 460: 21 Cal L Jour 507: 19 Cal W N 713: 28 Mad L Jour 589: 17 Mad L Tim 402: 2 Mad L W 524: 1915 Mad W N 522: 29 Ind Cas 223 P C.

(4-a) *Premsuk Das Assaram* v. *Udairam Gangabux*, (1918) 44 Ind Cas 233 (237): 45 Cal 138: 28 Cal L Jour 498: 22 Cal W N 204; *Tahalram* v. *Vasumal*, 1926 Sind 119 (120): 92 Ind Cas 562.

(5) *Manokarani Debi* v. *Haripada Mitter*, 1914 P C 164 (165): 18 Cal W N 718: 24 Ind Cas 311 P C [Admission by parent in previous suit is not binding on son]; *Thamnayya* v. *Chinnayya*, 1926 Mad 282 (283): 22 Mad L W 752: 1926 Mad W N 38: 92 Ind Cas 594.

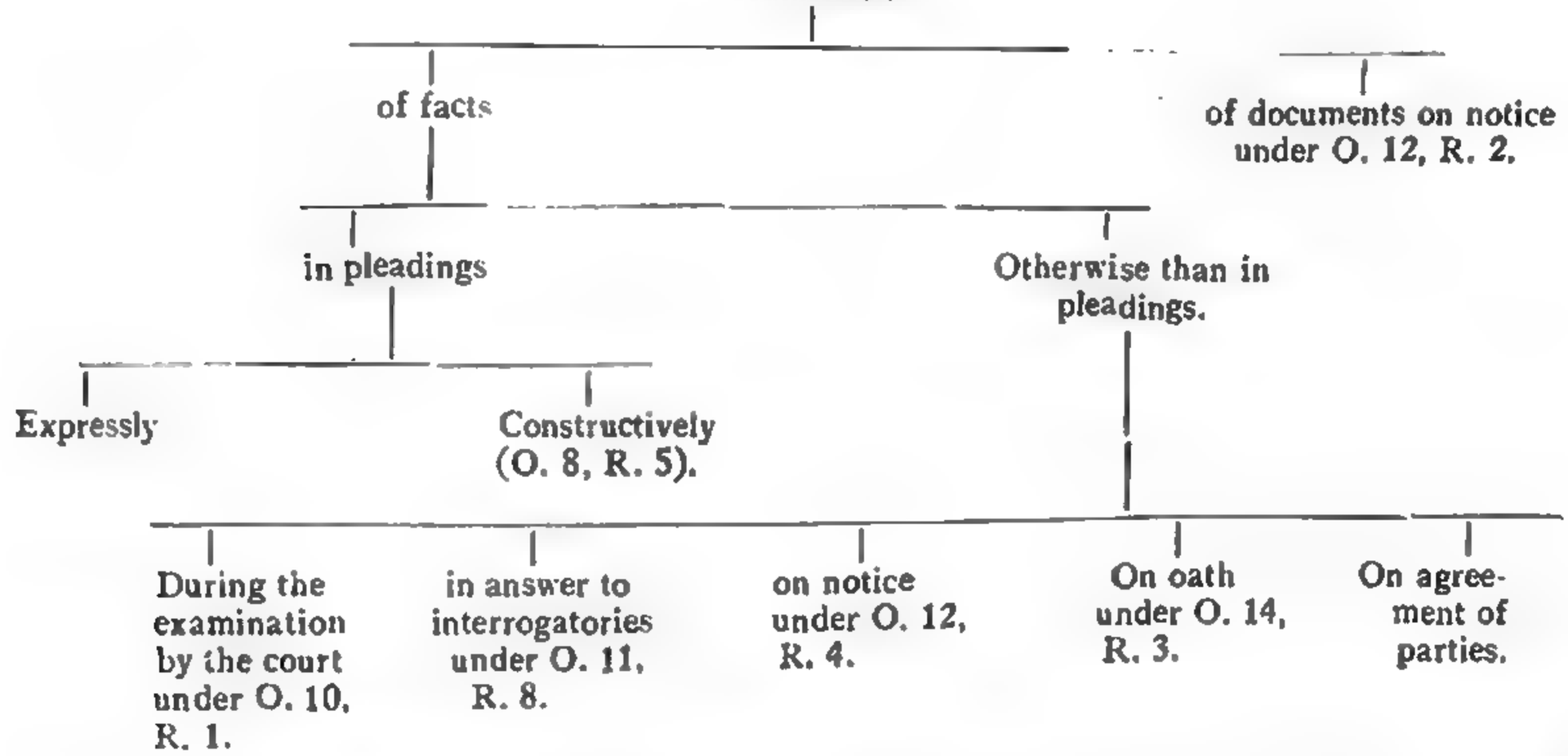
(6) *Sarat Chandra* v. *Bibhabati*, 1921 Cal 584 (591): 34 Cal L Jour 302: 66 Ind Cas 433.

(7) *Baul Das Misra* v. *Digambar Kurit*, 1921 Pat 280 (280): 1921 Pat H C C 297: 65 Ind Cas 644.

O. 12, R. 1, Notes 1—5.

S. 97 of the Estates Partition Act (Bengal Act V of 1897) renders provisions of the Code as to compelling production of documents applicable to enquires under the said Act.

2. Kinds of admissions.—The following tabular statement shows the various kinds of admissions *after* suit, that may be made. As to admissions *before* suit, *see* Ss. 17 to 31 of the Evidence Act.


Admissions
of facts
of documents on notice under O. 12, R. 2.
in pleadings
Otherwise than in pleadings.
Expressly
Constructively (O. 8, R. 5).
During the examination by the court under O. 10, R. 1.
in answer to interrogatories under O. 11, R. 8.
on notice under O. 12, R. 4.
On oath under O. 14, R. 3.
On agreement of parties.

3. Admission by minor.—(A minor defendant cannot make a valid admission where a guardian *ad litem* has been appointed for him in the suit.[1]

4. Withdrawal of admissions.—*See* R. 2, *infra.*

5. Costs.—*See* Rules 2, 4 and 9.

O. 12, R. 2.

R. 2. [S. 128.] Either party may *call upon* the other party to admit any document, saving all just exceptions; *and in case of refusal or neglect to admit, after such notice, the costs* of proving *any* such document *shall be paid by* the party *so neglecting or* refusing, whatever the result of the suit may be, *unless the Court otherwise directs*; and no costs of proving *any* document shall be allowed *unless* such notice *is* given, *except where the omission to give the notice is, in the opinion of the Court, a saving of expense.*

[R. S. C., O. 32, R. 2.]

Notice to admit documents.

Synopsis.

1. Object of the rule.
2. Form of notice. See R. 3, below.
3. Notice to admit facts. See R. 4 below.
4. Admissions between co-defendants.
5. Withdrawal of admission.

Note 3.

(1) *Parbati* v. *Dharam Raji*, (1916) 32 Ind Cas 368 (368).

O. 12, R. 2, Notes 1—5.

1. **Object of the rule.**—The object of the rule is to save the expense of producing, at the trial, evidence as to the documents which are admitted.

2. **Form of notice.**—*See* R. 3, below.

3. **Notice to admit facts.**—*See* R. 4 below.

4. **Admission between co-defendants.**—Admissions between co-defendants to which the plaintiff is not a party, cannot be used as evidence against the plaintiff, or be included in an order for taxation of the general costs of the action.[1]

5. **Withdrawal of admission.**—Leave may be given to withdraw or amend any admissions made by a party, on such terms as to the Court may appear just. Thus an admission made under a mistake may be allowed to be withdrawn and the plaint amended.[1] But, except under special circumstances, an admission forming the foundation of a judgment should not be allowed to be withdrawn in appeal.[2]

O. 12, R. 3.

R. **3.** [New.] *A notice to admit documents shall be in Form No. 9. in Appendix C, with such variations as circumstances may require.*

Form of notice.

[R. S. C., O. 32, R. 3.]

O. 12, R. 4.

R. **4.** [New.] *Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any*

Notice to admit facts.

Order 12, Rule 2—Note 4.

(1) *Kali Datt* v. *Abdool*, (1889) 16 Cal 627 (635): 16 Ind App 96: 5 Sar 326: 13 Ind Jur 180 P C; *Dodds* v. *Tuke*, (1884) 25 Ch D 617: 53 L J Ch 598: 50 L T 320: 32 W R 424.

Note 5.

(1) *Hollis* v. *Burton*, (1892) 3 Ch 226 C A: 67 L T 146: 40 W R 610.

(2) *Diwanchand Kirpa Ram* v. *Weld & Co.* 1925 P C 150 (154): 1925 Mad W N 459: 88 Ind Cas 54: 28 Bom L R 1438 P C.

O. 12, R. 4, Notes 1—2.

party to amend or withdraw any admission so made on such terms as may be just.

[R. S. C., O. 32, R. 4.]

Synopsis.

1. Scope of the rule. 2. "Any other party."

1. **Scope of the rule.**—This rule provides for notice to admit *facts*, as the two previous rules provide for notice to admit *documents*. The penalty for refusing to admit facts pursuant to a notice given under this rule is that the party receiving the notice may be ordered to pay the costs occasioned by proving the facts which ought to have been admitted. A notice to admit facts may be given even before the defence is filed.[1]

2 "**Any other party**".—"It is obvious only opposite parties can be meant".[1] For the meaning of "opposite party", *see* Note 11 to O. 11, R. 1.

O. 12, R. 5.

R. 5. [New.] *A notice to admit facts shall be in Form No.* 10 *in Appendix C, and admissions of facts shall be in Form No.* 11 *in Appendix C, with such variations as circumstances may require.*

Form of admissions.

[R. S. C., O. 32, R. 5.]

O. 12, R. 6.

R. 6. [New.] *Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.*

Judgment on admissions.

[R. S. C., O. 32, R. 6.]

Local Amendments.

MADRAS.

1. *Re-number* the existing Rule 6 as sub-Rule 6 (1) and *insert* the following as sub-Rules (2) and (3):—

"(2) The Court may also of its own motion make such order or give such judgment as it may consider just, having due regard to the admissions made by the parties.

"(3) Whenever an order or judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced."

Order 12, Rule 4—Note 1.

(1) *Crawford* v. *Chorley*, (1883) W N 198.

Note 2.

(1) *Brown* v. *Watkins*, (1885) 16 Q B D 125 (128): 55 L J Q B 126: 53 L T 726: 34 W R 293 [Per Mathew, J].

PATNA.

O. 12, R. 6, Note 1.

Substitute the following for Rule 6 in Order 12:—

6. Where admission of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it may think just.

RANGOON.

In Order 12, Rule 6 *substitute* "judgment, decree or order" for the word "judgment or order" and "and the Court may, either upon such application or upon its own motion, give such judgment or make such decree or order as the Court may think just" for "and the Court may . . . . just".

Add the following as sub-Rule (2):—

"(2) A decree or order passed under this rule may be executed at any time, notwithstanding that other questions between the parties still remain to be decided in the case."

Synopsis.

1. Scope of the rule.
2. "At any stage."
3. Admissions on pleadings.
4. Court may make such order as it may think just.
5. Orders that may be passed under this rule.
6. Admissions made otherwise than on pleadings.
7. English practice.
8. Co-plaintiffs.
9. Judgment if should be followed by a decree.
10. Appeal.

Minor defendant. See R. 1, Note 3. Withdrawal of admission. See R. 2, Note 5.

1. Scope of the rule.—A party can, under this rule, move for a judgment upon the admissions made by the opposite party and thus get rid of the portion of the action in which there is no dispute.[1] The object is to enable a party to obtain speedy judgment, at least to the extent of the relief, which, according to the admissions of the opposite party, he is entitled to.[2] But he is not bound to avail himself of this rule and is not precluded by not so applying from relying on such admissions at the trial.[3] Nor on the other hand, is the Court bound, in every case, to pass a judgment on the application of a party under this rule; the matter is entirely in the discretion of the Court. *See* Note 6 below.

In moving for a judgment under this rule, the party applying need not relinquish the rest of his claim.[4] But the admission on which a judgment can be claimed must be a clear and unequivocal one.[5] Further, an admission of a defendant will not necessarily entitle the plaintiff to a judgment, where the right asserted by the plaintiff has, in fact, no existence in

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Order 12, Rule 6—Note 1.

(1) *Throp* v. *Holdaworth*, (1876) 3 Ch D 637 (640): 4 L J Ch 406; *Zulfiquar Ahmad* v. *R Eliot*, 1925 Oudh 486: 85 Ind Cas 423.

(2) *Tahilram Tarachand* v. *Vassumal Deumal*, 1926 Sind 119 (120): 92 Ind Cas 562. See also *Gilbert* v. *Smith*, (1876) 2 Ch D 686 (687) C A: 45 L J Ch 514: 35 L T 43: 24 W R 568.

(3) *Tildesly* v. *Hopper*, 7 C D 403: 47 L J Ch 263: 38 L T 60: 26 W R 263 [Cited in 11 Bom L R 926 and 1042].

(4) *Tahilram* v. *Vassumal*, 1926 Sind 119 (120): 92 Ind Cas 562.

(5) *Koramal* v. *Mungilal*, (1920) 54 Ind Cas 836 (837): 23 Cal W N 1017; *Devsi Narain Patel* v. *Hassanand*, 1927 Sind 25 (26, 27): 97 Ind Cas 623.

O. 12, R. 6, Notes 1—4.

law,[6] or where he has no cause of action at all.[7]

The rule refers only to admissions on points of *fact* and not on points of *law*.[8]

2. "At any stage".—A plaintiff may move for judgment upon admissions on the defence, although he has joined issue on the defence.[1] Similarly, a defendant may apply to have the suit dismissed after he has delivered a rejoinder.[2]

3. Admissions on pleadings.—As has been seen in Note 2 to R. 1, an admission of facts in a pleading may be made either *expressly* or *constructively*. Under O. 8, R. 5, every allegation of fact in the plaint, if not denied specifically or by necessary implication, or, stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. This is a *constructive* admission in a pleading. A defendant denying a plaint allegation *evasively* will be deemed not to have denied at all, and will, therefore, be deemed to have admitted such allegation (*see* O. 8, R. 4). Thus in *Harris* v. *Gamble*[1] the defendant in his defence merely, "put the plaintiffs to proof of their several allegations in their statement of claim". Defendant failed to appear at the trial, and judgment was given for the plaintiff without calling evidence, on the ground that such a defence was an admission of facts alleged in the statement of claim.

4. Court may make such order as it may think just.—The provisions of this rule are *discretionary* and not mandatory; it is not, therefore, incumbent on the Courts in all cases, to pass a judgment upon admission.[1] If a case involves questions which cannot conveniently be disposed of on an application under this rule, or if the case is such that it is not safe to pass a judgment on admissions the Court may, in the exercise of its discretion, refuse the motion.[2] Thus in divorce cases a Court will not ordinarily pass a decree for dissolution of marriage on the mere admissions of the parties in view of possible collusion between the parties.[2-a] Where, however, the defendant admits the claim, but

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(6) *Chilton* v. *Corporation of London*, 7 C D 735: 47 L J Ch 433: 38 L T 498: 26 W R 474 [Cited in 14 Bom 213].

(7) See *Baul Das Misra* v. *Digambar Kuri*, 1921 Pat 280 (280): 1921 Pat H C C 297: 65 Ind Cas 644.

(8) *Sher Bahadur* v. *Md Amin*, 1929 Lah 569 (572): 11 Lah L Jour 207: 116 Ind Cas 330; *Jagwant Singh* v. *Silan Singh*, (1899) 21 All 285 (287): 1899 All W N 66; *Tagore* v. *Tagore*, (1872) 18 Suth W R 359 (367): Ind App Sup Vol 47: 9 Beng L R 377: 2 Suth 692: 3 Sar 82 P C; *Beni Pershad Koeri* v. *Dudhnath Roy*, (1900) 27 Cal 156 (163): 26 Ind App 216: 4 Cal W N 274: 7 Sar 580 P C.

Note 2.

(1) *Brown* v. *Pearson*, (1882) 21 Ch D 716: 46 L T 411: 30 W R 436.

(2) *Faccos* v. *Richards*, (1881) 50 L J Ch 337: 44 L T 87: 29 W R 330.

Note 3.

(1) *Harris* v *Gamble*, (1878) 7 Ch D 877: 47 L J Ch 344: 38 L T 253. See also *Rutter* v. *Tregent*, (1879) 12 Ch D 758: 48 L J Ch 791: 41 L T 16: 27 W R 902.

Note 4.

(1) *Premsukhdas* v. *Udai Ram*, (1918) 44 Ind Cas 233 (236): 45 Cal 138: 28 Cal L Jour 498: 22 Cal W N 204; *Mellor* v. *Sidebottom*, (1877) 5 Ch D 342: 46 L J Ch 398: 37 L T 7: 25 W R 401; *S P R M Firm* v. *Maung Po Kya*, 1924 Rang 144 (144): 1 Rang 580: 77 Ind Cas 382; *Bhagwan* v. *Sheoraj*, 8 Oudh W N 762: 1931 Oudh 321 (322): 132 Ind Cas 796; *Sher Bahadur* v. *Muhammad Amin*, 1929 Lah 569 (572): 11 Lah L Jour 207: 116 Ind Cas 330; *Galstaun* v. *E D Sassoon & Co, Ltd*, 1924 Cal 190 (191, 192): 27 Cal W N 783: 82 Ind Cas 548; *Malaikolandu Chettiar* v. *Periya Pillai*, (1911) 10 Ind Cas 351 (352): (1911) 2 Mad W N 393 [Admission in evidence by one of the defendants —Specifically denied by the other defendant in his pleading—First appellate Court not justified in decreeing on such admission]; *Bhawani Prasad* v. *Hakimullah*, 1927 All 175 (176): 98 Ind Cas 821.

(2) *Premsuk Das Assaram* v. *Udairam Gungabus*, (1918) 44 Ind Cas 233 (236): 45 Cal 138: 28 Cal L Jour 498: 22 Cal W N 204.

(2-a) *Baikanka* v. *Shiva*, (1893) 17 Bom 624 (625) F B; *Williams* v. *Williams*, (1878) 3 Cal 688 (692).

O. 12, R. 6, Notes 4—10.

the plaintiff is absent at the trial, the suit should not be dismissed; a decree should be passed on the strength of the defendant's admission.[8] Where an application is made under this rule on the basis of a *constructive admission*, the Court may refuse to pass a decree if, in the circumstances of the case, it is of opinion that the defendant must not be held to have admitted facts not specifically denied in the Written Statement.[4]

5. **Orders that may be passed under this rule.**—As a general rule a judgment on admissions can be passed in all cases in which under the Code, a preliminary decree can be passed. *See* O. 20, Rr. 13, 15, 16 and 18.

6. **Admissions made otherwise than on pleadings.**—The use of the words "or otherwise" without the words "in writing" which are used in R. 1 shows that a judgment may be given even upon *verbal* admission,[1] though caution is required in acting upon such admissions.[2] The rule is wide enough to afford relief not only in cases of admissions made in the pleadings, but also in the case of admissions *de hors* the pleadings.[3] Thus admissions contained in letters written before action brought[4] or in a letter written after action[5] are sufficient for the purposes of this rule.

7. **English practice.**—*See* Daniel's Chancery, Forms 270 and Seton on Decrees, Vol. I, page 399, Form No. 5. Also Chitty's Forms, 15th Edition, p. 310.

8. **Co-plaintiffs.**—An application under this rule for an order against a defendant should, where there are several plaintiffs, be made by *all* of them.[1]

9. **Judgment if should be followed by a decree.**—According to the Calcutta High Court, there is nothing objectionable to a decree being drawn up on a judgment under this rule and later on to another decree being drawn up after investigation of the claim not admitted.[1] But according to the Sind Judicial Commissioner's Court, it is not necessary to have a decree drawn up on a judgment passed under this rule, it being open to the plaintiff to enforce payment of the amount awarded as an order in execution proceedings by virtue of S. 36.[2]

10. **Appeal.**—An order rejecting an application for a judgment on admissions is a "judgment" within Cl. 15 of the Letters Patent and is appealable under the Letters Patent.[1]

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(8) *Nathu Singh* v. *Ohhuttan*, 1929 Lah 830 (681).

(4) *Madho Pershad* v. *Gajadhar*, (1885) 11 Cal 111 (118): 11 Ind App 186: 4 Sar 574: 8 Ind Jur 694: R & J 85 P C. See also proviso to O 8, R 5.

Note 6.

(1) In Re *Beeny*, (1894) 1 Ch 499; *Premsuk Das Assaram* v. *Udairam Gungabux*, (1918) 44 Ind Cas 233 (234): 45 Cal 138: 28 Cal L Jour 498: 22 Cal W N 204 [Remarks of Fletcher, J quoted in the judgment].

(2) *Natha* v. *Jodha*, (1884) 6 All 406 (415, 416): 1884 All W N 140.

(3) *Tahilram* v. *Vasumal*, 1926 Sind 119 (120): 92 Ind Cas 562.

(4) *Hampden* v. *Wallis*, (1884) 27 Ch D 251: 54 L J Ch 1175: 51 L T 357: 32 W R 977.

(5) *Ellis* v. *Allen*, (1914) 1 Ch 904: 83 L J Ch 590.

Note 8.

(1) Re *Wright*, (1895) 2 Ch 747: 65 L J Ch 37: 73 L T 396: 44 W R 125: 13 R 849.

Note 9.

(1) *Premsuk Das Assaram* v. *Udairam Gungabux*, (1918) 44 Ind Cas 233 (237): 45 Cal 138: 22 Cal W N 204: 28 Cal L Jour 498.

(2) *Tahilram* v. *Vasumal*, 1926 Sind 119 (120): 92 Ind Cas 562.

Note 10.

(1) *Koramal* v. *Mongilal*, (1920) 54 Ind Cas 836 (837): 23 Cal W N 1017.

O. 12, R. 7. R. 7. [New.] *An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.*

Affidavit of signature.

[R. S. C., O. 32, R. 7.]

O. 12, R. 8. R. 8. [New.] *Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.*

Notice to produce documents.

[R. S. C., O. 32, R. 8.]

O. 12, R. 9. R. 9. [New.] *If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.*

Costs.

[R. S. C., O. 32, R. 9.]

ORDER. XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

O. 13, R. 1. R. 1. [Ss. 138, 140.] (1) The parties or their pleaders shall *produce*, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

Documentary evidence to be *produced* at first hearing.

(2) The Court shall receive the documents so produced: provided that *they are* accompanied by an accurate list thereof prepared in such form as the High Court directs.

[1877—Ss. 138, 140; 1859—Ss. 128, 129.]

Local Amendments.

PATNA.

In Rule 1, *after* the words "at the first hearing of the suit" should be *added* the words:—

"Or, where issues are framed, on the day when issues are framed, or within such further time as the Court may permit." O. 13, R. 1. Note 1.

RANGOON.

To Rule 1, the following shall be *added* as sub-Rule (3):—

"(3). The High Court of Judicature at Rangoon directs that such lists shall be prepared in form Judicial ——— which will be given free of charge to parties wishing to tender documents in evidence." General 23.

OUDH.

For Rule 1, *substitute* the following:—

"1. (1) The parties or their pleaders shall produce or cause to be produced, on the date fixed by the Court, under Order 7, Rule 14 and Order 8, Rule 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced.

(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the Court.

(3) The Court shall receive the documents so produced, provided that (whenever the documents are produced at any stage of the case) they are accompanied by an accurate list thereof prepared in such form as the Chief Court may direct.

Explanation.—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the plaintiff or defendant it will not be deemed to be "in the power" of the plaintiff or defendant."

N.-W. F. P.

The following rule is *substituted*:—

"All documentary evidence shall be produced by the parties or their pleaders in the method and at the time prescribed in Orders 7 and 8; provided that after the settlement of issues, the Court may fix a date, not being more than 30 days after such settlement, within which the parties may present supplementary lists of documents on which they rely."

Synopsis.

1. Scope and object of the rule.
2. "Shall produce at the first hearing."
3. "First hearing." See O. 8, R. 1.
4. Admission of documents after first hearing. See R. 2.
5. "In such form as the High Court directs." See Appendix H, Form No. 5.

1. Scope and object of the rule.—A Court must secure a fair trial of cases, and to that end obviate the chances for the parties to adduce forged or manufactured evidence. This rule, accordingly, enjoins on the parties to lay their documents before the Court at the earliest possible opportunity.[1] Where the documents are not in the possession or power of the party, they cannot and therefore need not be produced at the first hearing.[2]

The rule is *peremptory* that the documents on which a party intends to rely must be produced at the first hearing.[3] But as the object of the rule is

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Order 13, Rule 1—Note 1.

(1) *Ranchhod Hirabhai* v. *Secretary of State*, (1898) 22 Bom 173 (175); *Lilabati Misrain* v. *Bishun Chobey*, (1907) 6 Cal L Jour 621 (634); *Talewar Singh* v. *Bhagwan Das*, (1908) 8 Cal L Jour 147 (151): 12 Cal W N 312; *Hari Ram Goenka* v. *Lachmi Singh*, 1928 Pat 537 (538): 110 Ind Cas 821; *Bhekderi* v. *Sri Ramachanderji*, 1931 Pat 275 (281): 10 Pat 388.

(2) *Syed Ikram Hossein* v. *Ram Lochun Dutt*, (1875) 23 Suth W R 29 (30); *Subramanyam Chetty* v. *Rajah of Ramnad*, 1930 Mad W N 511 (513) [Rule not applicable to documents which are produced by witness on summons].

(3) *Vijiaraghavalu Naidu* v. *Rajamani Ayyar*, 1931 Mad 512 (512): 1931 Mad W N 310: 133 Ind Cas 371: 34 Mad L W 528.

O. 13, R. 1, Notes 1—2.

not to penalise the parties, the Court is given discretion under R. 2, to receive any documents at later stages of the suit if there is no suspicion about their genuineness.[4]

The provisions of this order relating to the production of documents are made applicable to proceedings under the undermentioned Acts.[5]

2. "**Shall produce at the first hearing.**"—The procedure under the Code relating to the production of documents by the parties is briefly as follows:—

The plaintiff shall produce and deliver into Court with the plaint the document *on which he sues*, if it is in his possession or power (O. 7, R. 14, Sub-R. 1). Other documents, whether in his possession or power or not, *on which he relies* in support of his claim need not, however, be produced with the plaint, but a *list* thereof shall be filed at the time of the plaint (O. 7, R. 14, Sub-R. 2). In that list the plaintiff need mention only those documents on which he relies for his claim. He need not *anticipate the defence* case and mention in the list such documents as may form an answer to such a defence. Nor need he mention in the list of documents to be produced for the cross-examination of the defendant's witnesses or for refreshing the memory of a witness (O. 7, R. 18, Sub-R. 2).

Where the documents referred to in O. 7, R. 14 is not in his possession or power, the plaintiff shall, if possible state in whose possession or power it is. (O. 7, R. 15). After the suit is instituted, a summons with a copy of the plaint is served on the defendant to appear and answer the plaintiff's claim (O. 5, R. 1). The summons will also order the defendant to *produce* all documents in his possession or power on which he intends to rely in support of his case (O. 5, R. 7). On the day on which the defendant is to appear and answer according to the summons both parties must be present and the Court may *hear* the parties (O. 9, R. 1). On that day, both the parties shall, under this rule, bring in all the documents on which they rely, and the Court is bound to receive them, if they duly put them in (Sub-R. 2).[1]

The language of this rule may be contrasted with the language used in O. 7, R. 14 with reference to the production of the document on which the plaintiff sues, *viz.*, "he shall produce it *in Court* and shall at the same time *deliver the document* . . . . to be filed with the plaint." Production as such of documents under *this* rule amounts only to bringing in the documents with the object of leaving them in Court. The non-production of the documents by a party as per the terms of this rule is done at his own peril, the consequence of such non-production being that the Court *will not receive* them at a later stage except

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(4) *Imambandi* v. *Mutsaddi*, 1918 P C 11 (14): 45 Cal 878: 45 Ind App 73: 23 Cal W N 50 28 Cal L Jour 409: 16 All L J 800: 20 Bom L R 1022: 35 Mad L Jour 422: 9 Mad L W 518: 24 Mad L Tim 330: 1919 Mad W N 91: 5 Pat L W 276: 47 Ind Cas 513 P C; *Rani Prayag Kumari* v. *Siva Prasad*, 1926 Cal 1 (19): 42 Cal L Jour 280: 93 Ind Cas 385; *Durga Prasad Thakur* v. *Basawan Pandey*, 1928 Pat 209 (212): 106 Ind Cas 272: 9 Pat L Tim 317; *Hari Ram* v. *Fori Ram*, 1928 Pat 555 (556): 7 Pat 589: 110 Ind Cas 536; *Watson & Co* v. *Kunhye Bahadoor*, (1868) 9 Suth W R 294 (295).

(5) The Chota Nagpur Tenancy Act, (VI of 1908) S 265 (3); The Bengal Embankment Act (VII of 1866), S 3. The Estates Partition Act (Bengal Act, V of 1897), S. 97.

Note 2.

(1) *Ram Runjan Chuckerbutty* v. *Anund Coomar Mookerjee*, (1871) 15 Suth W R 323 (324) [Though by the inadvertence of Court officer, they were not kept in Court record in due time].

on satisfactory grounds. Accordingly, the plaintiff, if he desires to avoid the risk of his documents being rejected subsequently and to ensure their being received by the Court, must produce, under this rule at the first hearing all the documents mentioned in his list filed under O. 7, R. 14 and also such documents as may be ordered by the Court to be produced under O. 11, R. 14. But documents of the kind specified in O. 7, R. 18, Sub-R. 2 or documents which are not in the possession or power of the plaintiff do not come under this rule.[2] The defendant is bound by the same procedure so far as it may be applicable to him. **O. 13, R. 1, Notes 2—5.**

Is the Court bound to pass an order fixing a date for the production of documents? Under the corresponding section of the Code of 1882, the parties were required only to keep their documents in *readiness* at the first hearing to be produced *when called for by the Court.*[3] The present rule requires the parties not only to get ready but also *to produce* (*i.e.*,) to deposit in Court their documents *at the first hearing.* The terms of the present rule are clear, and an order fixing a date for production of documents by the parties is not a condition precedent for their production. But the rule does not preclude a Court from calling on the parties, for valid reasons, to produce their documents or a list thereof by a specified date.[4] Thus where the Court does not want the production of documents till a particular stage in the suit is reached it may pass an order requiring parties to produce their documents within a specified time.[5] The view, however, that the Court is bound to receive documents at any stage of the suit if there is no order of the Court for production within a fixed time[6] does not appear to be sound or consistent with the terms of this rule.

3. **"First hearing."**—*See* O. 8, R. 1.

4. **Admission of documents after first hearing.**—*See* R. 2.

5. **"In such form as the High Court directs."**—*See* Appendix H, Form No. 5.

R. **2.** [S. 139.] No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of *rule 1* shall be received at any subsequent stage of the proceedings unless good cause *is* shown to the satisfaction of the Court for the non-production **O. 13, R. 2.**

Effect of non-production of documents.

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(2) *Manbodh* v. *Bhairo*, 1922 Pat 569 (571): 1922 Pat H C C 300: 4 Pat L Tim 322: 77 Ind Cas 848: 4 U P L R (Pat) 97 [Documents falling under O 7, R 18]; *Baikuntha Nath Chakravarthi* v. *Umanath Chakravarthi*, 1925 Cal 1149 (1150, 1151): 88 Ind Cas 498 [Document in possession of witness]; *Kumar Gopika Raman Roy* v. *Atal Singh*, 1929 P C 99 (103): 1929 All L J 246: 49 Cal L Jour 327: 33 Cal W N 463: 56 Mad L Jour 562: 29 Mad L W 674: 10 Pat L Tim 301: 114 Ind Cas 561: 31 Bom L R 734: 56 Ind App 119: 56 Cal 1003 P C [Party and pleader ignorant of the existence of a document].

(3) *Jainukh* v. *Dina Nath*, 1898 Pun Re No 58; *Mahbub Hossein* v. *Patasu Kumari*, (1868) 10 Suth W R 179 (181): 1 Beng L R A C 120. See also *Gour Huree Chowdhry* v. *Pran Huree Laha*, (1874) 21 Suth W R 42 (43).

(4) See Madras Rules of Practice, R 62.

(5) *Chidambaram Chettiar* v. *Parvathi Achi*, 1926 Mad 347 (349): 23 Mad L W 69: 1926 Mad W N 156: 93 Ind Cas 16.

(6) *Ramaswami Chettiar* v. *Tyagaraja Pillai*, 1928 Mad 516 (517): 27 Mad L W 520: 51 Mad 472: 55 Mad L Jour 34: 110 Ind Cas 16; *Chidambara Chettiar* v. *Parvati*, 1925 Mad 744 (745): 87 Ind Cas 351.

O. 13, R. 2, Note 1.

thereof; and the *Court* receiving any such evidence shall record *the* reasons for so doing.

[1877—Ss. 138, 139; 1859—S. 128.]

Synopsis.

1. Effect of non-production of documents.
2. "Unless good cause is shown."
3. Appeal.

Discretion of Court to excuse late production. See Note 1.

1. Effect of non-production of documents.—The object of the previous rule is to prevent fraud by the late production of suspicious documents. *See* Note 1 to R. 1. When, therefore, the genuineness of a document is beyond doubt there can be no reasonable objection to its reception even at a later stage.[1] The rule makes the satisfactory explanation for non-production at the first hearing a condition precedent for the reception of documents produced out of time. But the rule must be liberally construed so as to advance the cause of justice.[2] No documents, whether public[3] or private[4] which are above suspicion should be excluded if they are necessary for the proper decision of the case.

The Court of the Judicial Commissioner of Oudh, while disagreeing with the view which gives a liberal construction to this rule, has, however, arrived at the same result by granting the application under its inherent powers under S. 151 of the Code.[5]

Once a document is received under this rule, no adverse inference can be drawn against the party on the ground of late production.[6]

Order 13, Rule 2—Note 1.

(1) *Imambandi* v. *Mutsaddi*, (1918) 47 Ind Cas 513 (517): 1918 P C 11: 45 Cal 878: 45 Ind App 73: 16 All L J 800: 20 Bom L R 1022: 28 Cal L Jour 409: 23 Cal W N 50: 85 Mad L Jour 422: 24 Mad L Tim 380: 9 Mad L W 518: 1919 Mad W N 91: 5 Pat L W 276 P C [Books filed in another Court previously]; *Narain Koer* v. *Gena Missir*, 1929 Pat 324 (325): 10 Pat L Tim 356: 120 Ind Cas 291; *Sir Bijoy Chand* v. *Khoka Sinha*, 1924 Cal 1059 (1063): 40 Cal L Jour 97: 84 Ind Cas 425 [Decrees of Court]; *Ramaswami Chettiar* v. *Thyagaraja Pillai*, 1928 Mad 516 (517): 27 Mad L W 520: 51 Mad 472: 55 Mad L Jour 34: 110 Ind Cas 16 [Public documents of certified copies or other genuine documents]; *Kamod Singh* v. *Khemkaran*, 1927 Nag 269 (270): 10 Nag L J 129: 103 Ind Cas 186 [But the other side must be given a fair opportunity to meet]; *Muhammad Tabarak Ali Khan* v. *Dalip Narain Singh*, 1927 Pat 117 (119): 98 Ind Cas 968: 8 Pat L Tim 255 [Registered document]; *Maung Tun Sein* v. *Ko Tu*, 1928 Rang 196 (196): 6 Rang 337: 111 Ind Cas 472; *Hefojuddin Talukdar* v. *Nab Nasya*, 1928 Cal 416 (1), (416): 108 Ind Cas 246 [Document produced at re-hearing on review—Received, though not tendered at the first trial]; *Bai Kashibai* v. *Shidappa Anapa Pujari*, (1913) 21 Ind Cas 23 (24): 37 Bom 682: 15 Bom L R 823 [But time to produce documents after close of whole case should not be granted]. See however *Madhu Sudan Sinha* v. *Kali Charan Sinha*, (1918) 46 Ind Cas 246 (248): 27 Cal L Jour 119 [The Court has a discretion to refer in proper cases]. See also *Subramanyam Chetty* v. *Rajah of Ramnad*, 1930 Mad W N 511 (513) [Court has no discretion to refuse reception of documents produced by *witness* on the ground of late production—O 13, Rr 1 and 2 apply only to documents produced by parties].

(2) *Ranchhod Hirabhai* v. *Secretary of State*, (1898) 22 Bom 173 (176). See also *Baroda Prasad* v. *Madhab Chandra*, (1906) 33 Cal 1345 (1348) [Document filed with plaint—Tendered only at close of plaintiff's case—Rejection technically correct—But discretion not sound]; *Chidambaram* v. *Parvathi*, 1926 Mad 347 (349): 23 Mad L W 69: 1926 Mad W N 156: 93 Ind Cas 16: *Jagdip Pandey* v. *Mt Taibunniesa*, 1924 Pat 208 (208): 72 Ind Cas 397. But see *Mt Taibunnissa Begam* v. *Jagdip Pandey*, 1924 Pat 517 (518, 519): 2 Pat L R Civ 1: 78 Ind Cas 489.

(3) *Kumar Gopika Raman* v. *Atal Singh*, 1929 P C 99 (103): 1929 All L J 246: 49 Cal L Jour 327: 33 Cal W N 463: 56 Mad L Jour 562: 29 Mad L W 674: 10 Pat L Tim 301: 114 Ind Cas 561: 31 Bom L R 734: 56 Ind App 119: 56 Cal 1003 P C [Official records of undoubted authority]; *Mt Taibunniesa Begam* v. *Jagdip Pandey*, 1924 Pat 517 (518): 2 Pat L R Civ 1: 78 Ind Cas 489.

(4) *Chidambaram* v. *Parvathi*, 1926 Mad 347 (348): 23 Mad L W 69: 1926 Mad W N 156: 93 Ind Cas 16 [Unregistered documents]; *Reazuddin* v. *Sib Narain*, 1930 Pat 603 (604): 129 Ind Cas 82 [Private documents]; *Attaollah Mudle* v. *Sukeeooddeen Turupdar*, 1864 Suth W R 271 (Gap) (272) [Document on unstamped plain paper genuine—Received].

(5) *Shankar Lal* v. *Mahbub Shah*, 1923 Oudh 59 (60): 25 Oudh Cas 286: 70 Ind Cas 278.

(6) *Kamakshya Narayan Singh* v. *Jado Charan Singh*, 1928 Pat 294 (299).

The discretion to reject a document under this rule must be exercised at the earliest possible opportunity after production, for, documents not promptly rejected,[7] or ordered merely to be kept on the file[8] will be deemed to have been received. O. 13, R. 2, Notes 1—3.

2. **"Unless good cause is shown."**—Vexatious and dilatory applications for the reception of documents cannot be granted.[1] It is not a good case for non-production that on the day fixed for the production of documents the hearing only resulted in an adjournment.[2] The Court must record its reasons for receiving document beyond time.[3] Admission of papers after long delay without recording any reasons is wrong.[3]

3. **Appeal.**—The admission or rejection of documents under this rule is entirely in the discretion, of the trial Court[1] and an appellate Court will not interfere with it,[2] unless such discretion has been exercised capriciously or improperly.[3] In a case where the trial Court, in its discretion received documents produced at a late stage, the Privy Council said "If the sanction of the Court can purge the original defect, it *has been* so purged", and held that the late production cannot be a ground of appeal from the decision in the suit.[4]

R. 3. [S. 140.] The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection. O. 13, R. 3, Note 1.

Rejection of irrelevant or inadmissible Documents.

[1877—S. 140; 1859—S. 129.]

Synopsis.

1. Scope of the rule.
2. Objection to admissibility.
3. Appeal.

1. **Scope of the rule.**—Under R. 1 the Court receives, as is bound to do, all documents of every description produced by the parties at the first

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(7) *Hari Ram Goenka* v. *Luchmi Singh*, 1928 Pat 537 (538): 110 Ind Cas 821.

(8) *Jamuna Prasad Shah* v. *Faujdar Shahni*, 1929 Pat 254 (257): 10 Pat L Tim 183: 8 Pat 766.

Note 2.

(1) *Chotesha* v. *Mt Maktum Bi*, 1928 Nag 223 (225): 109 Ind Cas 195.

(2) *Madhu Sudan Sinha* v. *Kalicharan Sinha*, (1918) 46 Ind Cas 246 (248): 27 Cal L Jour 119.

(3) *Bhekdhari* v. *Sri Ramchanderji*, 1931 Pat 275 (281): 10 Pat 386.

Note 3.

(1) *Hari Ram* v. *Fori Ram*, 1928 Pat 555 (556): 7 Pat 589: 110 Ind Cas 536.

(2) *Hari Ram* v. *Fori Ram*, 1928 Pat 555 (556): 7 Pat 589: 110 Ind Cas 536 [Admission by trial Court]; *Bhoom Narain* v. *Kuzmoon Ali*, (1864) 1 Suth W R 198 (198), (Do.); *Hanooman Singh* v. *Fell*, (1869) 3 Agra H C R 148, (Do.); *Minakshi* v. *Velu*, (1885) 8 Mad 373 (375), (Do.); *Nrisinha Charan* v. *Balasi*, 1926 Cal 106 (106): 90 Ind Cas 602 [Discretion refusing to admit a document]; *Vijayaraghavalu* v. *Rajamani*, 1931 Mad 512 (513): 1931 Mad W N 310: 133 Ind Cas 371: 34 Mad L W 528 [Rejection for want of satisfactory explanation for late production]; *Kamta Prasad* v. *Deputy Commissioner, Partabghar*, 1927 Oudh 612 (613): 1 Luck Cas 56: 101 Ind Cas 911, (Do.).

(3) *Chidambara* v. *Parvathi*, 1926 Mad 347 (349): 23 Mad L W 69: 1926 Mad W N 156: 93 Ind Cas 16 [Discretion in allowing late production]; *Rani Prayag Kumari* v. *Siva Prasad*, 1926 Cal 1 (19): 42 Cal L Jour 280: 98 Ind Cas 385; *Madhu Sudan Sinha* v. *Kali Charan Sinha*, (1918) 46 Ind Cas 246 (248): 27 Cal L Jour 119; *Chidambara Chettiar* v. *Parvathi Achi*, 1925 Mad 744 (745): 87 Ind Cas 351 [No judicial exercise of discretion]; *Talewar Singh* v. *Bhagwan Das*, (1908) 8 Cal L Jour 147 (150, 151): 12 Cal W N 312; *Daulat Ram* v. *Ballu*, 1928 Lah 704 (705): 108 Ind Cas 374 [Non-compliance of rule by Trial Court—No objection by party in trial Court—Cannot raise point in second appeal].

(4) *Tota Ram* v. *Rukmoni Bullab*, (1869) 12 Suth W R 32 (32): 3 Beng L R App 97 P C.

O. 13, R. 3, Notes 1—3.

hearing, however, numerous they might be. Under R. 2, again, the Court, at its discretion, receives documents subsequently produced, or rejects them for *late production*. Out of the documents received as aforesaid, the Court, under the rule, is expected and empowered to exercise discrimination and reject even *in limine*, documents considered *irrelevant or otherwise inadmissible*,[1] and retain on the file only such of the documents as may, if properly proved, be used as evidence at the trial.[2] Rejection under this rule may be at any stage.[3] For the procedure on rejection, *see* R. 6 below.

2. Objection to admissibility.—There is a distinction in this matter between a point of relevancy, and a point of admissibility. Whether an objection is raised or not, every Court is bound to reject irrelevant documents.[1] But objections to the admissibility of documents for want of proof or any necessary formality must be taken at the trial[2] and should be decided as they arise and not reserved until judgment is given.[3] In case of doubt on a question of admissibility, the safer course for the Court, in appealable cases, is to admit the document.[4]

No objection will be allowed to be taken in appeal to the admissibility of a document which was admitted in evidence without objection at the trial.[5] The reason is, that if the objection had been taken at the trial, the party tendering the document would have taken steps to duly prove it.[6] As to objections on the score of insufficient stamp duty, *see* Ss. 35 and 36 of the Stamp Act (II of 1899), and the following cases.[7]

3. Appeal.—There is no appeal for an order rejecting a document under this rule; though the order may be challenged in an appeal from the decree in the suit.[1]

Order 13, Rule 3—Note 1.

(1) *Roshun Johan* v. *Inayet Hossein*, 1867 Marsh 127: W R F B 41 (44, 45); *Hari Ram* v. *Lachmi Singh*, 1928 Pat 537 (538): 110 Ind Cas 821. See *Issur Chunder Ghose* v. *Russeek Lal Mundul*, (1869) 11 Suth W R 576 (576).

(2) *Tumeezoddy* v. *Busarut*, (1874) 21 Suth W R 76 (77, 78).

(3) *Soodukhina Chowdhrain* v. *Raj Mohan Bose*, (1869) 11 Suth W R 350 (352) [Want of time for Court to inspect and consider—Order to file the documents—No presumption that documents were held *admissible*].

(4) *The Collector of Gorakhpur* v. *Palakdhari*, (1890) 12 All 1 (26) F B. See also *Kalikishore* v. *Bhusanchander*, (1891) 18 Cal 201 (203): 17 Ind App 159: 5 Sar 607 P C.

(5) *Shahzadi* v. *Secretary of State*, (1907) 34 Cal 1059 (1074): 34 Ind App 194: 6 Cal L Jour 678: 9 Bom L R 1192: 2 Mad L Tim 439 P C [Trial Court held a document genuine and admitted—High Court in appeal held, forgery—Privy Council upheld Trial Court on the ground also of want of objection at trial]; *Kishori Lal* v. *Rakhal*, (1904) 31 Cal 155 (157); *Ohimnaji* v. *Dinkar*, (1887) 11 Bom 320 (324). See also *Ayyaperumal Odayan* v. *Ramasami Chettiar*, (1915) 30 Ind Cas 983 (984): 29 Mad L Jour 362: 2 Mad L W 650: 1915 Mad W N 614.

(6) *Hridoy* v. *Prasanna*, (1901) 28 Cal 142 (144, 145); *Ram Prasad* v. *Sham Narain*, (1907) 6 Cal L Jour 22 (25).

(7) *Gurpadapa* v. *Naro Vithal*, (1889) 13 Bom 493 (496); *Punchanand* v. *Taramoni*, (1886) 12 Cal 64 (67); *Venkata Ohinnaya* v. *Venkata Ramayya*, (1882) 4 Mad 137 (140): 6 Ind Jur 127; *Ramasami* v. *Ramasami*, (1882) 5 Mad 220 (221); *Sugappa* v. *Govindappa*, (1902) 12 Mad L Jour 351 (353); *Safdar Ali* v. *Lachman*, (1878-80) 2 All 554 (559, 560): 5 Ind Jur 92.

Note 2.

(1) *Miller* v. *Madho*, (1897) 19 All 76 (92): 23 Ind App 106: 7 Sar 73 P C; *Sumitra Kuer* v. *Ram Khair Chowbey*, (1920) 57 Ind Cas 561 (562): 1921 Pat 61: 1921 Pat H C C 17: 5 Pat L Jour 410: 1 Pat L Tim 702.

(2) *Ghulam Mahomed* v. *Kalim Ullah*, 1928 Lah 428 (429): 109 Ind Cas 728: 10 Lah L Jour 370; *Madhabi* v. *Gaganendra*, (1905) 9 Cal W N 111 (113); *G M Struthers* v. *O E Wheeler*, (1878) 6 Cal L Rep 109 (111) [Evidence before Commissioner—Objection to document must be before him]. See also *Kalli* v. *Gau Kim*, (1883) 9 Cal 939 (940, 941): 8 Ind Jur 140 [Some grounds of objection before Commissioner—Others at the trial—Allowed].

(3) See *Jadu Rai* v. *Bhubotram*, (1890) 17 Cal 173 (186, 187, 195). See *Ramjiban* v. *Oghore Nath*, (1898) 25 Cal 401 (403): 2 Cal W N 188.

Note 3.

(1) In re *Eskine*, (1872) 18 Suth W R 511 (511). See *Bunwaree Lal* v. *Hetnarain Singh*, (1858) 7 Moo I A 148 (168): 4 Suth W R P C 128: 1 Suth 307: 1 Sar 610 P C [The Privy Council scarcely interferes in question of admissibility].

Endorsements on documents admitted in evidence.

R. 4. [S. 141.] (1) Subject to the provisions of the next following sub-*rule*, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely :— O. 13, R. 4, Note 1.

(*a*) the number and title of the suit,

(*b*) the name of the person producing the document,

(*c*) the date on which it was produced, and

(*d*) a statement of its having been so admitted;

and the endorsement shall be signed or *initialled* by the Judge.

(2) *Where* a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following *rule*, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed *or initialled* by the Judge.

[1877—S. 141; 1859—S. 132.]

Local Amendments.

OUDH.

In Rule 4 (1) (*d*), *add* "in the Judge's own handwriting" *after* the word "statement".

RANGOON.

To Order 13, Rule 4, the following shall be *added* as sub-Rules (3), (4) and (5):—

(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted, thus, *A*, *B*, *C*, etc., and the documents admitted on behalf of the defendant with figures 1, 2, 3, etc.

(4) When a number of documents of the same nature are admitted, as, for example, a series of receipts for rent, the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series.

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(5) Every document on admission shall be entered in a list in Form——— prepared by the Bench Clerk and signed by the Judge.

Synopsis.

1. Legislative changes.
2. Endorsements on admitted documentary evidence.

Rule to be strictly followed. See Note 2, Pt. (4-a).

1. Legislative changes.—

The words "or initialled" in this rule are new.

O. 13, R 4, Note 2.

2. Endorsements on admitted documentary evidence.—There are two stages relating to documents filed in Court:—One is the stage when all the documents are filed by the parties in Court; the next stage is where the documents are formally *proved and tendered in evidence.* It is at this stage that the Court has to decide whether they are to be admitted or rejected.[1] If the documents are admitted and proved, then the endorsement containing the particulars referred to in the rule is to be made on them. The endorsement is intended to be a record of the fact that the document *has been admitted* in evidence after the necessary legal formalties have been complied with.[2] An endorsement, therefor, made *before* the documents are proved[3] or the practice of putting a seal on the documents immediately on their production[4] is not proper.

The rule as to the endorsement of the documents must be strictly followed[4-a] as otherwise the documents will not be legally before the Court and superior Courts may refuse to allow them to be used in evidence.[5] The marking of documents for mere *identification*[6] or a mechanical endorsement without the Judge applying his mind to a consideration as to the admissibility of the document[7] does not amount to an admission in evidence.

Documents shown to have been regularly admitted in evidence by a commissioner cannot be objected to on the ground of the want of endosement by the *Court* under this rule.[8]

O. 13, R. 5.

R. **5.** [S. 141-A.] (1) *Save in so far as is otherwise provided by the Bankers' Books Evidence Act,* 1891, *where a* document admitted in evidence in the suit is an entry in *a letter-book or a* shop-

Endorsements on copies of admitted entries in books, accounts and records.

Order 13, Rule 4—Note 2.

(1) *Raghubhir Saran* v. *Ram Chander,* 1931 Lah 546 (550): 32 Pun L R 482: 132 Ind Cas 481: 13 Lah 126; *Ramchandra* v. *Naro,* 1887 Bom P J 107 (107); *Hard Singh* v. *Karam Chand Kanshi Ram,* 1927 Lah 115 (117): 8 Lah 1: 100 Ind Cas 721: 28 Pun L R 455.

(2) *Ramkilawan* v. *Brijharat,* 1888 All W N 22 (23).

(3) *Firoz Din* v. *Nawab Khan,* 1928 Lah 432 (434): 9 Lah 224: 30 Pun L R 154: 112 Ind Cas 89.

(4) *Raghubir Saran* v. *Ramchunder,* 1931 Lah 546 (550): 32 Pun L R 482: 132 Ind Cas 481: 13 Lah 126.

(4-a) *Sadik Husain Khan* v. *Hashim Ali Khan,* (1916) 36 Ind Cas 104 (119): 1916 P C 27: 38 All 627: 43 Ind App 212: 19 Oudh Cas 192: 14 All L J 1248: 18 Bom L R 1037: 25 Cal L Jour 363: 21 Cal W N 130: 31 Mad L Jour 607: 21 Mad L Tim 40: 6 Mad L W 378: (1916) 2 Mad W N 577: 4 Oudh L J 22: 1 Pat L W 157: 10 Bur L Jour 140 P C; *Bisram Singh* alias *Bishen Singh* v. *Indurjeet Koonwar,* (1866) 6 Suth W R 2 (6); *Shyam Lal* v. *Ram Charan,* (1918) 43 Ind Cas 525 (526); *Sundar Das* v. *People's Bank of India, Ltd,* (1912) 16 Ind Cas 834 (834, 835): 169 Pun L R 1912: 272 Pun W R 1912.

(5) *Sadik Hussain Khan* v. *Hashim Ali Khan,* (1916) 36 Ind Cas 104 (119): 1916 P C 27: 38 All 627: 43 Ind App 212: 19 Oudh Cas 192: 14 All L J 1248: 18 Bom L R 1037: 25 Cal L Jour 363: 21 Cal W N 130: 31 Mad L Jour 607: 21 Mad L Tim 40: 6 Mad L W 378: (1916) 2 Mad W N 577: 4 Oudh L J 22: 1 Pat L W 157: 10 Bur L Jour 140 P C; *Partab Singh* v. *Mothu,* 1926 Jour 90 (3): 8 Lah L Jour 492: 27 Pun L R 544: 96 Ind Cas 998; *Secretary of State* v. *Shrimati Sarla Devi,* 1924 Lah 548 (549): 5 Lah 227: 79 Ind Cas 74; *Imam-ud-din* v. *Sri Ram Perbhu Dial,* 1928 Lah 142 (142, 143): 9 Lah 4: 29 Pun L R 831: 110 Ind Cas 832; *Watson* v. *Rodwell,* 11 Ch D 153.

(6) *Sunder Das* v. *The People's Bank of India, Ltd,* (1912) 16 Ind Cas 834 (834, 835): 169 Pun L R 1912: 27 Pun W R 1912. See also *Ramien* v. *Veerapudian,* (1912) 14 Ind Cas 894 (396): 37 Mad 455: 11 Mad L Tim 69: 22 Mad L Jour 217: 1912 Mad W N 530. See *Raojee Ganesh* v. *Rao Jalee Pershad,* (1867) 8 Suth W R 91 (91) [Documents on production under R 1 or 2 were called exhibits in S 128 of the Code of 1877].

(7) *Attili Venkanna* v. *Parasuram Byas,* 1929 Mad 522 (522): 56 Mad L Jour 633: 29 Mad L W 633: 120 Ind Cas 879 [Endorsement mechanically stamped by clerk—Judge's initials also in rubber stamp]; *Kesho Ram* v. *Firm, Pirumal Dina Nath,* 1927 Lah 679 (679): 9 Lah L Jour 347: 104 Ind Cas 146 [Court induced to endorse behind back of party]; *Kishna* v. *Waryaman,* 1927 Lah 45 (45): 99 Ind Cas 920: 8 Lah L Jour 537.

(8) *Ma Fatima* v. *Momin Bibi,* 1929 Rang 211 (218): 7 Rang 164: 118 Ind Cas 122; *Struthers* v. *Wheeler,* (1880) 6 Cal L Rep 109 (111-112).

book or other account in current use, the party on whose behalf the *book or* account is produced may furnish a copy of the entry. O. 13, R. 5, Notes 1—2.

(2) *Where* such a document is an entry in a public record produced from a public office, or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(*a*) where the record, book or account is produced on behalf of a party, then by that party, or

(*b*) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) *Where* a copy of an entry is furnished under the foregoing provisions of this *rule*, the Court shall, after causing the copy to be examined, compared and *certified* in manner mentioned *in Rule* 17 *of Order VII*, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

[1877—S. 141; 1859—S. 132.]

Local Amendment.

RANGOON.

To Order 13, Rule 5, sub-Rule (3), the following shall be *added*:—

A note of the return should be made in the list in Form Judicial —— General 25.

Synopsis.

1. Stamp if necessary on copies furnished under this rule.
2. Admission of unstamped documents.
3. Admission of unregistered documents.
4. Admission of altered documents.

1. **Stamps if necessary on copies furnished under this rule.**—Copies furnished under this rule need not bear any stamp.[1]

2. **Admission of unstamped documents.**—*See* S. 35 of the Stamp Act (II of 1889) and the undermentioned cases.[2]

Order 13, Rule 5—Note 1.

(1) *Nandubai* v. *Gau*, (1903) 27 Bom 150 (154): 4 Bom L R 951; *Kastur* v. *Fakirin*, (1902) 26 Bom 522 (526): 4 Bom L R 223; *Harichand* v. *Jiena Subhana*, (1887) 11 Bom 526 (528). See also *Krishnaji* v. *Dulaba*, (1891) 15 Bom 687 (690).

Note 2.

(1) *Kallu* v. *Hatki*, (1896) 18 All 295 (298): 1896 All W N 68; *Abid Husain* v. *Asghar Husain*, (1913) 19 Ind Cas 445 (446): 11 All L J 506; *Haran Chunder* v. *Russick Chunder*, (1873) 20 Suth W R 63 (63); *Arunachalam* v. *Olagappah*, (1868) 4 Mad H C R 312 (314); *Kapusan* v. *Shamu*, (1884) 7 Mad 440 (441); *Ranga Rao* v. *Bhavayamma*, (1894) 17 Mad 473 (476): 4 Mad L Jour 192; *Raja of Bobbili* v. *Inuganti Sitarama*, (1900) 23 Mad 49 (54); *Atmaram* v. *Amir Chand*, (1865-67) 3 Bom H C R A C 92.

O. 13, R. 5, Notes 3—4.

3. **Admission of unregistered documents.**—*See* S. 49 of the Registration Act (XVI of 1908) and the following cases.[1]

4. **Admission of altered documents.**—*See* the undermentioned cases.[1]

O. 13, R. 6, Note 1.

R. 6. [S. 142.] *Where* a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (*a*), (*b*) and (*c*) of *rule* 4, *sub-rule* (1), *together with* a statement of its having been rejected, and the endorsement shall be signed *or initialled* by the Judge.

Endorsements on documents rejected as inadmissible in evidence.

[1877—S. 142; 1859—S. 134.]

Synopsis.

1. Legislative changes.

1. **Legislative changes.**—

The words "or initialled" are new.

O. 13, R. 7.

R. 7. [S. 142-A.] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under *rule* 5, shall form part of the record of the suit.

Recording of admitted and return of rejected documents.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the *persons* respectively producing them.

[1877—S. 142; 1859—S. 134.]

Note 3.

(1) *Sriram* v. *Kesrimal*, (1896) 18 All 338 (340): 1896 All W N 92; *Burjorji* v. *Muncherjee*, (1881) 5 Bom 143 (151-152); *Ohuni Lal* v. *Bomanji*, (1883) 7 Bom 310 (312): 7 Ind Jur 607. [Proof of document is superseded by its admission in pleading]; *Hormasji* v. *Keshav*, (1894) 18 Bom 13 (17-18); *Shridhar Ballal* v. *Chintaman*, (1894) 18 Bom 396 (400); *Vani* v. *Bani*, (1896) 20 Bom 553 (556-557); *Sultan Nanaz* (1896) 20 Bom 704 (715); *Lakshman* v. *Damodar*, (1900) 24 Bom 609 (614): 2 Bom L R 422; *Shib Prasad* v. *Anna Purna*, (1869) 12 Suth W R 435 (436): 3 Beng L R A C 451; *Ulfatunnissa* v. *Husain Khan*, (1883) 9 Cal 520 (525): 12 Cal L Rep 209; *Bengal Banking Corpn* v. *Mackertich*, (1884) 10 Cal 315 (323): 8 Ind Jur 436; *Partap Chunder* v. *Mohendra Nath*, (1890) 17 Cal 291 (297): 16 Ind App 233: 5 Sar 444: 13 Ind Jur 370 P C; *Sytesh Chunder* v. *Dhunput Singh*, (1897) 24 Cal 20 (25); *Mugniram* v. *Gurumukh*, (1899) 26 Cal 334 (336); *Nagappa* v. *Devu*, (1891) 14 Mad 55 (57); *Gonaji* v. *Subbarayappa*, (1892) 15 Mad 253 (254); *Uppalakandi* v. *Kannan*, (1896) 19 Mad 288 (290); *Obai Goundan* v. *Ramalinga*, (1899) 22 Mad 217 (220): 8 Mad L Jour 256.

Note 4.

(1) *Khoob Coonwar* v. *Moodnarain*, (1861-63) 9 Moo Ind App 1 (17): 1 Sar 813: 1 Suth 465: 1 Suth W R P C 36 P C; *Anandji* v. *Naraid Spinning Co*, (1875-77) 1 Bom 320 (329-330); *Oodey Chand* v. *Bhaskar*, (1881-82) 6 Bom 371 (374): 6 Ind Jur 523: Chitty's S C C R 102; *Sitaram* v. *Daji Devaji*, (1883) 7 Bom 418 (419); *Isac Mahomed* v. *Bai Fatima*, (1886) 10 Bom 487 (492); *Venkatesh* v. *Baba Subraya*, (1891) 15 Bom 44 (45); *Gogun Chunder* v. *Dhuronidhur*, (1881) 7 Cal 616 (619): 9 Cal L Rep 257: 6 Ind Jur 90: 4 Shom L R 187; *Mohesh Chunder* v. *Kamini Kumari*, (1886) 12 Cal 313 (315-316); *Christacharlu* v. *Karibasayya*, (1886) 9 Mad 399: 10 Ind Jur 409 F B; *Govindaswami* v. *Kuppuswami*, (1889) 12 Mad 239 (241); *Ramayyar* v. *Shanmugam*, (1892) 15 Mad 70 (71-72): 2 Mad L Jour 39; *Subramania Ayyan* v. *Krishna*, (1900) 23 Mad 137 (144): 9 Mad L Jour 368; *Sonajee Mali* v. *Utamchand Bania*, (1899) 12 C P L R 33 (35).

Local Amendments.

O. 13, R. 7 Notes 1—2.

MADRAS.

Add the following proviso to Rule 7 (2):—

"Provided that no document shall be returned which by force of the decree has become wholly void or useless."

RANGOON.

Add the following to sub-Rule (2) of Order 13, Rule 7:—

Who shall give a receipt for them in Col. 6 of the list in Form Judicial General 23.

Synopsis.

1. Scope of the rule. 2. "Shall be returned."

Admitted documents. See Note 1, F.-N. (1) and Rule 5, Note 3, F.-N. (1).

1. **Scope of the rule.**—Documents admitted in evidence are the only documents that can be legally on record.[1] Other documents cannot be on the record of the suit.

2. "**Shall be returned.**"—Documents which do not form part of the record as aforesaid should not be used in the case.[1] They should be removed from the records and returned to the persons producing them.[2]

O. 13, R. 8.

Court may order any document to be impounded.

R. **8.** [S. 143.] Notwithstanding anything contained in *Rule* 5 *or Rule* 7 *of this Order or in rule* 17 *of Order VII*, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

O. 13, R. 9.

Return of admitted documents.

R. **9.** [S. 144.] (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under *rule* 8, be entitled to receive back the same:—

(*a*) *where the* suit *is one* in which an appeal is not allowed, when the suit has been disposed of, and

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Order 13, Rule 7—Note 1.

(1) *Har Gobind* v. *Noni Bahu*, (1892) 14 All 356 (357, 358): 1892 All W N 42; *Reazoonnea* v. *Bookoo*, (1869) 12 Suth W R 267 (268) [Party relying on document must prove unless admitted by the other side].

Note 2.

(1) *Kallido Pershad* v. *Ram Hari*, (1880) 5 Cal 317 (320): 2 Shome L R 251.

(2) *Sukri* v. *Iragowda*, 1872 Bom P J 275 (275); *Kallida Pershad* v. *Ram Hari Chuckerbutty*, (1879) 5 Cal 317 (320): 2 Shome L R 251: *Raghbir Saran* v. *Ramchunder*, 1931 Lah 546 (550): 32 Pun L R 482: 132 Ind Cas 481: 13 Lah 126.

O. 13, R. 9.

(*b*) *where the suit is one* in which an appeal is allowed, when *the Court is satisfied that* the time for preferring an appeal has elapsed *and that no appeal has been preferred or*, if an appeal has been preferred, *when* the appeal has been disposed of:

Provided that a document may be returned at any time *earlier than that prescribed by this rule* if the person applying *therefor* delivers to the proper officer a certified copy to be substituted for the original *and undertakes to produce the original if required to do so*:

Provided also that no document shall be returned which, by force of the decree, has become *wholly* void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the *person* receiving it.

[1877—S. 144; 1859—Ss. 135, 136, 137.]

Local Amendments.

BOMBAY.

Between the first and second proviso to sub-Rule (1) of Rule 9 of Order 13, the following proviso shall be *inserted*, namely:—

"Provided also that a copy of the decree and of the judgment filed with memorandum of appeal under Order 41, Rule 1, may be returned after the appeal has been disposed of by the Court."

PATNA.

Add the following as sub-Rule 1 (*a*) in Rule 9:—

"(1-A) Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced, to substitute a certified copy for the original as hereinbefore provided."

MADRAS.

Add the following as sub-Rule (3):—

"(3) Every application under the first proviso to sub-Rule (1) above shall be made by a verified petition setting forth facts justifying the immediate return of the original and the Court may make such order as it thinks fit for costs of any or all the parties to the application, including any costs "incidental to the preparation of the certified copy to be substituted for the original" and may further direct that any party against whom any order for costs is made shall have such costs, if paid, "included as costs in the cause".

LAHORE.

To sub-Rule (1), the following further proviso was *added*:—

"Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced."

NAGPUR.

Order 13, *Rule* 9.

Insert the following as sub-Rule (2) of Rule 9 and re-number the present sub-Rule (2) as sub-Rule (3):—

"Where the document has been produced by a person who is not a party to the suit, the Court may, and, at the request of the person applying for the return of the document, shall order the party at whose instance the document was produced to pay the costs of preparing certified copy." O. 13, R. 9, Notes 1—3.

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Stamp duty on copies furnished under this rule.

Petition for return, forged—Action under S. 476, Cr. P. C. See Note 2, F.-N. (1).

1. Legislative changes.—

The effect of the principal changes in the rule is:—

(1) In appealable cases the Court under the present Code should not only see that the time for preferring an appeal has expired but also be satisfied that no appeal has been preferred.

(2) In the case of return of documents before the time fixed by this rule, the Court under the present Code must also take an undertaking for the production of the original if and when required. The words "And undertakes to produce the original if required to do so" are new.

2. Scope of the rule.—This rule provides for the return of documents *placed on the record*, whereas R. 7 provides for return of documents *not placed on the record*. The return under this rule is made subject to conditions intended to secure the preservation of records for use by appellate Court if necessary.

The act of returning documents under this rule is merely ministerial and no evidence on oath is required, if there is a proper application for return.[1] Under the second proviso for sub-R. 1 no document shall be returned which, by force of the decree, has become wholly void or useless. But where a suit has been allowed to be withdrawn, the document on which the plaintiff sued does not become void or useless and must be returned.[2]

3. Stamp duty on copies furnished under this rule.—There is a distinction between a copy substituted under R. 5 and that substituted under this rule. The latter is liable to stamp duty if required by law.[1]

10. R. [S. 137.] (1) The Court may of its own *motion*, and may in its discretion upon the application of any of the parties to a suit, send for, either form its own records or from any other Court, the record of any other suit or proceeding, and inspect the same. O. 13, R. 10.

Court may send for papers from its own records or from other Courts.

(2) Every application made under this *rule* shall (unless the Court otherwise directs) be supported by an affidavit showing

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Order 13, Rule 9—Note 2.

(1) *Girija Nanda Kali Mitter*, v. *Emperor*, 1921 Cal 433 (433): 26 Cal W N 660: 71 Ind Cas 666 [Return of documents not judicial proceeding—No action under S 476, Criminal Procedure Code lies for a forged return application].

(2) *Vaman* v. *Ganesh*, 1893 Bom P J 123.

Note 3.

(1) *Kastur* v. *Fakiria*, (1902) 26 Bom 522 (526): 4 Bom L R 223 [The copy under R 5 is not, when *furnished*, certified].

O.13, R.10 Note 1.

how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this *rule* shall be deemed to enable the Court to use in evidence any document which under *the law of evidence* would be inadmissible in the suit.

[1877—S. 137; 1859—S. 138.]

Local Amendment.

RANGOON.

In Order 13, Rule 10, sub-Rule (3) shall be re-numbered as (5) and the following shall be *inserted* as sub-Rules (3) and (4):—

(3) If the Court thinks fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required. No summons to produce any record shall be issued to any Record-keeper, Chief Clerk, or official of any Court.

(4) Whenever a Judge sends for the record of another suit or case, or other official papers, and uses any part of such record or papers as evidence in a trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record, and shall further direct at the expense of which party such copy shall be made.

In Order 13, the following shall be *inserted* as Rules 10-A and 10-B:—

10-A. Exhibits, with their accompanying lists, shall not be filed with the record until after the termination of the trial.

10-B. If any exhibit included in the index of contents of the trial record is withdrawn after judgment, the fact should be noted in the column of remarks of the index, and it should be stated whether a copy has been substituted or not.

Synopsis

1 Scope and object of the rule.
2. Discretion of Court.
3. "From any other Court."
4. Affidavit in support of the application.

Criminal case record. See Note 3, F.-N. (1).
Records from Collector's office. See Note 2, F.-N. (3).
Revision. See Note 2, Pt. (6).

1. **Scope and object of the rule.**—The power given under this rule may be exercised also by an appellate Court.[1] A Court is not bound to send for the whole of the records but only such documents will be sent for as are specifically mentioned in the application.[2]

Order 13, Rule 10—Note 1.

(1) *Juggernath Sahoo* v. *Mahomed Hossein*, (1871) 15 Suth W R 173 (174) [But not where party omitted to use document sent for in the Lower Court]; *Hira Singh* v. *Ram Lal*, 1894 All W N 3 (3).

(2) *Jaookee Beebee* v. *Habeebul Hossein*, 1864 Suth W R 272 (273).

Documents do not become evidence in the case by the mere fact of being received into the Court under this rule. They must be admitted in evidence by the Court like any other document.[3] *See* sub-R. 3. **O.13, R.10, Notes 1—4.**

2. Discretion of Court.—The Court has a *discretion* to grant or refuse an application under this rule.[1] It should not, however, refuse to send for necessary documents on a proper application,[2] nor, having *ordered* them to be sent for, omit to *actually* send for them to be used by the party as evidence.[3] But a Court is not bound to send for a document when the party neglects or fails to make an application[4] or where he could, but would not employ other means of production of the documents under the Code.[5]

An omission to exercise the discretion in favour of a party in a proper case is a good ground in an appeal or revision provided the party has been prejudiced thereby.[6]

3. "From any other Court."—The Court from which a document is sent for need not necessarily be a *Civil Court*.[1] But it must be a *Court*.[2] A Court from which records are sent for under this rule has no discretion to refuse to send them.[3]

4. Affidavit in support of the application.—The rule as to the contents of an affidavit under this rule must be strictly complied with. An application without setting forth the necessary grounds satisfactorily in the affidavit will be rejected.[1]

Provisions as to documents applied to material objects.

R. **11.** [S. 145.] The provisions herein-contained as to documents shall, so far as may be, apply to all other material objects producible as evidence. **O.13, R.11.**

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(3) *Phulla* v. *Ghulam Nabi*, 1927 Lah 69 (2), (70): 98 Ind Cas 881; *Abdul Ghani* v. *Faqir Muhammad*, 1929 Lah 78 (79): 111 Ind Cas 361; *Maya Dhari* v. *Chuni Lal Panna Lal*, 1931 Lah 119 (120): 31 Pun L R 926: 131 Ind Cas 374; *Narappa Bin Appa Hegdi* v. *Gapaya Bin Kapaya*, (1864-66) 2 Bom H C R 341; *Punja* v. *Bhadu*, (1913) 18 Ind Cas 857 (858): 9 Nag L R 11; *Tuffazzul Hussain* v. *Ghulam Ali*, (1930) 31 Pun L R 250. See also *Bunwaree Lal* v. *Kisto Behary Roy*, (1864) 1 Suth W R 63 (64).

Note 2.

(1) *Rughoonath Bose* v. *Ooned Ali*, 1864 Suth W R 177 (178, 180) F B; *Heeramun* v. *Kaza Tahoour*, (1867) 7 Suth W R 109 (109).

(2) *Ram Ranjan* v. *Gopee Bullub*, (1872) 18 Suth W R 127 (128); *Romun Kishen Dey* v. *Sheikh Kadir Buksh*, (1866) 6 Suth W R 79 (79); *Krishna* v. *Protab*, (1882) 7 Cal 560 (565) [Though the documents cannot be produced before the termination of the trial].

(3) *Mohunt Gobind* v. *Lakhun*, (1908) 8 Cal L Jour 43 (46, 47): 11 Cal W N 112; *Abdul Rahman* v. *B B & C I Ry*, 1882 Bom P J 16 (16) [Collector's office not a Court].

(4) *Ohundi Churn* v. *Doorga Pershad*, (1883) 9 Cal 260 (264, 265): 12 Cal L Rep 81: 6 Ind Jur 438: 4 Sar P C J 351 P C; *Louis Coraah* v. *Goonoo Churn Ghose*, (1872) 18 Suth W R 13 (14).

(5) *Sobbee Jha* v. *Shosheenath*, (1871) 15 Suth W R 150 (151) [Taking out *summons* for production]; *Monmohinee Debee* v. *Sreedhama Ohurn Ranna*, (1870) 14 Suth W R 302 (303), (Do.).

(6) *Gopal Singh* v. *Laloo*, (1909) 2 Ind Cas 953 (953): 10 Cal L Jour 27; *Ram Runjun* v. *Gopee Bullub*, (1872) 18 Suth W R 127 (128); *Romun Kishen* v. *Kadir Buksh*, (1866) 6 Suth W R 79 (79); *Mahmad Abdul Aziz* v. *Mahmad Abdul Jalil*, (1918) 43 Ind Cas 57 (58, 59) All; *Gobinda* v. *Lakhun*, (1907) 11 Cal W N 112 (114, 116): 8 Cal L Jour 43.

Note 3.

(1) *Fakir-ud-din* v. *Mussummat Hossein Bibi*, 1874 Pun Re No 32 [Record of a criminal case].

(2) *Sobbee Jha* v. *Shosheenath Jha*, (1871) 15 Suth W R 150 (151) [A Court of Wards is no Court. The power to send for documents from 'public offices' under S 138 of the Code of 1859 has been taken away from the corresponding provisions of the later Codes]; *Juggernath Sahoo* v. *Syed Mahomed Husain*, (1871) 15 Suth W R 173 (174) [Record of a Cazee cannot be sent for].

(3) *Gopal Coomary Dassee* v. *Sooader Narain Deo*, (1879) 4 Cal L Rep 36 (37).

Note 4.

(1) *Maya Dhari* v. *Chuni Lal Panna Lal*, 1931 Lah 119 (120): 31 Pun L R 926: 131 Ind Cas 374; *Hira Singh* v. *Ram Lal*, 1894 All W N 3 (3).

O.13, R.11. **Local Amendment.**

ALLAHABAD.

Add the following to the end of Order 13:—

12. Every document not written in the Court vernacular or in English, which is produced (*a*) with a plaint or (*b*) at the first hearing or (*c*) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

13. When a document included in the list, prescribed by Rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in Rule 4 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A1, B1, C1, etc., AA1, BB1, etc., and those of the second A2, B2, C2, etc., AA2, BB2, etc. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series.

O. 14, R.1.

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.

Framing of issues.

R. 1. [S. 146.] (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue *or a defendant must allege in order to constitute his defence.*

(3) Each material proposition affirmed by one party and denied by the other *shall* form the subject of a distinct issue.

(4) Issues are of two kinds: (*a*) issues of fact, (*b*) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this *rule* requires the Court to frame and record issues *where* the defendant at the first hearing of the suit makes no defence. O. 14, R 1. Notes 1—2.

[1877—S. 146; 1859—S. 139. R. S. C., O. 33, R. 1.]

Synopsis.

1. Legislative changes.
2. Scope and object of the rule.
3. Issues between co-defendants.
4. Omission to frame issues.
5. Wrong issues.
6. Issues by consent.
7. Abandonment of issue.
8. Delay in raising issue.
9. Issue not raised in pleadings but in evidence.
10. Variance between pleadings and proof. See O. 6, R. 2.

Court not to frame inconsistent issues. See Note 5, F.-N. (1).
Issue—Abandonment of, by pleader. See Note 7, Pt. (4).
Issues must be decided. See Note 2, F.-N. (5).
One party. See Note 3.
Power of appellate Court to frame issues and remand for findings. See Note 4, Pts. (11) and (12).
Proper issues in account suits. See Note 5, F.-N. (1).
Proper issues in injunction suits. See Note 5, F.-N. (1).
Proper issues in lease suits. See Note 4, F.-N. (10).
Proper issues in suits for damages. See Note 5, F.-N. (1).
Proper issues in suits for malicious prosecution. See Note 5, F.-N. (1).
Proper issues in suits for possession. See Note 2, F.-N. (22); Note 5, F.-N. (1); Note 4, F.-Ns. (10) and (11); Note 9, F.-N. (2).
Proper issues in suits on easement. See Note 2, F.-N. (22).
Proper issues in suits to recover lands granted in trust. See Note 5, F.-N. (1).
Suits for rent. See Note 2, F.-N. (22); Note 5, F.-N. (1).
Suit on permission under cl. 12, Letters Patent. See Note 2, F.-N. (22).

1. Legislative changes.—

In sub-Rule (2), the words "or a defendant must allege in order to constitute his defence" are new.

2. Scope and object of the rule.—The plaint and the written statement constitute the pleadings in a case and mark the *first stage* at which the differences between the parties are placed before the Court. The Court itself may also at the *first hearing* examine the parties in order to ascertain with precision, the propositions of law or fact on which the parties are at variance;[1] and on such questions issues have to be framed and recorded.[2]

The framing of issues has a very important bearing on the trial and decision of a case. In the *first place* it is the *issues fixed* and not the pleadings that guide the parties in the matter of adducing evidence.[3] Thus when a

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Order 14, Rule 1—Note 2.

(1) *Arbuthnot & Co* v. *Betts*, (1870) 14 Suth W R 181 (182): 6 Beng L R 273; *Ali Kadar* v. *Gobind Das*, (1890) 17 Cal 840 (848); *Man Gobind Sircar* v. *Umbika Monee*, (1871) 16 Suth W R 218 (219); *Umesh Narain Chowdhury* v. *Secretary of State for India*, 1925 Cal 1157 (1160): 87 Ind Cas 575; *Devarajulu Naidu* v. *Koudammal*, 1925 Mad 427 (429): 20 Mad L W 754: 80 Ind Cas 929; *Muhamed Mahmood* v. *Safar Ali*, (1885) 11 Cal 407 (410); *Ganga Narain Gupta* v. *Tilluckram Choudhry*, (1888) 15 Cal 533 (537): 15 Ind App 119: 12 Ind Jur 254: 5 Sar 168 P C; *Kora Kutty* v. *Ahammad*, 1925 Mad 169 (169): 78 Ind Cas 1.

(2) *Moulvie Abdoollah* v. *Shahu Mujeeuoodeen*, (1871) 15 Suth W R 286 (287).

(3) *Huro Soonduree Debia* v. *Ameua Begum*, (1866) 5 Suth W R Act X 72 (73); *Syed Muhammad* v. *Fetteh Muhammad*, (1895) 22 Cal 321 (331): 22 Ind App 4: 6 Sar 515 P C [Object in framing issue is to allow appropriate evidence to be put forward]; *Kasturi Mal* v. *Lajja Ram*, (1921) 60 Ind Cas 751 (752) Lah.

O. 14, R. 1, Note 2.

point has been the subject of an issue, the parties will not be heard to say that the point was not disputed and so required no proof.[4] *Secondly*, the Court *cannot refuse to decide a point* on which an issue has been framed and evidence given by the parties,[5] even if the point involved is not mentioned in the pleadings.[6] Conversely the Court should not decide a suit on a matter on which no issue has been raised.[7] *Finally*, if the case goes in appeal it must be dealt with by the appellate Court *on the issues settled for trial*[8] and not on a point on which there is no issue.[9] It is therefore essential to the right decision of a case that appropriate issues should be framed and tried.[10]

Sub-R. (1) declares that an issue arises when a *material proposition* of law or fact is affirmed by one party and denied by the other,[11] and Sub-R. (2) defines what material propositions are.

The issues should be confined to points necessary for the proper trial and disposal of the case and should not be framed with respect to points *not so necessary*.[11-a] No issue need be framed on a point of law which is perfectly clear;[12] nor is the Court bound to grant an issue on a point not arising on the pleadings.[13] But when the pleadings raise points with sufficient clearness, issues should be framed on them though they may not have been put in the pleadings in any particular form.[14] Sub-R. (3) declares what each issue should contain. The issues should be so framed as to embrace the *whole dispute* in the suit[15] but only to cover the points in *dispute* and to cover each point *once* only.[16]

It is primarily the *duty* of the judge to frame the proper issues in a case[17] and the judge must apply his mind and understand the facts before framing them.[18] Where issues have already been framed in a suit, the fact that

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(4) *Anand Kuar* v. *Tansukh*, (1889) 11 All 396 (398): 5 Sar 372: 13 Ind Jur 171 P C.

(5) *Ramkor* v. *Gangaram*, (1892) 16 Bom 545 (547).

(6) *Saunder Narain* v. *Shaikh Nandar*, (1874) 21 Suth W R 407 (408).

(7) *Savirimuthu* v. *Sattan Chinnappah*, (1912) 15 Ind Cas 185 (186): 1912 Mad W N 177; *Jhanda Mal* v. *Gopal Das*, 1925 Lah 571 (572): 7 Lah L Jour 405: 26 Pun L R 778: 91 Ind Cas 784 [Issue not arising on pleadings].

(8) *Rup Singh* v. *Baiani*, (1885) 7 All 1 (11): 11 Ind App 149: 1884 All W N 246: 4 Sar 533: 8 Ind Jur 390 P C; *J P Wise* v. *Juggobundhoo Bose*, (1869) 12 Suth W R 229 (230).

(9) *Official Trustee* v. *Krishna*, (1886) 12 Cal 239 (246): 12 Ind App 166: 4 Sar 657: 9 Ind Jur 399 P C.

(10) *Ahmedabad Advance S & W Co* v. *Lakshmishankar*, (1906) 30 Bom 173 (188): 7 Bom L R 246.

(11) *Fateh Mahomed* v. *Imam-ud-din*, 1921 Lah 360 (361): 2 Lah L Jour 188: 68 Ind Cas 106: 93 Pun L R 1922.

(11-a) *Birch* v. *Furzind Ali*, (1871) 3 N W P 303 (307); *Dayal Chand* v. *Nobin Chandra*, (1872) 8 Beng L R 180: 16 Suth W R 235; *West End Watch Co* v. *Berna Watch Co*, (1911) 10 Ind Cas 805 (805): 35 Bom 425: 13 Bom L R 212.

(12) *Imperial Banking & Trading Co* v. *Pran Jivan*, (1864-66) 2 Bom H C 258.

(13) *Venkatanarasimha Naidu* v. *Bashyakarlu Naidu*, (1902) 25 Mad 367 (378): 29 Ind App 76: 6 Cal W N 641: 4 Bom L R 543: 8 Sar 258 P C; *Fateh Muhammad* v. *Inam-ud-din*, 1921 Lah 360 (361): 93 Pun L R 1922: 68 Ind Cas 106: 2 Lah L Jour 188; *Raghunath* v. *Deo Narain*, (1919) 51 Ind Cas 981 (983): 1918 Pat H C C 393 [In fact the Court is not justified in framing an issue on a question about which no dispute arises in the pleadings]; *Lachman Prasad* v. *Majju*, 1923 All 167 (167): 77 Ind Cas 913, (Do.).

(14) *Ramasubba Iyer* v. *Avudai Ammal*, (1914) 25 Ind Cas 123 (131): 1914 Mad W N 595.

(15) *Kutty Subramaniya* v. *Chinna Muttu*, (1866) 3 Mad H C R 25 (26).

(16) *Saleh Muhammad* v. *Ram Ratan Tiwari*, 1924 Nag 156 (157): 78 Ind Cas 1015.

(17) *Murli Prasad Awasthi* v. *Sheo Dat Prosad*, 1931 All L J 349: 1931 All 625 (628); *Gano Hari* v. *Shri Dev*, (1902) 26 Bom 360 (362): 4 Bom L R 58; *Sheik Chand* v. *Hira Lal*, (1907) 9 Bom L R 1114 (1115); *Nathu Bai Rasik Das* v. *Mulchand Krishna Vallab*, (1901) 3 Bom L R 535 (537).

(18) *Rathnasabapathy* v. *Ammakannu Ammal*, 1930 Mad 78 (79): 57 Mad L Jour 609: 30 Mad L W 914: 123 Ind Cas 15.

O. 14, R. 1, Notes 2—4.

the judge who framed the issues has been transferred will not make it obligatory on the incoming judge to frame issues again.[10]

Sub-R. (6) relates to cases where the defendant makes no defence. The Court is not bound to frame and record issues when the defendant is *ex parte* and no written statement has been put in.[20] But even in *ex parte* cases, if there is any room for doubt about any matter, the Court has been held, under certain circumstances, to be bound to inform the plaintiff specifically what points he has to prove.[21]

As to particular issues arising in certain kinds of suits, *see* the undermentioned cases.[22]

A point alleged by the plaintiff and *admitted* by the defendant cannot be said to be in issue and a decision can be given on the basis of such admission without an issue.[23] Averments contained in the plaint which are not traversed in the written statement and as to which no issue has been asked for will be deemed to be admitted.[24]

3. Issues between co-defendants.—It is contrary to practice to frame and try issues between co-defendants.[1] Where, however, such an issue is necessary for giving appropriate relief to the plaintiff, it should be framed and tried.[2]

4. Omission to frame issues.—A Court commits a grave irregularity in proceeding to the final hearing of a case without settling issues therein.[1] But the mere omission to frame issues is not necessarily *fatal* to the trial of the suit.[2] It is an irregularity which may or may not be a *material* one. If such omission has affected the disposal of the case on the merits it will be a ground

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(19) *Bhavani Kuar* v. *Narain Singh*, 1887 All W N 247 (248).

(20) *Amir Ali* v. *Imam-ud-din*, (1871) 15 Suth W R 145 (146); *Rustun Gazi* v. *Tara Prosanna Chowdhuri*, (1907) 11 Cal W N 871 (872).

(21) *Bhuri Bai* v. *Ishak Hussain*, 1923 Nag 83 (84): 69 Ind Cas 819.

(22) *Nagamony* v. *Janaki Ram*, (1895) 18 Mad 142 (143): 5 Mad L Jour 34 [The legality of an order granting permission to institute a suit under Cl 12 of the Letters Patent, may form the subject of an issue for trial in the suit so instituted]; *Lodai Mollah* v. *Kally Das Roy*, (1882) 8 Cal 238 (243): 10 Cal L Rep 581: 4 Shome L R 275 [Rent suits in which defendant sets up title of a third party]; *Ranee Tillessuree* v. *Ranee Asmedh*, (1875) 24 Suth W R 101 (104) [Rent suit]; *Nasar Bhai Ahmed Bhai* v. *Badrudin*, (1892) 16 Bom 533 (535) [Suit to establish an easement by prescription when limitation is pleaded]; *Achul Mahta* v. *Rajun Mahta*, (1881) 6 Cal 812 (814), (Do.); *Govind* v. *Vithal*, (1896) 20 Bom 753 (755) [Suits for possession of land on a sale deed by a person who is not defendant]; *Balaji* v. *Gangadhar*, (1908) 32 Bom 255 (258): 10 Bom L R 276 [Suits based on fraud]; *Sreemutty Nistarini Dossee* v. *Mukhun Lall*, (1872) 17 Suth W R 432 (439): 9 Beng L R 11 [Suit by a Hindu widow for declaration of her right to maintenance out of her husband's estate which has been mortgaged to the defendant by the husband's heir]; *Abdul Kadar* v. *Mahomed*, (1892) 15 Mad 15 (17) [In a suit for declaration that the defendant had no right either to the office of sheik or to the properties in question, and for an injunction restraining him from interfering with the properties, and for further and other relief, it was alleged by the defendant, that he was in possession and hence the plaintiff cannot maintain a suit for declaration without asking for possession. An issue was framed if the defendant was in possession].

(23) *Appaya* v. *Rami Reddi*, (1898) 11 Mad 367 (370): 13 Ind Jur 12.

(24) *Chundee Churn* v. *Mobaruck Ali*, (1870) 12 Suth W R 469 (469); *Ahmedee Begum* v. *Debee Persad*, (1872) 18 Suth W R 287 (287); *Jowadunissa* v. *Jhaman Lal*, (1875) 23 Suth W R 159 (159); *Madhoprosad* v. *Gajadhar*, (1889) 11 Cal 111 (118): 11 Ind App 186: 4 Sar 574: 8 Ind Jur 694: R & J 85 P C; *Apaji Patil* v. *Apa*, (1902) 26 Bom 735 (738): 4 Bom L R 534.

Note 3.

(1) *Dequmber* v. *Khettur*, (1865) 2 Suth W R 45 (46); *Bhuguan* v. *Dukhina*, (1867) 8 Suth W R 356 (357, 358).

(2) *Kalee Kinkur* v. *Kisto Mungul*, (1869) 11 Suth W R 462 (463, 464); *Chajju* v. *Umrao*, (1900) 22 All 386 (390): 1900 All W N 120.

Note 4.

(1) *Muttayan Chettiar* v. *Sangili Vira*, (1883) 12 Cal L Rep 169 (174): 6 Mad 1: 9 Ind App 128: 4 Sar 354: 6 Ind Jur 486: 5 Shome L R 57 P C: *Rewun* v. *Jankee*, (1866) 11 Moo Ind App 25 (27): 2 Sar 214 P C. See also *Jogeshur* v. *Doolun*, (1870) 2 N W P H C R 183.

(2) *Heti Lal* v. *Mst Ram Piari*, 1903 Pun Re No 77: 1904 Pun L R 9.

O. 14, R. 1, Note 4.

for remanding the case for a new trial. But if on the other hand parties have not been prejudiced by the omission[3] and *substantial justice* has been done in the case notwithstanding the omission to frame issues,[4] the decision will not be set aside or remanded for a new trial. Thus a decision will not be interfered with in the following cases on the ground of issue not having been framed:—

(1) Where the issue omitted relates to a point not necessary for the right determination of the case.[5]

(2) Where, in spite of the omission of an issue, the parties are alive to the point, have adduced evidence on it, and have discussed it in the trial Court.[6] Thus in a case where no specific issue was raised on a point but it was treated as if it arose in the suit and it had been put in issue in another suit between the same parties, it was held that evidence in that suit could be considered to determine the question where no surprise was caused thereby.[7]

(3) Where, in spite of the omission, the party affected had *notice* of the point and had *opportunity* to adduce evidence to meet it.[8] or

(4) Where the omission was due to the *deliberate* conduct of the party affected.[9]

On the other hand where there has been no trial at all or only an imperfect trial on the point as a consequence of the omission of an issue on it, the decision will be set aside.[10] In such cases the appellate Court should frame the proper issues and remand the case for re-trial on them.[11] Where an

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(3) *Sat Narain* v. *Krishna Dat*, 1925 Oudh 383 (384): 12 Oudh L J 275: 2 Oudh W N 243: 87 Ind Cas 900; *Hoti Lal* v. *Mussammut Ram Piari*, 1903 Pun Re No 77: 1904 Pun L R 9.

(4) *Mitha* v. *Furlrab*, (1870) 13 Moo Ind App 573 (582, 583 & 584): 6 Beng L R 148: 15 Suth W R 15: 2 Suth 387: 2 Sar 626.

(5) *Girdhar Das* v. *Sitaram Naik*, (1915) 27 Ind Cas 578 (579) Cal.

(6) *Chandra Kunwar* v. *Chaudhri Narpat*, (1907) 29 All 184 (190, 191, 192 and 195): 34 Ind App 27: 4 All L J 102: 9 Bom L R 267: 5 Cal L Jour 115: 11 Cal W N 321: 17 Mad L Jour 103: 2 Mad L Tim 109 P C; *Sayad Muhammad* v. *Fatteh Muhammad*, (1895) 22 Cal 324 (332): 22 Ind App 4: 6 Sar 515 P C; *Balmakund* v. *Dalu*, (1903) 25 All 498 (506) 1903 All W N 112 F B; *Muthuraman Chetty* v. *Krishna Pillai*, (1906) 29 Mad 72 (74): 15 Mad L Jour 478; *Ayyalammai Servaigarar* v. *Nallaswamy Pillai*, (1911) 10 Ind Cas 291 (291): 9 Mad L Tim 407; *Jacob Elias Sassoon* v. *Dossa Kalian*, (1912) 15 Ind Cas 757 (759): 5 Sind L R 192; *Mohiuddin* v. *Pirthichand*, (1915) 31 Ind Cas 664 (666): 19 Cal W N 1159; *Shri Satyadhyanathirtha* v. *Raghunath*, 1926 Bom 384 (385): 28 Bom L R 743: 96 Ind Cas 827; *Mahomed Basiroollah* v. *Ahmed Ali*, (1874) 22 Suth W R 448 (449); *Kachekalyana Rungappa Kalakka Tola Udiar* v. *Kachiviga Jaya Rungappa Kalakka Tola Udiar*, (1867-69) 12 Moo Ind App 495 (503): 2 Beng L R P C 72: 11 Suth W R P C 33: 2 Suth 206: 2 Sar 461 P C; *Gangaprasad Sahu* v. *Maharani Bibi*, (1885) 11 Cal 379 (384, 386): 12 Ind App 47: 4 Sar 621 P C [No settlement of issues. But where judgment has laid points for determination they may be looked upon as issues unless party is prejudiced]; *Sita Ramji* v. *Jadunath Singh*, (1914) 24 Ind Cas 72 (77 and 78): 1 Oudh L J 204 [Issue on record wide enough and evidence let in].

(7) *Nataraja Thambiran* v. *Kailasam Pillai*, 1921 P C 84 (86): 44 Mad 283: 48 Ind App 1: 25 Cal W N 145: 13 Mad L W 301: 18 All L J 1041: 57 Ind Cas 564: 39 Mad L Jour 98: 1920 Mad W N 371 P C.

(8) *Sundari Dassee* v. *Modhoo Chunder*, (1887) 14 Cal 592 (597); *Secretary of State* v. *Dipchand*, (1897) 24 Cal 306 (309); *Amir Ali* v. *Imamudeen*, (1871) 15 Suth W R 145 (146).

(9) *Anundo Lall* v. *Boycauntram*, (1880) 5 Cal 283 (286) 4 Cal L Rep 473.

(10) *Radha Kishore* v. *Goluck Chunder*, (1869) 11 Suth W R 366 (367) [Suit on lease]; *Joy Kishto* v. *Hurrehur*, (1869) 12 Suth W R 365 (365) [Suit for possession]; *Nawab Nazim* v. *Amrao Begum*, (1874) 21 Suth W R 59 (60); *Apaya* v. *Rama*, (1878-79) 3 Bom 210 (213); *Girdhari Lal* v. *W. Crawford*, (1887) 9 All 147 (153): 1886 All W N 325: 11 Ind Jur 154.

(11) *Mahomed Rasid* v. *Jadoo Mirdha*, (1873) 20 Suth W R 401 (402) [Suit for possession]; *Karm Khan* v. *Secretary of State for India*, (1911) 12 Ind Cas 53 (54): 223 Pun L R 1911: 121 Pun W R 1911; *Abdulla Khan* v. *Abdur Rahman Beg*, (1896) 18 All 322 (324, 325): 1896 All W N 81 [Suit for damages for deficiency in area sold—Proper issues to be framed and tried—Issues accordingly framed by Appellate Court and remanded].

issue already framed, though in terms covering the main question in the case, does not sufficiently direct the attention of the parties to it, and may thereby have prevented a party from adducing evidence on it, the proper course is to frame fresh issues and to remand the case for re-trial on them.[12] O. 14, R 1, Notes 4—7.

5. Wrong issues.—Where wrong issues have been framed in a suit and the suit has been disposed of on the findings on those issues, the decision will be set aside in appeal and the suit remanded for re-trial after framing proper issues.[1] This, however, will not be done where, in spite of the wrong issues, the points have been correctly understood by all the parties[2] or where all the available evidence has been adduced on the necessary points and duly discussed.[3]

6. Issues by consent.—Where the issues raised in a suit have been *consented* to by a party, then the decision cannot be objected to by him on the ground that the issues are wrong or defective or unnecessary.[1] Similarly where the parties affected by the wrong issue have waived their objections thereto, the decision will not be interfered with.[2]

7. Abandonment of issue.—It is open to the parties to abandon issues, thereby waiving the points raised therein. Such abandonment may be express or implied. It has been held by the High Court of Madras that Courts are not bound to raise issues *suo motu* on *questions of fact* where parties do not ask for them, that the omission to raise such issues implies an abandonment of such questions by the party interested, but that, where the question is one of *law*, it is incumbent on the Court to frame proper issues on such questions.[1] The High Court of Bombay has, on the other hand, broadly held

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(12) *Oolagappa Chetty* v. *Arbuthnot*, (1873) 14 Beng L R 115: 1 Ind App 268: 3 Sar 318: 21 Suth W R 358 P C; *Doorga Narain* v. *Brojo Kishore*, (1875) 23 Suth W R 172 (173).

Note 5.

(1) *Gobind Chund* v. *Mun Mohan*, (1869) 12 Suth W R 198 (199) [Suit for damages]; *Ishan Chunder* v. *Shama Churn Bhutto*, (1866) 6 Suth W R 57 (57): 11 Moo Ind App 7: 2 Ind Jur N S 87: 2 Sar 209 P C; *Reasut Ali* v. *Abbott*, (1869) 12 Suth W R 132 (133) [Suit to recover land granted in trust]; *Chunder Monee* v. *Mahesh Chunder*, (1869) 12 Suth W R 460 (461) [Suit for possession]; *Purbooddeen Mullick* v. *Molaem Bibee*, (1870) 14 Suth W R 149 (149, 150) [Rent suit—But in this case the appellate Court decided on the merits as there was evidence on record]; *Punchanun Roy* v. *Troylukho Mohinee Dossee*, (1870) 14 Suth W R 466 (466); *Ram Buddun* v. *Sirdar Dyal Singh*, (1872) 17 Suth W R 101 (101) [Suit for malicious prosecution]; *Bykunt Nath Sandyal* v. *Kalee Churn Paul*, (1872) 17 Suth W R 149 (150) [Suit for accounts]; *Nundkishore* v. *Ram Kishore*, (1872) 17 Suth W R 359 (360) [Suit for injunction]; *Misseback* v. *Luchmee Narain*, (1872) 17 Suth W R 504 (505) [Suit for rent]; *Ram Persaud* v. *Krishto Mohun*, (1872) 18 Suth W R 297 (297); *Mahomed Buksh Khan* v. *Hosseini Bibi*, (1888) 15 Cal 684 (692): 15 Ind App 81: 5 Sar 175: 12 Ind Jur 291 P C; *Iyyappa* v. *Ramalakshmana*, (1890) 13 Mad 549 (551) [Inconsistent issues]; *Mula Khah* v. *Nizam Din*, 1890 Pun Re No 108 [Object is to keep the points for decision]; *Rajani* v. *Ram*, (1912) 17 Ind Cas 881 (882): 17 Cal W N 55; [Separate and distinct]; *Namberumal Chettiar* v. *Raghavachariar*, 1921 Mad 701 (702): 14 Mad L W 563: 71 Ind Cas 390; *Eshan Chunder* v. *Dhonaye*, (1869) 11 Suth W R 61 (61) [Wrong issue amended in appeal—Party should ask for opportunity to meet it otherwise barred].

(2) *Lakshman Das* v. *Anna*, (1908) 32 Bom 356 (361): 6 Bom L R 731; *Banumal* v. *Newandmal*, 1921 Sind 159 (164): 16 Sind L R 207: 83 Ind Cas 360.

(3) *Rajah Saheb Perladh* v. *Broughton*, (1875) 24 Suth W R 275 (276); *Vishnu Ram Chandra* v. *Ganesh*, (1897) 21 Bom 325 (327).

Note 6.

(1) *Kisto Mohun* v. *Nopan Tara*, (1868) 10 Suth W R 389 (389); *Beer Chunder* v. *Taruee Chunder*, (1869) 11 Suth W R 20 (21): 2 Beng L R A C 160; *Moondur Bibee* v. *Hunooman Pershad*, (1869) 11 Suth W R 277 (278); *Sheo Sukoy Lall* v. *Wajed Ali Khan*, (1870) 13 Suth W R 205 (206): 5 Beng L R 187 Note; *Punchanun* v. *Troylukho*, (1870) 14 Suth W R 466 (466); *Soorjomonee Dayee* v. *Suddanund Mohapatter*, (1873) 20 Suth W R 377 (379): 12 Beng L R 304: Ind App Sup 212: 3 Sar 285 P C; *Raghubar Prosad* v. *Satoo*, 1926 Nag 164 (167): 89 Ind Cas 1009; *Sabitra Monee* v. *Mudhooshoodun*, Marsh 519.

(2) *Nathubai* v. *Mulchand*, (1901) 3 Bom L R 535 (538).

Note 7.

(1) *Nagappa* v. *Sidda Lingappa*, (1918) 47 Ind Cas 589 (590): 35 Mad L Jour 372; *Subbien* v. *Ramasami*, (1903) 26 Mad 363 (363).

O. 14, R. 1, Notes 7—10.

that it would be unsafe to presume, from the failure of the Court to raise the necessary issues an intention on the part of the party to admit the fact which the other party was bound to prove.[2]

Even on points *raised in the pleadings*, the conduct of a party may, in certain circumstances, amount to abandonment.[3] A pleader duly appointed to conduct a case on behalf of his client has full authority to abandon an issue raised on behalf of his client and the latter will be bound by such abandonment.[4]

8. Delay in raising issue.—R. 5 gives the Court power to raise issues or amend or strike out issues at any time. The mere fact that a particular issue was raised at a late stage of the suit will be immaterial if the parties had sufficient opportunity to adduce evidence and the Court was in a position to pronounce judgment on it.[1]

9. Issue not raised in the pleadings but in evidence.—A relief not founded on the pleadings should not ordinarily be granted. But as has already been pointed out, there is nothing irregular in a Court granting relief on matters not set forth in the pleadings where they are comprised in the issues and have been put into evidence.[1]

Where a material point has not been raised in the pleadings and is not comprised in the issues originally framed, but appears for the first time in evidence, the Court may frame an issue on it and decide it[2] after giving the party affected an opportunity to meet it.[3]

10. Variance between pleading and proof.—*Vide* Notes under O. 6, R. 2.

O. 14, R. 2.

R. 2. [S. 146, Cl. 6] *Where* issues both of law and of fact arise in the same suit, and the Court is of opinion that the case *or any part thereof* may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Issues of law and of fact.

[1877—S. 146, Cl. 6. 1859—S. 139. Cf. R. S. C., O. 25, R. 2.]

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.

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(2) *Ganoo* v. *Shri Dev Sidheswar*, (1902) 26 Bom 360 (362): 4 Bom L R 58.

(3) *Devarajalu Naidu* v. *Kondammal*, 1925 Mad 427 (429): 20 Mad L W 754: 80 Ind Cas 929.

(4) *Venkata* v. *Bhashyakarlu*, (1902) 25 Mad 367 (377): 29 Ind App 76: 6 Cal W N 641: 4 Bom L R 543: 8 Sar 258 P C; *Surjapal* v. *Debi*, (1916) 34 Ind Cas 390 (392): 3 Oudh L J 156.

Note 8.

(1) *Sayad Muhammad* v. *Fateh Muhammad*, (1895) 22 Cal 324 (331): 22 Ind App 4: 6 Sar 515 P C.

Note 9.

(1) *Mohant Govind Rao* v. *Sita Ram Kesho*, (1899) 21 All 53 (69): 25 Ind App 195: 2 Cal W N 681: 7 Sar 370 P C; *Wahid* v. *Safal*, (1890) 12 All 556 (558): 1890 All W N 130.

(2) *Arul Khadar* v. *Andhu Set*, (1865) 2 Mad H C R 423 (426); *Muzboot Singh* v. *Mt Chunder Mashee*, (1871) 16 Suth W R 44 (45); *Nundo Lall* v. *Proosunno*, (1873) 19 Suth W R 333 (334, 335) [Suit for possession]; *Nasarbhai* v. *Badrudin*, (1892) 16 Bom 533 (535).

(3) *Parashram* v. *Miraji*, (1896) 20 Bom 569 (570).

Court whether bound to decide questions of fact where it can dispose of on issues of law only. See Note 2, Pts. (2) and (9).
Disposal on issues of law. See Note 2, Pts. (3), (4) and (5).

1. Legislative changes.—

The words "or any part thereof" are new.

2. Scope and applicability of the rule.—Ordinarily a Court is not under any obligation as to the order in which it is to try the issues raised before it, and has the right to dispose of the issues in any way which it considers most likely to be conducive to the ascertainment of truth.[1] There are however, two reservations. The *first* is that in appealable cases, the Court should as far as possible decide on all the issues joined, inasmuch as a piecemeal trial might lead to protracted litigation and repeated appeals in the same suit.[2] The *second* is that contained in this rule, which prescribes that where issues of law going to the root of the case and capable of being decided without evidence, arise, the Court is bound to try those issues first and may in its discretion postpone the settlement of the issues of the fact until after the issues of law have been determined.[3] The rule casts on the Court the duty of determining whether circumstances exist in each particular case, for the exercise of the power conferred therein.[4] Where a party suggests that the suit can be disposed of on the hearing of a preliminary issue, the proper procedure is to set down the case for settlement of issues and on that day decide which, if any, of the issues can be decided in the above manner.[5]

The present rule, no doubt, contemplates the procedure to be followed at the issue stage: But O. 15, R. 3 empowers the judge to proceed to determine issues of law at any subsequent stage also,[6] so that even if issues of fact have been settled, a judge commits no irregularity if he proceeds to determine issues of law postponing the trial of the issues of fact.[7]

At the hearing of a case on a preliminary issue, the party by whom it is raised has the right to begin.[8]

The trial of issues of fact will not be stayed pending appeal on the decision on law except upon very strong grounds.[9]

An issue *requiring evidence* is not a preliminary issue which can be dealt with under this rule.[10] Where all the issues are issues of fact, the Court has

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Order 14, Rule 2—Note 2.

(1) *Sita Nath v. Doyadranath*, (1875) 23 Suth W R 54 (55).

(2) *Satya Niranjan v. Dwarka Nath*, (1921) 60 Ind Cas 528 (528): 1921 Pat 323 (1): 2 Pat L Tim 154; *Bhagwandas Gokuldji v. Balku Babaji*, 1932 Bom 1 (3): 33 Bom L R 1291: 136 Ind Cas 497 [Court dismissing on preliminary issue—Desirability—Decision on all issues desirable unless records are heavy and issue of law is clear].

(3) *Ranganani Dasi v. Jogendra Nath*, (1909) 3 Ind Cas 304 (306): 9 Cal L Jour 128.

(4) *Lachmi Narain v. Rup Narain*, 1921 Pat 467 (467): 2 Pat L R Civ 303: 6 Pat L Tim 729: 85 Ind Cas 29.

(5) *The Eagle Star and British Dominions Insurance Co v. Dinanath*, 1923 Bom 249 (251): 25 Bom L R 164: 72 Ind Cas 266: 47 Bom 509.

(6) *Lachminarain v. Rup Narain*, 1921 Pat 467 (467): 2 Pat L R Civ 303: 2 Pat L Tim 729: 85 Ind Cas 29

(7) *Kuarmani Singha v. Wasif Ali Mirza*, (1915) 28 Ind Cas 818 (819): 19 Cal W N 1193; *Ramakrishna Pillai v. Krishnaswamy Pillai*, 1922 Mad 321 (322): 15 Mad L W 667: 1922 Mad W N 521: 68 Ind Cas 167.

(8) *Fatmabai v. Aishabai*, (1888) 12 Bom 454 (459): 13 Ind Jur 63.

(9) Re *Palmer's Application*, (1882) 22 Ch D 88 C A.

(10) *Jagnarain Dubey v. Bidapat Dubey*, 1923 Pat 344 (345): 4 Pat L Tim 202: 72 Ind Cas 409: 1 Pun L R 332; *Yatindra Nath v. Hari*

O. 14, R. 2, Note 2. no power to try only some of them and postpone the trial of the others save on the ground of embarrassment.[11]

Materials from which issues may be framed.

R. 3. [S. 147.] The Court may frame the issues from all or any of the following materials:—

O. 14, R. 3, Notes 1—2. (*a*) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(*b*) allegations made in the *pleadings* or in answers to interrogatories delivered in the suit;

(*c*) the contents of documents produced by either party.

[1877—S. 147, 1859—S. 139.]

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. Issue not to be inconsistent with the pleadings.
4. Appeal.

Allegation on oath. See Note 2, Pt. (4).

1. Legislative changes.—

The word "pleadings" in clause (*b*) has been *substituted* for the words "in the plaint or in the written statement (if any) tendered in the suit" which occurred in the corresponding portion of the old section.

2 Scope and applicability of the rule.—In *Eshenchunder* v. *Shamcharan*,[1] their Lordships of the Privy Council observed that "the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made." In order to provide against failure of justice upon technical rules of pleadings and to enable the Court to frame issues on correct points of dispute, this rule prescribes that the Courts are to base the issues not only on the pleadings only but on the other materials referred to in the rule as well.[2] Owing to the infelicitous mode of drawing up pleadings prevalent in this country, the real points in dispute are often missed or obscured and therefore even if the pleadings are bad it is the duty of the judge to ascertain these points clearly and frame issues accordingly.[3] The proper "materials" that may be taken into consideration under this rule are:—

Charan, (1915) 26 Ind Cas 954 (957): 20 Cal L Jour 426. See *Katuru Seshagiri Rao* v. *Katuru Venkatakrishna Rao*, 1932 Mad W N 331 (332) [Such an issue not to be tried before framing all necessary issues]; *Sowkabai* v. *Tukoji Rao Holkar*, 1932 Bom 128 (129): 34 Bom L R 6: 56 Bom 224: 137 Ind Cas 362 [There is no power to frame a preliminary issue of *fact*].

(11) *Bhimnath* v. *Jagarnath*, 1925 Pat 674 (676): 1925 Pat H C C 294: 89 Ind Cas 814: 7 Pat L Tim 82; *Mahipal* v. *Lalji*, (1912) 16 Ind Cas 705 (707): 17 Cal W N 166. See also *Sowkabai* v. *Tukoji Rao Holkar*, 1932 Bom 128 (129): 34 Bom L R 6: 56 Bom 224: 137 Ind Cas 362.

Order 14, Rule 3—Note 2.

(1) *Eshen Chunder* v. *Shama Churn*, (1866-67) 11 Moo Ind App 7 (21 and 23): 6 Suth W R P C 57: 2 Ind Jur N S 87: 2 Sar 209 P C.

(2) *Giyana Sambandha* v. *Kandasami*, (1887) 10 Mad 375 (502).

(3) *Moulvie Abdoollah* v. *Shaha Mirjeasooddeen*, (1871) 15 Suth W R 286 (287); *Cannammal* v. *Vijaya Rangaswamy*, (1870-71) 8 Mad H C R 114 (125, 132).

(1) Allegations made on oath by the parties or any persons present on their behalf and statements made by pleaders appearing for the parties[4] [Cl. (*a*)]; O. 14, R. 3, Note 2.

(2) Allegations in answers to interrogatories[4-a] [Cl. (*b*)]; and

(3) Documents filed by parties [Cl. (*c*)].

Under R. 4 the judge can summon witnesses and documents and examine them before framing issues. In R. 5 provision is made for amendment, addition and striking out of issues in the course of the trial.

These "materials" mentioned in the rule are only intended to enable the Court to ascertain the contentions of the parties with precision,[5] *i.e.*, to elucidate points which are *ambiguous or obscure*.[6] They cannot *enlarge* the scope of the pleadings so as to enable the Court to raise an issue on a point not at all raised in the pleadings.[7] Issues may, however, be based on such materials, as for instance the oral examination of the parties or their pleaders, notwithstanding the fact that the allegation of fact contained in such examination differs from that contained in the pleadings.[8] Further, the Court cannot refuse to enquire into a plea raised by plaintiff's vakil in reply to a question put to him by the Court even though such a plea has not been advanced in the original plaint.[9] Also where a plaint has not set out the true facts, a plea raised by the defendant in his examination cannot be refused on the ground that it is not found in the written statement.[10]

The result of the exhaustive provisions contained in this rule is that if in spite of all these a point or plea has not been raised or agitated in the trial Court, it will not ordinarily be allowed to be raised for the first time in second appeal.[11]

The provisions of this rule do not apply where the defendant is *ex-parte*.[12]

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(4) *Modhe* v. *Dongre*, (1880-81) 5 Bom 609 (614); *Mackintosh* v. *Temple*, (1863) 2 Ind Jur N S 333; *Mt Kounallaya Dossee* v. *Ram Juggernath Dessicar*, (1867) 8 Suth W R 162 (162); *Man Gobind Sircar* v. *Umbika Monee Dossia*, (1871) 16 Suth W R 218 (219); *Latoo Mundul* v. *Bhoolum Mohun Chatterjee*, (1872) 17 Suth W R 361 (362); *Apaya* v. *Rama*, (1879) 3 Bom 210 (213); *Thakur Rohan Singh* v. *Thakur Surat Singh*, (1884-85) 11 Cal 318; 12 Ind App 52 (56); 4 Sar 590 P C; *Mahomed* v. *Safar Ali*, (1885) 11 Cal 407 (410); *Kamini Debi* v. *Jautosh*, (1887) 15 Ind App 159 (163); 16 Cal 103; 5 Sar 246 P C; *Ganga Narain Gupta* v. *Tilukram Chowdhry*, (1888) 15 Cal 533 (537); 15 Ind App 119 P C; *Secretary of State* v. *Dip Chund*, (1897) 24 Cal 306 (309); *Srimathi Bashini Dasi* v. *Krishna Lal Chatterjee*, (1919) 51 Ind Cas 1007 (1008) Cal; *M Koru Kutty* v. *Valikathodigal Ahammad*, 1925 Mad 169 (169); 78 Ind Cas 1.

(4-a) *Alikadir* v. *Gobind Das*, (1890) 17 Cal 840 (848).

(5) *Alikadir* v. *Gobind Das*, (1890) 17 Cal 840 (848).

(6) *Kashinath* v. *Ram Niranjan*, (1902) 22 All W N 35 (37, 38).

(7) *Kashinath* v. *Ram Niranjan*, (1902) 22 All W N 35 (37, 38); *Nagappa* v. *Siddalingappa*, (1918) 47 Ind Cas 589 (590); 35 Mad L Jour 372; *Pitty Theagaraya Chettiar* v. *Sivapada Mudali*, (1911) 12 Ind Cas 137 (138); 21 Mad L Jour 1008; 10 Mad L Tim 267; (1911) 2 Mad W N 275 [In fact a Court is not justified in framing an issue on a point alleged in the plaint].

(8) *Shahebzadi Begum* v. *Himmat Bahadur*, (1870) 4 Beng L R A C 103; 12 Suth W R 512; *Sounder Narain Pandah* v. *Shaikh Namdar*, (1874) 21 Suth W R 407 (408).

(9) *Kabeeroodden Ahmed* v. *Nyan Bibi*, (1867) 8 Suth W R 354 (355).

(10) *Doorga Narain* v. *Brijo Kishore*, (1875) 23 Suth W R 172 (173).

(11) *G F Fischer* v. *Kanaka Naicker*, (1859-61) 8 Moo Ind App 170 (187); 3 Suth W R 33; 1 Suth 395; 1 Sar 733 P C; *Wali-ul-lah Khan* v. *Muhammad Inher-ul-lal Khan*, (1888) 10 All 627 (630); 8 All W N 242; *Broja Soondur* v. *Futick Chunder*, (1872) 17 Suth W R 107 (408); *Jugdeep Narain Sahe* v. *The Court of Wards*, (1871) 22 Suth W R 469 (471); *Mt Ameeroonnissa Khatoon* v. *Mt Abidoonnissa Khatoon*, (1874-75) 23 Suth W R 208 (211); 2 Ind App 87; 15 Beng L R 67 P C.

(12) *Ameer Ali Soudagar* v. *Imamudeen*, (1871) 15 Suth W R 145 (146).

O. 14, R.3, Notes 3–4.

3. Issue not to be inconsistent with the pleadings.—The issue raised by the Court should not be *inconsistent* with the allegations contained in the pleadings.[1] Thus on a plea of forgery of a document, no issue can be raised as to whether it was executed under coercion or undue influence.[2] But an issue as to undue influence is not *inconsistent* with a plea of fraud.[3]

4. Appeal.—An order refusing to frame an issue asked for by a party is not appealable either under the Code[1] or under Cl. 15 of the Letters Patent as a "Judgment."[2]

O.14, R.4, Notes 1—2.

R. **4.** [S. 148.] *Where* the Court *is* of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a *future* day, and may (subject to *any law for the time being in force*) compel the attendance of any person or the production of any document by the person in whose *possession or power* it *is* by summons or other *process*.

Court may examine witnesses or documents before framing issues.

[1877—S. 148; 1859—S. 140.]

Synopsis.

1 Legislative changes. 2. Scope and applicability of the rule.

1. Legislative changes.—

1. The words "to be fixed by the Court" which occurred in the old section have been omitted.
2. The words "subject to the rules contained in the Indian Evidence Act "which occurred in the old section have been substituted by the words "subject to any law for the time being in force".
3. The words "in whose hands it may be" which occurred in the old section have been changed into "in whose possession or power it is".

2. Scope and applicability of the rule.—S. 163 of the Indian Evidence Act does not apply to a document produced under this rule by one party at the instance of the other party.[1]

Note 3.

(1) *Mahomed Baksh* v. *Hussain Bibi*, (1888) 15 Cal 684 (692): 15 Ind App 81: 5 Sar 175: 12 Ind Jur 291 P C [Suit to set aside a gift-deed on the allegation of undue influence]; *Eshenchunder Singh* v. *Shamachurn Bhutto Koilashchunder Singh*, (1866) 11 Moo Ind App 7 (20, 21): 6 Suth W R P C 57: 2 Ind Jur N S 87: 2 Sar P C J 209; *Iyyappa* v. *Ramalakshmana*, (1890) 13 Mad 549 (551); *Kumarasamy* v. *Poosari*, (1909) 4 Ind Cas 37 (37): 20 Mad L Jour 141 [Suit for possession].

(2) *Muhamed Buksh Khan* v. *Hosseini Bibi*, (1888) 15 Cal 684 (692): 15 Ind App 81.

(3) *Muhammad Ibrahim* v. *Umatullah Jan*, (1917) 39 Ind Cas 798 (800): 72 Pun W R 1917: 90 Pun Re 1917.

Note 4.

(1) *Ebrahim* v. *Fukhrunnissa*, (1879) 4 Cal 531 (535): 3 Cal L Rep 311.

(2) *Tuljaram* v. *Alagappa*, (1910) 8 Ind Cas 340 (343 & 349): 1910 Mad W N 697: 8 Mad L Tim 453: 21 Mad L Jour 1: 35 Mad 1 F B [Dissenting from 14 Cal 88 (93)].

Order 14, Rule 4—Note 2.

(1) *Trimbak* v. *Shri Sitaram Samsthan*, 1926 Nag 60 (61): 89 Ind Cas 1016.

Power to amend, and strike out, issues.

R. 5. [S. 149.] (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the *matters in* controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

[1877—S. 149; 1859—S. 141.]

Synopsis.

1 Legislative changes.
2. Scope and object of the rule.
3. Where an amendment of issues and the framing of new issues is obligatory.
4. Where an amendment of issues and the framing of new issues is discretionary.
5. "At any time before passing the decree."
6 Power of appellate Court to amend issues or frame additional issues.
7. Sub-Rule (2).

Variance in proof, pleadings and issues. **See Order 6.**

1. Legislative changes.—

The word "controversy" which occurred in the old section has been changed into "matters in controversy".

2. Scope and object of the rule.—This rule provides for amending issues, framing additional issues and striking out issues in the course of the trial of a suit. A Court trying a civil action has inherent jurisdiction to take cognisance of questions going to the root of the subject-matter in controversy between the parties at any stage of the trial.[1] But before doing so, the Court should, frame and record issues on such questions.[2]

This rule does not enable the re-opening of issues already closed; in other words, a permission to raise an additional issue would not empower the party to let in additional evidence on issues already closed.[3]

3. Where an amendment of issues and the framing of new issues is obligatory.—Where an amendment of an issue or an additional issue is *necessary* for determining the matter in controversy between the parties, it is obligatory on the Court under the latter portion of sub-R. (1) to make such amendments of issues or to frame such additional issues. The principle underlying this provision is that Courts are bound to take into consideration all the

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Order 14, Rule 5—Note 2.

(1) *Shamu Pattar* v. *Abdul Kadir Rowthen*, (1912) 16 Ind Cas 250 (252): 16 Cal W N 1009: 23 Mad L Jour 321: 12 Mad L Tim 338: 1912 Mad W N 935: 10 All L J 259: 14 Bom L R 1034: 35 Mad 607: 16 Cal L Jour 596: 39 Ind App 218 P C; *Baijnath Singh* v. *Brijraj Kuar*, 1922 Pat 514 (524); *Ratna Naidu* v. *Aiyavacharier*, (1915) 29 Ind Cas 991 (992): 1915 Mad W N 637 [Invalidity of mortgage for want of proper attestation—Raised only at trial—Distinct issue to be raised and opportunity for evidence to be given].

(2) *Sankararama Iyer* v. *Ponnusami Pillai*, (1919) 49 Ind Cas 273 (274): 1919 Mad W N 23: 9 Mad L W 198: 25 Mad L Tim 257.

(3) *Narayanan* v. *Lakshmanan*, (1915) 29 Ind Cas 1 (3): 39 Mad 456: 28 Mad L Jour 571.

O. 14, R. 5, Notes 3—4.

rights of parties whether legal or equitable.[1] Thus where the pleadings and proof necessarily lead to one or more particular issues, it is the duty of the Court, if they do not come by surprise to the other side, to raise such issues and give relief thereon.[2] Similarly, where a matter is fairly within the scope of the pleadings and important for the decision of the substantial dispute between the parties, it is equally the duty of the Court to frame issue on it and decide it.[3] For illustrations of this principle, *see* the cases noted below.[4] If the issue already framed do not clearly bring out the points in controversy between the parties[5] or if by inadvertance or other causes, the recorded issues do not enable the Court to try the whole case on the merits,[6] the issues should be amended or new issues framed in order to be able to give a decision on the *real points* in dispute.

4. Where amendments of issues and the framing of additional issues is discretionary.—The first portion of sub-R. 1 leaves it to the discretion of the Court to amend issues or frame additional issues in certain cases not falling within the obligatory provision. Where no injustice would be done to either party, the Court, in the exercise of its discretion, under special circumstances, may allow issues to be raised upon matters which do not come within the proper scope of the pleadings.[1] The same discretion applies in the matter of amendment of issues also.[2] This discretion is, however, subject to several restrictions. Thus a party, having set up one case and *failed* in it, will not be

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Note 3.

(1) *Viraswamy* v. *Aiyaswamy*, (1862-63) 1 Mad H C R 471 (477). See also *Sahib Ram* v. *Nagarmal*, (1884) Pun Re No 63; *Nehora* v. *Radha*, (1880) 5 Cal 64 (70, 71): 4 Cal L Rep 353: 4 Ind Jur 510: 3 Shom L R 78; *Bhoobun Dass Mundul* v. *Srimathi Bilahmony Dassee*, (1878) 1 Cal L Rep 415 (417).

(2) *Obhoychurn Mullick* v. *Soonee Chunder Paul*, 2 Hyde 263.

(3) *Kishen Pershad* v. *Bhawanee Deen*, (1866) 1 Agra 46 F B.

(4) *East India Ry Co* v. *Jordan*, (1870) 14 Suth W R O C 11 (14) [Suit by several plaintiffs as partners—Some of them found to be not partners at the time of cause of action. Court should frame issue whether plaintiffs are or are not partners and give relief to those who are partners]; *Banee Madhub* v. *Bipro Dass*, (1871) 15 Suth W R 69 (70) [Suit brought against two persons, an issue whether one of them is solely liable if it arises]; *Abdul Kader* v. *Mahomed*, (1892) 15 Mad 15 (16) [In a declaratory suit it appeared on the evidence for the defendant that he has been in possession of a part of the property, but no issue had been framed as to the maintainability of the suit under S 42 of the Specific Relief Act. *Held*, that the Court should take evidence and try an issue on this point]; *Wahid Alam* v. *Safat Alam*, (1890) 12 All 556 (558): 1890 All W N 130 [Where a plaintiff claims exclusive possession and proves a right to joint possession only, he is entitled to a decree for joint-possession provided a specific issue is raised on it, and the defendant is given an opportunity of meeting it]; *Ram Chunder* v. *Madho*, (1891) 11 All W N 45 (46), (Do.); *Parashram* v. *Murarji*, (1896) 20 Bom 569 (570): 1895 Bom P J 161, (Do.); *Muzhoot Singh* v. *Mt Chunder Mashee Kooer*, (1871) 16 Suth W R 44 (45) [In a suit for possession defendant pleaded limitation, and it was unexpectedly disclosed in the Courts of the trial that he was a mortgagee. It was the duty of the judge to frame an issue on this subject]; *Durga Narain Bose* v. *Brojo Kishore Ghose*, (1875) 23 Suth W R 172 (173) [In a suit for possession of land, the plaintiff described himself as the son of a certain man. The defendant denied that the land belonged to that person but stood in the name of an idol, the possession being with a different person under whom the defendant held it under a lease and mortgage deed. On the day of the final disposal of the suit the plaintiff petitioned that he was the son of that person, the lessor of the defendant. Held upon the new allegations the Court should have allowed the defendant to make his defence, framed issues and given the defendant an opportunity to produce his evidence]; *Hill* v. *Clarke*, (1905) 27 All 266 (270, 271): 1 All L J 632: 1904 All W N 238; *Bolye Meah* v. *Khetoo Gorai*, (1873) 20 Suth W R 208 (208) [In a case in which, after the evidence of both parties had been taken, the principal defendant asked for permission to file an amended written statement which would in effect raise a new question as part of the defence; held, though the application is informal it was the duty of the Munsif, if it appeared that this was the real question between the parties to amend the issues].

(5) *Olagappa Chetty* v. *Arbuthnot*, (1873) L R 1 Ind App 268 (318): 14 Beng L R 115: 3 Sar 318: 21 Suth W R 358; *Kuverji* v. *Babai*, (1895) 19 Bom 374 (386).

(6) *Hanooman Prasad Panday* v. *Mt Babooee Munraj Koonweree*, (1854-57) 6 Moo Ind App 393 (410, 411): 18 Suth W R 81 (Note) Sevestre 253: 2 Suth P C J 29: 1 Sar P C J 552.

Note 4.

(1) *Nehora Roy* v. *Radha Prasad*, (1880) 5 Cal 64 (70): 4 Cal L Rep 853: 4 Ind Jur 510: 3 Shom L R 78; *Modhe* v. *Dongre*, (1880-81) 5 Bom 609 (614); *Appaswamy Naicken* v. *Varadachari*, (1896) 19 Mad 419 (422): 4 Mad L Jour 263 [The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties, subsequent to the institution of the suit].

(2) *Umesh Narain* v. *Secretary of State*, 1925 Cal 1157 (1160): 87 Ind Cas 575.

O. 14, R. 5, Notes 4—5.

allowed to ask for issues to be raised to suit the proof.[3] Nor should a judge take the case altogether out of the hands of the parties and make for them a case which they had no intention of making for themselves.[4] Similarly no amendment should be made and no new issues raised on points which are inconsistent with the original pleas[5] or are wholly different from them[6] or which will change the nature of the suit[7] nor should a new issue be framed which would re-open the whole case.[8]

Where a judge at the settlement of issues had decided not to raise a certain issue, the question could not be re-opened at the trial.[9]

The exercise of the power under this part of the sub-rule being discretionary it is doubtful whether a revision would lie from an order declining to amend issues or frame additional issues.[10] In any view, the exercise of the discretion will not be interfered with unless the discretion is shown to have been *abused* or perversely exercised.[11]

5. "**At any time before passing the decree.**"—The Court may amend issues or frame additional issues at any time before passing the decree.[1] Thus the power can be exercised even after the close of the arguments[2] unless the exercise of the power at such a late stage is likely to prejudice the fair trial of the case.[3]

A Court acts irregularly in simply recording a proceeding declaring its intention to frame additional issues and postponing the actual framing of such issue till judgment.[4]

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(3) *Obhoy Churn* v. *Woomesh Chunder*, (1864) 2 Hyde 263; *Joytara* v. *Muhamed Mobaruck*, (1882) 8 Cal 975 (980): 11 Cal L Rep 399: 5 Shom L R 13; *Venkatanarasimha* v. *Bhashyakarlu*, (1902) 25 Mad 367 (378) P C: 29 Ind App 76: 6 Cal W N 641: 4 Bom L R 543: 8 Sar 258.

(4) *Naro Hari* v. *Anpurnabai*, (1874) 11 Bom 160 Note (164 Note): 1875 Bom P J 218; *Radha Binode* v. *Kootabode*, (1871) 15 Suth W R 363 (363): 14 Beng L R 205 Note; *Dodbasappa* v. *Pradhanappa*, 1926 Bom 33 (37): 27 Bom L R 1318: 91 Ind Cas 426.

(5) *Douglas* v. *Collector of Benares*, (1851) 5 Moo Ind App 271 (290): 1 Sar 434: 1 Suth 231; *Tarucknath* v. *Gouree Churn*, (1865) 3 Suth W R 147 (150); *Shurut Soonduree* v. *Puresh Narain*, (1870) 13 Suth W R 464 (465); *Hamilton* v. *Land Mortgage Bank*, (1883) 5 All 456 (459): 1883 All W N 99; *Damodar* v. *Paramanand Das*, (1883) 7 Bom 155 (160): 7 Ind Jur 367; *Mohomed Buksh Khan* v. *Hosseini Bibi*, (1888) 15 Cal 684 (692) P C: 15 Ind App 81: 5 Sar 175 P C. But see *Chandi Din* v. *Narain Kuar*, (1892) 14 All 366 (371) P C.

(6) *Bizji Bebee* v. *Monohur*, 2 Ind Jur N S 118; *Durga Baksh* v. *Mirza Muhammad Ali*, (1905) 27 All 1 (10) P C: 31 Ind App 235: 7 Oudh Cas 287: 8 Sar 725; *Ismail Mussajee* v. *Hafiz Boo*, (1906) 33 Cal 773 (783) P C: 33 Ind App 86: 8 Bom L R 379: 3 All L J 353: 3 Cal L Jour 484: 16 Mad L Jour 166: 10 Cal W N 570: 1 Mad L Tim 137.

(7) *East India Railway* v. *Jordan*, (1870) 14 Suth W R 11 (14) A C J; *Narayan Ganesh* v. *Hari Ganesh*, (1889) 13 Bom 664 (668, 669); *Jhari Singh* v. *Prithi Nath Sahu*, (1917) 38 Ind Cas 191 (192): 1 Pat L W 85: 2 Pat L Jour 69.

(8) *Haji Saboo* v. *Ayeshabai*, (1903) 27 Bom 485 (491): 5 Bom L R 475: 7 Cal W N 665: 30 Ind App 127: 8 Sar 477. See also *Sobhanadri* v. *Parthasarathi*, 1932 Mad 583 (587): 62 Mad L Jour 154: 35 Mad L W 279: 1932 Mad W N 494: 137 Ind Cas 274 [Issue framed subject to a conditional order—Trial proceeded both parties ignoring the condition—Appellate Court not to amend issue incorporating the condition as the same entails remand for additional evidence].

(9) *Bolye Chund Sing* v. *Moulard*, (1878) 4 Cal 572 (574).

(10) *V V M Chetty Firm* v. *R M A R Arunachalam Chetty*, (1915) 29 Ind Cas 876 (877): 8 L B R 77.

(11) *Indar Narain* v. *Nanak Chand*, (1911) 9 Ind Cas 267 (267): 51 Pun L R (1911) 193 Pun W R 1911.

Note 5.

(1) *Madho* v. *Dangre*, (1881) 5 Bom 609 (614); *Trimbakdas* v. *Mt Mathabai*, 1930 Nag 225 (228): 124 Ind Cas 609.

(2) *Shamu Pattar* v. *Abdul Kader*, (1912) 16 Ind Cas 250 (252): 35 Mad 607: 39 Ind App 218: 1912 Mad W N 935: 10 All L J 259: 14 Bom L R 1034: 16 Cal L Jour 596: 16 Cal W N 1009: 23 Mad L Jour 321: 12 Mad L Tim 338 P C; *Babu Baijnath Singh and others* v. *Mt Brijoraj Kuar and another*, 1922 Pat 514 (524): 68 Ind Cas 383: 2 Pat 52: 4 Pat L Tim 239. See also *Alagiri Naicker* v. *Guruswamy Naicker and others*, 1928 Mad W N 836: 1928 Notes 75 (b).

(3) *Sohan Bibi* v. *Hiran Bibi*, (1911) 10 Ind Cas 230 (231) All; *Nirod Krishna* v. *Indra Bhusan*, (1919) 53 Ind Cas 975 (976) Cal.

(4) *Kamul Kamini* v. *Obhoy Churn*, (1871) 15 Suth W R 151 (152).

O. 14 R. 5, Notes 6—7.

6. Power of the appellate Court to amend the issues or frame additional issues.—Where by inadvertance or other causes, the issues recorded do not enable the appellate Court to try the whole case on the merits, it should make the necessary amendments or frame additional issues.[1] But a point not suggested in the pleadings and not raised in the first Court should not be put in issue for the first time by the appellate Court.[2] Where new issues are raised by the appellate Court the parties should have an opportunity of producing evidence on them[3] and the proper course in such cases is to frame the issues and refer them for trial by the Court of the first instance.[4]

7. Sub-Rule 2.—Sub-Rule 2, empowers the Court at any time before passing the decree, to strike out any issue that appears to have been wrongly framed or introduced. But if the issues have been framed by consent of both the parties, they should not be struck out without the consent of both.[1] Where the lower appellate Court framed a wrong issue but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court refused to remand the case for a new finding on the point.[2]

O. 14, R. 6.

R. 6. [S. 150.] *Where* the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

Questions of fact or law may by agreement be stated in form of issues.

(*a*) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(*b*) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

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Note 6.

(1) *Ram Persaud* v. *Kristo Mohun*, (1872) 18 Suth W R 297 (297); *Sheonarain* v. *Jaigobind*, (1882) 4 All 281 (283): 1882 All W N 33; *Ram Prasad* v. *Jamma*, (1882) 2 All W N 93 (93).

(2) *Brojo Soondur* v. *Futick Chunder*, (1872) 17 Suth W R 407 (408); *Toodhesty Mirdha Taruck* v. *Chunder Chuckerbutty*, (1874) 22 Suth W R 299 (300); *Ram Narain* v. *Nilmonee*, (1874) 23 Suth W R 169 (170); *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*, (1875) 2 Ind App 87 (112): 23 Suth W R 208: 15 Beng L R 67: 3 Sar 423: 3 Suth 87; *Mackintosh* v. *Lalachund Malee*, (1875) 23 Suth W R 332 (333); *Rajaram* v. *Sonatun*, (1875) 23 Suth W R 404 (406); *Khodeeram* v. *Kishen*, (1876) 25 Suth W R 145 (145); *Walid-lah-khan* v. *Muhammad-Israr-ul-lah-khan*, (1888) 10 All 627 (628): 8 All W N 212; *Mulla Abdul Hai* v. *Khatija*, (1910) 12 Bom L R 514; *Fisher* v. *Kamala Naicker*, (1859-61) 8 Moo Ind App 170 (187): 3 Suth W R P C 33: 1 Sar 733: 1 Suth 895.

(3) *Srihari Mandal* v. *Judonath Ghose*, (1868) 10 Suth W R 169 (170): 1 Beng L R A C 110; *Eshan* v. *Dhoney*, (1869) 11 Suth W R 61 (61); *Latoo* v. *Bhuban*, (1872) 17 Suth W R 361 (362); *Mahomed Rasid* v. *Jadoo Mirdhas*, (1872) 20 Suth W R 401 (402).

(4) *Kelu Mula Cheri Nayar* v. *Chandu*, (1890) 19 Mad 157 (169).

Note 7.

(1) *Ramasamy Pillai* v. *Marimuthu Goundan*, 1928 Mad 764 (771).

(2) *Ram* v. *Ganesh*, (1897) 21 Bom 325 (327).

(*c*) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute. O. 14. R 6 Notes 1—2

[1877—S. 150; 1859—S. 142. Cf. O. 36, R. 1.]

Synopsis.

1. Scope and applicability of the rule. 2. Appeal.

Form of agreement. See Note 1.

1. Scope and applicability of the rule.—This rule may be compared with O. 36 which deals with the statement of a special case for the opinion of the Court, without bringing a suit. This rule and R. 7 deal with stating by consent, of *special issues in a suit*, and provide for what may be called an adjustment or compromise of a suit, not absolutely as under O. 23, R. 3, but contingently on the opinion of the Court on certain issues of fact or law submitted to it. Upon the finding of those issues being given the adjustment or compromise becomes absolute.[1] The finding on the issues so submitted must be confined to matters raised in issue.[2] As to the form of agreement for issues to be tried, *see* Appendix II, Form No. 1.

2. Appeal.—A decree passed under the terms of Rr. 6 and 7 is appealable.[1] But where the parties agreed to refer issues of fact to a commissioner and to abide by his findings, it was held that no appeal would lie against a decree passed on the report of the commissioner.[2]

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

R. **7.** [S. 151.] *Where* the Court *is* satisfied, after making such inquiry as it deems proper,— O. 14, R. 7.

(*a*) that the agreement was duly executed by the parties,

(*b*) that they have a substantial interest in the decision of such question as aforesaid, and

(*c*) that the same is fit to be tried and decided,

it *shall* proceed to record and try the issue and state its finding or *decision* thereon in the same manner as if the issue had been framed by the Court;

and *shall*, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so *pronounced*, a decree shall follow.

[1877—S. 151; 1859—S. 143.]

Order 14, Rule 6—Note 1.

(1) *Goculdas v. J Scott*, (1891) 16 Bom 202 (216).

(2) *Domaji v. Thulshiram*, 1928 Nag 179 (180): 107 Ind Cas 514.

Note 2.

(1) *Shugan Chand v. Judayal Mal*, 1886 All W N 233 (233) [Issues agreed by parties].

(2) *Protap Chunder Dass v. Arathoon*, (1882) 8 Cal 455 (459): 10 Cal L Rep 443; *Bahir Das v. Nobin Chundra*, (1902) 29 Cal 306 (310): 6 Cal W N 121

O.14, R. 7, Notes 1—2.

Synopsis.

1. Legislative changes. 2. Scope of the rule.

1. Legislative changes.—

1. The word "may" which occurred in the two paragraphs of clause (*c*) of the old section has been substituted by the word "shall" in the present rule.

2. Scope of the rule.—As has been seen in Note 1 to Rule 6 *ante* that rule provides for the adjustment of a suit *contingent* upon the opinion of the Court on certain issues of fact or law, submitted to it by the parties. Upon the findings on issues so submitted being given the adjustment becomes absolute and the Court is bound to pronounce judgment according to the terms of the agreement.[1]

As to appeals under this rule, *vide* Notes under R. 6, *supra*.

ORDER XV.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

O.15, R.1, Notes 1—2.

Parties not at issue.

R. **1**. [S. 152.] *Where* at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

[1877—S. 152; 1859—S. 144.]

Synopsis.

1. First hearing—Meaning of. See O. 8, R. 1. 2. Disposal at first hearing.

1. First hearing—Meaning of.—*See* O. 8, R. 1.

2. Disposal at first hearing.—Where the parties are not at issue upon any point of fact or law, the Court may, under this rule, at once pronounce judgment. It has been seen in O. 5, R. 1, that no summons need be sent to a defendant who has appeared at the presentation of the plaint and admitted the plaintiff's claim. In such a case and in cases where the defendant appears after summons at the first hearing and *confesses judgment*, the Court may proceed to give judgment.[1] But the Court must be satisfied that the proper persons are before the Court and that the confession of judgment is *unconditional*. Where the confession is conditional the Court must dispose of the suit on the merits.[2]

A Court is not justified in disposing of a case two days before the date fixed for hearing and the decree so passed will be set aside.[3]

Order 14, Rule 7—Note 2.

(1) *Gocuddas Co* v. *J Scott*, (1892) 16 Bom 202 (216).

Order 15, Rule 1—Note 2.

(1) *Bank of Bengal* v. *Churrie*, (1869) 3 Beng L R 396: 12 Suth W R 432 (434).

(2) *Atmaram* v. *Chundan Singh*, (1867) 2 Agra H C Rep 77.

(3) *Zul Fikar* v. *Nabi Baksh*, 1924 Lah 459 (460): 80 Ind Cas 321: 6 Lah L Jour 155.

O. 15, R. 2. Note 1.

R. **2.** [S. 153.] Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

One of several defendants not at issue.

[1877—S. 153.]

Local Amendment.

MADRAS.

Re-number Rule 2 as sub-Rule 2 (1) and *insert* the following as sub-Rule (2):—

"(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced."

Synopsis.

1. Confession of judgment by one of several defendants.

1. **Confession of judgment by one of several defendants.**—Where one of several defendants appears and confesses judgment, and judgment is pronounced against him, it does not bar further prosecution of the suit as against the other defendants.[1]

O. 15. R. 3.

R. **3.** [S. 154.] (1) *Where* the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court *is* satisfied that no further argument or evidence than the parties can at once *adduce* is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:

Parties at issue.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) *Where* the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

[1877—S. 154; 1859—S. 145.]

Order 15, Rule 2—Note 1.

(1) *Dick* v. *Dhunji*, (1901) 25 Bom 378 (386): 3 Bom L R 234.

O. 15, R. 3, Notes 1—3.

Synopsis.

1. Application of the rule.
2. Summons for settlement of issues only —Effect of.
3. "And shall fix a day", sub-Cl. (2).

1. Application of the rule.—This rule and O. 14, R. 2. give power to the Court to try issues of law first. The power under O. 14, R. 2 can be exercised at the issue stage.[1] As to whether this rule gives power to the Courts to proceed to determine issues of law at a *stage subsequent* to the issue stage, there is a difference of opinion. The High Courts of Madras[2] and Patna[3] have held that it does while the High Court of Calcutta[4] has held that it does not.

But though this rule empowers a Court to dispose of a suit on preliminary issues, it should not ordinarily do so but should pronounce its opinion on all important issues.[5] The reason is that piecemeal trial of a case leads to serious inconvenience and protracts litigation. In *Tara Kant Banerjee* v. *Puddo Mohini Dassa and others*.[6] Lord Justice Turner, in delivering the judgment of the Privy Council observed as follows:—"The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinion on *all* the important points."

Where the suit is sought to be disposed of on a preliminary point of law, it must be done only on the assumption that the facts pleaded can be and are proved.[7]

2. Summons for settlement of issues only—Effect of.—Where the summons has been issued for the settlement of issues only, the Court may proceed to hear and dispose of the case if the parties are ready and willing to proceed.[1] If, however, one of the parties *objects* to the adoption of such a procedure, the Court has no jurisdiction to proceed to dispose of the case.[2]

3 "And shall fix a day"—Sub-Cl. (2).—The great object of the Code in requiring a day to be fixed for the hearing of the case and all the evidence to be adduced on that day is that parties may thus be confronted with each

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Order 15, Rule 3—Note 1.

(1) *Lachmi Narain* v. *Rup Narain*, 1921 Pat 167 (167): 85 Ind Cas 29. 92 Ind Cas 712.

(2) *Ramakrishna* v. *Krishnasami*, 1922 Mad 321 (322): 68 Ind Cas 167.

(3) *Lachmi Narain* v. *Rupnarayan*, 1921 Pat 467 (467): 85 Ind Cas 29.

(4) *Yatindranath* v. *Haricharan*, (1915) 26 Ind Cas 954 (957) Cal.

(5) *Muhammad Sulaiman* v. *Birendra Chandra*, 1922 P C 405 (408): 50 Cal 243: 50 Ind App 247: 74 Ind Cas 906 P C; *Shibun* v. *Abdul Alim Abed*, (1930) 34 Cal W N 1129: 1930 Cal 787 (796): 130 Ind Cas 369; *Raghunath* v. *Sulzer Bruderzer & Co*, 1926 Lah 125 (127): 7 Lah 42:

(6) (1866) 10 Moo Ind App 476 (488): 5 Suth W R 63: 2 Sar 184: 1 Suth 631 P C.

(7) *Nawab Sidhi Nazir Ali* v. *Ojoodhyaram*, (1863) 10 Moo Ind App 540 (553): 5 Suth W R 83: 1 Suth 635: 2 Sar 198 P C.

Note 2.

(1) *Anonymous*, 1 Ind Jur O S 14: 1 Hyde 145.

(2) *Tirupati Varadachariar* v. *Parthasarthy*, (1914) 25 Ind Cas 9 (9): 1914 Mad W N 501: *Krishnabupathy* v. *Ramamoorthy*, (1892) 16 Mad 198 (201); *Soorendro* v. *Jugbundhoo*, (1874) 22 Suth W R 426 (427); *S Jeewan* v. *Goolab Khan*, (1869) 1 N W P 147.

other and the whole evidence on either side be at one and the same time before the Court.[1] O. 15, R. 3, Note 1.

O. 15, R. 4, Notes 1–3.

R. 4. [S. 155.] *Where* the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary *for* its decision upon such issues.

Failure to produce evidence.

[1877—S. 155; 1859—S. 145.]

Synopsis.

1 "The Court may pronounce judgment." 3. Appeal.
2 "Sufficient cause."

Court can determine preliminary issues first. See Note 1, Pts. (1) and (2). Proviso to the rule. See Note 2, Pt. (2).

1. "**The Court may pronounce judgment.**"—Even in a case in which the summons may have been issued for final disposal the Court has a discretion to adjourn the case for the production of such evidence as may be necessary. Thus if, after the written statement is filed the suit is found to involve issues of a less simple character than might have been anticipated at the outset it is desirable, in the interests of justice, that the discretion given to the Court by this rule should be so exercised as to ensure a fair trial and not to deny, in effect the trial to the parties.[1]

Where a party fails, without sufficient cause, to produce his evidence on the date fixed for final disposal, and an adjournment is refused, the Court can at once pronounce judgment. But it cannot *dismiss the suit for non-prosecution.*[2]

2. "**Sufficient cause.**"—Where the plaintiff and the defendants were endeavouring to settle their differences by arbitration, and the plaintiff was told by one of the defendants that he would inform the Court of what was going on, in consequence of which plaintiff did not appear with his evidence on the day fixed, it was held that there was sufficient cause for the plaintiff not to be ready with his evidence.[1]

3. **Appeal.**—A pronouncement of judgment under this rule is a decree and is appealable, as such.[1]

Note 3.

(1) *Kubbee Jha* v. *Shonkeenath*, (1871) 15 Suth W R 150 (151).

Order 15, Rule 4—Note 1.

(1) *Tuljaram* v. *Sitaram*, (1914) 24 Ind Cas 665 (666): 38 Bom 377: 16 Bom L R 39; *Ameer Ali* v. *B Run Bahadur*, (1867) 7 Suth W R 84 (84).

(2) *Sahdeo Ram* v. *Salig Ram*, 1929 All 543: (543): 117 Ind Cas 105.

Note 2.

(1) *Kadir Baksh* v. *Abdul Rahiman*, 1887 All W N 105 (105).

Note 3.

(1) *Hinga* v. *Munna*, (1904) 31 Cal 150 (154): 8 Cal W N 97; *Partab Rai* v. *Ram Kishen*, 1883 All W N 171 (171) [Dismissal of suit for failure to produce evidence must be taken to be one under this rule].

O. 16, R. 1.

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES.

R. 1. [S. 159.] *At any time* after the *suit is instituted*, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

Summons to attend to give evidence or produce documents.

[1877—S. 159; 1859—S. 149.]

Local Amendments.

BOMBAY.

The following shall be *added* as Rule 1-A:—

1-A.—(1) The Court may on the application of any party for a summons for the attendance of any person, permit that service of such summons shall be effected by such party.

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the Court.

ALLAHABAD.

The following proviso shall be *added*:—

Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to call any witness not named in a list, which must be filed in Court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor.

OUDH.

Substitute for Rule 1, the following:—

1. (1) The Court may, in any suit or class of suits, require any party to file by a date to be fixed by the Court, a list of witnesses whom he proposes to produce; and may, if necessary, direct that such list be kept in a sealed envelope for such time as the Court considers desirable.

Where such a list has been called for from any party, the latter shall not, except for special reasons, be permitted to summon or produce as witness, any person whose name has not been entered in the list.

(2) Subject to the provisions of sub-Rule (1) the parties may, after the suit is instituted, obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

SINDH.

Add the following as Rule 1-A, *after* Rule 1:—

1-A.—The Court may, on the application of any party for a summons for the attendance of any person as a witness, permit that service of such summons shall be effected by such party.

N.-W. F. P.

Substitute the following *for* Rule 1:—

1. (1) On such date as the Court may appoint and not later than 30 days after the settlement of issues, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents.

2. They shall not be permitted to call witnesses other than those contained in the said list, except with the permission of the Court and after showing

good cause for the omission of the said witnesses from the list; the Court granting such permission shall record reasons for so doing.

3. On application to the Court or such officer as it appoints in this behalf, the parties may obtain summonses for persons whose attendance is required in Court."

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. When witness summons may be applied for.
4. Summoning of party as a witness.
5. Refusal of summons.
6. Remedy when summons is refused.
7. Form of summons. See Form No. 13, Sch. 1, App. B.
8. Second appeal.
9. Revision.

Application—Time of...See Notes 3 and 5. May obtain. See Note 2.

1. Legislative changes.—

The words "at any time after the suit is instituted" have been substituted for the words "after the summons has been delivered or sent for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit . . . . before the day fixed for such settlement or disposal".

For the effect of the change, *see* Note 3.

2. Scope of the rule.—This order contains the necessary rules in the matter of enforcing the attendance of persons either to give evidence or to produce documents provided for in Ss. 30 and 32, *ante*. Though the Court is bound to help the parties in this behalf,[1] it is ordinarily, for the parties to move the Court to take the necessary steps,[2] unless the Court choses to act of its own motion under R. 14, *infra*.

The powers exercisable by Civil Courts under this order have been conferred on the tribunals appointed under the undermentioned Acts.[3]

3. When witness summons may be applied for.—Section 159 of the Code of 1882 was differently worded as is shown in Note 1, *supra*. It was, however, held under that Code that an application under that section could be made at any time before the party closed his case and not necessarily before the date

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Order 16, Rule 1—Note 2.

(1) *Tara Chand Samanta* v. *Chandra Sekhar Mookerjee*, (1910) 5 Ind Cas 184 (185): 11 Cal L Jour 29; *Raghunandan Prasad* v. *Mahabir Mahton*, 1926 Pat 545 (547): 7 Pat L Tim 775: 96 Ind Cas 448 [Court may, instead of summons, send a Court peon with an order to Collector for production of documents].

(2) *Nobin Chunder* v. *Anunga Munjuree*, (1875) 23 Suth W R 83 (84); *Ata Mohammad* v. *Harnam Singh*, 1927 Lah 845 (846): 99 Ind Cas 890.

(3) The Administrator-General's Act (III of 1913), S 46; The Bengal Agricultural and Sanitary Improvement Act (VI of 1920), S 33; The Bengal Drainage Act (VI of 1880), S 49; The Bengal Embankment Act (II of 1882), S 82; The Bengal Estates Partition Act (V of 1897), S 97; The Bengal Irrigation Act (III of 1876), S 92; The Bengal Land Registration Act (VII of 1876), S 53; The Bengal Sanitary Drainage Act (VIII of 1895), S 29; The Bengal Survey Act (V of 1875), S 50; The Bengal Tenancy Act (VIII of 1885), S 58 (8); The Bihar and Orissa Municipal Survey Act (I of 1920), S 7; The Bombay Land Revenue Code (Act V of 1879), S 192; The Bombay Local Boards Act (VI of 1923), S 128 (2); The Bundelkhand Encumbered Estates Act (I of 1903), S 34; The Burma Boundaries Act (V of 1880), S 15; The Burma Canal Act (II of 1905), S 74; The Burma Forest Act (IV of 1902), S 9 (*b*); The Calcutta Improvement Act (V of 1911), S 70 (*c*); The Calcutta Survey Act (I of 1887), S 9; The Charitable and Religious Trusts Act (XIV of 1920), S 11; The Chota Nagpur Tenancy Act (VI of 1908), Ss 263 and 265 (3); The Central Provinces Land Revenue Act (II of 1917), S 20; The Co-operative Societies Act (II of 1912), S 42 (3); The Incumbered Estates Act—Broach and Kaira (Act XXI of 1881), S 35; The Incumbered Estates Act—Sindh (Act XX of 1896), S 77; The Indian Income Tax Act (XI of 1922), S 37; The Indian Mines Act (IV of 1923), S 21; The Indian Naturalization Act (VII of 1926), S 11; The Indian Registration Act (XVI of 1908), S 75; The Madras Ganjam and Vizagapatam Act (XXIV of 1893), R 16; The Madras Survey and Boundaries Act (VIII of 1923), S 23; The Northern Indian Canal and Drainage Act (VIII of 1873), S 69; The Official Trustees Act (II of 1913), S 20; The Orissa Tenancy Act (II of 1913), S 67 (10); The Provident Insurance Societies Act (V of 1912), S 19 (3); The Punjab Sikh Gurdwara and Shrines Act (VI of 1922), S 24 (4); The United Provinces Canal Drainage Act (VIII of 1873), S 69;

O. 16, R. 1, Notes 3—5.

of the first hearing.[1] The present Code has clearly provided that an application under this rule can be made *at any time after the institution* of the suit.

4. Summoning of a party as a witness.—The Code of 1859, had a special provision (S. 162) for summoning the opposite party as a witness in the case. The Court had a *discretion* in the matter of such summons and had to be satisfied that such evidence was material.[1] There is nothing in this rule to prevent a party from examining his opponent as his witness in the case.[2] *See also* R. 21, *infra*.

5. Refusal of summons.—The Court is bound to issue summons where application is made at *any time* after the institution of the suit and before its final disposal[1] provided the application made therefor is a proper one.[2] It cannot be refused on the ground that such an application is *too late*, though it is within the discretion of the Court to refuse an *adjournment of the hearing* on the ground of want of diligence of the party.[3] The reason is that it is possible that the hearing may for some reason, be adjourned or the party may have his own facilities for the expeditious service of summons.[4] R. 9 *infra* which provides that summons must be served on the witness in sufficient time, is only a rule in favour of the *witness* and intended to induce due diligence in the party; but it does not empower the Court to refuse to issue a witness summons on the ground of late application.[4-a] Nor can summons be refused on the ground

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The United Provinces Land Revenue Act (III of 1901), S 199; The United Provinces Minor Irrigation Act (I of 1920), S 44; The United Provinces Town Improvement Act (VIII of 1919), S 58 (c); The Workmen's Compensation Act (VIII of 1923), S 23.

Note 3.

(1) *Indro Chunder Baboo* v. *Mc Hamilton, Grant Dunlop*, (1868) 9 Suth W R 530 (532); *Sen Sidapa* v. *Nilapa*, 1890 Bom P J 333; *Bhikshet* v. *Damodar*, 1893 Bom P J 419; *Baikali* v. *Alarakh*, (1891) 15 Bom 86 (86). See also *Dulichand* v. *Dhondi*, (1880-81) 5 Bom 184 (188) [Defendant's side not closed].

Note 4.

(1) *Siddhessurree Debia* v. *Denobundhoo*, (1866) 6 Suth W R 65 (66); *Hara Chand* v. *Kristo Mohun*, (1864) 1 Suth W R 297 (298); *Matungunee* v. *Kalee Dabea*, (1865) 2 Suth W R 4 (4); *Mokoond* v. *Suttoorghun*, (1872) 17 Suth W R 507 (508); *Gopal Chunder* v. *Mohesh Chunder*, (1874) 21 Suth W R 44 (44); *Neem Chand* v. *Anund Coomar*, (1867) 7 Suth W R 147 (147).

(2) *Bisheshar Shukul* v. *Bir Indra Kant Singh*, (1913) 20 Ind Cas 450 (451): 16 Oudh Cas 145; *Bonomalee Churn* v. *Hafizuddeen*, (1869) 12 Suth W R 317 (318): 13 Beng L R 247 Note; *Dhunput Singh* v. *Prem Bibee*, (1875) 24 Suth W R 72 (73) [Ordinarily, the Court must secure the evidence of the party, if required, before deciding the suit].

Note 5.

(1) *Panchkari Mitra* v. *Panchanan Saha*, 1924 Cal 971 (972): 39 Cal L Jour 598: 84 Ind Cas 9; *Satbai Govind Lavlekar* v. *Balakrishna Pandurang*, 1925 Bom 368 (368): 87 Ind Cas 702: 27 Bom L R 471; *Gora Chand* v. *Raj Koomar*, (1866) 5 Suth W R 111 (111); *Mohanlal Kalar* v. *Upshia*, (1900) 13 C P L R 152 (153); *Jadunandan Singh* v. *Sheonandan Prasad*, 1922 Pat 276 (278): 1 Pat 644: 1922 Pat H C C 200: 3 Pat L Tim 487: 68 Ind Cas 645; *Brojo Nath* v. *Pratap Chunder*, (1874) 22 Suth W R 296 (296) [Defendant's side not yet closed—Application, a day before the hearing]. See *Anurup Chandra* v. *Heera Monee*, (1869) 3 Beng L R App 38: 11 Suth W R 418.

(2) *Amir Ali Khan* v. *Kulsam Begam*, (1910) 8 Ind Cas 418 (420) Oudh [Witness list must contain proper particulars].

(3) *Baikunth Nath* v. *Jai Kishun*, 1929 All 449 (451): 113 Ind Cas 266: 51 All 341; *Abdul Bari Dewan* v. *Hirishikesh Mitra*, 1929 Cal 459 (461): 49 Cal L Jour 546; *Kandru Haldar* v. *Taraprasanna*, 1926 Cal 364 (1), (364): 87 Ind Cas 355; *Sardari Lal* v. *Mohar Singh*, 1925 Lah 67 (67): 79 Ind Cas 143; *Mohamed Hayat* v. *Gulam Mahommad*, (1921) 60 Ind Cas 656 (656); *Abdool Kadar* v. *Shaikh Abin*, (1875) 24 Suth W R 290 (291); *Bhagwat Dass* v. *Debi Din*, (1894) 16 All 218 (219): 1894 All W N 45; *Jagabandhu* v. *Gorey Lal*, (1917) 37 Ind Cas 266 (266): 1 Pat L Jour 173; *Latifannissa Bibi* v. *Alimulla*, 1929 Pat 622 (623); *Amir Ali Khan* v. *Kulsum Begam*, (1910) 8 Ind Cas 418 (418) Oudh; *Rajendro Narain* v. *Raja Kumud Narain Bhup*, (1879) 3 Cal L Rep 569 (571); *Brojo Lal* v. *Aughore Lall*, (1876) 25 Suth W R 71 (71); *Bonomali* v. *Woomesh Chandra*, (1881) 7 Cal 730 (731, 732): 9 Cal L Rep 341: 4 Shom L R 191; *The Firm Balmokand* v. *The Firm Jagat Ram*, (1921) 63 Ind Cas 735 (735) Lah; *Rattan Chand* v. *Anant Ram*, (1929) 114 Ind Cas 439 (440): 1929 Notes 28 (a). See also *Krishna* v. *Protab Chunder*, (1881) 7 Cal 560 (565). See also *Pearee Mohun* v. *Madhub Chunder*, (1868) 9 Suth W R 489 (489-490).

(4) *Makshi* v. *Bhola Nath*, 1896 All W N 120 (120); *Bhagchand* v. *Musaji*, 1923 Nag 58 (59): 68 Ind Cas 272; *Indro Chunder* v. *Hamilton Grant Dunlop*, (1868) 9 Suth W R 530 (532): *Moti* v. *Kanhya*, (1909) 4 Ind Cas 797 (799): 5 Nag L R 131.

(4-a) *Kaji Ahmad* v. *Kaji Mahamad*, (1884) 9 Bom 308 (310).

O. 16, R. 1, Notes 5—9.

that the evidence of a witness *may not be beneficial to the party*[5] or that the witness had not been summoned before[6] or that the party had undertaken to bring his witnesses[7] or that steps were not taken by the party within a time fixed by the Court for that purpose.[8]

This rule does not, however, take away the *inherent* power of the Court to refuse witness summons in order to prevent an *abuse of the process* of the Court.[9]

6. **Remedy when summons is refused.**—An order refusing an application for witness summons is not open to appeal; but its correctness can be questioned in an appeal from the decree in the suit and subject to the limitations prescribed in Ss. 99 and 105 of the Code.[1] The High Court may in a proper case interfere even in a second appeal[2] provided the appellant had insisted on his right in both the Lower Courts.[3]

7. **Form of witness summons.**—*See* Form No. 13 in Appendix B of the First Schedule.

8. **Second appeal.**—*See* Note 6 above.

9. **Revision.**—An order wrongly refusing an application may be a material irregularity in the exercise of jurisdiction and in that case will be open to revision.[1]

O. 16. R. 2.

R. **2.** [S. 160.] (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

Expenses of witness to be paid into Court on applying for summons.

(2) *In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving*

Experts.

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(5) *Md Hussain* v. *Radha Kishan*, 1925 Lah 572 (572): 26 Pun L R 181: 86 Ind Cas 1012; *Hurree Dass* v. *Moazzum Hossein*, (1871) 15 Suth W R 447 (448): 8 Beng L R App 16. See *Ramdhan* v. *Rajballab*, (1904) 6 Beng L R App 10.

(6) *Munshi* v. *Karmon*, 1927 Lah 281 (281): 28 Pun L R 173: 9 Lah L Jour 154: 101 Ind Cas 541; *Tara Chand* v. *Chandrasekar*, (1910) 5 Ind Cas 184 (186): 11 Cal L Jour 29; *Bhagchand* v. *Musaji*, 1923 Nag 58 (59): 68 Ind Cas 272.

(7) *Pandurang Ampai* v. *Kesharji Jadhaji*, (1882) 6 Bom 742 (743).

(8) *Ghulam Mohammad* v. *Mt Rasul Bibi*, 1931 Lah 135 (136): 32 Pun L R 84: 132 Ind Cas 579.

(9) *Ram Phul* v. *Wahed*, (1870) 14 Suth W R 66 (67, 68); *Veerabadra* v. *Nataraja*, (1905) 28 Mad 28 (33, 34, 36): 14 Mad L Jour 329; *Pritam Singh* v. *Sobha Singh*, 1924 Lah 647 (649): 75 Ind Cas 866. See also *Prayag Kumari Debi* v. *Sira Prasad Singh*, 1926 Cal 1 (36): 42 Cal L Jour 280: 93 Ind Cas 385.

Note 6.

(1) *Bhagwat Das* v. *Debi Din*, (1894) 16 All 218 (220): 1894 All W N 45; *Makhi* v. *Bhola Nath*, 1896 All W N 120 (120, 121).

(2) *Broja Nath Mookhopadhya* v. *Protap Chunder*, (1874) 22 Suth W R 296 (296).

(3) *Onoorap Chunder* v. *Heera Monee*, (1869) 11 Suth W R 418 (419): 3 Beng L R App 38.

Note 9.

(1) *Kazi Ahmad* v. *Kazi Mohd*, (1885) 9 Bom 308 (310); *Muhammad Hayat* v. *Ghulam Muhammad*, (1921) 60 Ind Cas 656 (656) Lah.

O. 16, R. 2. *evidence and in performing any work of an expert character necessary for the case.*

(3) *Where* the Court *is* subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to *any* rules *made in that behalf.*

Scale of expenses.

[1877—S. 160; 1859—S. 151.]

Local Amendments.

ALLAHABAD.

To Rule 2, *add*:—

(4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs. 10 *per mensem* and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their head-quarters.

BOMBAY.

Insert as proviso to sub-Rule (1) of Rule 2:—

Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness.

LAHORE.

Add the following proviso to Rule 2 (1):—

Exception.—When applying for a summons for any of its own officers, Government will be exempt from the operation of clause (1).

PATNA.

Add the following proviso to Rule 2 (1):—

Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, in his public capacity.

BENGAL.

Cancel clauses (1) and (2) and *substitute* therefor the following:—

"(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the persons summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case."

NAGPUR.

Add the following as an exception to Rule 2 (1):—

"*Exception.*—When applying for a summons for any of its own officers, Government will be exempt from the operation of sub-Rule (1)."

RANGOON.

O. 16, R. 2.

Add the following to Rule 2 (1):—

"Provided that in cases to which Government is a party:—

(*a*) No payment into Court will be required for the travelling and other expenses, of a Government servant who may be required to be summoned at the instance of Government to give evidence in his official capacity;

(*b*) The amount to be paid into Court for the travelling and other expenses of a Government servant whose salary exceeds Rs. 10 and who may be required to be summoned at the instance of a party other than the Government to give evidence in his official capacity in a Court situate at a distance of more than five miles from his head-quarters shall be equivalent to the travelling and halting allowances admissible under the Civil Service Regulations."

In Rule 2, the following shall be *substituted* for sub-Rule (3):—

"(3) Subject to the provisions of sub-Rule (2), travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale:—

(1) *Ordinary labouring classes.*—The actual Railway or Steam-boat fare to and from the Court by the lowest class; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses upto a limit of Rs. 2 a day by boat and of 4 annas a mile by road; and an allowance for each day's absence from home of ten annas to those who are residents of places other than the place where the Court is held and of eight annas to those who are residents of the place where the Court is held.

(2) *Petty village officers.*—The same rates as above for railway or steam-boat fare, or actual travelling expenses by boat or road upto the limit of Rs. 2 a day by boat and of four annas a mile by road; and an allowance for each day's absence from home of fourteen annas to those who are residents of places other than the place where the Court is held, and of twelve annas to those who are residents of the place where the Court is held.

(3) *Persons of higher ranks of life such as clerks, tradespeople, village headmen and headmen of circles.*—Second class railway or steam-boat fare to and from the Court; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses upto a limit of Rs. 4 a day by boat and annas six a mile by road; and an allowance not to exceed except in special cases Rs. 1-8-0 per each day's absence from home.

(4) *Persons of superior rank.*—The actual sum spent in travelling to and from the Court with an allowance according to circumstances, not to exceed except in special cases Rs. 5 for each day's absence from home.

(5) *Witnesses following any profession, such as medicine or law.*—A special allowance according to circumstances.

(6) *Lodging allowance.*—In addition to the above, a lodging allowance not exceeding except in special cases rupee one for persons in class (3) and rupees two for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness has to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent.

Provided that—

(1) A Government servant whose salary exceeds Rs. 10 *per mensem* giving evidence in his official capacity in a suit to which Government is a party—

(*a*) When giving evidence at a place more than five miles from his head-quarters, shall not receive anything under these rules, but shall be given a certificate of attendance;

O. 16, R. 2, Notes 1—4.

(*b*) when giving evidence at a place not more than five miles from his head-quarters, shall, in cases where the Court consider it necessary, receive under these rules actual travelling expenses, but shall not receive subsistence, special or expert allowances.

(2) A Government servant whose salary does not exceed Rs. 10 *per mensem*, giving evidence in his official capacity, shall receive his expenses from the Court.

Note.—When the journey has to be performed partly by rail or steam-boat and partly by road or boat, the fare shall be paid in respect of the former and the mileage or boat allowance in respect of the later part of the journey.

Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court, should be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fares."

Synopsis.

1. Legislative changes.
2. Applicability of section to Chartered High Courts.
3. Expenses of witnesses.
4. Remedy where the expenses are not paid.
5. Effect of non-service of summons owing to default of process-server.
6. Government servants summoned as witnesses if entitled to salary during absence on summons.

Considerations in fixing the scale of expenses. See Note 3.
Party making due payment not responsible for service. See Note 5, Pt. (1).

1. Legislative changes.—

Sub-Rule (2) is new.

2. Applicability of the rule to Chartered High Courts.—This rule does not apply to Chartered High Courts. *See* O. 49, R. 3.

3. Expenses of witnesses.—A witness is entitled to be paid his travelling and other expenses for his attendance in Court. But except as provided for in sub-R. (2) no witness is entitled to any compensation for *loss of time*[1] or to any special amount on the ground of *status*[2] though the expenses may be claimed suitable to the rank or status of the witness.[3] The right to claim expenses is not lost by the fact of the witness having attended and given evidence before making the claim[4] or of his having been called by one party and examined by the opposite party.[5] The Court must give the party a reasonable time for payment of the amount of expenses into Court.[6]

4. Remedy where the expenses are not paid.—The remedy of the witness is by an *application* to the Court and not by a separate suit.[1]

See also R. 4.

Order 16, Rule 2—Note 3.

(1) *Nawab Nazim of Bengal* v. *Prosonno Narain Deb*, 2 Hyde 236; *Rewachand Khimanmal* v. *Laloo*, (1911) 12 Ind Cas 190 (190): 5 Sind L R 44 [Chief Officer of Municipality—Summons to produce documents—Not entitled to search-fee].

(2) *Vali Asmal* v. *Rao Bahadur A U Malji*, 1922 Bom 116 (117): 64 Ind Cas 78: 46 Bom 89: 23 Bom L R 898 [Pleader as witness of facts—No expert—No claim on account of status].

(3) *Chunder Sekhur* v. *Judub*, (1873) 19 Suth W R 78 (78).

(4) *London, Bombay and Mediterranean Bank* v. *Mahomed Ibrahim*, (1879-80) 4 Bom 619 (621); In re *Bullock*, (1904) 28 Bom 647 (649-650): 6 Bom L R 1025.

(5) In re *Bullock*, (1904) 28 Bom 647 (649-650): 6 Bom L R 1025.

(6) *Pandu* v. *Rajeshwar*, 1924 Nag 271 (275): 20 Nag L R 131: 78 Ind Cas 996; *Mohun Munder* v. *Brij Bhokun*, (1868) 9 Suth W R 127 (128) [But a suit lies to recover money paid to a witness for expenses if he does not attend].

Note 4.

(1) *Edward Dubois* v. *Hurrish Chunder*, (1866) 5 Suth W R S C C Ref 6 (7); *Nataraja Desi-*

5. Effect of non-service of summons owing to the default of the process-server.—If the party duly pays the necessary fees into Court, he is not answerable for the non-service of the summons owing to the default of the process server.[1] A dismissal of the plaintiff's suit by reason of the plaintiff's witnesses not appearing owing to the default of the process server in serving the summons on them, is illegal.[2] It is otherwise if the fees are not duly paid.[3] O. 16, R. 2, Notes 5—6.

6. Government servants summoned as witnesses if entitled to salary during absence on summons.—They are not entitled to the payment of any salary as part of the expenses in as much as the Government does not deduct any salary for such absence.[1]

R. 3. [S. 161.] The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally. O. 16, R. 3.

Tender of expenses to witness.

[1877—S. 161, 1859—S. 151.]

Local Amendments.

BOMBAY.

Insert as proviso to Rule 3:—

Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him.

LAHORE.

For Rule 3, *substitute*:—

3. (1) The sum paid into a Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons if it can be served personally.

Tender of expenses to witness.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

Exception.—(1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their head-quarters, actual travelling expenses incurred by them may, when the Court consider it necessary, be paid to them.

Exception.—(2) A Government servant, whose salary does not exceed Rs. 10 *per mensem*, may receive his expenses from the Court.

PATNA.

Add the following as proviso to Rule 3:—

Provided that when the person summoned is an officer of Government, who has been summoned to give evidence in a case to which Government is a party,

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kar v. *Veerabadran Chetty*, (1907) 17 Mad L Jour 143 (143).

Note 5.

(1) *Mussilee Kanum* v. *Hookoom Bibi*, (1871) 15 Suth W R 88 (89).

(2) *Moti Ram* v. *Firm Kishore Lal Ram Sarup*, 1925 Lah 296 (296): 6 Lah L Jour 418: 85 Ind Cas 321.

(3) *Ram Bheja Mal* v. *Bhagwan Das*, 1925 Lah 457 (458): 7 Lah L Jour 232: 89 Ind 955: 26 Pun L R 560; *Ishen Chunder* v. *Onath*, (1872) 18 Suth W R 16 (18, 19).

Note 6.

(1) In the matter of Reference under R 1, O 46, C P Code, (1923) 38 Cal L Jour 149 (149, 150).

O. 16, R. 3.

of facts which have come to his knowledge, or of matters which he has had to deal, in his public capacity, then—

(*i*) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by Rule 2 and recover the amount from the Treasury;

(*ii*) if the officer's salary exceeds Rs. 10 a month, and the Court is situated not more than 5 miles from his head-quarters, the Court may, at its discretion, on his appearance, pay him the actual travelling expenses incurred;

(*iii*) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than 5 miles from his head-quarters, no payment shall be made to him by the Court. In such cases any expenses paid into Court under Rule 2 shall be credited to Government.

RANGOON.

To R. 3, *add* the following:—

This rule does not apply, where the person summoned is a Government servant summoned to give evidence in his official capacity in a case to which the Government is a party.

BENGAL.

Cancel Rule 3 and *substitute* therefor the following:—

"3. The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally."

NAGPUR.

For Rule 3 *substitute* the following:—

"3. (1) The sum so paid into Court shall, except in case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

Exception.—(1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, the actual travelling expenses incurred by them, may, when the Court considers it necessary, be paid to them.

Exception.—(2) A Government servant whose salary does not exceed Rs. 10 *per mensem* may receive his expenses from the Court."

Witness's right to claim expenses. See Rule 2, Note 3.

O. 16, R. 4.

Procedure where insufficient sum paid in.

R. 4. [S. 162.] (1) *Where* it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses *or reasonable remuneration*, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

(2) *Where* it *is* necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of *such* party; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid. O. 16, R. 4.

Expenses of witnesses detained more than one day.

[1877—S. 162; 1859—S. 151.]

Local Amendments.

LAHORE.

After the word "summoned" where it first occurs in Rule 4 (1), *insert*:—

"Or, when such person is a Government servant, to be paid into Court."

MADRAS.

Insert the following as Rule 4-A *after* Rule 4:—

Special provision for public servants summoned as witnesses in suits to which the Government is a party.

4-A.—(1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council, no payment in accordance with Rule 2 or Rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his head-quarters; and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed in the Civil Service Regulations and shall also pay any further sum that may be required under Rule 4 according to the same scale; and the money so deposited or paid shall be credited to Government.

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance.

BENGAL.

Cancel clause (1) and *substitute* therefor the following:—

"(1). Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid."

O. 16, R. 4, Notes 1—4.

NAGPUR.

After the word "summoned" where it first occurs in Rule 4 (1) *insert*:—

"Or, when such person is a Government servant, to be paid into Court."

Synopsis.

1. Scope of the rule.
2. Expenses of witnesses detained more than one day. Sub-Rule (2).
3. Direction to witnesses to appear on the adjourned date.
4. Realisation of expenses ordered.

1. **Scope of the rule.**—This rule lays down the procedure for the recovery of the expenses or the remuneration of a witness where an insufficient sum has been paid in or where he is detained for more than *one day*.[1] On default of payment, provision is made also for the discharge of the witness without requiring him to give evidence.

2. **Expenses of witnesses detained more than one day.—Sub-R. 2.**—If the attendance of a witness is required for a longer period than one day, the Court may order payment of the sum required from time to time; and, if such payment is not made, the witness may be discharged.[1]

3. **Direction to witness to appear on the adjourned date.**—If, on the day, a witness attends Court in pursuance of summons, the case is not reached, the Court *may* require him to attend on the date of the adjourned hearing.[1]

4. **Realisation of expenses ordered.**—The realisation of the expenses due to a witness should be by way of execution of the order against the party liable to pay[1] or, his legal representative[2] and, in the manner provided for by this rule. The *immoveable property* of the party cannot be proceeded against.[3]

O. 16, R. 5.

Time, place and purpose of attendance to be specified in summons.

R. 5. [S. 163.] Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person sum-

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Order 16, Rule 4—Note 1.

(1) *Chenchuramaya* v. *Narasimhayya*, (1907) 17 Mad L Jour 435 (436).

Note 2.

(1) *Edward Dubois* v. *Hurrish Chunder*, (1866) 5 Suth W R S C C Ref 6 (7).

Note 3.

(1) *Subbarayadu* v. *Chenchuramaya*, (1901) 24 Mad 200 (201) [And a fresh summons is not necessary]; *Vijayaraghava Reddi* v. *Komarappa Reddi*, (1912) 15 Ind Cas 367 (368): 22 Mad L Jour 409: 1912 Mad W N 410: 11 Mad L Tim 199 [But the Court is not bound to]. See also *Draksharapu Applaswami* v. *La Rive*, (1912) 16 Ind Cas 986 (986) Mad. See contra *Venkatappah* v. *Papammah*, (1869-70) 5 Mad H C R 132 (134) [Now obsolete].

Note 4.

(1) *Manavicraman Ettan Ettan Rajah* v. *Veerarayan styled Amijan Valia Rajah*, (1910) 5 Ind Cas 742 (743): 7 Mad L Tim 76 [Order under this rule executable]; *Edward Dubois* v. *Hurrish Chunder Biswas*, (1866) 5 Suth W R S C Ref 6 (7).

(2) See *Nachiappa* v. *Ponnusawmy Naicker*, (1912) 17 Ind Cas 293 (294): 23 Mad L Jour 287: 1912 Mad W N 888.

(3) *Mahamed Warish Sadagar* v. *Rahman Ali Meah*, 1921 Cal 430 (431): 26 Cal W N 877: 70 Ind Cas 123 [Section 36 is excluded by the specific provision in this Rule].

moned is called on to produce, shall be described in the summons with reasonable accuracy. O. 16, R. 5. Notes 1--3.

[1877—S. 163, 1859—S. 152.]

Synopsis.

1. Contents of summons.
2. Failure to specify the place of appearance.
3. Where the hearing is postponed. See Rule 4.

Summons defective in particulars—Witness not liable for non-compliance. See Note 2.

1. Contents of summons.—A summons should contain the necessary particulars of time and place of attendance[1] and of the documents to be produced.[2] In fixing the time for the attendance of Public Officers as witnesses, sufficient consideration must be given to the exigencies of public duties.[3]

2. Failure to specify the place of appearance.—A witness cannot be held liable for non-compliance with the summons where it is defective in particulars of time or place.[1] *See* R. 15, *infra*.

3. Where the hearing is postponed.—*See* Note 3 to R. 4 *supra* and R. 16 *infra*.

R. 6. [S. 164.] Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same. O. 16, R. 6, Note 1.

[1877—S. 164; 1859—S. 153. R. S. C., O. 37, R. 7.]

Synopsis.

1. Scope.

1. Scope.—It is open to a witness to produce documents at the hearing though he has not been summoned to produce them.[1]

Where anything has to be done before a document can be produced under this rule, it must be done by the party and not the Court.[2]

Order 16, Rule 5—Note 1.

(1) *Empress of India* v. *Ramsaran*, (1883) 5 All 7 (8): (1882) 2 All W N 145: 7 Ind Jur 324.

(2) See also *Doorgamonee Dossee* v. *Benodemonee Dossee*, (1864) Suth W R 164 (165); *Rewachand Khimanmal* v. *Laloo*, (1913) 12 Ind Cas 190 (190): 5 Sind L R 44 [Documents specified only need be produced].

(3) *Anonymous*, (1870-71) 6 Mad H C App. side ruling vi.

Note 2.

(1) *Empress of India* v. *Ram Saran*, (1883) 5 All 7 (8): (1882) 2 All W N 145: 7 Ind Jur 324.

Order 16, Rule 6—Note 1.

(1) *Baikuntha Nath Chakravarti* v. *Umanath Chakravarti*, 1925 Cal 1149 (1151): 88 Ind Cas 198.

(2) *Lekhraj* v. *Palee Ram*, (1870) 2 N W P H C 210 [Sanction of Government (which is necessary) to an officer in the Telegraph Department for producing a copy of a message that passed through his office].

O. 16, R. 7, Note 1.

Power to require persons present in Court to give evidence or produce document.

R. 7. [S. 165.] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

[1877—S. 165.]

Local Amendment.

BENGAL.

Insert the following *after* Rule 7 as Rule 7-A:—

"7-A.—(*i*) Except where it appears to the Court that a summons under this order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

(*ii*) Rules 16 and 18 of Order 5 shall apply to summons personally served under this rule, as though the person effecting service were a serving officer.

(*iii*) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant."

Synopsis.

1. Scope.

1. Scope.—This rule is subject to Ss. 130 and 131 of the Indian Evidence Act under which persons who are not parties to the suit cannot be compelled to produce particular documents.[1] It is left to the discretion of the Court to act under this rule.[2]

O. 16, R. 8.

Summons how served.

R. 8. [S. 166.] Every summons *under this Order* shall be served as nearly as may be in *the same* manner *as* a summons *to a* defendant, and the rules in *Order* V as to proof of service shall apply in the case of all summonses served under this *rule*.

[1877— S.167; 1859—S. 154.]

Local Amendments.

ALLAHABAD.

After "this order" and *before* "shall be served" *add* "may by leave of the Court be served by the party or his agent, applying for the same, by personal service, and failing such service".

OUDH.

Add the following provisos:—

Provided that any party may, with the sanction of the Court, himself or by his agent effect service on his own witness, as if he were an officer of the Court; but in this case no diet money paid to a witness by a party or by his agent

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Order 16, Rule 7—Note 1.

(1) *Bhagabat Prasad Singh* v. *Emperor*, (1911) 11 Ind Cas 794 (795): 14 Cal L Jour 120: 12 Cr L Jour 450.

(2) *Ramkrishna Puri* v. *Kisangir*, (1908) 4 Nag L R 129 (133).

shall be included in the costs of the suit unless the witness verifies such payment before an officer of the Court: O. 16, R. 8.

Provided also that the special procedure for the service of summons upon defendant under Order 5, Rule 20-A (1), shall not apply to service of summons under this order.

BENGAL.

Cancel Rule 8 and *substitute* therefor the following:—

"8. (1) Every summons under this order not being a summons made over to a party for service under Rule 7-A (*i*) of this order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order 5 as to proof of service shall apply thereto.

(2) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under Rule 2 of this order."

PATNA.

Add the following to Rule 8:—

"Provided that a summons under this order may by leave of the Court be served by the party or his agent, applying for the same, by personal service. If such service is not effected and the Court is satisfied that reasonable diligence has been used by the party or his agent to effect such service, then the summons shall be served by the Court in the usual manner."

RANGOON.

To Rule 8, the following proviso shall be *added*, namely:—

"Provided that, at the request of a party or his pleader, summons for service on a witness or witnesses, whose attendance is required by such party, may be delivered to such party or his pleader for service by a person employed by such party or his pleader, and the rules in Order 5 as to service and proof of service shall apply in such case as if the person employed by such party or his pleader to effect service were the officer of the Court whose duty it is to effect service of summons."

N. W. F. P.

Add to R. 8:—

"Provided that such summons shall ordinarily be made over for service to the party calling the witnesses, and his affidavit shall be considered sufficient proof of service; provided further that he shall, for sufficient reason, be entitled to apply to the Court to have the summonses served through its agency."

R. 9. [S. 167.] Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required. O. 16, R. 9.

Time for serving summons.

Local Amendment.

RANGOON.

To Rule 9, the following shall be *added*:—

Where the person summoned is a public officer or servant of a Railway Company, sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during his temporary absence from his post.

O.16, R.10, Note 1.

R. **10.** [S. 168.] (1) *Where* a person *to whom* a summons *has been issued* either *to attend* to give evidence or to produce a document *fails to attend or to produce the document in compliance with such summons*, the Court shall, if the certificate of the serving officer has not been verified by affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching the *service or* non-service *of the summons.*

Procedure where witness fails to comply with summons.

(2) *Where the Court sees reason to believe* that such evidence or production is material, and that *such* person *has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided* service, *it* may issue a proclamation requiring him to attend to give evidence or *to* produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door *or other conspicuous part* of the house in which he ordinarily resides.

(3) *In lieu of or at the time of issuing* such proclamation, *or at any time afterwards*, the Court may, in its discretion, *issue a warrant, either with or without bail, for the arrest of such person, and may* make an order for the attachment of *his* property to such amount as *it* thinks fit, not exceeding the amount of the costs of attachment and of *any* fine which may be imposed under *Rule* 12:

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

[1877—S. 168; 1859—S. 159. R. S. C., O. 37, R. 8.]

Synopsis.

1. Scope and applicability of the rule.
2. "Without lawful excuse."
3. Issue of proclamation. Sub-Rule (2).
4. Issue of warrant of arrest. Sub-Rule (3).
5. Appeal.

Clause (1). See Note 1, Pts. (1) to (4).
Duty of Settlement Courts. See Note 1, Pts. (14) (15).
F.-N. (2).
May issue. See Note 1, Pts. (10) and (11).

1. **Scope and applicability of the rule.**—This rule is intented to enable the Court to help the parties by *compelling* the obedience of recalcitrant witnesses.[1a] The rule becomes applicable only where the Court *finds* that the summonses

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Order 16, Rule 10—Note 1.

(1a) *Nilmonee v. Sherbo*, (1866) 6 Suth W R 14 (15). See *Saroda Dossee* v. *Baroda Kant*, (1866) 5 Suth W R Act X, 49 (50). See also

O.16, R.10, Notes 1—2.

have been *duly served*[1] as is indicated in sub-R. (1). It has no application where there has been no summons[2] or where the summons has not been returned[3] or where the witness attends or produces the document on the required date though he had refused the summons.[3-a] The rule being of a highly penal nature, the procedure laid down in sub-R. (1) must be strictly followed before a Court finds whether the summons was served or not.[4] The Nazir's report is not legal evidence on this point.[5]

As a general rule, it is for the party to move the Court to issue one or more of the coercive processes under this rule[6] though the Court is not precluded from taking action *suo motu*.[7] In either case, both the conditions precedent laid down in sub-R. (2) must be satisfied before any coercive action is taken.[8] If not, the party is entitled only to a fresh summons.[9] Even where both the conditions are satisfied, it is left to the discretion of the Court to take coercive measures or not;[10] but the discretion must not be *arbitrarily* exercised.[11]

2. "**Without lawful excuse.**"—The question of lawful excuse depends on the circumstances of each case.[1-a] It is not necessary for the Courts

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Janokee v. *Dukhina*, (1867) 7 Suth W R 519 (520): Beng L R Sup Vol 716 F B [Court can even send them for trial before magistrate].

(1) *Queen* v. *Hurynath Chowdry*, (1867) 7 Suth W R 58 (58).

(2) *Nabadip Chandra Nandi* v. *The Secretary of State*, (1916) 33 Ind Cas 968 (969): 20 Cal W N 511 [Duty of Settlement Courts].

(3) *Nand Mohun Chowdry* v. *Goluck Nath*, (1869) 11 Suth W R 99 (99).

(3-a) *Sunder Singh* v. *Emperor*, 1928 Lah 469 (469): 110 Ind Cas 336.

(4) *Kali Narain Roy Chaudhuri* v. *Shaikh Bajoo*, (1899) 3 Cal W N 307 (310); *Okhoy Chunder* v. *Erskine*, (1865) 3 Suth W R Mis 11 (12, 15); *Nagahia* v. *Udham*, (1917) 39 Ind Cas 592 (593): 18 Pun W R 1917 [Issue of a warrant without an affidavit or examination on oath of the serving officer illegal]; *Mohant Megh Lal* v. *Shib Pershad Madi*, (1881) 7 Cal 34 (38): 8 Cal L Rep 369. See however, *Emperor* v. *Narbadeshwar*, (1905) 27 All 491 (493): 25 All W N 66: 2 Cr L Jour 155 [A case of criminal revision]; In re: *Sree Krishna Doss*, (1909) 3 Ind Cas 474 (474): 19 Mad L Jour 81: 4 Mad L Tim 288 [Express declaration under O 5, R 19 of due service not essential and order under O 16, R 12 not invalid for want of such recording].

(5) *Ram Soondur* v. *Kalee Komul*, (1866) 6 Suth W R Act X 92 (93); *Shah Koondun Lall* v. *Noor Ali*, (1868) 10 Suth W R 3 (4); *Meah Khan* v. *Narain Chunder*, (1872) 18 Suth W R 197 (197); *Nilkant Bhuttacharjee, Petitioner*, 1864 Suth W R Mis 9 (9). See *Sreenath* v. *Watson*, (1865) 4 Suth W R Mis 4 (5).

(6) *Nund Mohun Chowdhry* v. *Goluck Nath Neogee*, (1869) 11 Suth W R 99 (99); *Bachman* v. *Lal Beharee*, (1870) 13 Suth W R 324 (324); *Manalal* v. *Sukhlal*, (1920) 57 Ind Cas 311 (311) Nag. See *Dowlut Mundur* v. *Omrao Singh*, (1870) 14 Suth W R 336 (337). See *Luchmun Singh* v. *Chokowree*, (1876) 25 Suth W R 154 (154, 155).

(7) *Ram Narayan* v. *Jaydeo Misir*, (1911) 10 Ind Cas 903 (904): 8 All L J 839: 33 All 690.

(8) *Hirdey Narain Mukhtar* v. *Emperor*, 1929 All 850 (854): 1929 All L J 1216; *Kalee Das Chukerbutty* v. *Eshan Chunder Chatterjee*, (1870) 13 Suth W R 416 (416); *Bhoobun Moyee* v. *Kishore Dasee*, (1866) 6 Suth W R 235 (235); *Ajoodhya Doss* v. *Bibee Misrun*, (1871) 15 Suth W R 176 (178) [That evidence is material is by itself no ground]. See *Mr J G Bachman* v. *Lall Beharee Pandey*, (1870) 13 Suth W R 324 (824).

(9) *Amir Ali* v. *Kulsum*, (1910) 8 Ind Cas 418 (419) Oudh; *Mode Narain Singh* v. *Bikram Singh*, 1924 Pat 36 (36): 4 Pat L Tim 545: 84 Ind Cas 1028. See also *Gopi Chand* v. *Kirpa Ram*, 1926 Lah 26 (27): 26 Pun L R 630: 90 Ind Cas 1030. See *Gour Churn* v. *Peary Lal*, (1913) 15 Beng L R App 12.

(10) *Kalee Das Chuckerbutty* v. *Eshan Chunder Chatterjee*, (1870) 13 Suth W R 416 (416); *Doulat Mundur* v. *Omrao Singh Rana*, (1870) 14 Suth W R 336 (337); *Rajoo Singh* v. *Balgobind*, (1864) 1 Suth W R 25 (26) [Connivance or otherwise inequitable conduct of parties—Good ground for refusal]; *Tara Chand* v. *Chandra Sekhar*, (1910) 5 Ind Cas 184 (186): 11 Cal L Jour 29; *Nilmoney Chowdhry* v. *Hossein Ally*, (1866) 5 Suth W R 222 (233).

(11) *Porun Chunder* v. *Gopee Nath*, (1867) 8 Suth W R 505 (505); *Ozeer Mahomed* v. *Bydnath*, (1866) 5 Suth W R Act X 6 (6); *Paras Ram* v. *Joti Pershad*, 1904 Pun Re No 61 [Witness leading man of District—No good ground for refusal]; *Upendra Nath* v. *Calcutta Corporation*, (1912) 13 Ind Cas 332 (334): 16 Cal W N 116 [Witness refusing to appear—Warrant must issue—Though applied for late]; *Jafar* v. *Goroo Pershad*, (1865) 3 Suth W R 97 (97); [Warrant returned "not found" a day before hearing—Application for attachment on date of hearing—Not to be refused]; *Bissembhur Sircar* v. *Soorodhuny*, (1865) 3 Suth W R 21 (23) [Case clearly falling within the rule—Refusal of coercive process illegal]; *Ranganawmy Reddi* v. *Kondu Reddi*, (1921) 61 Ind Cas 967 (969): 29 Mad L Tim 95 [Witness appearing and stating documents not in his possession—Issue of warrant arbitrary].

Note 2.

(1-a) *Doorga Dutt* v. *Jhungoor*, (1892) 16 Suth

O.16, R 10, Notes 2—5.

to institute a formal investigation and come to a decision on the evidence adduced in order to believe in the want of lawful excuse. If the Court believes that the witness has knowledge of the summons and thinks that his evidence is material and if there is no one in Court to account for the witness's absence, there is sufficient reason to act under this rule.[1] Non-payment or non-tender of expenses to the witness is a lawful excuse for non-attendance.[2] Where the summons is returned unserved, the party must be given reasonable time to make out the grounds for the coercive process.[3]

3. **Issue of proclamation—Sub-R. 2.**—Delay caused by the office owing to the late payment of process fees for proclamation cannot be set up by the party as a ground for non-production of witnesses.[1]

4. **Issue of warrant of arrest—Sub-R. 3.**—In requiring parties to take out warrants of arrest against recalcitrant witnesses, the Court must have due regard to the practical difficulties felt by litigants in procuring the evidence of an important witness by means of his arrest.[1] The issue of a proclamation *subsequent* to the issue of a warrant of arrest is a contravention of the terms of Sub-R. 3. [1-a]

A *panchayatdar* is not exempt from the coercive provisions of this rule.[2]

5. **Appeal.**—An order for attachment under this rule is appealable under O. 43, R. 1, Cl. (*g*) of the Code.

O.16, R.11.

If witness appears, attachment may be withdrawn.

R. **11**. [S. 169.] *Where, at any time after* the attachment of his property, such person appears and satisfies the Court,—

(*a*) that he did not, *without lawful excuse, fail to comply with the summons or intentionally* avoid service, and,

(*b*) *where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule*, that he had *no* notice of *such* proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

[1877—S. 169; 1859—S. 160.]

W R 63 (64). See also *Kalee Chunder Chowdhry* v. *Rance Surut Soonduree Debia*, (1872) 18 Suth W R 45 (47).

(1) *Periyanna* v. *Govindu*, (1869-70) 5 Mad H C R 104 (105).

(2) *Todar Mal* v. *Said Muhammad*, (1895) 17 All 277 (279): 15 All W N 74; *Cowell* v. *Ishen Chunder*, (1872) 18 Suth W R 16 (18, 19). See also *Lekh Raj* v. *Palee Ram*, (1869) 1 N W P H C R 241.

(3) *Premchand Roy* v. *Becharam Mookerjee*, (1866) 6 Suth W R 126 (126).

Note 3.

(1) *Bonomali* v. *Woomesh Chunder*, (1881) 7 Cal 730 (731): 9 Cal L Rep 341: 4 Shome L R 191.

Note 4.

(1) *Mt Misri* v. *Mt Rajmati*, 1926 All 103 (107): 89 Ind Cas 849. See also *Gajjoo Mal* v. *Chandoo*, 1927 Lah 424 (424): 101 Ind Cas 257.

(1-a) *Rangasawmy Reddi* v. *Konda Reddi*, (1921) 61 Ind Cas 967 (969): 29 Mad L Tim 95: 1920 Mad W N Jour xvi.

(2) *Mookka Kone* v. *Ammakutti Ammal*, 1928 Mad 299 (305): 51 Mad 1: 54 Mad L Jour 174: 27 Mad L W 611: 108 Ind Cas 760.

Synopsis.

1. Scope.—This rule provides for a case where the person in default satisfies the Court that he had not intentionally failed to carry out the order of the Court.[1] **O.16, R.11, Note 1.**

R. **12**. [S. 170.] The Court may, *where* such person does not appear, or appears *but* fails *so* to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as *it* thinks fit, having regard to his condition in life and all the circumstances of the case, and may order *his* property, or any part thereof, to be *attached and sold* or, *if already attached under rule* 10, *to be* sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any: **O.16, R.12, Notes 1—2.**

Procedure if witness fails to appear.

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

[1877—S. 170; 1859—S. 160.]

Synopsis.

1. Scope of the rule.
2. When fine can be imposed.
3. Appeal.

Contempt. See Note 1, Pt. (2).
Legal Practitioners Act—Non-production of documents by pleader—Penalty. See Note 1, F.-N. (1).
Order of fine whether bad for omission of express declaration under O. 5, R. 19. See Rule 10 and Note 1, F.-N. (4).

1. Scope of the rule.—R. 11 deals with the case when the person served appears and shows proper cause for his failure to appear; the present rule applies to a witness, who does not appear or on appearance, fails to show proper cause.[1]

This rule does not affect the special jurisdiction of a Chartered High Court, to proceed for contempt against a defaulting witness.[2]

2. When fine can be imposed.—There is a conflict of opinion on the point and three different views have been expressed:—

(1) The first view is that no fine could be imposed under this rule until the procedure laid down in R. 10, sub-R. (2) or (3) has been followed, *i.e.*, either a proclamation or a warrant of arrest or an

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Order 16, Rule 11—Note 1.

(1) *Sib Kumari* v. *Secretary of State*, (1920) 55 Ind Cas 425 (426): 31 Cal L Jour 363.

Order 16, Rule 12—Note 1.

(1) *Ram Gopal* v. *Secretary of State for India*, (1920) 55 Ind Cas 425 (426): 31 Cal L Jour 363. See also *Nando Lal* v. *Besser Ali*, (1919) 50 Ind Cas 806 (808) [Legal Practitioner's Act—Non-production of documents by Pleader—District Judge can apply this rule—*See* S 141, C P C].

(2) *Ebrahim* v. *King Emperor*, 1926 Rang 188 (189, 190): 4 Rang 257: 98 Ind Cas 57.

O.16, R.12, Notes 2—3.

attachment has been issued.[1] A person to whom a summons has been issued and who fails to obey it cannot straight away be fined under this rule.

(2) The second view is that the words "such person" in this rule refers to the "person to whom a summons has been issued" in sub-R. 1 of R. 10 and that the issue of a proclamation or an order for arrest or attachment are not *conditions precedent* to the imposition of fine, and that this rule deals with *all* cases of disobedience not covered by R. 11.[2]

(3) Where a party is *present in Court* and is directed to produce a document, the Court can, on his failure comply with the order, impose a fine upon him without going through the procedure in sub-Rr. 2 and 3.[3]

It is submitted that the second of the above views is correct. This R. 11, and sub-Rr. 2 and 3 of R. 10 all refer to "such person" and must therefore necessarily refer to some person referred to before, *i.e.*, "a person to whom a summons has been issued" in sub-R. 1.

What is lawful excuse depends upon the circumstances of each case.[4]

3. **Appeal.**—An appeal lies from an order imposing a fine under this rule. *Vide* S. 104 (1) (*h*) of this Code. But there is no Second Appeal, *see* S. 104 (2).

As regards orders of attachment and sale under this rule, no appeal lay under the Code of 1882.[1] R. 13 of the present Code makes applicable to such attachment and sale all the provisions in the Code regarding attachment and sale in execution of a decree.

O 16, R.13. R. **13**. [New.] *The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.*

Mode of attachment.

Note 2.

(1) *Nabadip Chandra Nandi* v. *Secretary of State*, (1916) 33 Ind Cas 968 (969): 20 Cal W N 511; *Ramgopal* v. *Secretary of State*, (1920) 55 Ind Cas 425 (426): 31 Cal L Jour 363; *Ashutosh Mullick* v. *Secretary of State for India*, (1920) 57 Ind Cas 302 (303) Cal. See also *Kali Narain Roy* v. *Shaikh Bajoo*, (1899) 3 Cal W N 307 (310) [Can only be fined after he has been arrested and brought before the Court]; *Hirdey Narain* v *Emperor*, 1929 All 850 (853): 1929 All L J 1216; *Amir Chand* v. *Jowahir Singh Harbhajan Singh*, 1928 Lah 473 (474): 110 Ind Cas 853.

(2) *Peta Narasayya*, In re, 1925 Mad 1247 (1247, 1248): 49 Mad L Jour 438: 22 Mad L W 332: 1925 Mad W N 767: 90 Ind Cas 991: 48 Mad 941; *Sundar Singh* v. *Emperor*, 1928 Lah 469 (469): 110 Ind Cas 336; *Banwari Lal* v. *Emperor*, 1928 Lah 979 (980) [Obiter].

(3) *Chunnilal* v. *Emperor*, 1929 All 99 (100): 116 Ind Cas 483.

(4) *Banwari Lal* v. *Emperor*, 1928 Lah 979 (980) [Missing the train and intimating to Court by telegram—Lawful excuse]; *Tarachand* v. *Chandrasekar*, (1910) 5 Ind Cas 184 (186): 11 Cal L Jour 29 [Latitude to be given to busy professional men]; *Premchand Dowlatram*, In re, (1888) 12 Bom 63 (64) [Summons to produce documents—Witness attends but pleads non-possession of documents—Not liable to fine—Jurisdiction can be exercised only after arrest].

Note 3.

(1) *Badri* v. *Tej Singh*, (1910) 7 Ind Cas 100 (100): 7 All L Jour 1152: 33 All 68.

O.16, R.14, Notes 1—2.

R. **14**. [S. 171.] Subject to the *provisions* of this Code as to attendance and appearance and to *any law for the time being in force, where* the Court at any time thinks it necessary to examine any person other than a party to the suit and not *called* as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Court may of its own accord summon as witnesses strangers to suit.

[1877—S. 171.]

Synopsis.

1. **Scope of the rule.**
2. **Cross-examination of a witness summoned by Court of its own accord.**

1. **Scope of the rule.**—Ordinarily, it is for the party to summon the witnesses necessary for his case. This rule is only intended to enable the Court to secure *suo motu* the attendance of a witness whose evidence appears to the *Court* to be necessary.[1] But the Court cannot compel a party to summon such a witness or penalise him for his refusal to summon him.[2]

The general powers under this rule are, in the case of appellate Courts, circumscribed by the specific provisions of O. 41, R. 27.[3]

2. Cross-examination of a witness summoned by Court of its own accord.—The parties cannot be refused the right to cross-examine a witness examined by the Court under this rule.[1]

O.16, R.15.

R. **15**. [S. 172.] Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit *shall* attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document *shall* either attend to produce it, or cause it to be produced, at such time and place.

Duty of persons summoned to give evidence or produce document.

[1877—S. 172; 1859—S. 167.]

Duty of persons summoned to produce documents. See Rule 5, Note 1, F.-N. (2).

Order 16, Rule 14—Note 1.

(1) *Maung Gyi* v. *Maung Meik Gale*, (1893-1900) L B R 658; *Po Gyi* v. *Maung Paw*, (1909) 2 Ind Cas 347 (348): 5 L B R 1 [Boundary dispute—Identity of land doubtful—This rule freely used].

(2) *Billa* v. *Chhuta*, (1911) 10 Ind Cas 85 (86): 159 Pun L R (1911): 174 Pun W R 1911.

(3) *Srinivasachariar* v. *Rangammal*, (1895) 18 Mad 94 (98) [Per Shefford, J].

Note 2.

(1) *Gooroodoss* v. *Greedhur*, (1869) 11 Suth W R 110 (111) [Cross-examination refused—The evidence is no legal evidence]; *Tarince Charan* v. *Saroda Sundari*, (1869) 11 Suth W R 468 (472): 3 Beng L R A C 145 [Refusal—A serious mistake].

O.16, R.16. R. **16.** [S. 173.] (1) A person so summoned and attending shall, unless the Court *otherwise directs*, *attend at each hearing* until *the suit has been disposed of.*

When they may depart.

(2) *On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.*

Direction to witness to appear on the adjourned date. See Rule 4, Note 3.

O.16, R.17. R. **17.** [Ss. 174, 175.] *The provisions of rules* 10 *to* 13 *shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule* 16.

Application of rules 10 to 13.

[1877—Ss. 174, 175; 1859—Ss. 168, 169.]

Jurisdiction of Court to punish. See Rule 12, Note 2, F.-Ns. (3) and (8).

Without lawful excuse. See Rule 10, Note 2.

O.16, R 18 Note 1. R. **18.** [S. 174.] *Where* any person *arrested under a warrant is* brought before the Court *in custody and* cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, *and, in default of his giving such bail or security, may order him to be detained in the civil prison.*

Procedure where witness apprehended cannot give evidence or produce document.

[1877—S. 174; 1859—S. 169.]

Synopsis.

1. **Non-attendance when an offence.**

1. Non-attendance when an offence.—S. 174 of the Indian Penal Code deals with the offence of non-attendance in obedience to an order passed by a public servant. No such offence is committed unless:—

(*a*) there is summons to attend[1]

Order 16, Rule 18—Note 1.

(1) *Sreenath Ghose*, In the matter of, (1868) 10 Suth W R Cr 83 (84).

(*b*) such summons is specific as to the time and place of attendance[2] and

O.16, R.18, Note 1.

(*c*) the non-attendance is legally found[3] to be "intentional."[4]

No witness to be ordered **to attend in person** *unless resident within certain limits.*

R. **19.** [S. 176.] No one shall be ordered to attend in person to give evidence unless he resides—

O.16, R.19, Notes 1—2.

(*a*) within the local limits of *the Court's* ordinary original jurisdiction, or

(*b*) without such limits *but* at a place less than fifty or (where there is railway *or steamer* communication *or other established public conveyance* for five-sixths of the distance between the place where he resides and the place where the Court is situate) *less than* two hundred miles distance from the Courthouse.

Synopsis.

1. Scope of the rule. 2. Revision.

1. Scope of the rule.—When a party desires to examine himself on commission, in his own favour, the provision of O. 26, R. 4 apply.[1] This rule provides an exemption from personal attendance of a witness who resides outside the limits prescribed in the rule.[2]

2. Revision.—The High Court of Lahore has held that an order in contravention of this rule is not open to revision.[1]

R. **20.** [S. 177.] *Where* any *party* to a suit present in Court refuses, without lawful excuse, when *required by the Court*, to give evidence or to produce any document then and there in his possession or power, the Court may *pronounce judgment* against him or make such order in relation to the suit as it thinks fit.

O.16, R.20.

Consequence of refusal of party to give evidence when called on by Court.

[1877—S. 177; 1859—S. 170.]

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(2) *Empress* v. *Ram Saran*, (1883) 5 All 7 (8): 1882 All W N 145: 7 Ind Jur 321: *Queen-Empress* v. *Krishtappa*, (1897) 20 Mad 31 (32): 1 Weir 83; *Shib Pershad*, In the matter of, (1872) 17 Suth W R Cr 38 (38)

(3) *Queen* v. *Sutherland*, (1870) 14 Suth W R Cr 20 (20).

(4) *Sreenath Ghose*, In the matter of, (1868) 10 Suth W R Cr 33 (34) [Superior officer refusing permission to attend—No intention to disobey].

Order 16, Rule 19—Note 1.

(1) *Sarat Kumar* v. *Ram Chandra*, 1922 Cal 42 (43): 35 Cal L Jour 78: 68 Ind Cas 9. See *Jagannath Sastry* v. *Sarathambal Ammal*, 1923 Mad 321 (322): 44 Mad L Jour 202: 17 Mad L W 251: 1923 Mad W N 157: 71 Ind Cas 530: 46 Mad 574.

(2) *Dinaram Somani*, In re, 1923 Cal 427 (428): 27 Cal W N 370: 82 Ind Cas 76; *Wali Mahomed* v. *Jamal Bhai*, 1932 Nag 135 (136): 28 Nag L R 146 [**Plaintiff outside prescribed limits—Cannot be summoned as defendant's witness**]

Note 2.

(1) *Firm Rahmadullah Fakharuddin* v. *Firm Rahim Baksh Qumaruddin*, 1923 Lah 301 (301): 75 Ind Cas 107.

O.16, R.20, Notes 1—2.

Synopsis.

1. Scope and applicability.
2. May pronounce.
3. Appeal.

Without lawful excuse. See Rule 10, Note 2.

1. Scope and applicability.—This rule applies to miscellaneous proceedings also.[1] The provisions of this rule being highly penal in character, it must be strictly construed.[2] Thus a party is bound only *to produce* the document required and is not bound to *exhibit* it as evidence in the case.[3] Again, the rule applies only when the party is *present* in Court and refuses to comply with the order.[4] The failure to obey a requisition in one suit to produce or give evidence will not entitle the Court to give a judgment against the defaulter, under this rule in any *other suit*.[5] Nor can the rule be applied when the default has been once condoned[6] nor against all parties when only *one* of them was affected by an obligation under this rule.[7]

A party who is not guilty of *wilful* default, is not liable to be visited with the consequences of this rule.[8]

2. "May pronounce."—The rule is permissive and not mandatory and it is, therefore, within the *discretion* of the Court to pronounce judgment against the defaulter,[1] though such discretion must be exercised with caution and forbearance.[2] It would be a wrong exercise of discretion if the Court penalises the party and prevents him from proving his case[3] merely by reason of the default. Where, for example, there is sufficient evidence on his side[4] or where the opposite party has failed to give any evidence in support of his

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Order 16, Rule 20—Note 1.

(1) *Seetaram Sahoo* v. *Sheo Golam Sahoo*, (1873) 19 Suth W R 183 (184) [Interlocutory application]; *Syed Disham Hossain* v. *Mussammut Khodeja*, (1867) 8 Suth W R 64 (64) [Execution proceedings]. See also *Chunder Mohun Mojoomdar* v. *Tetooram Bose*, (1865) 4 Suth W R Act X 18 (19) [Suits under the Bengal Rent Act]; *Soopun Khan* v. *Huro Pershad Paul*, (1865) 4 Suth W R Act X 50 (50), (Do.).

(2) *Obhoy Churn Mookerjee* v. *Mussamut Pearee Dossee*, (1874) 22 Suth W R 270 (271).

(3) *Radha Nath* v. *Uttam Chandra*, (1918) 46 Ind Cas 879 (879): 28 Cal L Jour 24.

(4) *Mankolam Vasudevan Nambudri* v. *Mankolam Sankaran Nambudri*, (1911) 12 Ind Cas 719 (719): 10 Mad L Tim 451: 22 Mad L Jour 60: (1912) 1 Mad W N 546 [He is, therefore, not bound to be present on the adjourned date].

(5) *Arunachella Mudaly* v. *Vencatachella Mudaly*, (1869-70) 5 Mad H C R 269 (272).

(6) *P Vasudevan Nambudripad* v. *Kovilagatha Valiarany*, (1868-69) 2 Mad H C R 231 (233) [Default overlooked—Case adjourned—Rule cannot be enforced on adjourned date].

(7) *Benode Ram Sein* v. *Brohmo Moyee Debia*, (1864) 1 Suth W R 168 (169, 170); *Prosunno Coomar Shaha* v. *Gooroo Pershad Roy*, (1864) 1 Suth W R 25 (25).

(8) *Data Hurrukman Singh* v. *Oodoy Chand Pyne*, (1866) 6 Suth W R 247 (248). See also *Krishnaji A Nimkar* v. *Vishnu A Nimkar*, (1864-66) 2 Bom H C R 340 [Refusal to answer—Not of any *material* question—Judgment not to be against party]; *Gooroodoss Roy* v. *Greedhur Sein*, (1869) 11 Suth W R 110 (112); *Thakoor Lall Misser* v. *Brohmo Moyee Dabia*, (1871) 15 Suth W R 253 (254); *Bhally Mahomed* v. *Nobin Chunder*, (1871) 15 Suth W R 269 (269); *Raj Chookun Duswandi* v. *Busjeet Tewaree*, (1873) 20 Suth W R 165 (166). See *Jhoomuck Singh* v. *Jeetun Lall*, (1869) 12 Suth W R 359 (360).

Note 2.

(1) *Gopal Lal Bose* v. *Kalenath Mookerjee*, (1866) 6 Suth W R 89 (89); *Raj Chunder Ghose* v. *Koylash Chunder Banerjee*, (1866) 6 Suth W R Act X 86 (86); *Narain Das* v. *Mahtab Chunder*, (1868) 10 Suth W R 174 (174): 1 Beng L R S N 11 (*d*); *Pakaktar* v. *Jakriram*, (1869) 11 Suth W R 5 (5): 2 Beng L R (App) 12; *Kisto Coomar Chowdhry* v. *Gobind Coomar*, (1864) Suth W R 133 (134). See *Ranji Shett* v. *Awaker Mullandeayata*, (1866) 3 Mad H C R 299 (300-301); *Narajandar* v. *Maharajah of Burdwan*, (1868) 1 Beng L R S N 11.

(2) *Vasudevan* v. *Kovilagatha Valia Rany*, (1868) 4 Mad H C R 231 (233); *Hurukman* v. *Ooday*, (1866) 6 Suth W R 247 (248); *Syud Shah Alch Ahmed* v. *Bebee Nuseebun*, (1872) 17 Suth W R 563 (564).

(3) *Roop Narain Miser* v. *Kasheeram Singh Timbiram*, (1870) 2 N W P 67; *Mahomed Hamidolla* v. *Durbesh Shaikh*, (1875) 24 Suth W R 314 (314, 315).

(4) *Herbert Cowell* v. *Ishen Chunder Sen*, (1872) 18 Suth W R 16 (17); *Bissonauth Mojoomdar* v. *Khettur Chunder Sen*, Marsh 467.

own case,[5] or the claim of the opposite party is *prima facie* unsustainable[6] the Court need not act under this rule. But the Court will be justified in acting under this rule against the defaulting party[7] where for example, his evidence or his production of any document is material[8] or where there is evidence for the opposite party[9] or where the opposite party is unable to make out his case without compliance of the order, by the defaulting party.[10]

O.16, R.20, Notes 2—3.

3. **Appeal.**—A decision pronouncing judgment against a party under this rule is an appealable *order* and an appeal lies therefrom.[1] *See* O. 43, R. 1 (*h*).

R. **21**. [S. 178.] *Where* any party to a suit is required to give evidence or to produce a document, the *provisions* as to witnesses shall apply to him so far as they are applicable.

O.16, R.21.

Rules as to witnesses to apply to parties summoned.

[1877—S. 177; *cf.* 1859—S. 126.]

Local Amendments.

BENGAL.

Cancel Rule 21 and *substitute* therefor the following:—

"21. (1) When any party to a suit is required by any other party thereto to give evidence, or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When any party to a suit gives evidence on his own behalf, the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing."

ALLAHABAD.

To Order 16, *add* the following rules:—

22. (1) Save as provided in this rule and in Rule 2, the Court shall allow travelling and other expenses on the following scale:—

(*a*) in the case of witnesses of the class of cultivators, labourers, and menials, six annas a day;

(*b*) in the case of witnesses of a better class, such as Zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct; and

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(5) *Damoodar Bhooshun* v. *Rughoonath*, (1869) 12 Suth W R 242 (242): *Thakoor Lall Misser* v. *Brohmo Moyee Dabee*, (1871) 15 Suth W R 253 (254), (Do.); *Syud Shah Alch Ahmed* v. *Bebee Nuseebun*, (1872) 17 Suth W R 563 (563), (Do.); *Ravji Ranchod Naik* v. *Vishnu Ranchod Naik*, (1884) 9 Bom 241 (244) [Rule will not justify the Judge in dispensing with proof of the execution of a will in probate cases].

(6) *Gireedharee Singh* v. *Kalika Sookul*, (1867) 7 Suth W R 46 (47) [A claim barred by limitation on the very face of it].

(7) *Brahmamoyee* v. *Krista*, (1876-77) 2 Cal 222 (225); *Tara Chand* v. *Boistub Churn*, (1871) 16 Suth W R 196 (197).

(8) *Kalakam Venkaiya* v. *Bhupalam Pedda Mullasappah*, (1868-69) 4 Mad H C R 142 (144) [Non-production of a material document]. See also *Tara Chand Banerjee* v. *Boistub Churn Bhudro*, (1871) 16 Suth W R 196 (197), (Do.). See *Ram Jeebun Loll* v. *Nond Loll*, (1865) 2 Suth W R, Act X, 43 (43).

(9) *Phoolbasee Koer* v. *Parjun Singh*, (1869) 12 Suth W R 369 (370).

(10) *Hemangini Dasi* v. *Ramnidhi Kundu*, (1868) 10 Suth W R 158 (159): 1 Beng L R S N 10. See also *Laith Narain Deo* v. *Bolakee Chowdhry*, 1864 Suth W R 24 (25). See *Kasinauth Shaha* v. *Duarakanath Sirkar*, (1872) 17 Suth W R 550 (551): 9 Beng L R 215 (Note) [The corresponding provision of the Code of 1859, i.e., S 170, does not contain the words "present in Court" and "then and there". But the principles decided in the cases under the said Code quoted above are, nevertheless, applicable under the present Code].

Note 3.

(1) *Kedarnath Bhuttacharjee* v. *Kirpa Ram Bhuttacharjee*, (1866) 5 Suth W R 270 (270). *Khomkar Abdul* v. *Khoda Newaz*, Marsh 568. See also *Ishur Chunder Sen* v. *Onath Nath Deb*, (1872) 18 Suth W R 16 (18).

O.16, R.21, Note 1.

(c) in the case of witnesses of superior rank, including officers of Government in receipt of a salary of not less than Rs. 200 a month, from three to five rupees a day.

(2) If a witness demands any sum in excess of what has been paid to him, such sum shall be allowed if he satisfy the Court that he has actually and necessarily incurred the additional expense.

Illustration.

A post office employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip, which the witness will present to the Court from which the summons issued.

(3) If a witness be detained for a longer period than one day the expense of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule as may seem to the Court to be reasonable and proper:

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.

23. In cases to which Government is a party, Government servants whose salary exceeds Rs. 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a Court situated more than five miles from their head-quarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses.

Synopsis.

1. Opposite party as a witness.

Parties to give evidence on their own side. See Note 1, Pt. (1).

1. **Opposite party as a witness.**—The practice of a party not examining himself as his witness and forcing the opposite party to summon him, thereby hoping to obtain an opportunity of being cross-examined by his own counsel[1] has been severely condemned by their Lordships of the Privy Council. The High Courts of Bombay and Lahore have also held that the practice of summoning the opposite party as a witness is equally objectionable.[2]

As regards the weight of the evidence of the opposite party summoned as a witness, *see* the undermentioned case.[3]

Order 16, Rule 21—Note 1.

(1) *Lal Kunwar* v. *Chiranji Lal*, (1910) 5 Ind Cas 549 (550): 14 Cal W N 285: 11 Cal L Jour 172: 7 Mad L Tim 57: 1910 Mad W N 8: 12 Bom L R 244: 20 Mad L Jour 182: 32 All 104: 37 Ind App 1 P C; *Kishori Lal* v. *Chuni Lal*, (1909) 1 Ind Cas 128 (129): 5 Mad L Tim 58: 9 Cal L Jour 172: 13 Cal W N 370: 11 Bom L R 196: 31 All 116: 19 Mad L Jour 186: 36 Ind App 9 P C.

(2) *Baldev* v. *Baldev Das*, (1909) 3 Ind Cas 45 (45) Bom; *Biram Das* v. *Mangal Singh*, 1929 Lah 868 (871).

(3) *Mathura Das* v. *Jetha Jai Chand*, (1898) 2 Cal W N (S N) 99 (99).

ORDER XVII.

O. 17, R. 1, Note 1.

ADJOURNMENTS.

Court may grant time and adjourn hearing.

R. 1. [S. 156.] (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Costs of adjournment.

(2) In *every* such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing *beyond the following day* to be necessary for reasons to be recorded.

[1877—S. 156; 1859—S. 146.]

Local Amendments.

ALLAHABAD.

The following proviso is added:—

"Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order 16, Rule 1."

LAHORE.

To Rule 1 *add* the following as sub-Rule (3):—

(3) Where sufficient cause is not shown for the grant of an adjournment under sub-Rule (1), the Court shall proceed with the suit forthwith.

Synopsis.

1. Scope of the rule.
2. "May adjourn"—Discretion of Court.
3. Sufficient cause must be shown.
4. "The Court shall fix a day"—Sub-Rule (2).
5. Costs of adjournment—Sub-Rule (2).
6. Costs in pauper suits.
7. Proviso.
8. Appeal.
9. Review.
10. Revision.

Adjournments not at instance of parties—Applicability of rule. See Note 1, Pts. (2) to (5).

Costs of adjournment as condition precedent. See Note 5, Pts. (4) to (9).

Hearing of the suit and hearing of the evidence—Distinction. See Note 1, Pt. (5).

Proviso—Trial Court itself to exercise discretion and not to ask for orders of superior Court. See Note 7, Pt. (2).

1. Scope of the rule.—The rule vests in Courts a discretion to grant time to a party *at any stage* of the suit.[1] But the application of the rule is

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Order 17, Rule 1—Note 1.

(1) *Gaman v. Muhammad*, (1916) 36 Ind Cas 76 (76): 1916 Pun L R 91: 1916 Pun W R 167 [Such time may be granted even at the stage of arguments].

O. 17, R. 1, Notes 1—2.

limited to adjournments granted at the instance of *parties* and does not extend to those necessitated by rules of the Court.[2] Thus an order made on the settlement of issues fixing a day for the final hearing is not an order under this rule.[3] Similarly orders for adjournment necessitated by delay on the part of Court's officers in the performance of Court's duty are not governed by this rule.[4]

The rule speaks of the "hearing of the suit." There is a distinction between the hearing of the *suit* and the hearing of *evidence*. Thus the Court may adjourn the hearing of the suit and yet may, under O. 13, R. 2, refuse to accept documentary evidence which ought to have been, but was not produced, at the first hearing of the suit, though such hearing resulted only in an adjournment.[5]

Neither this rule nor any other rule of this order, applies to execution proceedings.[6] (*Vide also* notes under Rr. 2 and 3).

2. **"May adjourn"—Discretion of Court.**—The granting of an adjournment to a party to a suit is, under this rule, left to the *discretion* of the Court.[1] The discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner,[2] and upon proper materials.[3] It should be exercised after considering the party's conduct in the case,[4] and the opportunity he has had of getting ready, and the truth and sufficiency of the reason alleged by him for not being ready.[5] Where the adjournment is refused, reasons should be given for such refusal.[6]

The main object of vesting the discretion in the Court, is to enable it to prevent a party from improperly *delaying* proceedings and abusing the process of the Court.[7] The Court should not, therefore, be too technical in such matters,[8] and unless there is a pressing necessity for proceeding with the case,

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(2) *Sm Toolsey Monee Dassee* v. *Sm Prosad Money Dassee*, (1898) 2 Cal W N 490 (491).

(3) *R* v. *R*, (1891) 14 Mad 88 (93).

(4) *Mani Ram* v. *Jagannath*, 1929 Lah 620 (621): 117 Ind Cas 891 [It is the duty of Court to see that service of summons to witnesses is effected. Adjournment caused by non-service of such summons on the part of the process department is not an adjournment under R 1].

(5) *Madhu Sudan* v. *Kali Charan*, (1918) 46 Ind Cas 246 (248): 27 Cal L Jour 119.

(6) *Dhonkal Singh* v. *Phakkar Singh*, (1893) 15 All 84 (94): 13 All W N 36 F B.

Note 2.

(1) *Shivandas* v. *Pamanmal*, (1915) 27 Ind Cas 942 (943): 8 Sind L R 275; *Gaman* v. *Mahammad*, (1916) 36 Ind Cas 76 (76): 1916 Pun L R 91: 167 Pun W R 1916; *Amolak Rao* v. *Mahipat Rao*, 1922 Nag 81 (81): 66 Ind Cas 850; *Rameshwar Singh* v. *Harihar Jha*, (1920) 57 Ind Cas 250 (252): 1921 Pat 76 (2): 5 Pat L Jour 390: 1 Pat L Tim 666 [Apart from an express provision of law, the Court is not bound to grant an adjournment]; *Madhoprasad* v. *Ajudhyaprasad*, (1911) 10 Ind Cas 748 (748): 13 Bom L R 161 [Parties to a suit cannot by consent, obtain an adjournment of the case as a matter of course].

(2) *Shrivandas* v. *Pamanmal*, (1915) 27 Ind Cas 942 (943): 8 Sind L R 275.

(3) *Sarju Pershad* v. *Umanpatgir*, (1916) 35 Ind Cas 464 (466) All.

(4) *Jagabandhu* v. *Gorey Lal*, (1917) 37 Ind Cas 266 (266): 1 Pat L Jour 173.

(5) *Nabi Baksh* v. *Nuruddin*, 1927 Lah 879 (879) 100 Ind Cas 301; *Jatindra Nath* v. *Suradhani Debi*, 1928 Cal 102 (102): 105 Ind Cas 851.

(6) *Sarju Parshad* v. *Umanpat Gir*, (1916) 35 Ind Cas 464 (466) All.

(7) *Shivandas* v. *Pamanmal*, (1915) 27 Ind Cas 942 (944): 8 Sind L R 275.

(8) *Raghava Ayyar* v. *Ramaswami Ayyar*, 1926 Mad 859 (860): 1926 Mad W N 434: 96 Ind Cas 536; *Maung Ba Thein* v. *U Po Min*, 1929 Rang 215 (216) [On the day fixed for hearing, case not called until 2 P M—Six witnesses for plaintiff examined and forty witnesses for defendant present—Defendant's Advocate appearing in other Court and defendant applying for adjournment but Court refusing—Though defendant has not shown sufficient cause for not being ready with his case, Court could use its discretion in allowing adjournment]; *Bhujang Rao* v. *Baliram*, 1928 Nag 165 (165): 11 Nag L J 78: 108 Ind Cas 879 [Adjournment—Refusal to postpone the hearing for an hour or two to give time for a party to appear can be hardly called proper].

or the application for adjournment is obviously frivolous, the adjournment asked for should not be refused.[9]

O. 17, R. 1, Notes 2—3.

3. **Sufficient cause must be shown.**—On the one hand an adjournment should not be refused where sufficient cause for the adjournment is shown;[1] and on the other, it should not be granted even on condition of payment of costs, where no sufficient cause exists.[2]

What is sufficient cause will depend upon the circumstances of each case.[3] Speaking generally, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible,[4] or where there has been little or no negligence on his part,[5] an adjournment should not be refused. But where the party has been wanting in due diligence,[6] or is guilty of negligence,[7] an adjournment can be refused.

The following are some of the circumstances which have been held to constitute sufficient cause for adjournment:—

(1) Where a party is not ready for the hearing by reason of his having been taken by *surprise*.[8]

(2) Where he could not reasonably know of the date of hearing in sufficient time to get ready for the same.[9]

(3) Where his witnesses fail to appear for the hearing owing to non-service of summonses on them when such non-service is not due to the fault of the party.[10] In such cases an adjournment should

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(9) *Jhanda Singh* v. *Dungar Mal*, 1882 All W N 127 (127).

Note 3.

(1) *Dulhin Souraj* v. *Audhan Singh*, 1891 All W N 112 (116 and 117); *Muhammad Hussain* v. *Radha Kishan*, 1925 Lah 572 (572, 573): 26 Pun L R 181: 86 Ind Cas 1012.

(2) *Bindubashini* v. *Secretary of State*, 1924 Cal 774 (776): 51 Cal 70: 40 Cal L Jour 163: 79 Ind Cas 745.

(3) *Dadabhai* v. *Sorabji*, (1865-67) 3 Bom H C R (O C) 55; *Sellan* v. *Vettiyan Parayan*, 1926 Mad 944 (2), (944): 1926 Mad W N 624: 24 Mad L W 413: 97 Ind Cas 895; *Maung Ba Thein U Po Min*, 1929 Rang 215 (216).

(4) *Sarju Prasad* v. *Umapatgir*, (1916) 35 Ind Cas 464 (466) All; *Shaik Awlad* v. *Shaik Abdool Kureem*, (1872) 18 Suth W R 141 (142) [Where a defendant has not been served with the summons in time so as to enable him to produce his evidence, he should be given time if he asks for it]; *Ram Lal Gope* v. *Kali Prasad Sahu*, 1929 Pat 609 (612): 10 Pat L Tim 589: 120 Ind Cas 304 [Where a suit was adjourned to a particular date and the defendant was ready with his witnesses on that date but it happened to be a holiday and therefore the case was not taken up and the witnesses returned to their places, there was sufficient cause for adjournment]; *Baboo Seetharam Sahoo* v. *Roy Baboo Sheo Gollam Sahoo Bahadur*, (1872) 18 Suth W R 325 (325, 326) [Court not sitting on date of hearing—No date fixed—Court taking it on a future date—Party not knowing the usual practice in such cases—Adjournment ought to be given].

(5) *Raghava Ayyar* v. *Ramasami Ayyar*, 1926 Mad 859 (860): 1926 Mad W N 434: 96 Ind Cas 536.

(6) *Fitz Holmes* v. *The Bank of Upper India, Ltd*, 1923 Lah 548 (550): 4 Lah 258: 5 Lah L Jour 438: 77 Ind Cas 523; *Simon Elias* v. *Jorawarmull*, (1875) 24 Suth W R 202 (202); *Anna Khatun* v. *Mohammad Wali*, 1926 Oudh 75 (76): 88 Ind Cas 481; *Hari Dass* v. *Meer Mouzam*, (1871) 15 Suth W R 447 (448): 8 Beng L R App 16 [Witnesses not served owing to process fee being paid late]; *Jagabandhu* v. *Goorey*, (1917) 37 Ind Cas 266 (266): 1 Pat L Jour 173, (Do.); *Arumugham Pillai*, In re, (1912) 15 Ind Cas 584 (585) Mad, (Do.).

(7) *Aludomal* v. *Ali*, (1911) 10 Ind Cas 554 (555): 5 Sind L R 49; *Mottiram* v. *Tukaram*, 1926 Nag 486 (487): 96 Ind Cas 1006.

(8) *Ameer Ali* v. *Run Bahadur*, (1867) 7 Suth W R 84 (84); *S N Mullick* v. *Ganga Gope*, 1925 Pat 534 (534 and 535): 1925 Pat H C C 199: 91 Ind Cas 167: 7 Pat L Tim 381.

(9) See *Ram Lal* v. *Kali Prasad*, 1929 Pat 609 (612): 10 Pat L Tim 589: 120 Ind Cas 304.

(10) *Narayan Singh* v. *Dy Commissioner of Partabgarh*, (1920) 55 Ind Cas 890 (890): 7 Oudh L J 91; *Dhani Ram* v. *Gaya Singh*, 1925 Oudh 304 (304): 84 Ind Cas 173; *Gaurava* v. *Kanteppa*, 1896 Bom P J 220 (218 of the book) [But not where the summonses could not be served owing to the party's dilatoriness]; *Jhanda Singh* v. *Dungar Mal*, 1882 All W N 127 (127) [Where adjournment is asked for for the attendance of witnesses, then, unless there is pressing necessity for proceeding with the case, or application is obviously frivolous or party was grossly negligent adjournment "ought to be granted"].

O. 17, R. 1, Notes 3—5.

be granted to enable the party to take steps again for their attendance.[11] The mere fact that the process fees were paid late, is no ground for refusing adjournment if the witnesses are absent though served in sufficient time to attend.[12] Where the absence of witnesses is due to a *bona fide* mistake on the part of the party, there is sufficient cause for adjournment.[13]

(4) Where a party is unready owing to his lawyer having withdrawn his appearance in the case under circumstances which do not give the party sufficient time to engage another lawyer and enable him to get ready.[14]

For cases which have been held *not* to constitute sufficient cause for adjournment, *see*.[15]

Applications for adjournment should not be belated but should be sufficiently early so that no inconvenience may be caused to the judge or the opposite party.[16]

4. "The Court shall fix a day"—Sub-R. 2.—Where a suit is adjourned the date to which it is adjourned should be fixed by order of Court.[1] The date so fixed should be communicated to the parties or their pleaders or to such of them as are present or represented in Court when the adjournment takes place.[2] It is not, however, necessary to communicate it to an absent party,[3] for it is the duty of the pleaders to get acquainted with the date of adjournment.[4]

5. Costs of adjournment—Sub-R. 2.—In granting an adjournment under this rule, the Court may, if it thinks fit, direct the party asking for ad-

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(11) *Chandrika Baksh* v. *Brij Bihari Lal*, (1901) 4 Oudh Cas 379 (386) [but see *Devchand Khatoo* v. *Birjee Coomaree*, (1903-1904) 2 L B R 91 (93)]; *Chatur Bhuj* v. *Govind Ram*, 1923 All 218 (219): 21 All L J 348: 67 Ind Cas 668: 45 All 407: 4 L R A Civ 409: 74 Ind Cas 571; *Mt Kisto* v. *Behari Lal*, 1928 Lah 641 (2), (642): 108 Ind Cas 612 [But not if the party has undertaken to produce them]; *Khan Derao* v. *Bastinga*, 1889 Bom P J 269 (325) [Non-attendance of witnesses through illness is sufficient ground]; *Md Ibrahim* v. *Hari Chand*, 1926 Lah 501 (501): 93 Ind Cas 1024, (Do.).

(12) *Madhodas* v. *Girdharilal*, (1920) 58 Ind Cas 436 (437): 16 Nag L R 1.

(13) *Surjyamoni Dasi* v. *Kali Kanta Das*, (1900) 28 Cal 37 (52, 53): 5 Cal W N 195; *F A C Rebello* v. *Co-operative Navigation & Trading Co. Ltd.*, 1925 Bom 105 (108): 26 Bom L R 907: 84 Ind Cas 363 [But when notice for the discovery and inspection of documents has been posted to the hearing of the suit but on the day so fixed, no judgment is given on the notice, adjournment of hearing of the suit may be refused].

(14) *Hare Krishna* v. *Bishnu Chand*, (1908) 35 Cal 799 (802, 806): 12 Cal W N 888: 7 Cal L Jour 426 [Two pleaders engaged—Senior ill on the hearing date—Another senior engaged, not allowed to argue on ground of want of vakalat —Junior not ready to argue—Adjournment must be granted]; *Jadu Bans Upadhya* v. *Bhuneswri Upadhya*, (1911) 10 Ind Cas 214 (214) All [But where pleader could not attend hearing and time is granted to engage another and the second pleader engaged asks again for adjournment, adjournment can be refused].

(15) *Maung Po Kwe* v. *Maung Sein*, 1927 Rang 258 (1), (258): 6 Bur L Jour 113: 104 Ind Cas 683 [Absence of Advocate owing to his attendance in another case is not sufficient ground for adjournment]; *A Gurunathan Yogi* v. *A Raghavayya*, 1928 Mad 401 (401): 106 Ind Cas 875 [The fact that compromise was suggested is no sufficient cause for adjournment especially where the suit is an old one]; *Rameshwar Singh* v. *Harihar Jha*, 1921 Pat 76 (2), (78): 5 Pat L Jour 390: 1 Pat L Tim 666: 57 Ind Cas 250 [Non-compliance with a provision of law by party asking for adjournment is not sufficient cause for adjournment]. See also *Mahant Rang Lal Bhagat* v. *Deonarain*, 1887 All W N 282 (282) [Illness of Pleader—No ground in appeal for adjournment].

(16) *Ganesh Prasad* v. *Bhangilal*, 1925 Nag 236 (2), (237): 83 Ind Cas 257.

Note 4.

(1) *Imtiaz Ali* v. *Shaikh Bhola*, 1882 All W N 171 (171) [A mere note by a clerk does not amount to a proper appointment of adjourned date for the hearing of a case].

(2) *Durga Prasad* v. *Het Ram*, 1923 All 79 (80): 20 All L J 912: 77 Ind Cas 91; *Gajadhar Prasad* v. *Firm, Manulal Jagarnath Prasad*, 1925 Pat 807 (809): 7 Pat L Tim 456: 4 Pat 440: 93 Ind Cas 257.

(3) *Commissioner of Income Tax* v. *Perianna*, 1930 Mad 113 (114, 117): 58 Mad L Jour 10: 31 Mad L W 78: 122 Ind Cas 449.

(4) *Robert Watson & Co* v. *Ambica Dasi*, (1899) 27 Cal 529 (531): 4 Cal W N 237.

journment to pay costs to the other party.[1] The sum so awarded should not, however, be in the nature of a penalty or punishment but should be commensurate with the costs which, in the opinion of the Court, the party who is ready will have to incur;[2] and sufficient opportunity should be given to the party to obey the order.[3]

O. 17, R. 1, Notes 5—7.

An order directing payment of costs can be executed under S. 36.

The payment of costs may be made a condition precedent to the adjournment.[4] Such a condition need not however be express if it is sufficiently obvious from the context.[5] If the costs are not so paid a further adjournment may be refused.[6] If a suit or appeal is adjourned on condition that it will *stand dismissed* if the costs of the adjournment are not paid within a certain date, then on failure of payment of costs within such a date, the suit or appeal will stand dismissed.[7] Similarly if the suit is adjourned on condition that if the defendant does not pay the costs ordered before the adjourned date, the defence will be struck off and the suit proceeded with *ex parte*, the Court can in case of default strike off the defence.[8] But the Court has no jurisdiction to pass such a conditional order of adjournment as to enable it, on default, to pass a decree without evidence, *when such evidence is necessary*.[9]

No costs can be awarded against a party not at fault, in the matter of the adjournment.[10]

6. Costs in pauper suits.—The High Court of Rangoon has held that even a plaintiff suing in *forma pauperis* may be ordered to pay costs as a condition precedent to his being granted an adjournment.[1]

7. Proviso.—Where the trial of the suit has once begun, it should ordinarily go on from day to day. The Court has, however, discretion to adjourn the trial of a part-heard case to a day beyond the following day, but in

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Note 5.

(1) *Shanks* v. *Savage*, (1881) 7 Cal 177 (177): *Lim Pin Sin* v. *Eng Wan Hock*, 1928 Rang 306 (307): 6 Rang 561 [Costs of adjournment can be awarded even against a plaintiff suing in *forma pauperis*].

(2) *Gajendra Shah* v. *Ram Charan*, 1930 Oudh 171 (173): 4 Luck 529: 7 Oudh W N 197: 121 Ind Cas 894.

(3) *Dhaniram Mahata* v. *Murti Lal Mahata*, (1909) 1 Ind Cas 366 (368): 13 Cal W N 525: 36 Cal 566: 11 Cal L Jour 150; *Dalaruddin Haldar* v. *Deolar Bux Molla*, 1925 Cal 570 (571): 78 Ind Cas 125; *Kalu Sarang* v. *Abedannessa Khatun*, 1926 Cal 1221 (1222): 97 Ind Cas 172.

(4) *Lim Pin Sin* v. *Eng Wan Hock*, 1928 Rang 306 (307): 6 Rang 561.

(5) *Tatayya* v. *Venkatasubbaraya Sastri*, 1928 Mad 786 (788): 111 Ind Cas 168; *Ram Chand* v. *Ali Akbar*, (1916) 35 Ind Cas 534 (534, 535). 90 Pun W R 1916: 158 Pun L R 1916; *Naredra Nath* v. *Uma Charan*, (1919) 49 Ind Cas 272 (273) Cal.

(6) *Chandika Baksh* v. *Brij Bihari Lal*, (1903) 6 Oudh Cas 41 (43).

(7) *Asghar Ali* v. *Mahabir*, 1925 Oudh 102 (103): 27 Oudh Cas 225: 84 Ind Cas 742; *Sewaratan* v. *Kristo Mohan Shaw*, 1922 Cal 320 (321): 48 Cal 902: 66 Ind Cas 481.

(8) *E I Ry Co* v. *Jitmal Kallomal*, 1925 All 280 (282): 23 All L Jour 212: L R 6 All 212: 47 All 538: 86 Ind Cas 862; *Veerabhadrappa* v. *Chinnamma*, (1898) 21 Mad 403 (404): 8 Mad L Jour 189 [But it is not open to the Court to strike off the defence unless payment of costs is made a condition precedent to the hearing of defendant's evidence].

(9) *Musthan Rawther* v. *Natharsa Rauthar*, (1908) 18 Mad L Jour 541 (542): 4 Mad L Tim 200.

(10) *Umatul Mughar* v. *Saligram*, (1915) 29 Ind Cas 137 (138): 126 Pun L R 1915: 1915 Pun W R 51. See also *Sundar* v. *Sambhal*, (1896) All W N 220 (220) [Where adjournment is occasioned by the Court's convenience, it was held the payment of process for issue of summons, is not obligatory of the party in view of the rule prevailing in Allahabad].

Note 6.

(1) *Lim Pin Sin* v. *Eng Wan Hock*, 1928 Rang 306 (307): 6 Rang 561.

O. 17, R. 1, Notes 7—10.

such a case the Court should record its reasons therefor.[1] In exercising such a discretion the Court should act of itself and not ask for orders of the superior Court in the matter.[2]

8. **Appeal.**—No appeal lies from an order refusing adjournment under this rule;[1] but such a refusal is liable to correction by an appellate Court in an appeal from the decree in the suit.[2] The refusal may be made a ground of attack in appeal at whatever stage of the hearing of the suit, the order of refusal may have been made.[3] The exercise of discretion under this rule is not liable to be interfered with in second appeal.[4] (*Vide also* notes under S. 100 and 101).

9. **Review.**—An order of adjournment once made cannot be rescinded in review unless for good and sufficient reasons and in the presence of the other side.[1]

10. **Revision.**—An order of adjournment is not liable to revision.[1] But where an adjournment is refused and the suit is either dismissed for default or decreed *ex parte*, a revision will lie from an order passed in appeal against an order refusing to set aside the dismissal for default or the *ex parte* decree as the case may be.[2] Even in such a case the matter will not be interfered with except for strong reasons.[3]

O. 17, R. 2.

R. 2. [S. 157.] *Where* on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by *Order IX* or make such other order as it thinks fit.

Procedure if parties fail to appear on day fixed.

[1877—S. 157; 1859—S. 147.]

Local Amendments.

ALLAHABAD.

Add to Rule 2:—

Where on any such day the evidence, or a substantial portion of the evidence, of any party has been recorded and such party fails to appear, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.

Note 7.

(1) *Ma Daw Thu* v. *Ma*, (1910) 8 Ind Cas 990 (991): 3 Bur L Tim 146.

(2) *Sivagami Ammal* v. *Louis Gnana Prakasa Mudaliar*, (1915) 26 Ind Cas 261 (262): 16 Mad L Tim 504.

Note 8.

(1) *Laxman Rao* v. *Vithoba*, (1918) 45 Ind Cas 898 (899) Nag.

(2) *Madhodas* v. *Girdharilal*, (1920) 58 Ind Cas 436 (437): 16 Nag L R 1.

(3) *Jethalal Girdhar* v. *Varaj Lal Bhai Shankar*, 1922 Bom 267 (269): 23 Bom L R 769: 63 Ind Cas 478.

(4) *Parsottam Das* v. *Kesho Saran*, (1914) 24 Ind Cas 206 (207) All.

Note 9.

(1) *Bishen Perkash* v. *Ruthun Gir*, (1873) 20 Suth W R 2 (3).

Note 10.

(1) *Rajabai* v. *Jagannath*, 1924 Nag 417 (418): 7 Nag L J 183: 78 Ind Cas 969; *Mulchand* v. *Juggi Lal*, (1914) 25 Ind Cas 207 (207): 12 All L J 460.

(2) *Bevis & Co* v. *Ram Prasad*, 1922 All 72 (73): 44 All 825: 66 Ind Cas 167: 20 All L J 158; *Ajodhya Prasad* v. *Secretary of State*, 1924 Nag 298 (299): 79 Ind Cas 123.

(3) *Shivandas* v. *Pamanmal Mangharam*, (1915) 27 Ind Cas 942 (944): 8 Sind L R 275.

Explanation.—No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application. **O. 17, R. 2, Note 1.**

OUDH.

To Rule 2 *add* the following as sub-Rule 2 (2), and *read* the existing Rule 2 as sub-Rule 2 (1):—

(2) Where before any such day, the evidence or a substantial portion of the evidence of any party has been recorded, and such party fails to appear on such day, the Court may, in its discretion proceed with the case as if such party were present and may dispose of it on the merits.

Explanation.—No party shall be deemed to have failed to appear if he is either present in person, or is represented in Court by his agent or pleader though engaged only for the purpose of making an application.

Synopsis.

1. Scope and applicability of the rule.
2. Execution proceedings.
3. Distinction between this rule and Rule 3. See Rule 3.
4. "Any day to which the hearing of the suit is adjourned."
5. "Appearance". See Notes to Order 3, Rule 1.
6. "Hearing." See Notes to Order 9, Rule 9.
7. "One of the modes directed by Order 9."
8. "Or make such other order as it thinks fit."
9. Appeal and revision. See Note 7 to Rule 3.

Default of appearance on the date fixed for judgment. See Note 8, Pt. (8).
Difference between O. 9, and O. 17. See Note 1, Pt. (1-a) and Note 7.
Dismissal for default not res judicata. See Note 7, Pt. (4) and O. 9, R. 4.
No day fixed for hearing, rule inapplicable. See Note 4, F.-N. (1).
Parties and pleaders to be acquainted with orders of Courts. See O. 17, R. 1, Note 4.
Powers of Court at different stages of the suit. See Note 8, Pts. (5) to (8).
Remedies against orders passed under this rule. See Note 7, Pts. (2) to (4).
Suit not to be dismissed for default, where plaintiff lets in all evidence. See Note 8, Pt. (6).

1. Scope and applicability of the rule.—This rule should be read along with the provisions of O. 9. That order deals with the failure of parties to appear at *the first hearing* of the suit, while this rule deals with their failure to appear at the *adjourned* hearing of the suit.

If, at the hearing of a suit after settlement of issues, the parties or either of them fail to appear, the suit need not be decided on the *merits*. Nor need it necessarily be dismissed under O. 9; the Court has a *discretion* either to proceed under O. 9 or pass such *other orders* as the Court thinks fit.[1] Where a suit has been disposed of under circumstances which make this rule applicable, such disposal will be referred to the provisions of this rule.[2]

This rule will not, however, apply if the parties are *present* though they may have defaulted in respect of some other act.[3] Nor will it apply if the

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Order 17, Rule 2—Note 1.

(1) *Ramanathan Chettyar* v. *Karuppayee*, (1910) 8 Ind Cas 156 (157): 8 Mad L Tim 450: (1910) Mad W N 753; *Kote Ne* v. *Md Durbesh*, (1917) 42 Ind Cas 537 (538, 539) (L B).

(2) *Muniappan* v. *Balayan*, (1909) 4 Ind Cas 1167 (1167): 19 Mad L Jour 222; *Venkatachellapathi Chettiar* v. *Periyasami Udayan*, (1910) 6 Ind Cas 681 (681): 7 Mad L Jour 308.

(3) *Shadeo Ram* v. *Salig Ram*, 1929 All 543 (543): 117 Ind Cas 105.

O. 17, R. 2, Notes 1—6.

person absent is not validly a party in the suit as where a minor party has no guardian *ad-litem* appointed for him.[4]

The rule does not apply to proceedings *after* decree.[5]

2. Execution proceedings.— This rule does not apply to execution proceedings.[1] (*Vide also* notes under R. 1, *supra* and R. 3, *infra.*)

3. Distinction between this Rule and R. 3.—*See* R. 3.

4. "Any day to which the hearing of the suit is adjourned."—This rule does not apply unless the day to which a suit has been adjourned is a day fixed for the *hearing* or trial of the case.[1] Thus it has been held not to apply in the following cases:—

(1) Where the day was fixed for consideration of an application for amendment of issues.[2]

(2) Where it was fixed for the hearing of an application for the appointment of a guardian *ad litem* of a minor defendant.[3]

(3) Where on the defendant asking for a stay of the suit, it was adjourned to another date for the production of the copy of a certain order.[4]

Where a suit was postponed to a fixed day for finding out the whereabouts of an unserved defendant and no other separate day was specifically fixed for hearing it was held that the date fixed was the date of the hearing of the suit.[5]

5. Appearance.—By virtue of an explanation added to this rule by the High Court of Allahabad[1] and the Chief Court of Oudh, no party shall be deemed to have failed to appear if he is represented by an agent or a pleader though engaged only for making an application. *See also* O. 3, R. 1.

6. "Hearing."—*See* Notes to O. 9, R. 9.

The word "hearing" means the taking of evidence or the hearing of arguments or the consideration of questions relating to the suit which would en-

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(4) *Damu Diga* v. *Yakraya Nathu*, (1920) 56 Ind Cas 455 (456): 44 Bom 767: 22 Bom L R 328.

(5) *Lachmi Narain Marwary* v. *Balmakund Marwary*, 1924 P C 198 (200): 35 Mad L Tim 143: 5 L R P C 171: 47 Mad L Jour 441: 20 Mad L W 491: 4 Pat 61: 51 Ind App 321: 22 All L Jour 990: 26 Bom L R 1129: 40 Cal L Jour 439: 29 Cal W N 391: 1924 Mad W N 707: 5 Pat L Tim 623: 81 Ind Cas 747 P C.

Note 2.

(1) *Raghunath Singh* v. *Raghubir Sahai*, (1892) All W N 222 (224): 15 All 55; *Dhonkal* v. *Phaklar*, (1893) 15 All 84 (94): 1893 All W N 36; *Tirthasami* v. *Annappayya*, (1895) 18 Mad 131 (133).

Note 4.

(1) See also *Golap Sundari Debi* v. *Indra Kumar Hazra*, (1909) 1 Ind Cas 86 (88): 9 Cal L Jour 367: 13 Cal W N 493: 5 Mad L Tim 360. See also *Baboo Seetharam Sahoo* v. *Roy Baboo Sheo Gollam Sahoo Bahadur*, (1872) 18 Suth W R 325 (325) [Court not sitting—No date fixed for adjourned hearing—This rule does not apply—Court not justified in refusing adjournment and disposing of the suit].

(2) *Sukhdeo Pattak* v. *Judagi Mian*, 1921 Pat 96 (97): 6 Pat L Jour 331: 2 Pat L Tim 760: 63 Ind Cas 746.

(3) *Debi Sahai* v. *Saraswati*, (1911) 10 Ind Cas 313 (314): 8 All L J 612: 33 All 560: *Abdul Rahman* v. *Shib Lal*, 1922 Pat 252 (254, 255): 4 U P L R (Pat) 13: 1922 Pat H C C 81: 6 Pat L Jour 650: 2 Pat L Tim 572: 63 Ind Cas 570; *Balmakund Ram Marwari* v. *Madho Prashad*, 1924 Pat 714 (715): 5 Pat L Tim 424: 1924 Pat H C C 215: 78 Ind Cas 224.

(4) *Raghbir* v. *Daulat Ram*, (1916) 36 Ind Cas 32 (33): 111 Pun L R 1916: 137 Pun W R 1916.

(5) *Ghulam Hyder Khan* v. *Diwan Tekchand*, (1919) 53 Ind Cas 560 (561): 13 Sind L R 149.

Note 5.

(1) *Baldeo Singh* v. *Chhaju Singh*, 1931 All 703 (704): 1931 All L Jour 646: 133 Ind Cas 622 [Defendant absent—Pleader applying for adjournment—On refusal withdrawing—Held no failure to appear—Decree is one on merits].

able the Judge to finally come to an adjudication upon it; and not the consideration of merely interlocutory matters.[1] It refers so far as this rule is concerned to the commencement of the hearing on *each day* of the hearing, and cannot be considered to mean that the suit is in a continuous state of being called on for hearing so long as it is being heard.[2]

7. **"One of the modes directed by Order 9."**—As has been seen in Note 1, *ante*, O. 9 refers to cases of default of appearance of parties at the *first hearing* of a case. This rule makes the provisions of O. 9 applicable to cases of such default at *adjourned* hearings.

In an old Calcutta case[1] it was held that there was a distinction between O. 9 and this rule and that the provisions of O. 9 relating to the restoration of suits and the setting aside of *ex parte* decrees did not apply to orders passed under this rule. This view has, however, been overruled and it has been repeatedly held that the said provisions of O. 9 will apply to orders passed under this rule on default of appearance of parties at adjourned hearings.

Thus:—

(*i*) if the *plaintiff* fails to appear at an adjourned hearing, the Court may make an order dismissing the suit for default under this rule and R. 8 of O. 9: and the plaintiff may thereupon apply for restoration of the suit under O. 9, R. 9.[2]

(*ii*) if the *defendant* fails to appear at an adjourned hearing, the Court may pass an *ex parte* decree under this rule and R. 6 of O. 9: and the defendant may thereupon apply under O. 9. R. 13 to set aside the *ex parte* decree.[3]

(*iii*) if neither party appears at such hearing, the Court may dismiss the suit under this rule and R. 3 of O. 9; and the plaintiff may thereupon either file a fresh suit or apply to have the dismissal set aside;[4]

But the provisions of this rule will not apply to proceedings after decree.[5]

Note 6.

(1) *Balmakund* v. *Lachmi Narain*, (1920) 57 Ind Cas 748 (750) 2 U P L R (Pat) 197: *Damodar Das* v. *Raj Kumar*, (1922) Pat 485 (487 and 488): 1 Pat 188: 69 Ind Cas 837.

(2) *Arunachallam Chettiar* v. *Sivalingam Chettiar*, 1927 Mad 799 (800): 26 Mad L W 76: 104 Ind Cas 871.

Note 7.

(1) *Sital Hari Banerjee* v. *Heera Lal Chatterjee*, (1894) 21 Cal 269 (273, 274) [Overruled by Full Bench decision in 23 Cal 738].

(2) *Satish Chander* v. *Ahara Prasad*, (1907) 34 Cal 403 (417): 11 Cal W N 329: 5 Cal L Jour 247: 2 Mad L Tim 123 F B; *Ryall* v. *Sherman*, (1877) 1 Mad 287 (288); *Ramaya* v. *Ramaya*, (1884) 7 Mad 41 (42); *Mariannissa* v. *Ramkalpa Gorain*, (1907) 34 Cal 235 (240): 5 Cal L Jour 260; *Nagendra Kumar* v. *Nobin Mondal*, (1909) 1 Ind Cas 741 (741, 742): 36 Cal 189; *Rukan* v. *Tara Chand*, 1922 All 68 (69): 20 All L J 123: 65 Ind Cas 775. See also *Chellam Iyer* v. *Subramanya Iyer*, 1932 Mad 414 (414): 1932 Mad W N 423: 137 Ind Cas 792 [Party to appear in person—Default].

(3) *Jouardan* v. *Ramdhone*, (1896) 23 Cal 738 (753, 756, 758, 760, 764, and 765) F B; *Hildreth* v. *Sayaji*, (1894) 20 Bom 380 (382); *Bhagwan* v. *Hira*, (1897) 19 All 355 (357): 1897 All W N 89; *Mt Janina Bibi* v. *Seri Chand Bhagat*, (1898) 2 Cal W N 693 (694); *Enatulla* v. *Jiban Mohan*, (1914) 23 Ind Cas 769 (771): 41 Cal 956: 18 Cal W N 775: 19 Cal L Jour 535.

(4) *Alwar* v. *Seshammal*, (1887) 10 Mad 270 (271).

(5) *Lachmi Narayan* v. *Balmukund*, 1924 P C 198 (200): 35 Mad L Tim 143: 5 L R P C 171: 47 Mad L Jour 141: 20 Mad L W 491: 3 Pat 61: 51 Ind App 321: 22 All L J 990: 26 Bom L R 1129: 40 Cal L Jour 139: 29 Cal W N 391: 1924 Mad W N 707: 5 Pat L Tim 623: 81 Ind Cas 747 P C

O. 17, R. 2, Notes 8—9.

8. **"Or make such other order as it thinks fit."**—In the interpretation of the above words, three questions arise for consideration, *viz.*:—

(*i*) What is the meaning of the expression "such other order as it thinks fit?"

(*ii*) Whether the expression includes the power to decide the case on the merits. And if so,

(*iii*) When is the Court to proceed under O. 9 and when to proceed to decide the case on the merits?

On the first two questions, the High Court of Allahabad had held that the expression "such other order as it thinks fit" only empowers the Court to grant an *adjournment* and not to decide the case on the *merits*.[1] An earlier decision of the High Court of Madras was also to the same effect.[2] But in a later decision of the same High Court, the power of the Court to give a decision on the *merits* in certain circumstances has been recognised.[3] The High Court of Calcutta also recognises the power of the Court to give a decision on the merits.[4] The Allahabad High Court has recognised this power by adding a new clause to this rule. So also the Chief Court of Oudh.

On the third question, where the evidence has *not yet begun*, it has been held, that the Court should either proceed under O. 9 or adjourn the case. Where, however, the case is *part heard*, it would seem that the rule vests in the Court a discretion either to proceed under O. 9 or to give a decision on the merits.[5] In cases where the plaintiff has adduced *all his evidence* or has made out a *prima facie* case, but is absent at the adjourned hearing, the Court should proceed to give a decision on the merits and *not* dismiss the suit for default.[6] Where the case *has been closed* but has been adjourned for the Court to refer to a document[7] or to pronounce judgment,[8] and either of the parties fails to appear at the adjourned hearing, the Court should *not* proceed under O. 9 but give a decision on the merits.

9. **Appeal and Revision.**—No appeal lies from an order dismissing a suit[1] or appeal[2] for default under this rule. It may, however, be open to revi-

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Note 8.

(1) *Phul Kocr* v. *Hashmat Ullah*, (1915) 29 Ind Cas 553 (553): 37 All 460: 13 All L J 679; *Ram Charan* v. *Raghubir*, 1923 All 551 (552): 21 All L J 495: 45 All 618: 4 L R A Civ 294: 75 Ind Cas 387; *Ram Adhin* v. *Ram Bharose*, 1925 All 182 (182): 22 All L J 1041: 5 L R A Civ 740: 85 Ind Cas 27: 47 All 181; *Ganeshi Lal Harnarain* v. *Debi Das*, 1925 All 267 (271): 47 All 140: 6 L R A Civ 79: 85 Ind Cas 470.

(2) *Ramanuja* v. *Rangasami*, (1908) 18 Mad L Jour 51 (54): 3 Mad L Tim 225.

(3) *Subramania Othuvar* v. *Munusamiya Pillai*, (1915) 31 Ind Cas 869 (869) Mad.

(4) *Mariannissa* v. *Ram Kalpa*, (1907) 34 Cal 235 (237): 5 Cal L Jour 260; *Kader Khan* v. *Juggeswar*, (1908) 35 Cal 1023 (1026-1027).

(5) *Mt Aisha* v. *Mt Chatta and others*, 1925 Oudh 433 (434): 2 Oudh W N 432: 89 Ind Cas 418; *Nand Singh* v. *Diwan Chand*, (1925) 26 Pun L R 190.

(6) *Ningappa* v. *Gowdappa*, (1905) 7 Bom L R 261 (262); *Subramania* v. *Munusamiya*, (1915) 31 Ind Cas 869 (869) Mad; *Chamak Lal* v. *Mauji Mandal*, 1929 Pat 248 (248, 249): 120 Ind Cas 625; *Zorawar Singh* v. *Sahab Singh*, 7 L R 136 (Rev); *Ram Dam Panday* v. *Narayan Murti*, (1909) 3 Ind Cas 683 (684): 5 L B R 75.

(7) *Ramratan Shukul* v. *Malajat*, (1871) Select Cases Part X, No 10.

(8) *Nand Lal* v. *Shanker*, (1911) 11 Ind Cas 842 (842): 254 Pun L R 1911: 165 Pun W R 1911.

Note 9.

(1) *Maharajah of Vizianagaram* v. *Lingam Krishna Bhupati*, (1914) 12 Mad L Jour 473 (474); *Ghazanfar Ali Khan* v. *Asharfi Lal*, (1902) 5 Oudh Cas 294 (296); *Nasarat Khan* v. *Manulla*, (1916) 32 Ind Cas 766 (767) Cal; *Lachmi Narain* v. *Ramsaran*, 1925 Pat 433 (434): 6 Pat L Tim 152: 86 Ind Cas 785.

(2) *Anwar Ali* v. *Jafer Ali*, (1896) 23 Cal 827 (828).

sion.[3]

O. 17, R. 2, Note 9.

No appeal lies from an order restoring a suit dismissed for default under this rule.[4] Where a Court wrongly held that no application under O. 9, R. 13 lay against an order under this rule, it amounted to a refusal of exercise of jurisdiction vested in it and was held liable to revision.[5]

O. 17, R. 3.

R. 3. [S. 158.] *Where* any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Court may proceed notwithstanding either party fails to produce evidence, etc.

[1877—S. 158; 1859—S. 148.]

Local Amendments.

ALLAHABAD.

Amend R. 3:—

3. Where any party to a suit, to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act, necessary to the further progress of the suit, for which time has been allowed, the Court may, whether such party is present or not, proceed to decide the suit on the merits.

OUDH.

Substitute the following for R. 3:—

3. Where any party to a suit to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, and whether such party is present or not, proceed to decide the suit on the merits.

Synopsis.

1. Scope and applicability of the rule.
2. Execution proceedings.
3. Distinction between this rule and Rule 2.
4. "To whom time has been granted."
5. When is party deemed to fail to do the act for which time has been granted.
6. "Any other act necessary to the further progress of the suit."
7. Remedy of a person aggrieved by an order under this rule.

Applicability only to cases of default by party given time for acts specified. See Note 1, Pts. (1) and (2) and Note 4.

Applicability where time granted owing to non-service of summons. See Note 5, Pts. (1) to (4) see also O. 17, R. 1; Note 3, Pts. (10) to (12).

Decision under this rule is res judicata. See Note 7, Pt. (1).

Default by non-production of heirship-certificate. See Note 3, F.-N. (13) and Note 7, F.-N. (2).

Default contemplated by this rule. See Notes 1 and 3 to 6.

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(3) *Lachmi Narain* v. *Ram Saran*, 1925 Pat 433 (434): 6 Pat L Tim 152: 86 Ind Cas 785

(4) *Alwar* v. *Seshammal*, (1887) 10 Mad 270 (271); *Bhagwan Dai* v. *Hira*, (1897) 19 All 355 (357): 1897 All W N 89 [No appeal was held to lie from an order under the section corresponding to this rule read with section 108 of the last Code, setting aside a decree passed *ex parte*].

(5) *Ganesh Lal Har Narain* v. *Debi Das*, 1925 All 267 (269, 270): 47 All 140: 6 L R A Civ 79: 85 Ind Cas 470.

O. 17, R. 3, Note 1.

Default in payment of costs ordered as condition precedent. See Note 7, F.-N. (10); see also O. 17, R. 1,; Note 5, Pts. (6) to (9).

Disposal to be not for default on merits. See Note 1, Pts. (8) to (10).

Inapplicability to default in filing amended plaint ordered. See Note 1, F.-N. (12).

Inapplicability to default in payment of Court-fee ordered. See Note 1, F.-N. (5) and Note 7, F.-N. (2).

Inapplicability to default in supplying several stamp for partition-decree as per award. See Note 1, F.-N. (13).

No revision. See Note 7, Pt. (5).

1. Scope and applicability of the rule.—This rule does not apply unless time had been granted to a party at *his instance*,[1] to do one or other of the three things mentioned in the section, *viz.*, to produce evidence, or to cause the attendance of witnesses, or to perform any other act *necessary for the progress of the suit*,[2] and unless default had been committed by such *party in doing the act for which the time was granted*.[3]

The rule is *permissive* and not mandatory as is shown by the words the Court "*may*" proceed to decide the suit forthwith.[4] The stringent provisions thereof should not be applied unless the facts do not admit of the application of any other provision of the Code.[5] Where, for instance, there are no sufficient materials on record to give a proper decision, it should grant a further adjournment of the case.[6] Similarly if the facts of the case make the provisions of R. 2 applicable the Court should act under that rule even though such facts come within the operation of this rule as well.[7]

Order 17, Rule 3—Note 1.

(1) *Ram Nath* v. *Munaraj*, 1884 Pun Re No 139; *Pearee* v. *Shamachurn*, (1873) 19 Suth W R 34 (35); *Ryall* v. *Sherman*, (1876-78) 1 Mad 287 (288): 1 Ind Jur 446 [In a suit, issues having been settled, the final hearing of the suit was adjourned to a fixed date for final disposal. On that date plaintiff did not appear, and the suit was dismissed under S 148 of Act VIII of 1859. *Held*, that as this was not a case which had been adjourned in favour of either party to enable him to produce his proofs or cause the attendance of his witnesses, the order was not one which could properly be made]; *Panna Lal* v. *Bull*, 1906 Pun Re No 30: 82 Pun L R 1906: 36 Pun W R 1906; *Murlidhar* v. *Narain Das*, (1913) 19 Ind Cas 472 (478): 169 Pun L R 1913: 107 Pun W R 1913; *Enatulla* v. *Jiban*, (1914) 23 Ind Cas 769 (770): 18 Cal W N 775: 19 Cal L Jour 535: 41 Cal 956; *Harjas Rai* v. *Narain Singh*, (1915) 29 Ind Cas 938 (938): 51 Pun Re 1915: 98 Pun L R 1916; *Venkatappa Nayanumvaru* v. *Padi Rama Krishnappa*, (1916) 32 Ind Cas 714 (715) Mad.

(2) *Dulhin Sonraj Kuari* v. *Audhan Singh*, (1891) All W N 112 (113, 114); *Sain Das* v. *Mussammat Rajji*, (1875) Pun Re No 32 [When the adjournment was not granted for a party to do anything. Here adjournment was for "inspection by Court" of spot]; *Bhimachari* v. *Collector of Dharwar*, (1876) Bom P J 250 (251) [Where it did not appear from the endorsement on the application that time was granted to the plaintiff to produce evidence, it was held that S 148 of the Code of 1859 [Corresponding to this rule did not apply]; *Mariannissa* v. *Ramkalpa*, (1907) 34 Cal 235 (240): 5 Cal L Jour 260; *Murli Dhar Kanshi Ram* v. *Narain Das*, (1913) 19 Ind Cas 472 (473): 169 Pun L R 1913: 107 Pun W R 1913 [A plaint was rejected on the ground that the plaintiff had no right to bring a suit without filing an agreement to arbitrate under Cl 20 of the Second Schedule of the C P Code; *Harjas Rai* v. *Narain Singh*, (1915) 29 Ind Cas 938 (939): 51 Pun Re 1915: 98 Pun L R 1916; *B M Venkatappa Nayanna Varu* v. *Padi Ramakrishnappa Chetty*, (1916) 32 Ind Cas 714 (715) Mad; *Laxman* v. *Manjunath*, 1921 Bom 458 (458): 45 Bom 1181: 23 Bom L R 511: 64 Ind Cas 289; *Balwant Singh* v. *Charan Singh*, 1926 Jour 189 (4): 27 Pun L R 714; *Mt Muhammad-ul-Nissa* v. *Hukumchand Jagadhar Mal*, 1926 Jour 197 (4): 27 Pun L R 592; *Lekh Raj Bhoja Ram* v. *Shafi Mahomed*, 1927 Lah 484 (485): 102 Ind Cas 289; *Ma Chon* v. *Maung Myint*, 1927 Rang 148 (148, 149): 6 Bur L Jour 77: 101 Ind Cas 618: 5 Rang 838.

(3) *Connalammal* v. *Rangaswami*, (1868-69) 4 Mad H C R 56 (59); *Kader Khan* v. *Jeggeswar*, (1908) 35 Cal 1023 (1027); *Majiti Nagaratnam* v. *Pachigolla Ramiah*, (1915) 27 Ind Cas 882 (882): 2 Mad L W 105; *Harjas Rai* v. *Narain Singh*, (1916) 29 Ind Cas 938 (938): 51 Pun Re 1915: 98 Pun L R 1916; *Laxman* v. *Manjunath*, 1921 Bom 458 (458): 45 Bom 1181: 23 Bom L R 511: 64 Ind Cas 289; *Mahant Damodar Das* v. *Raj Kumar Das*, 1922 Pat 485 (488): 1 Pat 188: 69 Ind Cas 837; *Mylne* v. *Koir*, 1928 Rang 191 (192): 6 Rang 323: 114 Ind Cas 299.

(4) *Lachman Singh* v. *Bhajan Singh*, (1893) All W N 84 (84); *Sher Ali* v. *Mangu*, (1919) 52 Ind Cas 292 (293, 294): 150 Pun Re 1919: 60 Pun W R 1919.

(5) *Shankar Das* v. *Hanram*, (1904) Pun L R 74; *Kartar* v. *Surasti*, 1908 Pun Re No 9: 98 Pun L R 1908: 28 Pun W R 1908; *Kale Shah* v. *Shahbal Shah*, 1899 Pun Re No 80; *Muhammad Sadik* v. *Muhammad Jan*, (1889) 11 All 91 (92): 1888 All W N 286 [A failure to supply the deficient Court fee does not justify an order under S 158 of the old Code, since S 54 (O 7, R 11) contains clear directions as to the procedure in such cases].

(6) *Mussammat Uttar Kour* v. *Atma Singh*, (1870) Pun Re No 20.

(7) *Lachman Singh* v. *Bhajan Singh*, (1893) All W N 84 (84); *Baldeo Sahai* v. *Manohar Lal*, (1895) Pun Re No 82; *Sain Das* v. *Mt Rajji*,

A decision "forthwith" should nevertheless be a decision on the merits *i.e.*, on a consideration of such materials as may be necessary and available,[8] and does not mean a *summary* decision.[9] If, in the case of the plaintiff, such materials fail to substantiate the claim, the suit will be dismissed on *that ground* and *not for the default* committed by him.[10] O. 17, R. 3, Notes 1—3.

In a case where the defendant's prayer for adjournment was refused but some time was nevertheless given to him for his evidence and after plaintiff's evidence was over, the Court passed a decree without waiting for the time fixed for the defendant's evidence, the decree was held to be illegal.[11]

The rule applies only *after the suit* has been instituted,[12] but not to proceedings *after the decree*.[13]

2. Execution proceedings.—The provisions of this rule do not apply to execution proceedings.[1]

3. Distinction between Rr. 2 and 3.—Rr. 2 and 3 provide for distinct and different sets of circumstances:—

(1) R. 2 applies where an adjournment has been generally granted and not for *any special* purpose. This rule applies where the adjournment has been given for one of the *purposes mentioned in the rule*.[1]

1875 Pun Re No 32; *Ma On Bwin* v. *Ma Shwe Mi*, (1918) 47 Ind Cas 691 (692): 9 L B R 266.

(8) *Chidipatu Somayya*, in re, (1915) 31 Ind Cas 307 (307): 2 Mad L W 1067; *Nagendra Kumar* v. *Nabin Mandal*, (1909) 1 Ind Cas 741 (741): 36 Cal 189.

(9) *Sitara Begam* v. *Tulshi Singh*, (1901) 23 All 462 (464): 1901 All W N 149; *Badar Mal* v. *Gudu Miya*, (1910) 8 Ind Cas 850 (850): (1911) 1 Mad W N 71: 9 Mad L Tim 163; *Naurang* v. *Bhakhori*, (1919) 51 Ind Cas 189 (190, 191): 4 Pat L Jour 277; *Sher Ali* v. *Mangu*, (1919) 52 Ind Cas 292 (293, 294): 150 Pun Re 1919: 60 Pun W R 1919; *Karamchand* v. *Jinda Ram*, 1924 Lah 404 (404): 71 Ind Cas 862; *Gulab Rai Bola Ram* v. *Farid*, 1927 Lah 388 (1) (388): 100 Ind Cas 788; *Sakhu* v. *Ram Lalan*, (1919) 51 Ind Cas 850 (851): 17 All L J 849: 41 All 663; *Raman Chettiar* v. *Mohideen Sahib*, (1907) 17 Mad L Jour 81 (82) [A Court has no power to restore an *ex parte* decree once set aside. Where the Court is acting under S 158, the proper course for it is to decide the suit as it stood then before it if the Judge could do so, and not to "restore" the *ex parte* decree once set aside by it].

(10) *Pazhani Andi* v. *Naku*, 1927 Mad 109 (110): 51 Mad L Jour 684: 99 Ind Cas 32

(11) *Rajabala Dasi* v. *Jaichand Lal Babu*, 1930 Cal 251 (251): 50 Cal L Jour 549: 126 Ind Cas 411.

(12) *Sankaranarayana Ayyar* v. *Venkatarama Ayyar*, 1925 Mad 1045 (1046): 86 Ind Cas 491 [Where a plaint is rejected on the ground that the plaintiff has not filed an amended plaint, as he was asked to do, O 17, R 3, does not apply].

(13) *Sheo Mangal* v. *Dilraj*, (1919) 50 Ind Cas 886 (887): 17 All L J 493: 1 U P L R (A) 9 [Where an order has been made for preparation of a partition decree in terms of an award and the plaintiff fails to comply with an order of the Court to pay the stamp duty as distinct from Court fees, his omission to pay is no ground for dismissal of the suit].

Note 2.

(1) *Hajrat Akramnissa* v. *Valiulnissa*, (1894) 18 Bom 429 (432): *Bilas Kuer* v. *Ram Sahai*, (1893) All W N 28 (28) [Collector to whom proceedings are sent for execution has no power to act under this rule]: *Wilayet Husain* v. *Shafat Begam*, 1893 All W N 12 (13) [Difficulty of applying the provisions to execution proceedings pointed out]. In this case it was assumed that the order was passed under section 158 for arguments' sake. Relief asked for in the prior application being different from that in the second application, the second application not barred]; *Dhonkal Singh* v. *Phakkar Singh*, (1893) 15 All 84 (94): 1893 All W N 36. But see *Pheku* v. *Pirthi Pal Singh*, (1893) 15 All 49 (54): 1892 All W N 222.

Note 3.

(1) *Venkatappa Nayanum* v. *Padi Ramakrishnappa*, (1916) 32 Ind Cas 714 (715) Mad: *Ramanuja* v. *Rangasami*, (1908) 18 Mad L Jour 51 (53): 3 Mad L Tim 225; *Usto Sahebdino* v. *Ghulam Kadir*, (1915) 27 Ind Cas 924 (926): 8 Sind L R 241; *Naghia* v. *Udham*, (1917) 39 Ind Cas 592 (593): 18 Pun W R 1917; *Syed Shah Muhammad Maudood* v. *Maharajah Sir Rameshwar Singh*, 1923 Pat 530 (531): 1 Pat L R 281: 74 Ind Cas 693; *Maung Pway* v. *Saya Pe*, 1927 Rang 46 (47): 4 Rang 408: 99 Ind Cas 717; *Krishta Kishore* v. *Pancharam*, 1928 Cal 341 (342): 47 Cal L Jour 467: 111 Ind Cas 430; *E Mylne* v. *T Koir*, 1928 Rang 191 (193): 114 Ind Cas 299: 5 Rang 323; *Chanianan* v. *Samayyany*, 1929 Rang 73 (74): 6 Rang 766: 115 Ind Cas 668; *Mulchand* v. *Piare Lal*, (1929) 116 Ind Cas 752: 1929 Notes 39 (a): 1929 All L J 391; *Durga Das* v. *Lagat Hayat Khan*, (1929) 117 Ind Cas 73: 1929 Notes 26 (*b*).

O. 17. R. 3, Note 3.

(2) R. 2 does not apply unless the party has *failed to appear* at the hearing. R. 3 will apply where the party is present and has committed the default referred to in the rule.[2] A party appearing by pleader and asking for adjournment must, in the absence of an effective withdrawal of appearance by the pleader, be deemed to have appeared.[3] And even if the Pleader reports "no instructions" after refusal of the adjournment, it may not, under certain circumstances, constitute a failure to appear.[4]

There might be cases where a default under this rule is coupled with a default under R. 2 as well. Thus a party to whom time has been granted at his instance, for doing one or other of the acts mentioned in this rule, may not only commit default in the doing of the act but may not appear in person or by pleader. In such a case, what is the Court to do? On this question the authorities are not uniform.

It was held by the High Court of Allahabad in the undermentioned case[5] that in such cases, the procedure to be followed is under R. 2. The rule has since been amended by that Court giving a discretion to that Court to proceed to decide the suit on the merits. The Bombay[6] and the Madras[7] High Courts are agreed that in such cases the Court should proceed only under R. 2. On the other hand, the Calcutta,[8] Lahore,[9] and Patna,[10] High Courts take the

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(2) *Abdul Karim* v. *Ratilal Gujrati*, 1930 Nag 152 (152): 127 Ind Cas 351; *Onkar* v. *Kamal Chand*, 1924 Nag 26 (27): 76 Ind Cas 288; *Pramotha Nath Saha* v. *Sashi Mukhi Debi*, (1918) 45 Ind Cas 200 (201) Cal; *Ganesh Prasad* v. *Bhangilal*, 1925 Nag 236 (2), (238): 83 Ind Cas 257 [A Pleader's unpreparedness to argue affords no ground for the Court to ignore his presence and proceed to dismiss the appeal as if there was no appearance; he is bound to proceed to decide on merits]; *Johari Mal* v. *Chandra Sen*, 1926 Jour 155 (1): 95 Ind Cas 798 All; *Kallu* v. *Lokmad Das*, 1927 All 507 (507): 102 Ind Cas 273; *Damodar Das* v. *Raj Kumar Das*, 1922 Pat 485 (487, 488): 1 Pat 188: 69 Ind Cas 837 [Defendant present—His Vakil asks for time —Refused—Not conducting further—Decree passed is under O 17, R 2 and liable to be set aside under O 9].

(3) *Visvanatha* v. *Sami*, 1924 Mad 43 (44): 18 Mad L W 209: 1923 Mad W N 802: 73 Ind Cas 982; *Akula Bukkayya* v. *Aluri Venkatanarasimham*, (1917) 39 Ind Cas 948 (949): 1917 Mad W N 565: 33 Mad L Jour 553.

(4) *Palaniappa* v. *Muthu*, (1911) 10 Ind Cas 770 (771): 4 Bur L Tim 67; *Balakrishna Ayyar* v. *Muthammal*, 1925 Mad 316 (316, 317): 82 Ind Cas 1028. But see *Shiam Sundar Lal* v. *Shib Ram*, (1930) 124 Ind Cas 402: 1930 Notes 23 (c). And also *T Kaliappa Mudaliar* v. *Kumarasami Mudali*, 1926 Mad 971 (973): 51 Mad L Jour 290: 1926 Mad W N 616: 96 Ind Cas 517 [Plaintiff present—His pleader reports "no instructions"—Dismissal—O 17, R 2 applies].

(5) *Rukam* v. *Tarachand*, 1922 All 68 (68, 69): 20 All L J 123: 65 Ind Cas 775; *Jangpal Singh* v. *Raja Kushalpal Singh*, 1923 All 153 (156, 157): 20 All L J 97: 70 Ind Cas 942; *Ram Adhin* v. *Ram Bharose*, 1925 All 182 (182): 22 All L J 1041: 5 L R A (Civ) 740: 85 Ind Cas 27: 47 All 181; *Ganesh Lal* v. *Debi Das*, 1925 All 267 (270): 47 All 140: 6 L R A (Civ) 79: 85 Ind Cas 470; *Phul Kuar* v. *Hashmatullah*, (1915) 29 Ind Cas 553 (553): 13 All L J 679: 37 All 460. But see *Badam* v. *Nathu*, (1903) 25 All 194 (195): 1903 All W N 6. But see *Kunwar Kalyan* v. *Mehin Lal Kamdar*, 1926 All 729 (731): 96 Ind Cas 564 [On the ground of costs directed not having been paid R 3 was held to apply—Difficulty of avoiding Rr 2 and 3—Recommended to Rule Committee for amendment].

(6) *Basayya* v. *Allayya*, 1925 Bom 328 (329): 27 Bom L R 477: 87 Ind Cas 710; *Sagajirao* v. *Smith*, (1896) 20 Bom 736 (743, 744); *Ratanbai* v. *Shankar*, 1923 Bom 27 (28, 29): 46 Bom 1026: 68 Ind Cas 514: 24 Bom L R 775. But see *Ningappa* v. *Gowdappa*, (1905) 7 Bom L R 261 (262) [If there is evidence on record sufficient to a decision on the merits, R 3 should be applied].

(7) *Maharajah of Vijayanagram* v. *Lingam Krishna*, (1902) 12 Mad L Jour 473 (474); *Chandramathi* v. *Narayanaswami*, (1910) 5 Ind Cas (23) (24, 25): 19 Mad L Jour 760: 7 Mad L Tim 369: 33 Mad 241; *Pichamma* v. *Sreeramulu*, (1918) 43 Ind Cas 566 (567 and 570): 34 Mad L Jour 24: 23 Mad L T 1: 1918 Mad W N 92: 41 Mad 286 F B [Overruling 34 Mad 97: 6 Ind Cas 233]; *Authimoolam Pillai* v. *Secretary of State*, (1928) 108 Ind Cas 897: 1928 Notes 21 (c): 1928 Mad W N 162: 27 Mad L W 347: 54 Mad L Jour 351.

(8) *Mariannissa* v. *Ramkalpa*, (1907) 34 Cal 235 (237, 238): 5 Cal L Jour 260; *Kader Khan* v. *Juggeswar*, (1908) 35 Cal 1023 (1027); *Durga Kanta* v. *Anto Koch*, (1917) 42 Ind Cas 649 (650): 22 Cal W N 671; *Enatulla* v. *Jiban Mohan Roy*, (1914) 23 Ind Cas 769 (770, 771): 18 Cal W N 775: 19 Cal L Jour 535: 41 Cal 956; *Aktar Hussain* v. *Hussani Begum*, (1932) 56 Cal L Jour 12 (14) [Plaintiff part-heard—Plaintiff absent—Dismissal—O 17, R 2 and not R 3 applicable].

(9) *Jhanda Singh* v. *Sadiq Mahomed*, 1924 Lah 545 (546): 5 Lah 218: 78 Ind Cas 453; *Hargopal* v. *Harish Chandar*, (1918) 47 Ind Cas 596 (597): 66 Pun L R 1918: 169 Pun W R 1918:

view that the Court can proceed under this rule if there are materials on record to enable the Court to come to a decision on the merits and that otherwise the Court should proceed under R. 2. Even according to the Patna High Court, this rule will apply only after the hearing of the case *has commenced*.[11] For other Courts, *see*.[12]

Where the entire evidence is over and the case is posted to a day for the clearing up of a point or for the Court satisfying itself on a particular point before delivering judgment and the parties defaulted on that day and failed to appear, even, the Bombay and Madras High Courts have held that the Court should proceed under R. 3 and not under R. 2.[13]

4. "To whom time has been granted."—Where a party is ordered to be present at an adjourned hearing it does not amount to a granting of time to the party to do any *act* within the meaning of this rule. [1] Nor is an adjournment on the joint application of *both the parties* within this rule.[2] The rule will also not apply where time was granted not *to the party in default* but to the opposite party.[3] Further the time must have been granted for the doing of an act which it was not the *duty of the Court* to do.[4]

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48 Pun Re 1919 [Where default takes place within the meaning of both Rr 2 and 3 and there is not enough material on record to enable the Court to proceed to judgment, the Court should proceed under R 2]. See however *Ram Rattan* v. *Hyat Muhammad*, 1880 Pun Re No 41. And *Madan Gopal* v. *Budhu*, 1932 Lah 477 (478): 138 Ind Cas 200 [Party absent—Decree—*Ex parte* decree and not decree under O 17, R 3].

(10) *Sashi Bhusan* v. *Dwarka Prasad*, 1922 Pat 2 (3): 3 Pat L Tim 64: 6 Pat L Jour 313: 61 Ind Cas 897; *Ram Kishen Lal* v. *Jatadhari*, (1918) 46 Ind Cas 488 (489): 1918 Pat H C C 236: 3 Pat L Jour 481 [Rule 3 contemplates material for decision prior to default]; *Shaikh Muhammad* v. *Chulhai Mahton*, (1919) 52 Ind Cas 290 (292): 4 Pat L Jour 712: 1920 Pat H C C 118.

(11) *Mahabir Prasad* v. *Sheodayal*, 1928 Pat 167 (167): 7 Pat 236: 107 Ind Cas 824: 9 Pat L Tim 658.

(12) *Fakir* v. *Viran*, (1910) 6 Ind Cas 851 (852): 3 Sind L R 208 [Where at any adjourned hearing there is no appearance of the plaintiff and there are no materials on record, the appropriate procedure is laid down by S 157]; *Ghulam Hyder Khan* v. *Tekchand*, (1919) 53 Ind Cas 560 (560): 13 Sind L R 149 [When both the conditions laid down in O 17, Rr 2 and 3 coincide, O 17, R 2 should have preference for the consequences of non-appearance have a natural precedent over the merits]; *Chauharaja* v. *Kalka Pande*, 1923 Oudh 18 (19): 9 Oudh L J 543: 72 Ind Cas 394 [Where the defendant absents himself on the date fixed for evidence in a case, the proper procedure for a Court is to proceed under O 17, R 3 and not under O 9, R 6, C P Code]; *Ramshar Dat Singh* v. *Maharaja Jagit Singh*, 1925 Oudh 278 (280): 78 Ind Cas 340 [Rule 3 applies where two elements exist, viz., (1) the adjournment must have been at the instance of a party; (2) there must be materials on record to proceed to decide the suit]; *Syed Md Hasan* v. *Syed Ali Hyder*, 1925 Oudh 337 (346): 12 Oudh L J 1: 85 Ind Cas 509: 28 Oudh Cas 8: 1 Oudh W N 803 [Where a plaintiff realising the weakness of his case absented himself on the date fixed for hearing and let the suit be dismissed for default, the decision is one under O 9, R 3, C P Code, even though the Court purported to act under O 17, R 3 and the decision does not bar a fresh suit]; *Puttu Lal* v. *Mussamat Chhutko*, 1925 Oudh 360 (1), (360): 85 Ind Cas 528: 1 Oudh W N 636 [When one of the parties fails to appear on the date to which the case is adjourned, the case falls under O 17, R 2 [*N.B.*—The Oudh Chief Court has since introduced an amendment giving a *discretion* to the Court to proceed to decide the suit on the merits in such cases].

(13) *Irappa Chanapa* v. *Sidava Tukappa*, 1931 Bom 111 (113, 114): 32 Bom L R 1430: 128 Ind Cas 889; *Penamucha Anandaraju* v. *Nadimpalli Venkata Raju*, (1914) 23 Ind Cas 519 (519): 1 Mad L W 428. See also *Draupadi Ammal* v. *S I Railway Co, Ltd*, (1914) 24 Ind Cas 353 (353) Mad [Where all the evidence has been adduced and an adjournment was granted for the production of a succession certificate for a portion of the claim but the plaintiff failed to produce the same. Suit ought not to be dismissed under O 17, R 2 but should be disposed of on the merits under R 3 in respect of that portion of the claim for which succession certificate was not necessary and in respect of that portion for which the certificate was necessary the suit should have been dismissed].

Note 4.

(1) *Panna Lal* v. *Bull*, 1906 Pun Re No 30: 82 Pun L R 1906: 36 Pun W R 1906; *Gulab Rai Bhola Ram* v. *Farid*, 1927 Lah 388 (388): 100 Ind Cas 788.

(2) *Alwar* v. *Seshammal*, (1887) 10 Mad 270 (271).

(3) *Ramaya* v. *Rangaya*, (1884) 7 Mad 41 (42); *Panna Lal* v. *Bull*, 1906 Pun Re No 30: 82 Pun L R 1906: 36 Pun W R 1906.

(4) *Pearee Mohun Bera* v. *Shama Churn Mytee*, (1873) 19 Suth W R 34 (35) [Where adjournments are made by a Court in order to give effect to its processes for compelling the attendance of the witnesses, being thus made as much on its own motion as at the instance of the defendant or as at the instance of the plaintiff, the case cannot be said to come under Act VIII of 1859, S 158]; *Karamchand* v. *Jinda Ram*, 1924 Lah 404 (404): 71 Ind Cas 862, (Do.).

O.17, R. 3, Notes 4—6.

Where a party applied for adjournment of the case for getting a transfer thereof and the application was refused but the case was fixed for further evidence, it was held that this rule did not apply as no time can be said to have been granted to the party within the meaning of this rule.[5]

When a case comes within the meaning of the language of this rule, the mere fact that the date fixed is a holiday (when the date has been expressly agreed upon) will not prevent the Court from proceeding under this rule.[6]

5. **When is party deemed to fail to do the act for which time has been granted.**—At the adjourned hearing of a case, the witnesses on behalf of a party were absent though served and the party applied for warrants of arrest against them. The application was refused. Thereupon the pleader reported "no instructions" and the suit was dismissed. It was held that the dismissal was not one under this rule.[1] Where a party takes steps in time but the witnesses are not served owing to delay on the part of the Court's officers, to serve them, the party cannot be said to have committed default.[2] Even if the steps are taken late but there is sufficient time to get the witnesses served the party cannot be said to be in default.[3] He will be held to have committed a default if the steps are taken *too late* to get the witnesses served.[4]

When a commission has been issued, the non-return of the commission is no failure on the part of a party.[5]

When time is to be regarded as the essence of the default the party should have distinct notice of the time within which the act should be done.[6]

6. **"Any other act necessary to the further progress of the suit."**—The act contemplated by this rule is one which must be necessary to the *further progress* of the suit.[1] An act which brings about a stay and thus *arrests* the further progress of the suit cannot be interpreted to be an act necessary to the further progress of the suit; a Court cannot therefore dismiss a suit for non-prosecution because the party failed to produce a stay order within the period allowed.[2] As to what are such acts, *see*,[3] as to what

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(5) *Murli Dhar* v. *Dunichand and Gokalchand*, 1923 Lah 281 (281): 69 Ind Cas 368.

(6) *Bhagwan Das* v. *Har Pershad*, 1906 Pun Re No 111: 92 Pun L R 1907: 131 Pun W R 1906.

Note 5.

(1) *Ganga* v. *Gudur*, (1910) 5 Ind Cas 499 (499) Cal.

(2) *Lila Ram* v. *Ramzan*, 1924 Lah 272 (272): 69 Ind Cas 665; *Mota Ram* v. *The Firm Kishori Lal Ram Sarup*, 1925 Lah 296 (296): 6 Lah L Jour 418: 85 Ind Cas 321; *Nagahia* v. *Udham*, (1917) 39 Ind Cas 592 (593): 18 Pun W R 1917 [When once a party has given the address and other particulars of his witnesses and has also paid the expenses, the Court is quite incompetent to proceed against that party, if service of summons is not effected, nor proceed under R 3 for party refusing to pay warrant batta when such order was passed illegally].

(3) *Dhani Ram* v. *Gaya Singh*, 1925 Oudh 304 (304): 84 Ind Cas 173: 10 O & A L R 864.

(4) *Hari Kishen* v. *Mukh Raj*, 1926 Lah 27 (28): 89 Ind Cas 857.

(5) *B Bindhachal Singh* v. *Nand Prasad*, 1927 All 749 (750): 100 Ind Cas 29.

(6) *Shaik Saheb* v. *Mahomed*, (1890) 13 Mad 510 (511).

Note 6.

(1) *Raghavachariar* v. *Vedanta Chariar*, (1891) 3 Mad 259 (260): 5 Ind Jur 633; *Virabhadrappa* v. *Chinnamma*, (1898) 21 Mad 403 (404): 8 Mad L Jour 189; *Authimulam* v. *Secretary of State*, (1928) 54 Mad L Jour 351: 1928 Notes 21 (*c*): 27 Mad L W 347: 1928 Mad W N 162: 108 Ind Cas 897.

(2) *Kisan* v. *Manjai*, 1928 Nag 24 (26): 10 Nag L J 177: 105 Ind Cas 30.

(3) *Jaisari Singh* v. *Jaisari Singh*, (1912) 17 Ind Cas 294 (295) All [Summons to respondent returned unserved and time given to appellants to take further steps]; *Ram Baksh Singh* v. *Harkarangir*, 1930 Oudh 351 (352): 7 Oudh W N 582: 127 Ind Cas 27 [*Ex parte* order set aside on payment of costs—Costs not paid]; *Ma On Bwin* v. *Ma Shwe Mi*, (1920) 47 Ind Cas 691 (691, 692): 9 L B R 266 [Failure of appellant to take steps for preparation of Bench copies and translations of vernacular documents].

are not such acts, *see*.[4] When the act is one ordered without jurisdiction, a default in doing it will not attract the provisions of this rule.[5]

7. **Remedy of a person aggrieved by an order under this rule.**—A decision under this rule is a decree. It will operate as *res judicata* and bar a second suit for the same relief.[1] But if the decision is not one properly within the rule, there is no bar against a second suit.[2]

The remedy of a party aggrieved by an order under this rule is by way of appeal[3] or review[4] and not revision.[5] It has, however, been held in a case before the Lahore High Court that a decree passed under this rule may nevertheless be an *ex parte* decree to which the provisions of O. 9 will apply.[6]

Where the order has been *expressly passed under this rule*, the remedy is by way of appeal only even though the Court had no power to proceed thereunder and acted erroneously in doing so,[7] and even though R. 2 may have been mentioned by mistake instead of R. 3.[8]

But, where the rule under which the order is passed is *not stated*, then the Court must go into the matter and decide whether the order is really one under R. 2 or 3.[8-a] The *substance* of the order will be examined for determining under which rule it falls. In such a case, the guiding principle has been laid

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(4) *Rahman* v. *Ahmad Din*, 1926 Lah 571 (571): 96 Ind Cas 312 [A dismissal of suit for failure to amend plaint and pay costs of adjournment cannot fall under O 17, R 3]; *Muhammad Bakhsh* v. *Malik Musa*, 1924 Lah 608 (608): 76 Ind Cas 254 [Non-production of document which ought to be produced in Court by the plaintiff when plaint is presented does not attract operation of O 17, R 3]; *Abdul Rahman* v. *Shib Lal*, 1922 Pat 252 (255): 1922 Pat H C C 81: 6 Pat L Jour 650: 2 Pat L Tim 572: 63 Ind Cas 570: 4 U P L R (Pat) 13 [Where a date is fixed for appointment of a guardian of a minor defendant and the plaintiff takes no steps to get the guardian appointed the Court cannot dismiss the suit without giving the plaintiff an opportunity to adduce evidence at least against the original defendants in the suit]; *Tulsi Ram* v. *Daya Ram*, 1925 All 604 (605): 23 All L J 513: 6 L R A Civ 396: 88 Ind Cas 448 [Parties agreeing to abide by oath affecting a third person to be taken in particular manner—Oath illegal under Oaths Act—Court fixing date for oath to be taken—Oath not taken on that day—O 17, R 3 does not apply].

(5) *Debi Lal* v. *Jai Prakash Narain*, 1925 Pat 316 (317): 75 Ind Cas 1 [Dismissal of suit for failure to supply defendant with copies in a specific language].

Note 7.

(1) *Muhammad* v. *Imam Khatun*, (1912) 13 Ind Cas 172 (173): 25 Pun L R 1912: 37 Pun W R 1912; *Venkatachalam* v. *Mahalakshmamma*, (1887) 10 Mad 272 (279).

(2) *Shaik Saheb* v. *Muhamed*, (1890) 13 Mad 510 (511) [The decision will not be *res judicata* if the dismissal was due to non-payment of Court-fees when no date was fixed for its payment]; *Pethaperumal* v. *Murugandy*, (1895) 18 Mad 466 (467, 468): 5 Mad L Jour 189 [The dismissal of suit for non-production of a certificate of heirship is not a decision under this rule, so as to bar a second suit on the same cause of action as *res judicata* as the want of succession certificate prevents an adjudication on the merits]. But see *Ram Ghulam Singh* v. *Harnandan*, 1885 All W N 168 (168).

(3) *Lalta Prasad* v. *Nand Kishore*, (1900) 22 All 66 (78): 1889 All W N 176; *Govind Ramchandra Shembekar* v. *Vithal Gopal Sahasrabudhe*, (1912) 16 Ind Cas 159 (160): 14 Bom L R 560: 36 Bom 536; *Viswanatha* v. *Sami*, 1924 Mad 43 (44): 18 Mad L W 209: 1923 Mad W N 802: 73 Ind Cas 982; *Rameshar Dut Singh* v. *Maharaja Jagjit Singh*, 1925 Oudh 278 (280): 78 Ind Cas 340; *Ma Chon* v. *Maung Myint*, 1927 Rang 148 (148): 6 Bur L Jour 77: 101 Ind Cas 618: 5 Rang 838.

(4) *Pichamma* v. *Sriramulu*, (1918) 43 Ind Cas 566 (568): 34 Mad L Jour 24: 23 Mad L Tim 1: 1918 Mad W N 92: 41 Mad 286 F B; *Ambalavana Padeiyatchi* v. *Subramania Padeiyatchi*, (1870-71) 6 Mad H C R 262 (264); *Venkataramaya* v. *Anumukonda Rangaya*, (1884) 7 Mad 41 (42); *Sheodayal Singh Raj Gond* v. *Kausal Prasad*, (1898) 11 C P L R 94 (94).

(5) *Gaura Bibi* v. *Ghasitiya*, (1911) 12 Ind Cas 603 (604): 8 All L Jour 1265: 34 All 123.

(6) *Murli Dhar* v. *Duni Chand*, 1923 Lah 281 (281): 69 Ind Cas 368.

(7) *Gangaram* v. *Chiddu*, (1912) 14 Ind Cas 119 (120): 9 All L J 763; *Gundan* v. *Kamakha Rama Chetty*, (1916) 33 Ind Cas 660 (660): 3 Mad L W 524; *Pichamma* v. *Sreeramulu*, (1918) 43 Ind Cas 566 (568): 34 Mad L Jour 24: 23 Mad L Tim 1: 1918 Mad W N 92: 41 Mad 286; *Sukhu* v. *Ram Lotan*, (1919) 51 Ind Cas 850 (851, 852): 41 All 663: 17 All L J 849; *Bakar Husain* v. *Hussain Mirza*, 1923 Pat 223 (223): 4 Pat L Tim 46: 73 Ind Cas 373; *Madho Dass* v. *Maharajah of Benares*, 1925 All 252 (252): 6 L R A Civ 152: 84 Ind Cas 521; *Lal Chand* v. *Kaka Ram*, 1927 Lah 562 (562): 103 Ind Cas 192. But see *Ryall* v. *Sherman*, (1876-78) 1 Mad 287 (288): 1 Ind Jur 446; *Kanhailal* v. *Naubat Rai*, (1881) 3 All 519 (520): 1881 All W N 17; *Amrita Lal* v. *Rakhali Dassi*, (1899) 27 Cal 217 (219 and 221): 4 Cal W N 294.

(8) *Mt Mahadei* v. *Tirbeni*, 1925 Oudh 495 (495): 86 Ind Cas 356.

(8-a) *Sri Ram Mahtab Singh* v. *Mahtab Hassan*, 1928 Lah 427 (428): 108 Ind Cas 61.

O. 17, R. 3, Note 7. down to be that unless the facts and circumstances of the case clearly indicate that the order was one under this rule, the order should be treated as one under R. 2.[9] For cases in which the order was treated as one under this rule, *see*.[10] For cases where it was treated as one under R. 2, *see*.[11]

As to the power of an appellate Court in such cases, *see*.[12]

As to the effect of an appellate order in such cases, *see*.[13]

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

O.18, R.1.

R.. 1. [S. 179 Expln.] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Right to begin.

[1877—S. 179.]

Synopsis.

1. Right to begin.
2. Allegations.
3. Admissions.
4. Preliminary issue raised by defendant that the suit does not lie.
5. Preliminary issue that the appeal does not lie.
6. Applicability.

Application for restitution of mesne profits. See Note 2, F.-N. (4).

"Facts." See Note 3.

Right to begin—Examples. See Notes 1 and 2.

Review application—Who is to begin. See Note 2, F.-N. (4).

Two sets of defendants—Counsel when to be heard. See Note 1, Pt. (6).

"Unless the defendant admits the facts alleged by the plaintiff." See Note 3, Pt. (4).

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(9) *Shaikh Muhammad* v. *Chulbai Mahto*, (1919) 52 Ind Cas 290 (292): 4 Pat L Jour 712: 1920 Pat H C C 118; *Ganesh Lal* v. *Debi Das*, 1925 All 267 (269): 47 All 140: 85 Ind Cas 470: 6 L R A Civ 79; *Murdari* v. *Mariam*, (1895) 15 All W N 140 (140).

(10) *Chuttan Lal* v. *Kanhaya Lal*, (1912) 17 Ind Cas 836 (837): 19 All L J 478 [An Assistant Collector dismissed a suit for mesne profits recording the following order:—"As the plaintiff has failed to prove his claim and has failed to prosecute the case, it is ordered that the plaintiff's claim be dismissed for default." *Held*, that the Assistant Collector did not take action under R 2, O 17, but that, he acted under R 3 of that order and, therefore, an appeal lay against that order and no revision]; *Kunwar Kalyan* v. *Mehin Lal Kandar*, 1926 All 729 (730): 96 Ind Cas 564 [Date fixed for production of evidence—No evidence produced and costs ordered as condition precedent not paid—Pleader reported no instructions—Order 17, R 3]; *Raghubar Dayal* v. *Puran Singh*, 1929 All 432 (432): 1929 All L J 507: 119 Ind Cas 569 [When a case was called for hearing, the plaintiff's pleader appeared and applied for an adjournment—The application was rejected and the pleader declined to examine even the witnesses who were in attendance. The Judge dismissed the suit writing a judgment on the merits. *Held*, that the dismissal was one on the merits and not one for default and the decree was appealable].

(11) *Mittadar Venkoba Royar* v. *Mittadar Khadiriappa Gounder*, (1914) 23 Ind Cas 614 (615): 1914 Mad W N 344 [Dismissal of suit—Default of plaintiff—Instructions to pleader to apply for adjournment only—Order of dismissal, not one under the rule]; *Jwala Pershad Sahu* v. *Bigairam Mandwari*, (1915) 28 Ind Cas 905 (905) All; *Naurang* v. *Bhakhoni*, (1919) 51 Ind Cas 189 (190, 191): 4 Pat L Jour 277: 1 Pat L Tim 176; *Baqar Hussain* v. *Tirpalti Govind Nath Tewari*, 1927 All 464 (464): 100 Ind Cas 691 [Plaintiff failing to pay charge for service of summons as ordered by Court—Dismissal of suit—Effect]; *Ko Tha Lin Bwin* v. *Ko Hla Kye*, 1930 Rang 270 (271): 8 Rang 168: 125 Ind Cas 358.

(12) *Ashrof Ali* v. *Mahomed Morden*, 1924 Rang 177 (178): 79 Ind Cas 482 [Where in appeal against dismissal under O 17, R 3, the appellate Court directs further evidence to be taken by the trial Court, without expressly setting aside the trial Court's decree, it acts with material irregularity]; *Sarju Prasad* v. *Gujadhar Lal*, 1922 All 497 (499): 77 Ind Cas 527.

(13) *Kusher* v. *Jugrag Singh*, (1907) 10 Oudh Cas 245 (246).

1. Right to begin.—The right to begin follows the *onus probandi* as provided by Ss. 101 to 114 of the Indian Evidence Act (I of 1872). As a general rule, the plaintiff has to prove his claim by positive proof, for the Court has to see whether there is proof of claim before it need enquire as to the truth or otherwise of the defence.[1] It is the duty of the parties to prove their case and the Judge "has nothing to do with the getting up of a case",[2] but the Court has jurisdiction on a proper occasion, in the interest of justice to examine *de bene esse*, witnesses upon an *ex parte* application.[3] It must be pointed out that evidence need not always be led by the party who has the right to begin and has the burden; it is open to him to sustain the *onus* by facts which he may elicit in cross-examination of the other party's witnesses.[4] The *onus* is not in all cases, and necessarily a question of law. How much or what evidence will discharge the *onus* is a question which depends upon the weight attached to the evidence.[5] In the case of two sets of defendants whose interests are the same, both should address the Court before any evidence is taken,[6] but the defendant supporting the plaintiff must begin before the other defendants.[7]

2. Allegations.—Under S. 102 of the Evidence Act, the burden of proof rests on the party who would fail if no evidence at all were given on either side.[1] Thus in all claim petitions it is the claimant to the attached property that must begin.[2] Similarly it is the defeated attaching creditor who challenges the order in the claim petition that must begin.[3] For other instances, *see* cases under Ss. 101, 102 and 103 of the Indian Evidence Act and the undermentioned cases.[4]

Order 18, Rule 1—Note 1.

(1) *Dallo* v. *Jagan Lal*, 1928 All 688 (688): 110 Ind Cas 818; *Prem Das* v. *Sarbaland*, 1923 Lah 41 (42): 79 Ind Cas 211 [Suit to recover property alienated by father—Punjab customary law—Plaintiff must prove that his suit is within time].

(2) *Enoch and Zaretzky*, In re, (1910) 1 K B 327 [Per Moulton, L J].

(3) *Edwards* v. *Multer*, (1870) 5 Beng L R 252.

(4) *Baliram* v. *Kamalja*, 1924 Nag 367 (371, 372): 78 Ind Cas 330.

(5) *Pannalal* v. *Ganu Bhavaji Nhavi*, (1911) 12 Ind Cas 691 (691): 13 Bom L R 1021.

(6) *Dukshina Mohun Roy*, In re, (1902) 29 Cal 32 (32).

(7) *Haji Bibi* v. *H H Sir Sultan Mahomed*, (1908) 32 Bom 599 (602): 10 Bom L R 327.

Note 2.

(1) *Appa Row* v. *Subbanna*, (1890) 13 Mad 60 (65).

(2) *Nyathayah* v. *F N Burn*, (1868) 2 Beng L R 91: 11 Suth W R 8 (15) F B; *Ram Nath* v. *Bindraban*, (1896) 18 All 369 (370): 16 All W N 106; *Mohima Chunder* v. *Mohesh Chunder*, (1888) 16 Cal 473 (479): 16 Ind App 23: 5 Sar 321; *Mohima Chander* v. *Nooroodeen*, (1869) 11 Suth W R 422 (423 (1): 3 Beng L R A C 70.

(3) *Govind Atmaram* v. *Santai*, (1888) 12 Bom 270 (272); *Abdul Rahiman* v. *Mohammad Azim*, (1900) 4 Cal W N 151 (152); *Shekh Adam Isufbhai* v. *Jamnadas*, (1893) 17 Bom 94 (99).

(4) *Kali Kishore* v. *Bhusan Chunder*, (1891) 18 Cal 201 (214): 17 Ind App 159: 5 Sar 607 P C [Suit on title—Plaintiff to begin]; *Maha Raja Tej* v. *Srikanth Ghose*, (1841-46) 3 Moo Ind App 261 (273): 6 W R P C 48: 1 Suth P C J 152 P C [Suit on a contract, the party who alleges that the contract is governed by special law must prove it]; *Hurryhur Mookhopadhya* v. *Madhub Chunder Baboo*, (1871) 14 Moo Ind App 152 (172): 8 Beng L R 566: 2 Suth P C J 484: 2 Sar P C J 713: 20 Suth W R 459; *The Zamindar of Ramnad* v. *Zamindar of Yettiapooram*, (1857-59) 7 Moo Ind App 441 (470): 1 Suth P C J 360: 1 Sar P C J 701: 4 Suth W R P C 31 [Person alleging that his consent was obtained to a contract though undue influence must prove it]; *Rance Purvatha Yurdhya Nauchiar* v. *Jaya Veera Rama Komara Ettuappa Naicker*, (1865) 4 Suth W R 31 P C, (Do.); *Robert Watson Co* v. *Sreedhur Mandle*, (1868) 10 Suth W R 421 (2) (422) [Suit against agent for advance paid]; *Hurryhur* v. *Madhab Chunder*, (1871) 8 Beng L R 566: 20 Suth W R 459 (463, 464): 14 Moo Ind App 152: 2 Sar 713: 2 Suth 484 P C [Suit for resumption of Mal lands]; *Koylash Bashiny* v. *Gocoolmoni*, (1882) 8 Cal 230 (237): 10 Cal L Rep 11, (Do.); *Bacharam* v. *Peary Mohun*, (1883) 9 Cal 813 (817): 12 Cal L Rep 475, (Do.); *Beer Chunder* v. *Ram Gutley Dutt*, (1867) 8 Suth W R 209 (210) (1), (Do.); *Narendra* v. *Bishun Chundra*, (1886) 12 Cal 182 (184), (Do.); *Sartaj* v. *Deoraj*, (1887) 10 All 272 (289): L R 15 Ind App 51: 5 Sar 139: 12 Ind Jur 213 P C; *Muhutab Chand* v. *Govt. of Bengal*, (1846) 4 Moo Ind App 466 (499); *Kanhaiya Lal* v. *Girdhari Lal*, (1912) 13 Ind Cas 956 (956): 9 All L J 103 [Plea of minority by defendant. Plaintiff must prove that he was not a minor]; *Mohima Chunder* v. *Jugal Kishore*, (1881) 7 Cal 736

O.18, R.1, Notes 3—6.

3. **Admissions.**—Where the defendant *admits* the facts alleged by the plaintiff but contends that he is not entitled to any part of the relief which he seeks, the defendant gets the right to begin. Thus in suits on a settled account, signed by the defendant[1] or on a bond, the execution of which is admitted[2] or in a suit for restitution of conjugal rights by the husband where the marriage is admitted by the wife,[3] the defendant has the right to begin. But he will not get this right to begin unless *all the material facts* are admitted and not only *some* of them.[4]

In a suit to recover possession of land from the tenant by the landlord, it is not for the plaintiff to explain the possession of the defendant tenant but for such defendant to show that it necessarily leads to an inference of perpetual tenancy.[5] Again where the defendant held certain lands, admittedly some at least of which were rent paying, the defendant ought to lead some *prima facie* evidence of the fact that the lands were rent-fee if he wants to plead such a fact.[6]

4. Preliminary issue raised by the defendant that the suit does not lie.—Where the defendant raises a preliminary objection that the suit does not lie as, for instance, where he pleads that the suit is barred by *res judicata*, he has the right to begin.[1] It must be remembered that for the purposes of the preliminary issue, the pleadings are taken as true.[2]

5. Preliminary issue that the appeal does not lie.—Where the respondent in an appeal objects that the appeal does not lie, the appellant must show that he has a right of appeal and has therefore the right to begin.[1]

6. Applicability.—The procedure in regard to trial of suits as laid down in this order is to be followed in proceedings under the undermentioned Local and Special Acts.[1]

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(739): 9 Cal L Rep 471 [Suit to set aside registered deed]; *Ghansam Singh* v. *Lal Singh*, (1887) 9 All 61 (63): 1886 All W N 296 [Application for review—Counsel for opposite party allowed to begin]; *Venkatacharlu* v. *Kandappa*, (1892) 15 Mad 95 (96) [Suit for ejectment—Plaintiff must prove that he has superior title]; *Kalu* v. *Barsu*, (1895) 19 Bom 803 (806, 807), (Do.); *Ramakka* v. *V Nagesam*, 1925 Mad 145 (148) (2): 47 Mad 800: 48 Mad L Jour 89: 92 Ind Cas 792 [Applicant for mesne profits of property taken in execution of decree reversed on appeal must begin]; *Dinobundhoo* v. *Keshub Chunder*, (1865) 3 Suth W R (Mis) (1) 25, (Do.); *Krishna Mohan* v. *Kunjo Behari*, (1882) 9 Cal L Rep 1 (3); *Killing Valley Tea Co* v. *Secretary of State*, 1921 Cal 40 (41) (1): 48 Cal 161: 61 Ind Cas 107 [Reference to High Court under the Income tax Act]; *Faki Abdulla* v. *Babaji*, (1890) 14 Bom 458 (461, 462) [Plaintiff must prove that is claim is not barred]; *Hanmanta Kolaji* v. *Mahadev Kondaji*, (1894) 18 Bom 513 (515), (Do.); *Ruttonchand* v. *Bocha Bibee*, (1869) 12 Suth W R 529 (531) [Suit for account—Plaintiff to show what sum is due on the account].

Note 3.

(1) *Simon Elias* v. *Jorawar Mull*, (1875) 24 Suth W R 202 (203).

(2) *Chuni Kuar* v. *Udai Ram*, (1884) 6 All 73 (74): 3 All W N 221; *Beebi Meheroonissa* v. *Rajah Gunee*, (1872) 17 Suth W R 509 (510) (2); *Sivji Satu* v. *Patlu*, (1871) 8 Bom H C A C 139.

(3) *Tuvuriammal* v. *Santiago*, (1914) 23 Ind Cas 242 (243): 7 Bur L Tim 129: 7 L B R 347.

(4) *Aghore Nauth* v. *Prem Chund*, (1880) 7 Cal L Rep 274 (275).

(5) *Secretary of State* v. *Luchmeswar Singh*, (1888) 16 Cal 223 (232): 16 Ind App 6: 5 Sar 275: 13 Ind Jur 10.

(6) *Akbur Ali* v. *Bhyea Lal*, (1881) 6 Cal 666 (669): 7 Cal L Rep 497: 8 Shome L R 260.

Note 4.

(1) *Fatmabai* v. *Aishabai*, (1888) 12 Bom 454 (459).

(2) *Kanhayalal* v. *National Bank of India, Ltd*, (1913) 18 Ind Cas 949 (950): 17 Cal W N 541: 1913 Mad W N 406 : 13 Mad L Tim 406: 11 All L J 413: 17 Cal L Jour 478: 15 Bom L R 472: 184 Pun L R 1913: 25 Mad L Jour 104: 40 Cal 598: 40 Ind App 56 P C.

Note 5.

(1) *Rustomji Burjorji* v. *Kessowji*, (1884) 8 Bom 287 (289).

Note 6.

(1) The Madras Survey and Boundaries Act (VIII of 1923), S 23; The U P Court of Wards Act (IV of 1912), S 57 (2); The Bengal Settled Estates Act (III of 1904), S 8 (2); The Bengal Tenancy Act (VIII of 1885), S 107; The Madras Railway Protection Act (IV of 1886), S 15; The Calcutta Rent Act (III of 1920), S 24; The Bengal Court of Wards Act (IX of 1879), S 66.

R. 2. [Ss. 179, 180.] (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

O.18, R.2, Note 1.

Statement and production of evidence.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

[1877—Ss. 179, 180.]

Local Amendments.

BENGAL.

Insert the following as Rule 2-*A*:—

"**2-A.** Notwithstanding anything contained in clauses (1) and (2) of Rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit."

MADRAS.

At the end of Rule 2 *insert* the following "explanation":—

"*Explanation.*—Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage."

NAGPUR.

Add the following as sub-Rule (4) to Rule 2:—

"(4). Notwithstanding anything contained in this rule the Court may order that the production of evidence or the address to the Court may be in any order which it may deem fit."

RANGOON.

Add the following as a proviso to sub-Rule (2) of Rule 2:—

"Provided that the Court may, in its discretion, call upon the other party to proceed under this sub-rule before the evidence of the party having the right to begin is complete if it considers that the other party will not be prejudiced by so proceeding and that unnecessary inconvenience and delay will thereby be avoided."

Synopsis.

1. Scope of the rule.
2. Hearing. See Note to O. 8, R. 1.
3. "The other party."
4. Arguments.

On the day fixed for the hearing of the suit. See Note 1, Pt. (1).

1. Scope of the rule.—On the day fixed for hearing the party having the right to begin must state his case, but this does not give him the right to introduce new pleas without the leave of Court. He has only the right to state his case, as has already been put forward.[1] It follows, as a consequence,

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Order 18, Rule 2—Note 1.

(1) *Mahomed Ali* v. *Gulab*, 1927 Lah 615 (615): 103 Ind Cas 501.

O. 18, R. 2, Note 1.

that the Courts ought not to allow evidence to be given in regard to contentions not raised in the pleadings.[2]

It is not the duty of the Court to determine what witnesses shall be examined.[3] The parties must select their own witnesses and ask the Court to examine such of them as they tender.[4] It is, however, in the discretion of the Court to allow further evidence after the case has been closed.[5] But in such cases it behoves the Court of first instance to take care that a party whose case has been finished is not permitted, without good reason to mend that case by fresh evidence after his adversary has succeeded in impeaching it.[6] But a document filed with the plaint when tendered after the close of the case, but before the other party began, could be admitted.[7]

Where the *onus* is on the plaintiff and he has failed to sustain it, successfully, the Court will act rightly in dismissing the suit without insisting on the defendant to go into the witness box;[8] but where the burden of proving *some issues* lies on the defendant, the plaintiff is entitled to reserve his case, and produce rebutting evidence after the defendant's evidence on those issues has been recorded.[9] Where a witness has been summoned and does not appear, the party calling him is entitled to call upon the Court to compel his attendance;[10] but it is not only illegal but improper and unfair to permit the defendant, at the very outset, of the case to be put into the witness-box nominally as a plaintiff's witness. It is certainly in accord with justice that a party who has to defend a suit should hear what his opponent has to say before he himself is called upon to answer.[11]

Reasonable time must be given for either party to produce his evidence and the Court would exercise sound discretion, if it allowed the party to produce his evidence at any time before it proceeds to judgment.[12] Thus when the defendant's request for time to produce his witnesses was refused but the defendant produced them on the day the case was posted for judgment it was held that it was a wrong exercise of discretion not to examine the witnesses before proceeding to judgment.[12-a]

A pleader is bound to call the witnesses his party wishes to examine and any threat on the part of the Court to report to the High Court the conduct of the pleader in examining such witnesses is highly improper.[13]

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(2) *G B Verman & Co* v. *Gopal Das, Ram Lal,* 1923 Lah 363 (365): 76 Ind Cas 733.

(3) *Deen Dyal Singh* v. *Danee Roy,* (1870) 13 Suth W R 185 (188).

(4) *Monno Moyee* v. *Bheem Coomar,* (1866) 6 Suth W R 231 (232); *Ramakrishna Puri Kisangir,* (1908) 4 Nag L R 129 (131); *Parasram* v. *Joti Prasad,* 1904 Pun Re No 61; *Nund Mohun Chowdhry* v. *Goluck Nath Neogee,* (1869) 11 Suth W R 99 (99); *Buksh Ali* v. *Joynat Khan,* (1869) 11 Suth W R 218 (248); *Deen Dyal* v. *Danee Roy,* (1870) 13 Suth W R 185 (188).

(5) *Rakhal Doss* v. *Protab Chunder,* (1869) 12 Suth W R 455 (456).

(6) *Hurro Monee Dossea* v. *Onookool Chunder,* (1867) 8 Suth W R 461 (463); *Syud Abdool Ali* v. *Mullick Sudderooddeen,* (1870) 14 Suth W R 493 (495).

(7) *Baroda Prasad Chatterjee* v. *Madhab Chandra Ghose,* (1906) 33 Cal 1345 (1348).

(8) *Ruthna Gramany* v. *Veerabadra Aiyar,* (1913) 21 Ind Cas 96 (102): 25 Mad L Jour 281: 1913 Mad W N 751. But see *Ramaun Ghonarain* v. *Bessin Laul,* (1866) 5 Suth W R 179 (179).

(9) *Karm Baksh* v. *Chiragh Din,* (1911) 12 Ind Cas 862 (864) (1): 66 Pun Re 1911: 190 Pun W R 1911: 104 Pun L R 1912.

(10) *Bhomar Manahi* v. *Digambar Das,* (1902) 6 Cal W N 548 (550).

(11) *Bhagwanti* v. *Sohan Lal,* (1908) Pun Re 116. See however *Subbaji* v. *Shiddappa,* (1902) 26 Bom 392 (396): 4 Bom L R 86.

(12) *Moni Lal Bandopadhya* v. *Khiroda Dasi,* (1893) 20 Cal 740 (743, 745).

(12-a) *Ibid.*

(13) *King-Emperor* v. *Bajya,* (1901) 3 Bom L R 562 (563).

2. Hearing.—*See* Notes to O. 8 , R. 1 and also.[1]

O.18, R.2, Notes 2—4.

3. "The other party."—The other party means the party other than the one who has the right to begin and has begun. Where there are two sets of defendants and their interests are practically the same, the rule is that after the plaintiff's case has been closed, both the defendants should address the Court before any evidence is given by either set of defendants.[1]

But where a defendant or a set of defendants support the plaintiff's case, wholly or in part, the former must immediately follow the plaintiff and call their witnesses, and then only can the other set of defendants who differ from the plaintiff be called upon to address the Court and produce their evidence.[2]

4. Arguments.—It is in the option of the parties to argue their case when the evidence has been closed and it is for them to decide whether they will exercise that privilege or not[1] and a Court delivering judgment without hearing arguments is not acting irregularly where the parties having had the opportunity did not choose to make use of it.[2] Where new cases are quoted in reply, the other party will be allowed to address the Court on such new cases and on the points not argued before the Court previously.[3]

A Judge, who has not heard any part of the evidence and before whom no part of the proceedings has taken place, is not justified in proceeding to judgment until he has given the parties an opportunity of appearing before him and stating their case; a judgment so pronounced is bad in law and must be set aside.[4]

The practice of submitting written arguments by pleaders is not proper and in any case, must first be submitted to the other side and then to the Court.[5]

A party must be represented by *one* pleader or set of pleaders and cannot be represented *severally* by different pleaders.[6]

R. 3. [S. 180.] Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; *and*, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so

O.18, R. 3.

Evidence where several issues.

Note 2.

(1) *Madho Lal* v. *Banarsi Das*, 1925 All 98 (99): 5 L R A Civ 582: 82 Ind Cas 73: *Ram Nath* v. *Hub Nath*, (1920) 57 Ind Cas 203 (203): 42 All 542: 18 All L J 638.

Note 3.

(1) Re *Dukshina*, (1902) 29 Cal 32 (32).

(2) *Haji Bibi* v. *Sultan Mahomed*, (1908) 32 Bom 599 (600, 601): 10 Bom L R 327..

Note 4.

(1) *Mahmud Khan* v. *Ghazanfar Ali*, (1920) 57 Ind Cas 34 (35): 141 Pun L R 1920: 2 U P L R (L) 188.

(2) *Harji* v. *Devi Ditta*, 1924 Lah 107 (107): 4 Lah 364: 77 Ind Cas 398.

(3) *Kernot* v. *Walton*, (1883) 9 Cal 14 (22).

(4) *Sher Khan* v. *Bahadur Shah*, 1904 Pun Re No 91: 5 Pun L R 1905.

(5) *Amjad Ali* v. *Suresh Banjan Pal*, 1921 Cal 426 (428): 37 Cal L Jour 42: 73 Ind Cas 706; *Venkayya* v. *Emperor*, 1928 Mad 1130 (1131): 28 Mad L W 511: 1928 Mad W N 788: 55 Mad L Jour 712: 111 Ind Cas 849.

(6) *Jankibai* v. *Atmaram*, (1871) 8 Bom H C A C 241.

O.18, R.3, Note 1.

produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

[1877—S. 180.]

Synopsis.

1. Scope of the rule.

1. **Scope of the rule.**—Where there are several issues the burden of proving some of which lies on the other party, the party beginning may at his option—

(1) produce his evidence on those issues or;

(2) Reserve it by way of answer to the evidence produced by the other party.

In the "latter" case, the party beginning may, after the other party has produced his evidence, produce his rebutting evidence.[1] It is in the discretion of the Court to give adjournments for the purpose.[2] A party trying to prove a point not raised in his pleadings cannot object to the opposite party tendering rebutting evidence as to that point.[3]

O.18, R.4, Note 1.

Witnesses to be examined in open Court.

R. 4. [S. 181.] The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

[1877—S. 181; 1859—S. 172.]

Synopsis.

1. Examination of witnesses.
2. Open Court.
3. Power of the appellate Court to examine witnesses.

Evidence of the witnesses in attendance. See Note 1.
Examination to be on oath. See Note 2, Pt. (6).
Pardanishin women and exempted persons —Examination in open Court. See Note 2, Pt. (3).
Waiver of rules of procedure for examination. See Note 2, Pts. (7), (8) and (9).
Witnesses not examined properly—Court should interfere. See Note 2, Pt. (5).

1. **Examination of witnesses.**—A party has a right to have *all* the witnesses tendered by him examined by the Court.[1] The Court cannot ordinarily refuse to examine them[1-a] on the ground that their names do not find

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Order 18, Rule 3—Note 1.

(1) *Shrepat Singh* v. *Naresh Chandra Bose*, 1926 Pat 94 (98) [Defendant pleading that plaintiff was benamidar for him—Plaintiff to be permitted to adduce rebutting evidence]; *Sheikh Mabud Bakhsh* v. *Musst Mahmudan*, 1926 Jour 88 (2): 1926 Pat H C C 24: 7 Pat L Tim 445: 93 Ind Cas 273, (Do.).

(2) *Motiram* v. *Tukaram*, 1926 Nag 486 (487): 96 Ind Cas 1006.

(3) *Mir Syed Hasan* v. *Taiyaba Begun*, (1915) 26 Ind Cas 547 (560): 1 Oudh L J 591.

Order 18, Rule 4—Note 1.

(1) *Looloo* v. *Rajendur*, (1867) 8 Suth W R 364 (365); *Ram Jewan* v. *Radha Pershad*, (1871) 16 Suth W R 109 (110); *Hurishchunder* v. *Gopalchunder*, (1873) 20 Suth W R 203 (204); *Brij Soondur* v. *Kimonnissa*, (1875) 23 Suth W R 63 (64); *Babaji* v. *Kedari*, 1888 Bom P J 210; *Shaik Ibrahim* v. *Shaik Suleman*, (1885) 9 Bom 146 (149, 150).

(1-a) *Poran Chunder* v. *Gopeenath*, (1867) 8 Suth W R 505 (505); *Jeswant Singh* v. *Jet Singh*, (1837-41): 2 Moo Ind App 424 (427): 6 Suth W R P C 46: 1 Suth (P C J) 150: 1 Sar (P C J) 212 P C; *Khuda Buksh* v. *Imam Ali*, (1887) 9 All 339 (340): 1887 All W N 61; *Durga Dayal* v. *Anoraji*, (1895) 17 All 29 (32): 1894 All W N 190; *Queen-Empress* v. *Viraswami*, (1896) 19 Mad 375 (381): 2 Weir 680: 6 Mad L Jour 195; *Gopee Ojha* v. *Hur Gobind Singh*, (1869) 12 Suth W R 229 (229); *Firm Amar Singh*

a place in the witness list,[2] or on the ground that they were not present at the previous hearing.[3] But if it clearly appears that the object of summoning them is merely to obstruct or delay justice, the Court can refuse to examine them[4] and whenever it so refuses, it must record its reasons for such refusal.[5]

Where the witness to be examined is an infant or a person of advanced age, the Court may hold an examination on the *voir dire* as to his competency to give evidence.[6] But this examination must be held before the actual examination commences.[7] Courts, of course, have always the power to examine any of the parties to the suit and compel their attendance.[8] It is also in the discretion of the Court to allow a party to call further evidence after he has closed his case.[9]

The examination of a witness is not complete without any opportunity being allowed for his cross-examination by the other side.[10] A Court cannot fix any time limit for cross-examination[11] though it has full power to prevent any abuse of the rights of cross-examination.[12] A co-defendant who is represented by a separate vakil may cross-examine another defendant, in order to discredit the evidence given by him in plaintiff's favour.[13] Refusal by the trial Court to examine the witnesses tendered by a party before delivery of judgment may amount to a substantial error or defect of procedure which may have affected the decision of the case on the merits and is a ground for second appeal under S. 100, Cl. (*c*).[14]

2. Open Court.—The parties have a right to have the evidence of witnesses taken in *open Court, i.e., publicly.*[1] All witnesses should, without distinction give their evidence from the witness-box; it is not desirable that any one should give his evidence on the *dais* by the side of the Judge.[2] The following may be deemed to be exceptions to the rule that the examination of witnesses should be in open Court:—

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v. *Firm Jai Dial*, 1926 Lah 450 (450): 94 Ind Cas 21.

(2) *Rakhal Doss* v. *Protap Chunder*, (1869) 12 Suth W R 455 (456).

(3) *Mt Man Bi* v. *Lal Mian*, (1897) 10 C P L R 92 (93); *K N K V Venyathan Chettiar* v. *A K Kuppusami Pilai*, (1893-1900) L B R 398.

(4) *Chowdhry Khoorja* v. *Shib Tohal*, (1872) 17 Suth W R 172 (173); *Ram Dhan* v. *Rajballab*, (1871) 6 Beng L R App 10.

(5) *Ma Yon* v. *Maung Hmun*, (1897-1900) Vol II U B R 373.

(6) *Nafar Sheikh* v. *Emperor*, (1913) 20 Ind Cas 741 (745): 41 Cal 406: 18 Cal L Jour 582: 18 Cal W N 147; *Queen-Empress* v. *Lal Sahai*, (1889) 11 All 183 (185): 1889 All W N 65; *Sheikh Fakir* v. *Emperor*, (1907) 11 Cal W N 51 (53).

(7) *Sheikh Fakir* v. *Emperor*, (1907) 11 Cal W N 51 (53). But see *Nafar Sheikh* v. *Emperor*, (1913) 20 Ind Cas 741 (744, 745).

(8) *Ram Gutty* v. *Mumtaz Bebee*, (1868) 10 Suth W R 280 (282): 1 Bom L R S N 20.

(9) *Hurro Monee* v. *Onokool Chunder*, (1867) 8 Suth W R 461 (463).

(10) *Gorachand* v. *Ram Narain Chowdhry*, (1868) 9 Suth W R 587 (588) [Unless consented to]; *Chandrasinji* v. *Mohansamggi*, (1906) 30 Bom 523 (535, 536): 8 Bom L R 705; *Sheikh Shurfuraz Mollah* v. *Sheikh Dhunoo*, (1871) 16 Suth W R 257 (257).

(11) *Amir Ali Khan* v. *Kulsum Begam*, (1910) 8 Ind Cas 418 (421) Oudh.

(12) *Banke Lal* v. *Kanhaiya Lal*, 1922 Oudh 124 (128).

(13) *Narasimma* v. *Kistnama*, (1862-63) 1 Mad H C 456 (456).

(14) *Moni Lal* v. *Khiroda Dass*, (1893) 20 Cal 740 (743, 744).

Note 2.

(1) *Baksiram Mulchand* v. *Dwaraka Prasad*, 1928 Pat 438 (439); *Soorendro Pershad* v. *Nundun Misser*, (1874) 21 Suth W R 196 (198); *Rajah Bommarauze* v. *Rangasamt Mudali*, (1859-61) 6 Moo Ind App 232 (247): 1 Sar P C J 536 [Witnesses should not be examined in the absence of the parties]; *Krishna Iyer* v. *The Official Receiver, Trichinopoly*, 1925 Mad 381 (381): 75 Ind Cas 445.

(2) *Wadhawa Singh* v. *Emperor*, (1921) 63 Ind Cas 461 (462): 22 Cr L Jour 669: 3 U P L R (L) 78.

O.18, R.4, Notes 2—3.

(1) *Purdanishin* women and other persons who are exempted from personal appearance in Court should not be examined in open Court.[3] *See also* Ss. 132 and 133 *ante;*

(2) Where witnesses are examined on commission.[4]

The Court should not as a rule, interfere in the examination of the witnesses except where it is found that they are not properly examined through the incompetency of those who have the management of the case.[5]

The Oaths Act, provides imperatively that no person shall testify except on *oath* or *affirmation*. As to the effect of the omission to take the oath or affirmation, *see* the Oaths Act and the undermentioned cases.[6]

The parties may agree to the evidence being given in a *particular manner* and such consent will bind them[7] except where the evidence amounts to nothing or is *manifestly untrue*[8] or where the evidence is *legally inadmissible*.[9]

3. Power of the appellate Court to examine witnesses.—Where the Court of first instance refuses to examine the witnesses tendered by a party, they may be examined by the appellate Court.[1] But the objection to the rejection of witnesses must be taken at the earliest possible opportunity, and, if not, so taken, the High Court will refuse to interfere.[2] It has been held that the procedure of an appellate Court calling for an expert witness to prove the handwriting of the attestors is illegal.[3] *See also* O. 41, Rr. 27 and 33 *infra*.

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(3) *Farid-un-nissa*, In re, (1883) 5 All 92 (94): 1882 All W N 184; *Basumoti Adhikarin* v. *Budram Kalita*, (1894) 21 Cal 588 (589, 590).

(4) *See* O 26 below.

(5) *Ramgati* v. *Imitari Banu*, (1868) 1 Beng L R (S N) 20 (c).

(6) *Queen-Empress* v. *Maru*, (1888) 10 All 207 (221): 1888 All W N 86 [S 6 of Oaths Act is imperative and not directory]; *Insen Meah* v. *Kalaram*, (1878) 2 Cal L Rep 476 (477) [Refusal to make the oath or solemn affirmation in a particular manner—Presumption]; *Muhammad Zahur* v. *Chedu*, (1892) 14 All 141 (145): 1892 All W N 3. (Do.); *Chintaman* v. *Shriniras*, (1898) 22 Bom 680 (683). (Do.); *The Queen* v. *Tarindee Churn Bose*, (1874) 21 Suth W R Cr 31 (32); *Q* v. *Sewa Bhogta*, (1875) 14 Beng L R 294: 23 Suth W R Cr 12 (12); *Velu Mudali* v. *Sowerby*, (1864-65) 2 Mad H C 246 (247) [Member of the Church of England is not exempted from taking an oath in a Court of Justice]; *Anonymous Case*, (1862-63) 1 Mad H C 99 note 99 [Mahomedan witness though suffering from a disease which disqualifies him from taking an oath on the Koran must be sworn in the regular way, or not at all]; *Mohammad Salah* v. *Mt Muriamunnissa*, (1868) 10 Suth W R 284 (284); *Abaji* v. *Bala*, (1898) 22 Bom 281 (283) [Offer to be bound by oath]; *Sheo Nath* v. *Sukh Lall*, (1900) 27 Cal 229 (231): 4 Cal W N 327; *Ram Narain* v. *Babu Singh*, (1896) 18 All 46 (49): 1895 All W N 158: *Thoyi Ammal* v. *Subbaraya Mudali*, (1899) 22 Mad 234 (236, 237); *Moyan* v. *Pathu*, (1908) 31 Mad 1 (3): 17 Mad L Jour 545: 3 Mad L Tim 98.

(7) *Ramaya* v. *Devappa*, (1906) 30 Bom 109 (112): 7 Bom L R 642; *S Krishna Reddi* v. *Sundara Reddi*, (1915) 26 Ind Cas 384 (388): 1914 Mad W N 931; *Prakasa Rajanimgaru* v. *Venkata Rao*, (1913) 21 Ind Cas 319 (320): 38 Mad 160: 1913 Mad W N 800: 25 Mad L Jour 360. See however *Jugdeo Singh* v. *Molazim Hossein*, (1870) 13 Suth W R 108 (109).

(8) *Gooroodass* v. *Greedhur Sein*, (1869) 11 Suth W R 110 (111).

(9) *Luckeemonee* v. *Shunkuree*, (1865) 2 Suth W R 252 (253); *Munno Singh* v. *Amrut Lall*, (1866) 5 Suth W R 234 (234).

Note 3.

(1) *Parmeshari* v. *Mohamed Syud*, (1881) 6 Cal 608 (611): 7 Cal L Rep 504: 4 Shome L R 24: 5 Ind Jur 417; *Arjun* v. *Shankar*, (1898) 22 Bom 253 (255).

(2) *Surm* v. *Ubhman*, (1870) 2 All H C 209; *Lalla Debeedin* v. *Sheogolam*, (1870) 2 N W P 206; *Somashekhara* v. *Subhadramaji*, (1881-82) 6 Bom 524 (527): 6 Ind Jur 592; *Keenoo* v. *Eshan Chunder*, (1866) 6 Suth W R 213 (215); *Nil Kanth* v. *Soosella*, (1866) 6 Suth W R 324 (324); *Chunder Nath* v. *Anundmoyee*, (1869) 11 Suth W R 289 (290); *Gooroo Doss* v. *Poran Mundle*, (1869) 12 Suth W R 363 (364); *Osman Singh* v. *Chumman*, (1871) 15 Suth W R 87 (88); *Ramessur* v. *Shib Narain*, (1870) 14 Suth W R 419 (420).

(3) *Bindessuree Dutt* v. *Doma Singh*, (1868) 9 Suth W R 88 (89).

O.18, R.5, Note 1.

R. 5. [S. 182.] In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the judge shall, if necessary, correct the same, and shall sign it.

How evidence shall be taken in appealable cases.

[1877—S. 182; 1859—S. 172.]

Local Amendment.

RANGOON.

The following shall be *substituted* for Rule 5 of Order 18:—

5. In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing in the language of the Court or in English by or in the presence and under the direction and supervision of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed shall be read over or translated to the witness by such person as the Judge may direct, provided that the Judge may, if he thinks fit, require the evidence to be read over in his own presence.

Such person shall, after reading over the deposition to the witness, append a certificate at the foot of the deposition form as follows:—

Read over
————by me in Burmese or (as the case may be) and acknowledged
Interpreted
correct.

(Signature)
Interpreter or Clerk.

The Judge shall, if necessary, correct the deposition and shall sign it.

Synopsis.

1. Scope and applicability of the rule.
2 Effect of evidence taken in the absence of parties.
3. "Shall be read over."
4 Signature of witness.
5 Signature of Judge.

1. Scope and applicability of the rule.—This rule applies to all proceedings[1] except that it does not apply to Chartered High Courts[2] and to the Chief Court of Oudh[2-a] and to the Court of the Judicial Commissioner of the

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Order 18, Rule 5—Note 1.

(1) *Mohunt Joyram Geer* v. *A B Miller*, (1871) 15 Suth W R O C 16 (18): 7 Beng L R 74 [Insolvency proceedings]; *Lakhmidas Hansraj*, In re, (1867) 5 Bom H C R O C 63, (Do.); *Kalliandas Kirparam* v. *Trikamlal Gulabrai*, (1872) 9 Bom H C R 307, (Do.); *Abdul* v. *Mahomed*, (1891) 14 Mad 404 (405), (Do.); *W Heysham* v. *Bholanath Mullick*, (1871) 17 Suth W R 221 (223): 11 Beng L R 230 [Proceedings under the Land Acquisition Act]; *Saroda Soonduree* v. *Muddan Mohun*, (1875) 24 Suth W R 162 (162) [Probate proceedings]; *Mt Feroza Jan* v. *Mirza Amir Ali*, 1923 Oudh 119 (120): 9 Oudh L J 593: 74 Ind Cas 445 [Witness examined on commission] [The procedure of this rule is applicable to proceedings under the Bengal Land Registration Act II of 1906 (S 53-A) and the Madras Ganjam and Vizagapatam Act XXIV of 1839 (R 16)].

(2) See O 49, R 3.

(2-a) See the U P (Oudh Courts) Act IV of 1925, S 16 (2). So also Rules 6 to 9, 11, 13 to 16 of this Order are not applicable.

O.18, R.5, Notes 1—3.

North-West Frontier Province.[2-b] In the exercise of their original jurisdiction and to Courts constituted under the Provincial Small Cause Courts Act.[3]

An objection that the depositions of witnesses were not taken in the manner prescribed must be taken at the earliest possible opportunity and not in second appeal.[4]

The Notes by a Munsif as to the *age* or *description* of the witness in the heading of the deposition do not form part of the evidence.[5]

2. **Effect of evidence taken in the absence of parties.**—The examination of a material witness in the absence of the other party is a material irregularity which will vitiate the procedure if objection to the same is taken at the proper time.[1] Where no opportunity was given to a party to examine his witness, or to rebut the evidence or cross-examine the witness of the opposite party, then that evidence is not admissible for or against him unless consented to.[2] Where the defendant fails to appear without lawful excuse, the Judge may at once enter judgment against the defendant but where the Court takes the evidence of the plaintiff, the defendant who has appeared is entitled to cross-examine him.[3] The admission of a fact dispenses with the proof thereof and such portion of the statement as is an admission can always be treated as evidence without the whole statement being treated as such.[4]

3. "**Shall be read over.**"—There is a conflict of opinion as to whether a deposition *not read over* to the witness is admissible in evidence against him in a subsequent trial for perjury or forgery. The High Courts of Calcutta,[1] Lahore[2] and Madras[3] have held that it is not, while the Judicial Commissioner's Court of Nagpur has held that it is admissible.[4] But the fact that the deposition was read over by the *witness himself*[5] or that the reading over of the deposition was not in the *presence* of the Judge[6] or that a certificate as to the read-

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(2-b) See S 46 (2) of the North-West Frontier Province Law and Justice Regulation (VII of 1901). Similarly Rr 6, 8, 9, 11 and 13 to 16 of this Order are not applicable.

(3) See O 50, R 1 (*b*). See also *Kalu* v. *Tikaram*, 1925 Nag 412 (413, 414): 89 Ind Cas 390.

(4) For observations on the improper manner in which evidence is generally taken by the lower Courts, see *Phul Kuar* v. *Surjan Pandey*, (1882) 4 All 249 (250, 251): 2 All W N 40; *Lalla Mahomed* v. *Peer Nuzur*, (1872) 18 Suth W R 112 (113).

(5) *Muhammad Hasan* v. *Abdul Hamid*, (1919) 50 Ind Cas 431 (434) (Cal); *Maqbulan* v. *Ahmad Hussain*, (1904) 26 All 108 (118): 8 Cal W N 241: 31 Ind App 38: 8 Sar 583: 6 Bom L R 233 P C.

Note 2.

(1) *Raja Bommarauze* v. *Rangasamy*, (1854-57) 6 Moo I A 232 (247-251): 1 Sar 536 P C.

(2) *Gorachand* v. *Ram Narain*, (1868) 9 Suth W R 587 (588); *Gooroo Doss* v. *Greedhur*, (1869) 11 Suth W R 110 (112).

(3) *Pakaltar* v. *Jakriram*, (1869) 2 Beng L R App 12.

(4) *Shurfuraz* v. *S Dhunoo*, (1871) 16 Suth W R 257 (258).

Note 3.

(1) *Emperor* v. *Nabab Ali Sarkar*, 1924 Cal 705 (707): 51 Cal 236: 81 Ind Cas 803: 25 Cr L J 1027 [Dissenting from the observations *obiter* in 45 Cal 825); *Emperor* v. *Jogendra*, (1914) 42 Cal 240: 24 Ind Cas 571 (571): 18 Cal W N 1242; *Empress* v. *Mayadeb*, (1881) 6 Cal 762 (763): 8 Cal L Rep 292; *Mohendra Nath* v. *Emperor*, (1908) 12 Cal W N 845 (847).

(2) *Kartar Singh* v. *Emperor*, (1917) 39 Ind Cas 847 (848): 12 Pun Re 1917 (Cr): 15 Pun W R 1917 (Cr): 18 Cr L J 607.

(3) In re *Nalluri Chenchiah*, (1919) 50 Ind Cas 987 (988, 989): 42 Mad 561: 36 Mad L Jour 291: 9 Mad L W 349: 1919 Mad W N 183: 25 Mad L Tim 356; *Kamatchinathan Chetty* v. *Emperor*, (1905) 28 Mad 308 (309): 2 Cr L J 756.

(4) *Mirabux* v. *Emperor*, 1923 Nag 39 (40): 18 Nag L R 192: 68 Ind Cas 36.

(5) *Ramesh Chandra* v. *Emperor*, (1919) 50 Ind Cas 660 (662, 663): 46 Cal 895: 23 Cal W N 661: 29 Cal L Jour 513.

(6) *Bogra* v. *Emperor*, (1910) 7 Ind Cas 414 (415): 8 Mad L Tim 117: 1910 Mad W N 435: 11 Cr L Jour 482: 20 Mad L Jour 943: 34 Mad 141; *Meango* v. *Baviah*, (1918) 45 Ind Cas 507 (508, 509): 7 Mad L W 435: 24 Mad L Tim 242: 1918 Mad W N 239.

ing over to the witness was not appended by the Judge[7] or the non-observance of some other formality[8] will not render the evidence inadmissible in evidence. O.18, R.5, Notes 3—5.

4. Signature of witness.—There is no obligation upon witnesses to affix their signature or mark, after their evidence is read over to them. It is, however, generally the practice to have their signatures.[1] But *see* R. 16 below where such signature is obligatory.

5. Signature of Judge.—It is essential that the Judge should sign the deposition so read over to the witness. A prosecution for perjury on the basis of such deposition cannot otherwise be sustained.[1]

R. 6. [S. 183.] *Where* the evidence is taken down in a language different from that in which it *is* given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it *is* given. O.18, R.6, Notes 1—2.

When deposition to be interpreted.

[1877—S. 183; 1859—S. 172.]

Local Amendment.

RANGOON.

The following shall be *inserted* as Rule 6-A:—

6-A. Where there are no interpreters paid by Government, and it is found necessary to employ an interpreter in a civil case, he shall be paid such fee, ordinarily not exceeding Rs. 2 *per diem*, as the Court may fix. The fee shall be advanced by the party at whose instance the interpreter is required, and shall be treated as costs in the case. All payments of interpreters' fees shall be made through the Court and duly entered in Bailiff's Register II.

Synopsis.

1. Applicability.
2. Shall be interpreted.

1. Applicability.—This rule does not apply to the Chartered High Courts, *see* O. 49, R. 3. Nor does it apply to cases governed by S. 19 of the Oudh Laws Act[1]; nor to the Court of the Judicial Commissioner of the North-West Frontier Province.[1-a]

2. Shall be interpreted.—*See* Note 3, R. 5 above.

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(7) *Ram Gopal* v. *Raghu Nath*, (1905) 2 Cal L Jour 496 (497). *See Senuk Kachee* v. *Oree Doobey*, (1869) 2 N W P H C 241.

(8) *Promode Nath Sinha Roy* v. *Harishee Bagdhi*, 1929 Cal 78 (80): 55 Cal 1084: 113 Ind Cas 833 [Dictation to typist]; *Emperor* v. *Jagal Ram*, (1918) 17 Ind Cas 872 (873): 1918 Pun Re No 28 Cr: 16 Pun L R 1918: 29 Pun W R 1918.

Note 4.

(1) *Emperor* v. *Fateh Ali*, (1912) 16 Ind Cas 521 (522): 37 Pun W R 1912 Cr: 245 Pun L R 1912: 8 Pun Re 1912 Cr: 13 Cr L Jour 713.

Note 5.

(1) *Empress* v. *Mayadeb*, (1881) 6 Cal 762 (763): 8 Cal L Rep 292.

Order 18, Rule 6—Note 1.

(1) *Hazari* v. *Emperor*, 1931 Oudh 385 (385): 8 Oudh W N 685: 132 Ind Cas 270: 32 Cr L Jour 851: 1931 Cr C 817: 16 A I Cr R 486.

(1-a) See S 46 (2) of the North-West Frontier Province Law and Justice Regulation (VII of 1901). Similarly Rr 5, 8, 9, 11 and 13 to 16 of this Order are not applicable.

O.18, R. 7. R. 7. [S. 185-A (3).] *Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.*

Evidence under section 138.

O.18, R.8, Notes 1—3. R. 8. [S. 184.] *Where* the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum when evidence not taken down by Judge.

[1877—S. 184; 1859—S. 172.]

Local Amendment.

RANGOON.

Rule 8 shall be deleted.

Synopsis.

1. **Applicability.**
2. **Memorandum of evidence.**
3. **Effect of non-compliance.**

1. **Applicability.**—This rule does not apply to Chartered High Courts, *see* O. 49, R. 3, nor to the Court of the Judicial Commissioner of the North-West Frontier Province, *see* S. 46 (2) of Law and Justice Regulation thereof (VII of 1901). For a local repeal of this rule and Rr. 9 and 13 of this order, *see* the undermentioned Act.[1]

2. **Memorandum of evidence.**—Where a Judge does not take down the whole of the evidence himself, he is bound to make a memorandum of evidence and record every material answer made by the witness in the examination-in-chief, in the cross-examination and in reply to questions by the Court. It should be written down in consecutive sentences.[1] Where there is a conflict between the Judge's memorandum and the recorded deposition of a witness, the Court must be guided by the latter and not the former.[2] In cases governed by this rule, there must be either one or two records of evidence. If it is one record it must be in Judge's *own handwriting*; if otherwise, there must be a memorandum of evidence.[3]

3. **Effect of non-compliance.**—Failure to make a memorandum of evidence does not vitiate the proceedings if evidence is taken down *in the language* in which it is given.[1]

Order 18, Rule 8—Note 1.

(1) The C P Laws Act (II of 1879), S 11.

Note 2.

(1) *Suheeooddeen* v. *Luchmeeput*, (1866) 6 Suth W R 112 (113); *Beni Pershad* v. *Muhammad Khan*, 1882 All W N 184 (184).

(2) *M Heeranath* v. *B Burm Narain*, (1871) 15 Suth W R 375 (377).

(3) *Promode Nath* v. *Harishee*, 1929 Cal 76 (79, 80): 55 Cal 1084: 113 Ind Cas 833 [Dictation to typist—Memorandum of evidence is necessary]; *Kallian Das Kriparam* v. *Trikam Lal*, (1872) 9 Bom H C R 307; In re *Lakhmidas Hanzraji*, (1868-69) 5 Bom H C O C 63; *Ghulam Shah* v. *Ganapat Rai*, 1886 Pun Re No 45.

Note 3.

(1) Case of *Beharee Lall Bose*, (1868) 9 Suth W R Cr 69 (69).

R. 9. [S. 185.] Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down. O. 18, R. 9, Note 1.

When evidence may be taken in English.

[1877—S. 185; 1859—S. 172.]

Synopsis.

1. Applicability.

1. **Applicability.**—This rule, corresponding to S. 185 of the Code of 1877, does not apply to enquiries under the Central Provinces Laws Act,[1] nor to the Court of the Judicial Commissioner of the North-West Frontier Province.[1-a]

R. 10. [S. 186.] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears *to be* any special reason for so doing. O.18, R.10, Note 1.

Any particular question and answer may be taken down.

[1877—S. 186; 1859—S. 172.]

Synopsis.

1. Scope of the rule.

1. **Scope of the rule.**—This rule does not apply to Chartered High Courts. *See* O. 49, R. 3.

R. 11. [S. 187.] *Where* any question put to a witness *is* objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon. O.18, R.11.

Questions objected to and allowed by Court.

[1877—S. 187; 1859—S. 172.]

Synopsis.

1. Applicability.
2. Objection when to be taken.

Objection to admissibility taken in the appellate Court. See Note 2, Pt. (2).

Order 18, Rule 9—Note 1.

(1) *See* The Central Provinces Laws Act (XX of 1875), S 11 inserted by Central Provinces Laws (Amendment) Act (II of 1879).

(1-a) *See* The North-West Frontier Province Regulation (VII of 1901), S 46 (2).

O.18, R.11, Notes 1—2.

1. **Applicability.**—This rule does not apply to Chartered High Courts, *see* O. 49, R. 3, nor to the Court of the Judicial Commissioner of North-West Frontier Province, *see* S. 46 (2) of Law and Justice Regulation thereof (VII of 1901).

2. **Objection when to be taken.**—Objection as to admissibility of evidence has to be taken in the Court of first instance and if not so done, the appellate Court will not entertain any such objection[1] and where evidence of doubtful *admissibility* has been loosely received the Privy Council will deal with the case as it appears to them just and will not allow any mere technical objection to prevail as to its admissibility.[2] But an erroneous omission to object to irrelevant evidence will not make it relevant and will therefore be disregarded.[3]

O.18, R.12, Note 1.

R. **12.** [S. 188.] The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Remarks on demeanour of witnesses.

[1877—S. 188; 1859—S. 172.]

Synopsis.

1. Remarks on demeanour.

Plaintiff examining defendant as his wit- ness. See Note 1, Pt. (4).

1. **Remarks on demeanour.**—Under this rule, the Court may record such remarks about the demeanour of a witness as it thinks fit and the same cannot be expunged under the cloak of an amendment.[1] But where a witness stated his age to be 24 but the Judge made a note in his deposition that his age "appeared to be 18 or 19" it was held that the note cannot be considered to be evidence in the case.[2] The Court's belief that the evidence is biassed, is not a valid ground for refusing to record it.[3] The evidence of a defendant called to give evidence on the plaintiff's side, cannot be judged under different principles, merely because he is a defendant.[4]

Order 18, Rule 11—Note 2.

(1) *Jardine Skinner & Co* v. *Ranee Shama*, (1868) 10 Suth W R 60 (60); *Chadu Singh* v. *Beharee Tewaree*, (1868) 10 Suth W R 90 (91); *Rani Pudmavati* v. *B Doolar Singh*, (1846) 4 Moo Ind App 259 (284): 7 Suth W R 41: 1 Suth 178: 1 Sar 348; *Raja Bommarauze* v. *Rangaswami Mudali*, (1854-57) 6 Moo Ind App 232 (248): 1 Sar 536; *Chimnaji Govind* v. *Dhinkar*, (1887) 11 Bom 320 (324); *Kissen Kaminee* v. *Ram Chunder*, (1869) 12 Suth W R C R 13 (14); *Shertul Persad* v. *Jummejoy*, (1869) 12 Suth W R C R 244 (245); *Zia-ud-din* v. *Mt Fatima*, (1912) 14 Ind Cas 539 (540): 216 Pun W R 1912; *Mukdoomunnissa* v. *Nokhy Singh*, (1875) 24 Suth W R 296 (296); *Peruma Goundan* v. *Rama Goundan*, (1915) 28 Ind Cas 378 (379): 28 Mad L Jour 115; *Shahzadi Begam* v. *Secretary of State*, (1907) 34 Cal 1059 (1074): 34 Ind App 194: 6 Cal L Jour 678: 9 Bom L R 1192: 2 Mad L Tim 349 P C; *Ittichiri Ammah* v. *Kaliani*, (1895) 5 Mad L Jour 81 (82); *Pratap Chunder* v. *Collector of Gowalporah*, (1874) 22 Suth W R 216 (218); *Kishori Lal* v. *Rakhal Das*, (1904) 31 Cal 155 (157, 158); *Hridoy Krishna Dass* v. *Prasanna Kumari*, (1901) 28 Cal 142 (144, 146); *Ramanuj Rai* v. *Dakshinashwar Rai*, 1926 Cal 752 (754): 43 Cal L Jour 237: 30 Cal W N 259: 93 Ind Cas 101.

(2) *Ajodhya Prasad Singh* v. *Umrao Singh*, (1861-63) 13 Moo Ind App 519 (529): 6 Beng L R 509: 15 Suth W R 1. (P C).

(3) *A B Miller* v. *Babu Madho Dass*, (1897) 19 All 76 (92): 23 Ind App 106: 7 Sar 73 P C; *Kanto Prasad* v. *Jagat Chandra*, (1896) 23 Cal 335 (338); *Kameshwar Prasad* v. *Amanutulla*, (1899) 26 Cal 53 (56, 72): 2 Cal W N 649; *Padman* v. *Hunwanta*, 1915 P C 111 (112): 93 Pun Re 1915: 18 All L J 801: 17 Bom L R 609: 22 Cal L Jour 172: 19 Cal W N 929: 11 Pun L R 1916: 110 Pun W R 1915: 29 Mad L Jour 307: 18 Mad L Tim 54: 2 Mad L W 645: 1915 Mad W N 500: 29 Ind Cas 807 P C.

Order 18, Rule 12—Note 1.

(1) *O Dunu* v. *Emperor*, 1922 All 107 (110): 20 All L J 261: 44 All 401: 66 Ind Cas 1005.

(2) *Mahomed Hasan Mia* v. *Abdul Hamid*, (1919) 50 Ind Cas 481 (434) (Cal).

(3) *Bhagchand* v. *Musaji*, 1923 Nag 58 (60): 68 Ind Cas 272.

(4) *Mathuradas* v. *Jetha Jaichand*, (1897) 2 Cal W N 99 (Notes).

O.18, R.13, Note 1.

R. **13**. [S. 189.] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum of evidence in unappealable cases.

[1877—S. 189; 1859—S. 172.]

Synopsis.

1. Scope of the rule.

1. Scope of the rule.—A Judge is bound under this rule, to make a memorandum of the substance of what each witness deposes.[1] A short abstract of the whole evidence is not sufficient compliance with the rule.[2]

This rule does not apply to Chartered High Courts. *See* O. 49, R. 3. As to the applicability of this rule to enquiries under various local or special enactments, *see* the undermentioned Acts.[3]

O.18, R.14. Note 1.

R. **14**. [S. 190.] (1) *Where* the Judge is unable to make a memorandum as required by this *Order*, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

Judge unable to make such memorandum to record reasons of his inability.

(2) Every memorandum so made shall form part of the record.

[1877—S. 190; 1859—S. 172.]

Local Amendment.

RANGOON.

In the second line of sub-Rule (1) for the words "this order" the word and figures "Rule 13" shall be substituted.

Synopsis.

1. Applicability.

1. Applicability.—This rule does not apply to Chartered High Courts. *See* O. 49, R. 3 (4), not to the Court of the Judicial Commissioner of the North-West Frontier Province, *see* S. 46 (2) of Law and Justice Regulation thereof (VII of 1901).

Order 18, Rule 13—Note 1.

(1) *Amrita Shaha* v. *Panchkori Shaha*, (1896) 1 Cal W N 229 (Notes); *Ayemuddin Bewa* v. *Animuddin Pramanik*, 1921 Cal 558 (558): 25 Cal W N 599; *Ratna Pathan* v. *Para Sundaram*, (1915) 30 Ind Cas 634 (634): 2 Mad L W 803: 1915 Mad W N 768.

(2) *Amritha Shaha* v. *Panchkori Shaha*, (1905) 9 Cal W N 418 (419); *Chethru Gope* v. *Sri Charan Bhagat*, (1905) 9 Cal W N 420 (421).

(3) The Orissa Tenancy Act (II of 1913), S 198 (*h*): The C P Laws Act (XX of 1875), S 11; The North-West Frontier Province Law and Justice Regulation (VII of 1901), S 46 (2).

O.18, R.15, Notes 1—2.

Power to deal with evidence taken *before* another Judge.

R. **15.** [S. 191.] (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of *a* suit, *his* successor may deal with *any* evidence or memorandum *taken down or made under the foregoing rules as if such evidence or memorandum* had been taken down or made by *him or under his direction under the said rules and may* proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-*rule* (1) shall, so far as they *are* applicable, *be deemed to* apply to *evidence taken in* a suit transferred under section 24.

[1877—S. 191.]

Synopsis.

1. **Applicability.**
2. **Scope of the rule.**
3. **Sub-Rule (2).**

New plaintiff substituted—De novo trial. See Note 2, Pt. (7).

Successor when bound to hear arguments de novo. See Note 2, Pt. (6).

1. **Applicability.**—This rule does not apply to Chartered High Courts. *See* O. 49, R. 3; nor to the Court of the Judicial Commissioner of the North-West Frontier Province, *see* S. 46 (2) of Law and Justice Regulation thereof (VII of 1901).

2. **Scope of the rule.**—Under S. 191 of the Code of 1882, as it stood before 1888, it was held that the successor of the Judge who was removed was bound to fix a date for the *entire* hearing and trial of the case before himself and that such trial should proceed in the ordinary way except that the parties would be allowed to use the evidence already taken as evidence in the case.[1] This view, however, was dissented from by a Full Bench in *Jadu Rai* v. *Kanizak Hussain*[2] and held that the rule empowers the Judge to make use of the materials collected by the predecessor as evidence in the case without being bound to fix a day for commencing the trial *de novo*. In order to give effect to this latter view, the old S. 191 was substituted by a new section by Act VII of 1888 empowering the Judge to *proceed with the suit from the stage at which the predecessor* left it. That section has been substantially re-enacted in this rule.

It is not competent for any *co-ordinate Court* to hear the case under this rule.[3] Thus an additional Munsif has no jurisdiction to deliver

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Order 18, Rule 15—Note 2.

(1) *Afzal-un-nissa Begam* v. *Ali Ali*, (1885) 8 All 35 (37): 1885 All W N 322; *Jogram* v. *Narain*, (1885) 7 All 857 (860): 1885 All W N 285.

(2) (1886) 8 All 576 (581, 600, 611): 1886 All W N 195 F B. *See also* the following cases under the old Code:—*Soorendro Pershad* v. *Nundun Misser*, (1874) 21 Suth W R 196 (198); *Syud Mahomed* v. *Oomdah*, (1870) 13 Suth W R 184 (185), (Do.); *Gour Chunder* v. *Manick Ram*, (1870) 13 Suth W R 76 (78), (Do.); *Sreenath Ray* v. *Goluck Chunder Sein*, (1871) 15 Suth W R 348 (349) [Where such an agreement has been entered into the witnesses should not be re-examined without some good reason]; *Maharajah Jugatendur Bunwaree* v. *Din Dayal*, (1864) 1 Suth W R 309 (311), (Do.); *Naranbhai* v. *Naro Shankar*, (1866-67) 4 Bom H C R 98.

(3) *Sukram* v. *Kalakahar*, (1869) 3 Beng L R A C J 105.

judgment in a case in which the evidence was taken by the Principal Munsif.[4] O.18, R.15, Notes 2—3.

An *opinion* reduced to writing by a Judge but not pronounced by him is not a judgment, but a mere memorandum[5] and the successor is bound to hear arguments or give the parties an opportunity of being heard before the judgment is given.[6]

Where a *new* plaintiff is added after the removal of the predecessor, this rule has no application and the successor is bound to grant a *de novo* trial.[7]

3. **Sub-R. (2).**—*See* the undermentioned cases.[1]

O.18, R.16, Note 1.

R. **16.** [S. 192.] (1) *Where* a witness *is* about to leave the jurisdiction of the Court, or other sufficient cause *is* shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of *any* party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

Power to examine witness immediately.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient. of the day fixed for the examination, shall be given to the parties,

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, *and the Judge shall, if necessary, correct the same, and shall sign it*, and *it* may then be read at any hearing of the suit.

[1877—S. 192; 1859—S. 173.]

Synopsis.

1. Applicability of the rule. 2. Scope of the rule.

De bene esse examination of witness. See Note 2, Pt. (1).

1. **Applicability of the rule.**—This rule does not apply to the Chartered High Courts, *see* O. 49, R. 3; nor to the Court of the Judicial Commissioner of the North-West Frontier Province, *see* S. 46 (2) of Law and Justice Regulation thereof (VII of 1901).

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(4) *Raghubir Rai* v. *Thakur Rai*, 1887 All W N 13 (13).

(5) *Mohammad Akil* v. *Assadunnissa*, (1868) 9 Suth W R 1 (5, 30): 1 Beng L R Sup Vol 774; *Nobo Chunder Benerjee* v. *Ishur Chunder Mitter*, (1869) 12 Suth W R 254 (254).

(6) *Sardar Mahtab Singh* v. *Musst Sobha Kaur*, 1886 Pun Re No 110; *Sher Khan* v. *Bahadur Shah*, 1904 Pun Re No 91: 5 Pun L R 1905; *Ma Nyo* v. *Ma Yauk*, (1907-1908) 4 L B R 256 (260, 261); *Ghulam Ali Shah* v. *Shahabal Shah*, 1905 Pun Re No 3: 87 Pun L R 1905: 13 Pun W R 1905; *Harji Mal* v. *Devi Ditta*, 1924 Lah 107 (108): 4 Lah 364: 77 Ind Cas 398; *Kammoory Nundriraju* v. *Kasa Subbiah*, (1912) 17 Ind Cas 278 (279): 1912 Mad W N 999: 12 Mad L Tim 332; *Kishna Mills* v. *Sunder Singh*, (1917) 39 Ind Cas 651 (652): 14 Pun Re 1917.

(7) *Krishna Rai* v. *Collector and Government Agent, Tanjore*, (1911) 9 Ind Cas 254 (254): 21 Mad L Jour 808: 9 Mad L Tim 324.

Note 3.

(1) *Mahadeo Prasad* v. *Gajadhar*, (1906) 10 Cal W N 12 (13); *Palanisami Goundan* v. *Thondama Goundan*, (1902) 26 Mad 595 (596).

O.18, R.16, Note 2.

2. Scope of the rule.—This rule provides for the *de bene esse* examination of a witness about to leave the jurisdiction of the Court.[1] Courts should not examine such witnesses without notice to the parties or their pleaders and without giving them an opportunity to cross-examine them.[2]

The evidence taken under this rule should be *signed* by the witness after being read over to him.

O.18, R.17, Note 1.

R. **17**. [S. 193.] The Court may at any stage of a suit recall any witness who has been examined and may (subject to the *law* of evidence *for the time being in force*) put such questions to him as the Court thinks fit.

Court may recall and examine witness.

Synopsis.

1. Scope of the rule.

1. Scope of the rule.—This rule provides for the recalling of witnesses after their examination has once finished; but a witness examined by the plaintiff cannot be recalled as witness on the *defendant's* side without the leave of the Court.[1] Nor can a witness dispensed with by the plaintiff, be recalled under this rule.[2] For special circumstances justifying a recall of a witness, *see* the undermentioned cases.[3]

O.18, R.18.

R. **18**. [New.] *The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.*

Power of Court to inspect.

Local Amendment.

ALLAHABAD.

Add the following rules at the end of O. 18:—

19. (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings.

Synopsis.

1. Scope of the rule.

Judge not to decide solely by his view on inspection. See Note 1, Pts. (2) and (3).

Order 18, Rule 16—Note 2.

(1) *Edwards* v. *Muller*, (1870) 5 Beng L R O C 252.

(2) *Peary Lal Das* v. *Peary Lal Datta*, (1918) 22 Ind Cas 407 (408): 19 Cal W N 903: 18 Cal L Jour 646.

Order 18, Rule 17—Note 1.

(1) *Mackintosh* v. *Nobinmoney*, (1863) 2 Ind Jur N S 160.

(2) *Sreenath Roy* v. *Goluck Chunder*, (1871) 15 Suth W R 348 (349).

(3) *Durga Charan Chandra* v. *Khorda Co, Ltd.*, (1915) 29 Ind Cas 696 (698): 20 Cal W N 254.

1. Scope of the rule.—This rule enables the Judge to inspect any property or thing though it may issue a commission also for that purpose.[1] The object of this provision is to enable the tribunal to understand questions that are being raised and to follow and apply the evidence.[2] But a judgment should not be based solely on the basis of such personal local inspection.[3] Though the Code nowhere lays down that it is obligatory on the Judge to record the result of the local enquiry[4] yet it is desirable that the result of such inspection should be recorded in the proceedings and not left for notice till judgment.[5] O. 18, R. 18, Note 1.

A Munsif is not bound to get the sanction of the District Judge before he makes an inspection. Sanction is however necessary for the levy of money for the expenses of such inspection.[6]

Where, at the instance of the plaintiff, a Munsif held a local inspection and, in the course thereof, at the instance of both the parties, he examined a person whose statements he used as confirming his impression formed independently of them, it was held that the parties could not turn round and say that the Munsif ought not to have used those statements.[7]

ORDER XIX.

AFFIDAVITS.

Power to order any point to be proved by affidavit.

R. **1.** [S. 194.] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable: O. 19. R 1.

Order 18, Rule 18—Note 1.

(1) *Sabapathy* v. *Perumal*, 1921 Mad 323 (323): 44 Mad 640: 40 Mad L Jour 554: 13 Mad L W 520: 1921 Mad W N 336: 62 Ind Cas 790; *Dwarkanath Sardar* v. *Prosunno Kumar Hajra*, (1897) 1 Cal W N 682 (685).

(2) *Ram Chandra Rao* v. *Babu Narayan Lal*, (1920) 58 Ind Cas 909 (911) Pat; *Municipal Council, Calicut* v. *Velayudha Menon*, 1931 Mad 531 (532): 131 Ind Cas 139; *London G O Co* v. *Lavell*, (1901) 1 Ch 135 (C A); *Dwarka Prasad* v. *Makhu Lal*, (1919) 52 Ind Cas 241 (243) Pat.

(3) *Municipal Council, Calicut* v. *Velayudha Menon*, 1931 Mad 531 (532): 131 Ind Cas 139; *Tirath Ram* v. *Md Abdul Rahim*, 1923 Lah 546 (548): 73 Ind Cas 616; *Raghoba* v. *Ananda Bai*, 1930 Nag 40 (41): 119 Ind Cas 695; *Md Ishaq* v. *Balmakund Lal*, 1929 All 116 (117): 113 Ind Cas 762; *Ahmed Sahib Shutari* v. *Magnesite Syndicate Ltd*, (1915) 29 Ind Cas 60 (61): 39 Mad 501: 2 Mad L W 460: 17 Mad L Tim 387: 28 Mad L Jour 598; *Kishan Narain* v. *Ram Baksh*, (1914) 22 Ind Cas 51 (52): 12 All L J 48; *Harnama* v. *Ghania Lal*, 1930 Lah 152 (152): 124 Ind Cas 346; *Dvarka Prasad* v. *Makhu Lal*, (1919) 52 Ind Cas 241 (243) Pat.

(4) *Raj Chandra Banik* v. *Iswar Chandra Banik*, 1925 Cal 170 (170, 171): 80 Ind Cas 292; *Lakhmidas* v. *Bhaiji*, (1911) 10 Ind Cas 914 (916): 35 Bom 317: 13 Bom L R 313; *Haricharan Chakraburthy* v. *Jitendra Nath Ganguly*, (1922) 65 Ind Cas 601 (602) Cal.

(5) *Khanchand* v. *Gulrajmal*, (1910) 5 Ind Cas 939 (941): 4 Sind L R 180; *Hari Charan* v. *Jitendra*, (1922) 65 Ind Cas 601 (602) Cal, *Moran* v. *Bhagbat Lal*, (1906) 33 Cal 133 (135): *Rai Kishori Ghose* v. *Kumudhini Kanta Ghose*, (1912) 14 Ind Cas 377 (378, 379): 15 Cal L Jour 138; *Ashraf Ali* v. *Mahommad Ali*, (1914) 24 Ind Cas 618 (620) Cal; *Joy Coomar* v. *Bundhoo Lall*, (1882) 9 Cal 363 (365, 366): 12 Cal L Rep 490: 5 Shome L R 142; *Ram Ballav Marwari* v. *Mriganka Lal*, 1926 Cal 660 (660): 91 Ind Cas 715; *Ananta Lal Sahu* v. *Gokul Sahu*, (1916) 35 Ind Cas 344 (345) Pat; *Ramaya* v. *Devappa*, (1906) 30 Bom 109 (112): 7 Bom L R 642 [Local inspection by consent of parties].

(6) *Bodi Naidu* v. *Chengama Naidu*, (1914) 23 Ind Cas 297 (297): 26 Mad L Jour 9: 1914 Mad W N 79.

(7) *Narain Singh* v. *Baba*, (1918) 41 Ind Cas 262 (263): 4 Pat L W 189: 1918 Pat H C C 131 See also *Madan Mohan Garagh* v. *Munna Lal*, 1928 Lah 497 (498): 26 All L J 804: 115 Ind Cas 644 (2).

O. 19, R. 1, Note 1.

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

[1877—S. 194. Cf. R. S. C., O. 37, R. 1.]

[*See* O. 11.]

Synopsis.

1. Affidavits—Essentials of.
2. Stamp duty, if necessary.
3. Court-fee, if necessary.
4. Cross-examination of deponent of affidavit.
5. Agreement to take evidence by affidavit.
6. Necessity for affidavits on matters of record or questions of law.
7. Applicability.

Affidavit when evidence. See Note 6, see also O. 11, R. 22, Note 1.

Application for declaration as touts. See R. 2, Note 4.

1. Affidavits—Essentials of.—An affidavit is a declaration in writing sworn before a person having authority to administer an oath.[1] The officer authorised, must be *on duty* at the time when the oath is administered.[2] But the want of the seal of the Magistrate before whom it is sworn does not make it bad.[3] The deponent may, instead of signing his name, affix a mark or a stamp bearing his name.[4]

Under the rules of the Supreme Court in England as also under the Rules of Practice framed by the High Courts in India, every affidavit should be drawn up in the first person and divided into paragraphs consecutively numbered, each paragraph dealing with a specific portion of the subject as nearly as may be.[5] It should also state correctly the description, and true place of abode of the deponent.[6] Any person acquainted with the facts of the case may give the affidavit.[7] An affidavit should not contain any *inferences* but only *facts*.[8] The contents must be read over to the deponent in a language which he understands and vouched by him to be correct.[9]

Order 19, Rule 1—Note 1.

(1) *Abdul Hussain Khan* v. *Sonadero Bibi*, (1910) 8 Ind Cas 897 (898): 4 Sind L R 88 [A statement before a *foreign Court* authorised to administer oaths]. This affidavit *was not* sworn before the Sessions Judge when functioning as a Sessions Judge. See page 898, left column, 1st para, last sentence]. See also S. 117, the Presidency Towns Insolvency Act (III of 1909).

(2) *Abdul Hussain Khan* v. *Sonadero Bibi*, (1910) 8 Ind Cas 897 (898): 4 Sind L R 88.

(3) *Pesu Mal Harbhagwan Dass* v. *Bishen Dass Mewa Ram*, 1927 Lah 376 (377): 28 Pun L R 300: 101 Ind Cas 615.

(4) *Anonymous*, (1868) 9 Suth W R 357 (357): *Muthu Ramalingam Sethupathy* v. *Shunmugha Nadan*, 1928 Mad 175 (176): 54 Mad L Jour 65: 1927 Mad W N 885: 27 Mad L W 237: 51 Mad 242: 107 Ind Cas 804.

(5) See Madras Civil Rules of Practice, Rr 37, 38.

(6) See Madras Civil Rules of Practice, R 38.

(7) *Mangal* v. *Emperor*, (1914) 22 Ind Cas 740 (742): 11 All L J 986: 36 All 13: 15 Cr L Jour 164; *Akiyannessa* v. *Abdul Gani Sadagar*, (1917) 41 Ind Cas 1 (2) Cal [An affidavit as to what was argued in a case, sworn by a person who did not know the language in which the argument was made, is worthless].

(8) *Surajmal Chunilal* v. *Manekchand Kapurchand*, (1904) 6 Bom L R 704 (711).

(9) *Mangal* v. *Emperor*, (1914) 22 Ind Cas 740 (742): 11 All L J 986: 36 All 13: 15 Cr L Jour 164.

2. Stamp duty, if necessary.—An affidavit for the immediate purpose of being used or filed in any Court or before the officer of any Court, is exempt from stamp duty.[1] O. 19, R. 1, Notes 2—7.

3. Court fee, if necessary.—No Court-fee is payable on an affidavit filed in Court. *See also* Court Fees Act, S. 19 (XIV).

4. Cross-examination of deponent of affidavit.—Where the adverse party *bona fide* desires the production of the deponent for cross-examination, the Court has no power, under this rule, to order that the affidavit may be read at the hearing on proof of certain facts.[1] The Court will refuse to act on an affidavit, when the deponent cannot be cross-examined.[2]

On principle no cross-examination is allowed on affidavits in support of a petition for sanction under S. 195, Cr. P. C. and sanction should be given when the affidavit discloses materials for a *prima facie* case.[3]

5. Agreement to take evidence by affidavit.—When parties agree to take evidence by affidavit, it does not preclude them from taking oral evidence for supplementing the same except where the agreement specifies that the evidence is upon affidavits *alone*.[1]

6. Necessity for affidavits on matters of record or questions of law.—An affidavit is of no weight when it is simply a party's "opinion" on a question of law.[1] It is superfluous when the facts deposed to therein are already a matter of record.[2]

7. Applicability.—The power to take affidavits in proof of facts is extended to enquiries under the undermentioned Local or Special Acts.[1]

Power to order attendance of *deponent* for cross-examination.

R. 2. [S. 195.] (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the *deponent*. O. 19, R. 2.

Note 2.

(1) See Stamp Act (II of 1899), Sch 1, Art 4. See also *Sheshamma, In re*, (1888) 12 Bom 276 (277).

Note 4.

(1) *Habib Bux* v. *Samuel Fitz & Co, Ltd*, 1926 All 161 (2) (163): 23 All L J 961: 6 L R A Civ 553: 89 Ind Cas 22 [Proof of documents by affidavit]; *Krishna Ayyar* v. *Madhava Panikkar*, 1921 Mad 381 (382): 30 Mad L Tim H C 26: 63 Ind Cas 258 [Showing answers to interrogatories].

(2) See *Abdul Hussain Khan* v. *Mt Bibi Sona Dero*, (1910) 8 Ind Cas 897 (898): 4 Sind L R 88 [When the ruler of a Native State could not be compelled to appear for cross-examination his affidavit is worthless].

(3) *Safura Bai* v. *Abdullabhai Readymoney*, (1909) 4 Ind Cas 273 (274): 11 Bom L R 1164: 10 Cr L Jour 539.

Note 5.

(1) *Glossop* v. *Heston and Isleworth Local Board*, (1879) 47 L J Ch 536: 26 W R 433 cited in 2 Mad 201; *Lovell* v. *Wallis*, (1883) 53 L J Ch 494: 1883 W N 231: 49 L T 593.

Note 6.

(1) *Narindra* v. *Abdul Haq*, (1914) 25 Ind Cas 9 (11) Oudh [Whether a particular property is talukdari property].

(2) *Zamiran* v. *Fateh Ali*, (1905) 32 Cal 146 (149); *Mt Kariman* v. *A H Forbes*, (1908) 8 Cal L Jour 308 (312): 31 Cal 146.

Note 7.

(1) The Charitable and Religious Trusts Act (XIV of 1920), S 11 (1); *See also* The Indian Elections Offences and Enquiries Act (XXXI to XL of 1920), S 5; and the Presidency Towns Insolvency Act (III of 1909), S 117.

O. 19, R. 2, Notes 1—5.

(2) Such attendance shall be in Court, unless the *deponent* is exempted from personal appearance in Court, or the Court otherwise directs.

[*Cf.* R. S. C., O. 38, R. 1. *See* Ss. 132 and 133. *See* O. 11.]

Synopsis.

1. "May be given on affidavit."
2. Stay of execution.
3. Rule to show cause.
4. Application to declare a person a tout.
5. Affidavit of documents.

Affidavit by marks instead of signatures. See R. 1, Note 1, Pt. (4).

Exemption from personal attendance in Court. See Ss. 132 and 133.

1. **"May be given on affidavit."**—When evidence by affidavits is given, great care should be taken to see that they represent the real facts.[1] Thus when contributories of a company in liquidation complain of mis-application of the funds by the liquidators, and apply to make an officer of the company liable for such misappropriation they must definitely set out the sum misapplied and the grounds of the charge in the affidavit.[2] In motions to vary a commissioner's report affidavits should be filed, only when the Court orders it or for advancing a special fact with the permission of the Court.[3] A party in a suit for dissolution of marriage is not entitled to give evidence by affidavit.[4]

Legal Practitioners are officers of the Court and, when called upon to speak to facts relating to the case in which they are engaged, should not be asked to file affidavits. Their statements should be accepted.[5]

2. **Stay of execution.**—An application for stay of execution should be supported by an affidavit.[1]

3. **Rule to show cause.**—An application for a rule to show cause must be supported by an affidavit.[1]

4. **Application to declare a person a tout.**—Though it is open to a Court in an application under the Legal Practitioners' Act to act on an affidavit, to declare a person a tout, it is desirable that Courts should hear oral evidence.[1]

5. **Affidavit of documents.**—The production of documents can be resisted by a party by claiming privilege and the grounds of privilege must be sufficiently disclosed in the affidavit of documents. If the affidavit of docu-

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Order 19, Rule 2—Note 1.

(1) *Rummens* v. *Occil*, (1910) 129 L T Jo 263 [See remarks of Eve, J].

(2) *Jahangir* v. *Karani & Co*, (1895) 19 Bom 88 (94).

(3) *Sumar Ahmed* v. *Haji Ismail Haji Habib*, (1875-77) 1 Bom 158 (161).

(4) *Alice Skinner* v. *A V Skinner*, (1891) Pun Re No 13.

(5) *Sutharsanachariar* v. *Samarapuri Chettiar*, 1928 Mad 690 (692): 1928 Mad W N 634: 110 Ind Cas 837; *Ruttonsey Lalji* v. *Pooribai*, (1883) 7 Bom 304 (309).

Note 2.

(1) *Mullanchand Shivram* v. *Khan Saheb Kharsedji Nasarvanji*, (1891) 15 Bom 536 (537).

Note 3.

(1) *Kristo Mohini Dassee* v. *Kally Prosunno Ghose*, (1881) 6 Cal 485 (488): 8 Cal L Rep 43; In the matter of *Francis Choisy* v. *R Currie & Co*, (1869) 12 Suth W R 413 (413); *Hurruck Chund*, In re, (1880) 5 Cal 605 (611): 6 Cal L Rep 382.

Note 4.

(1) *Bavu Sahib* v. *D J of Madura*, (1903) 26 Mad 596 (597).

ments does not sufficiently set out the plea, a party may supplement the same by a separate affidavit.[1] Similarly, when a party claims to seal up a portion of a document on the ground that it is irrelevant to the issue, the affidavit of documents must clearly specify such portions, and the grounds on which he claims to seal them.[2] O. 19, R. 2, Note 5.

[*See also* O. 11.]

R. 3. [S. 196.] (1) Affidavits shall be confined to such facts as the *deponent* is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: *provided that* the grounds thereof *are stated.* O. 19, R. 3.

Matters to which affidavits shall be confined.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party *filing* the same.

[1877—S. 196; R. S. C., O. 38, R. 3.]

Local Amendments.

ALLAHABAD.

Add the following to O. 19:

4. Affidavits shall be entitled, *In the Court of*———*at*———(*naming such Court*). If the affidavit be in support of, or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case, it shall be entitled *In the matter of the petition of.*

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" or "I make oath and say".

9. Except in interlocutory proceedings, affidavit shall strictly be confined to such fact as the declarant is able of his own knowledge to prove. In interlocutory

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Note 5.

(1) *Umbica Churn* v. *Bengal S & W Co.* (1895) 22 Cal 105 (110).

(2) *Jadub Lall* v. *Kanai Lall.* (1893) 20 Cal 587 (589).

O. 19, R. 3.

proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed", and, if such be the case, "and verily believe it to be true", and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a Civil Court shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

11-A. Such identification may be made by a person:—

(*a*) personally acquainted with the person to be identified, or

(*b*) satisfied, from papers in that person's possession or otherwise, of his identity:

Provided that in case (*b*) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified:—

FORM.

I, (name, address and description), declare that the person verifying this petition (or making this affidavit) and alleging himself to be *A. B.* has satisfied me (here state by what means, *e.g.*, from papers in his possession or otherwise) that he is *A. B.*

12. No verification of a petition and no affidavit purporting to have been made by a *Pardanashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition, or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made, and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

15. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made, and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made. **O. 19, R. 3.**

RANGOON.

To Order 19, the following shall be *added* as Rules 4 to 12:—

Mode of taking oath or affirmation by declarant of affidavit.

4 The officer administering the oath to the declarant of an affidavit should first make the declarant take the oath or affirmation. Then he should make the declarant repeat the whole of the statement written in the affidavit as coming from him. Then the declarant should sign the affidavit. Lastly the officer administering the oath should sign and date it.

Form of affidavit.

5. Every affidavit to be used in a Court of Justice should be entitled "In the———Court of———at———", naming the Court. If there is a case in Court, the affidavit in support of or in opposition to an application respecting it, must also be entitled. In the case of———. 'If there is no case in Court, the affidavit should be entitled', 'in the matter of the petition of'.

Mode of writing affidavits.

6. Every affidavit containing any statement of facts shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

Address of person making affidavit.

7. Every person, other than a plaintiff or defendant in a suit in which the application is made, making an affidavit, shall be described in such a manner as will serve to identify him clearly that is to say, by the statement of his full name, the name of his father, his profession or trade, and the place of his residence.

Mode of speaking by declarant to fact within his own knowledge.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words 'I affirm' (or 'make oath') 'and say'.

Mode of speaking by declarant to fact not within his own knowledge.

9 When the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant must use the expression 'I am informed' (and, if such be the case, should add 'and verily believe it to be true)' or he may state the source from which he received such information. When the statement rests on facts disclosed in documents or copies of documents procured from *any* Court of Justice or other source, the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents.

Identification of person making affidavit not personally known to commissioner.

10. Every person making an affidavit, if not personally known to the commissioner, shall be identified to the commissioner by some person known to him, and the commissioner shall specify at the foot of the petition, or of the affidavit (as the case may be), the name and description of him by whom the identification is made, as well as the time and place of the identification and of the making of the affidavit.

O. 19, R. 3, Notes 1—2.

11. If any person making an affidavit is ignorant of the language in which it is written, or appears to the commissioner to be illiterate or not fully to understand the contents of the affidavit, the commissioner shall cause the affidavit to be read and explained to him in a language which he understands. If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained as herein provided, the commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained, and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the commissioner shall state in his certificate, the name of the interpreter, and the fact that he was sworn to interpret truly.

Interpretation of affidavit when person making it is ignorant of the language in which it is written.

12. In administering oaths and affirmations to declarants the commissioner shall be guided by the provisions of the Indian Oaths Act, 1873.

Administration of oath or affirmation.

Synopsis.

1. Statements as to belief must contain grounds thereof.
2. Scandalous and irrelevant matter.

Affidavit as to service of summons. See O. 5, R. 19.

Duty of vakils as to affidavits. See O. 11, Rr. 12 and 13, Note 11, Pt. (12).

Worthless affidavits. See R. 1, Note 1, F.-N. (7); Note 4, F.-N. (2) and Note 6.

1. **Statements as to belief must contain grounds thereof.**—The grounds of belief must first be stated with sufficient clearness to enable a Court to judge whether it would be safe to act on the deponent's belief.[1] Thus, where, in an interlocutory application for injunction to restrain the publication of a libel, the affidavit in support of the application stated that the documents complained of were "to the best of his knowledge, information and belief, utterly untrue," but no grounds for his belief were shown, it was held insufficient.[2] Though ordinarily, evidence on information and belief is admissible in interlocutory applications intended to maintain things in *status quo* till the rights of the parties are decided, yet, in England, if the application is only interlocutory in form, but really aiming at finally disposing of the rights of the parties, it will be inadmissible.[3]

2. **Scandalous and irrelevant matter.**—If an affidavit contains scandalous and irrelevant allegations, it may be ordered to be taken off the file, or, the particular passage may be expunged.[1]

Order 19, Rule 3—Note 1.

(1) Re *J L Young Manufacturing Co,* (1900) 2 Ch 753 (C A); *Bonnard* v. *Perryman,* (1891) 2 Ch 269: 60 L J Ch 617: 65 L T 506: 39 W R 435 (C A); *Lumley* v. *Osborne,* (1901) 1 K B 532: 70 L J K B 416: 84 L T 461: 49 W R 374; *Damodar Nandram* v. *Pandat Madiram,* (1907) 9 Bom L R 540 (542); *Padmabati Dasi* v. *Rasik Lal Dhar,* (1910) 6 Ind Cas 666 (667): 37 Cal 259; *Gobinda Mohan* v. *Kunja Behari,* (1909) 4 Ind Cas 380 (382): 10 Cal L Jour 414: 14 Cal W N 153; *Satya Kumar* v. *Manager, Benares Bank,* (1918) 46 Ind Cas 335 (336): 22 Cal W N 700; *Duraiswami Chetty* v. *Govindu Chetty,* (1914) 23 Ind Cas 377 (379): 1 Mad L W 894: 15 Mad L Tim 377; *Chandrika Prasad Singh* v. *Hira Lal,* 1924 Pat 312 (313): 5 Pat L Tim 124: 73 Ind Cas 721; *Keshub Prasad Singh* v. *Harihar Prasad Singh,* 1926 Pat 54 (55): 90 Ind Cas 703.

(2) In *Quartz Hill Consolidated Gold Mining Co* v. *Beall,* 20 C D 501 (508): 51 L J Ch 874: 46 L T 746: 30 W R 583 (C A) cited in 14 Cal W N 153: 4 Ind Cas 380 (382). See also *Amulya Chandra* v. *Satis Chandra,* 1932 Cal 255 (256): 35 Cal W N 1267: 1932 Cr C 288: 33 Cr L Jour 369: 136 Ind Cas 901 [Affidavit in contempt proceedings—Based on information—Source of information not given].

(3) *Gilbert* v. *Endean,* (1878) 9 Ch D 259: 39 L T 404: 27 W R 252 (C A).

Note 2.

(1) *Goddard* v. *Parr,* (1855) 3 W R (Eng) 633; In re, *Jessop,* (1910) W N 128 [A case in which the C A refused to strike out extracts from

ORDER XX.

JUDGMENT AND DECREE.

O. 20, R. 1, Notes 1—3.

R. 1. [S. 198.] The Court, after the *case has* been *heard*, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

Judgment when pronounced.

[1877—S. 198; 1859—S. 183.]

Local Amendment.

MADRAS.

The existing Rule 1 is re-numbered as sub-Rule (1) and the following is added as sub-Rule (2):—

(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court.

Synopsis.

1. Scope of the order.
2. Chartered High Courts.
3. "After the case has been heard."
4. "Shall pronounce judgment in open Court."
5. "Judgment," meaning of.
6. When judgment may be pronounced.
7. Holiday.
8. "Or on some future day."
9. Notice to parties.
10. Non-compliance with Rules 1, 2 and 3.

Judgment on evidence taken before another Judge. See Note 3, Pt. (4).

"Pronounce"—Meaning. See Note 4, Pt. (4).

1. Scope of the order.—Rules 1 to 5 of this order deal with judgments and Rr. 6 to 19 with decrees. Rule 20 enacts that the parties shall be entitled to obtain certified copies of the judgment and decree on application made by them and at their expense. Rules 12 to 18 in particular deal with the classes of cases in which *preliminary* decrees may be passed. As to whether the list is exhaustive of the cases in which preliminary decrees can be passed, *see* Note 10 to S. 2, sub-S. 2, *ante*.[1]

2. Chartered High Courts.—This rule does not apply to Chartered High Courts[1] or the Chief Court of Oudh[2] in the exercise of their ordinary or extraordinary Original Civil Jurisdiction.

3. "After the case has been heard."—*See* also S. 33 *ante*. A judgment given without the Judge having heard the case fully, is a nullity. Where, after arguments were partly heard, a party died and the Court, without bringing his legal representatives on the record, pronounced judgment, it was held

letters marked "without prejudice"]; *Osmastan* v. *Association of Land Financiers*, (1878) W N 101; *Warner* v. *Mosses*, (1881) W N 69 (81); *Christie* v. *Christie*, 1873 L R 8 Ch 499; *Cracknall* v. *Janson*, 11 C D 12; *Govinda Mohan Das* v. *Kunja Behari Das*, (1909) 4 Ind Cas 380 (381): 10 Cal L Jour 414: 14 Cal W N 153.

Order 20, Rule 1—Note 1.

(1) *Municipal Committee of Nasik* v. *Collector of Nasik*, (1915) 28 Ind Cas 589 (591): 17 Bom L R 324: 39 Bom 427.

Note 2.

(1) *See* Order 49, Rule 3; *Banarsi Das* v. *Sagar Mal*, 1929 All 403 (403): 1929 All L J 713: 116 Ind Cas 23.

(2) *See* the U P Act IV of 1925, S 16 (2).

O. 20, R. 1, Notes 3—6.

that the judgment was a nullity as the case had not been fully heard.[1] It is not legal for the Judge to appoint assessors to appraise the value of the evidence in the case and base his judgment on that opinion[2] or to base the judgment upon the unrecorded statements made at the Bar.[3]

As a general rule it is the Judge that heard the evidence that should give the judgment.[4] The following cases are however the exceptions to the general rule:—

(1) Where the Judge is prevented by death, transfer, or other like cause from concluding the trial of the suit. In such cases the successor may deal with the evidence taken by the predecessor and proceed with the suit. *See* O. 18, R. 15.

(2) Under Rule 2 *infra* a Judge may *pronounce* a judgment written by his predecessor.

(3) Where the evidence has been taken by a Commissioner under the provisions of O. 26, Rr. 1 and 4.

4. "Shall pronounce judgment in open Court."—Judgments should be pronounced in *open Court*.[1] The expression "open Court" refers to the *place* and *manner* of the pronouncement of the judgment.[2] The mere posting of a notice on the notice-board announcing the result of an appeal is not a sufficient compliance with the rule.[3] But it is not necessary that the whole of the judgment should be read out by the Judge in open Court.[4] Nor is a judgment of the Full Bench rendered invalid by its pronouncement at a time when one of the Judges of the Bench was absent on other duty.[5] Where a judgment was written and signed by the Judge who heard the case but, at his request, was read out by his colleague, a Judge presiding in another Court, it was held that such a procedure is not invalid and will, in any case, be only an irregularity which is cured by S. 99 of the Code.[6]

5. "Judgment," meaning of.—*See* S. 2, Sub-S. (9) and the case noted below.[1] As to what judgments should contain, *see* R. 4 *infra*.

6. When judgment may be pronounced.—A judgment can be pronounced only after the case has been heard. Where a date has been fixed

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Note 3.

(1) *The American Baptist Foreign Mission Society* v. *Ammalanadhurmi*, (1918) 48 Ind Cas 859 (864) Mad.

(2) *Kunthu Lal* v. *Jhommi Lal*, (1913) 21 Ind Cas 427 (428) All.

(3) *Ayemuddin Bewa* v. *Asimuddin*, 1921 Cal 558 (558): 25 Cal W N 599.

(4) *Naranbhai* v. *Naroshankar*, (1866-67) 4 Bom H C R 98; *Radhanath Bannerjee* v. *Jadonath Singh*, (1867) 7 Suth W R 441 (441, 445).

Note 4.

(1) *Sagarmal* v. *Lachmisaran*, 1923 Pat 129 (130): 1 Pat 771: 75 Ind Cas 879; *Bai Dahi* v. *Hargovindas Kuberdas*, (1906) 30 Bom 455 (457): 8 Bom L R 229. See also *Mohammad Akil* v. *Assadun Kissa Bibee*, (1867) 9 Suth W R 1 (5): 1 Beng L R Sup Vol 774.

(2) *Venkatesa* v. *Kamalammal*, (1912) 13 Ind Cas 463 (464): (1912) 1 Mad W N 65: 11 Mad L Tim 84: 22 Mad L Jour 212.

(3) *Nagiah* v. *Seshamma*, 1921 Mad 690 (691): 41 Mad L Jour 885: 14 Mad L W 514: 1921 Mad W N 866: 65 Ind Cas 82.

(4) *Kutuabuddin* v. *Gulam Rabbani*, 1926 Jour 159 (3): 94 Ind Cas 121.

(5) *Meyappa Chettiar* v. *Chidambaram Chettiar*, 1925 Mad 58 (59): 47 Mad L Jour 397: 1924 Mad W N 692: 21 Mad L W 12: 83 Ind Cas 91. See also *Chinnu Pillai* v. *Kalimuthu*, (1911) 9 Ind Cas 596 (597): (1911) 2 Mad W N 238: 9 Mad L Tim 389: 21 Mad L Jour 246; 35 Mad 47 [Where to avoid the question of validity of a judgment a new Full Bench was constituted].

(6) *Ala Bux* v. *Khidir Ahmad*, (1918) 46 Ind Cas 618 (619): 29 Cal L Jour 568. See also *Abdul Majid* v. *Nur Muhammad*, (1919) 50 Ind Cas 641 (643) Cal; *Adwaitya Charan* v. *Sorajranjan*, (1916) 34 Ind Cas 584 (585) Cal.

Note 5.

(1) *Aiyappa* v. *Gopalaswami*, (1912) 16 Ind Cas

for the hearing of the suit or appeal, the Court cannot pronounce its judgment before such date.[1] The Court, has, however, ample authority to direct successive trials of different issues, and to record *interlocutory judgments* thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case.[2] There is no objection to a Judge at the close of the hearing of a suit or appeal stating at once orally the judgment which he intends to record and deliver, and afterwards to pronounce in open Court his written judgment.[3] O. 20, R. 1, Notes 6—9.

See also Notes 7, 8 and 9 *infra.*

7. Holiday.—The delivery of a judgment or the doing of any judicial act on a holiday is not illegal,[1] though if a party is *injuriously affected* by such act he will be entitled to have the proceedings set aside on that ground.[2]

8. "Or on some future day."—The law pre-supposes a prompt and continous trial and a judgment must be pronounced as quickly as possible.[1] A judgment delivered after an interval of seven months on an incomplete and imperfect record of evidence was held not to be a legal decision.[2]

9. Notice to parties.—Where a judgment is to be passed on a future day after the case has been heard, it is necessary that due notice thereof should be given to the parties or their pleaders.[1] It is not the duty of the parties to make enquiries as to when the judgment will be delivered; they are entitled to rely on the Court obeying the express provisions of law and giving notice to them or their pleaders of the date fixed for the delivery of judgment.[2] A judgment delivered without due notice to the parties or their pleaders cannot be said to have been validly pronounced within the meaning of this rule.[3] The posting of a notice on the notice-board[4] or the sending of a notice to the pleader of a party[5] announcing the result of a case, is not a compliance with the rule. But it is not necessary

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45 (46): (1912) Mad W N 1122: 12 Mad L Tim 309.

Note 6.

(1) *Paras Ram* v. *Joti Prasad*, (1904) Pun Re No 61.

(2) *Bhuban Mohini* v. *Kumud Bala*, 1924 Cal 467 (473): 28 Cal W N 131: 39 Cal L Jour 140: 82 Ind Cas 934.

(3) (1869-70) 5 Mad H C R App VIII.

Note 7.

(1) *Venkatesa* v. *Kamalammal*, (1912) 13 Ind Cas 463 (463): (1912) 1 Mad W N 65: 11 Mad L Tim 84: 22 Mad L Jour 212: *Sheo Ram* v. *Thakur Prasad*, (1907) 29 All 562 (563): 1907 All W N 168.

(2) *Ram Das* v. *Official Liquidator*, (1887) 9 All 366 (382): 1887 All W N 34; *Venkatesa Ayyangar* v. *Kamalammal*, (1912) 13 Ind Cas 463 (465): (1912) 1 Mad W N 65: 11 Mad L Tim 84: 22 Mad L Jour 212.

Note 8.

(1) *Rajab Khan* v. *Langdaji*, (1912) 15 Ind Cas 938 (939): 8 Nag L R 91; *Satyendra Nath Ray* v. *Kastura Kumari*, (1908) 35 Cal 756 (761): 12 Cal W N 682: 7 Cal L Jour 666: 4 Mad L Tim 33 F B [Ten months' delay strongly disapproved].

(2) *Rajabkhan* v. *Langdaji*, (1912) 15 Ind Cas 938 (939): 8 Nag L R 91.

Note 9.

(1) *Ma Hla Dun* v. *Maung Shwe Ya*, (1917) 38 Ind Cas 575 (576): 9 Bur L Tim 250.

(2) *Ma Me Thin* v. *Maung San Lun*, (1915) 27 Ind Cas 784 (784): 8 Bur L Tim 99.

(3) *Kharak* v. *Lacchan Singh*, 1925 All 293 (294): 23 All L J 145: 6 L R A Civ 131: 47 All 332: 86 Ind Cas 869; *Begg Sutherland & Co* v. *Bahadur Chand*, 1928 Lah 841 (842): 110 Ind Cas 177 [Pronouncing judgment to counsel's clerk not legal].

(4) *Nagiah* v. *Seshamma*, 1921 Mad 690 (690): 41 Mad L Jour 385: 14 Mad L W 514: 1921 Mad W N 866: 65 Ind Cas 82.

(5) *Seva Ram* v. *Hassu*, 1927 Lah 839 (839): 28 Pun L R 132: 100 Ind Cas 909.

O. 20, R. 1, Notes 9—10.

that the parties should be *present* at the time of the delivery of the judgment and a suit cannot be dismissed on the ground that the parties were not present at the time of the delivery of the judgment.[6]

Where there is nothing on the record to show, that the notice was not given to the parties or their pleaders, it must be presumed that they did receive such notice.[7]

The provisions of the rule apply also to cases where a judgment is pronounced by a successor under the next rule.[8]

10. Non-compliance with Rules 1, 2 and 3.—A judgment not pronounced at all is not a valid judgment,[1] but the non-compliance with this rule and with Rr. 2 and 3 as to the *manner* in which it is to be pronounced, dated and signed is only an irregularity within the meaning of S. 99 of the Code and does not afford a ground for the reversal in appeal of the decree based on the judgment in the absence of the prejudice.[2] A decree that follows such a judgment is nevertheless valid until set aside on appeal.[3]

O. 20, R. 2, Notes 1—2.

Power to pronounce judgment written by Judge's predecessor.

R. 2. [S. 199.] A Judge may pronounce a judgment written but not pronounced by his predecessor.

[1877—S. 200; 1859—S. 184.]

Synopsis.

1. Rule does not apply to Chartered High Courts.
2. "Written, but not pronounced by his predecessor."
3. "May pronounce."
4. Non-compliance with Rules 1, 2 and 3. See Note 10 to Rule 1 above.

Judgment dated and recorded by predecessor-successor, when can pronounce. See Note 3, Pt. (2).

Rule—Whether applies to an order. See Note 2, F.-N. (5).

Rule—Whether mandatory. See Note 2, Pt. (9).

Successor, if can pronounce a separate judgment. See Note 3, Pt. (1).

1. Rule does not apply to Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction (O. 49, R. 3).

2. "Written, but not pronounced by his predecessor."—The object of the Legislature in enacting this rule is that the judgment should be that of the Judge *who heard the case* though it may be *delivered* by another; in

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(6) *Jiwanda Mal* v. *Muhammad Ali*, 1901 Pun Re No 82; *Nundlal* v. *Shankeru*, (1911) 11 Ind Cas 842 (842): 165 Pun W R 1911: 254 Pun L R 1911.

(7) *Habibullah* v. *Benarsi Das*, (1920) 55 Ind Cas 837 (838): 22 Oudh Cas 379: 2 U P L R Oudh 60.

(8) *Kanumoory Nüadri Razu* v. *Kasa Subbiah*, (1912) 17 Ind Cas 278 (279): 12 Mad L Tim 332: 1912 Mad W N 999.

Note 10.

(1) *Mohammad Akil* v. *Assadun Kissa*, (1867) 9 Suth W R 1 (5, 30): Beng L R Sup Vol 774 [Written opinions sent to the Registrar by Judges are not judgments]; *Mohendra Nath Pal* v. *Parameswar Maity*, 1931 Cal 164 (165): 52 Cal L Jour 566: 130 Ind Cas 573.

(2) *Fort Gloster Jute Manufacturing Co* v. *Chandra Kumar Das*, (1919) 51 Ind Cas 405 (406, 407): 29 Cal L Jour 438: 46 Cal 978: 24 Cal W N 791; *Nilmoney Singh* v. *Bhobany Churn*, Marshall, 327: 2 Hay 305 [Judge making local inspection and pronouncing judgment on the spot—Only an irregularity].

(3) *Kharak Singh* v. *Laccham Singh*, 1925 All 293 (295): 23 All L J 145: 6 L R A (Civ) 131: 47 All 332: 86 Ind Cas 869.

order, therefore, that this rule may apply it is necessary that the predecessor must have *written* the judgment.[1] There is difference of opinion, however, as to whether it should be also *signed* by the predecessor. According to the High Court of Calcutta the judgment is, under the provisions of R. 3 *infra*, to be signed at the time of pronouncing it by the successor and that therefore it is not necessary that the predecessor should have signed it.[2] The High Court of Patna, has, on the other hand, expressed the view that R. 3 applies only to cases where the judgment is delivered by the *very Judge who wrote it* and not to cases coming under R. 2, where the judgment is written by one officer and is pronounced by another.[3] It seems to follow from this that the predecessor must have written and also signed the judgment.[4] O. 20, R. 2, Note 2.

There is also a difference of opinion on the question whether it is necessary for the predecessor to have written the judgment at a time *when he had still jurisdiction over the suit.* The general consensus of opinion is that it is not.[5] Thus when a District Judge retired from office on October 4, 1927, and the judgment was signed by him on October 9, 1927, and the same was pronounced in Court by his successor on October 17, 1927, it was held that the judgment was valid in law.[6] A contrary view has, however, been expressed in the undermentioned cases.[7]

Can a judgment be pronounced by the *predecessor* after his transfer or after he has left his judicial post? According to the Chief Court of Punjab, there is no illegality in adopting such a course.[8] According to the High Court of Rangoon, the pronouncement of the judgment is a material part of the trial and cannot be performed by any other person than a *Judge of the Court in which the suit was tried.*[9] It would seem to follow from this that a Judge who has ceased to be the Judge of the Court in which the suit was tried cannot pronounce a judgment therein though it had been written by himself.

Order 20, Rule 2—Note 2.

(1) *Jagram* v. *Narain*, (1885) 7 All 857 (859): 1885 All W N 285.

(2) *Dulal Chandra Deb* v. *Ram Narain Deb*, (1904) 31 Cal 1057 (1064).

(3) *Lakhiama Jiu* v. *Lokanath Dass*, (1920) 58 Ind Cas 437 (440, 441): 1 Pat L Tim 77: 5 Pat L Jour 147.

(4) *Jagram* v. *Narain*, (1885) 7 All 857 (859): 1885 All W N 285.

(5) *Basant Behari* v. *Secretary of State*, (1913) 19 Ind Cas 785 (786): 11 All L J 411: 35 All 368; *East Hopetown Tea Company* v. *Kallu*, 1904 All W N 131 (131); *Lilawathi Juar* v. *Chotley Singh*, (1921) 61 Ind Cas 932 (940): 42 All 362: 18 All L J 356 [Arguments heard by Acting Subordinate Judge subsequently reverted as Munsif —Judgment written after reversion]; *Girjashankar* v. *Gopalji*, (1906) 30 Bom 241 (243): 7 Bom L R 951 [Judgment, written by a Judge after his transfer]; *Satyendra Nath Ray Chowdury* v. *Kastura Kumari Ghatwalin*, (1908) 35 Cal 756 (759): 12 Cal W N 682: 7 Cal L Jour 666: 4 Mad L Tim 33 [Judgment after he had left the judicial post]; *Rani Sundar Koer* v. *Chandreshwar*, (1907) 34 Cal 293 (295): 11 Cal W N 501 [Judgment written when judge on leave]; *Mussamat Parbati* v. *Mussamat Bhikun*, (1872) 8 Ben L R 98 [Judgment written by a judge after he had been relieved from his office]; *Mussamat Parbutty* v. *Mussamat Higgin*, (1872) 17 Suth W R 475 (476), (Do.): *Daya Ram* v. *Jatti*, (1916) 35 Ind Cas 938 (938): 80 Pun Re 1916: 128 Pun W R 1916: 43 Pun L R 1917, (Do.); *Narpat Rai* v. *Devi Das*, (1912) 14 Ind Cas 371 (372): 13 Pun W R 1911 [Order on a particular issue pronounced by successor after he ceased to have jurisdiction]; *Maung Thu Hmwe* v. *Maung Aung Ba*, (1897-1901) Upp Bur R Vol II 246 [Judgment written by a judge after making over charge of his office].

(6) *Baramdeo Pandey* v. *Debi Dat Singh*, 1931 All 90 (91): 1930 All L J 1566: 130 Ind Cas 303: 53 All 133.

(7) *Lalshah* v. *Rikiram*, (1894) 7 C P L R 18 (19): *Kishni Bai* v. *Budhu Ram*, (1919) 49 Ind Cas 724 (729): 80 Pun Re 1919: 35 Pun W R 1919 [Judgment written after transfer].

(8) *Daya Ram* v. *Mussamat Jatti*, (1916) 35 Ind Cas 938 (938): 80 Pun Re 1916: 128 Pun W R 1916: 43 Pun L R 1917 [Judgment or order written and pronounced by judge after he gave over charge of his office].

(9) *Maung Ba* v. *Maung Ye*, 1924 Rang 358 (358): 4 U B R 171: 76 Ind Cas 170.

O. 20, R. 2, Notes 3—4.

3. **"May pronounce."**—The rule is not mandatory and the successor is not bound in all cases to pronounce the judgment written by the predecessor; he may, if he sees reason to do so, refuse to pronounce that judgment and may deliver a judgment according to his own view of the case.[1] Where a judgment is signed and dated by the predecessor himself and there is nothing to show that it was not pronounced by him the successor cannot proceed to pronounce it for a second time.[2]

4. **Non-compliance with Rules 1, 2 and 3.**—*See* Note 10 to R. 1 above.

O. 20, R. 3, Notes 1—2.

R. 3. [S. 202.] The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, *when once signed*, shall not afterwards be altered or added to, save *as provided by section* 152 or on review.

Judgment to be signed.

[1877—Ss. 201, 202, 203; 1859—S. 185.]

Local Amendment.

MADRAS.

Substitute the following *for* Rule 3:—

3. The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by Section 152 or on review, provided also that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand-writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge.

Synopsis.

1. Rule does not apply to Chartered High Courts.
2. Applicability of the rule.
3. "Shall not afterwards be altered or added to."
4. "Save as provided by S. 152 or on review."
5. Non-compliance with Rules 1 to 3.

Dated and signed. See Rule 2, Note 2, Pt. (2).

Loss of decree. See Rule 7, Note 3, F.-N. (5).

1. **Rule does not apply to Chartered High Courts.**—This rule does not apply to Chartered High Courts[1] or to the Chief Court of Oudh[2] or to the Court of the Judicial Commissioner of the North-West Frontier Province[3] in the exercise of the ordinary or extraordinary original civil jurisdiction.

2. **Applicability of the rule.**—There is a conflict of opinion as to whether this rule, in so far as it requires the Judge to sign and date the judgment at the time of pronouncing it, applies to cases where the successor pronounces the judgment of the predecessor under the provisions of this rule. *See* Note 2 to R. 2 above.

Note 3.

(1) *Maung Ba* v. *Maung Fe*, 1924 Rang 358 (358): 4 U B R 171: 76 Ind Cas 170; *Lachman Prasad* v. *Ram Kishan*, (1911) 8 Ind Cas 1096 (1096): 7 All L J 1194: 33 All 229.

(2) *Bhalla* v. *Fazal Muhammad*, (1920) 58 Ind Cas 143 (144): 97 Pun L R 1920: 52 Pun W R 1920.

Order 20, Rule 3—Note 1.

(1) *See* O. 49, R. 3.

(2) *See* the U P Act IV of 1925, S 16 (2).

(3) *See* S 46 (2) of N-W F Province Law and Justice Regulation (VII of 1901).

O. 20, R. 3, Notes 3—4.

3. "Shall not afterwards be altered or added to."—The jurisdiction of the Court to reconsider its order continues so long as the order has not been perfected under this rule,[1] but ceases once the judgment is signed, except as provided by S. 152 or on review.[2] The Court cannot therefore, after the judgment is signed, alter it, or add to it, in any manner, except as provided by this rule, and this even with the consent of the parties.[3] Thus it cannot alter the grounds on which the judgment proceeded,[4] or add findings on issues omitted to be decided by the judgment.[5] Nor can a successor alter the judgment which had been pronounced by the predecessor on any point.[6] Where a Judge pronounces a judgment but suspends the drawing up of the decree till a succession certificate is produced by the plaintiff, he cannot, on the plaintiff's failure to produce the certificate, cancel the judgment and deliver a different one inconsistent with the former.[7]

The words "after such *revision* as may be deemed necessary" in the rule as substituted by the High Court of Madras, do not authorise the Judge to revise the transcript and to substitute fresh words for the words originally dictated; they do not contemplate a revision of the *effective part* of the judgment but should be of the nature referred to in S. 152, and one relating to clerical and arithmetical mistakes arising from any accidental slip or omission.[8]

4. "Save as provided by S. 152 or on review."—This rule recognises two exceptions to the general rule that a Judge cannot, after he has once signed the judgment, reconsider the matter over again:—

(1) Under S. 152 of the Code *clerical or arithmetical mistakes in* judgments, decrees or orders or *errors due to accidental slips or omissions* can be corrected by the Court.[1] *See also* Note 2 to S. 152.

(2) Under O. 47, R. 1 the Court may grant a review of the judgment where the conditions of that rule are satisfied. *See* O. 47, R. 1.[2]

Note 3.

(1) *Pearl Dai* v. *Jotindra Nath*, (1909) 4 Ind Cas 441 (442): 10 Cal L Jour 496.

(2) *Musammat Husaina* v. *Musammat Sahib Nur*, (1913) 20 Ind Cas 3 (5): 254 Pun L R 1913: 159 Pun W R 1913; *Ramcharan Singh* v. *Jang Bahadur Singh*, 1924 Pat 696 (697): 5 Pat L Tim 631: 79 Ind Cas 900; *Secretary, Chhoti Bazaar Bank* v. *Baqridi and others*, (1931) 8 Oudh W N 1238 (1239, 1240): 136 Ind Cas 253: 1931 Notes 10 (a) [No clerical or arithmetical mistake, etc.,—Judgment cannot be altered except by review].

(3) *Venkatasubbamma Rao* v. *Venkatarama Rao*, (1900) 24 Mad 1 (10, 11, 13): 2 Bom L R 771: 27 Ind App 197: 10 Mad L Jour 221: 4 Cal W N 725: 7 Sar 678 P C; *Subramania* v. *Corera*, 1925 Mad 457 (458, 459): 48 Mad L Jour 121: 1925 Mad W N 86: 86 Ind Cas 723.

(4) *R Snadden* v. *Todd, Finley and Co.* (1867) 7 Suth W R 286 (287).

(5) *Shidaya* v. *Shivaya*, (1902) 4 Bom L R 129 (132).

(6) *Md Yusuf Khan* v. *Abdul Rahman Khan*, (1889) 16 Cal 749 (752): 16 Ind App 104: 5 Sar 362: 13 Ind Jur 170: R and J 112 P C; *Harihar Prasad* v. *Maheswari Prasad*, 1925 Pat 47 (47, 48): 3 Pat 654: 82 Ind Cas 813. But see *Official Assignee* v. *Haji Mahomed Haddy*, (1918) 47 Ind Cas 555 (555): 11 Bur L Tim 97.

(7) *Kishun Kunwar* v. *Ganga Prasad*, (1909) 31 All 153 (155): 6 All L J 54: 1 Ind Cas 820.

(8) *Hari Krishna Pillai* v. *Arur Pandithar*, 1923 Mad 663 (664): 18 Mad L W 105: 1923 Mad W N 354: 72 Ind Cas 688.

Note 4.

(1) *See* Note 3 to S 152. See also *Zinat Bibi* v. *Jahangir Bakhsh Khan*, (1899) 2 Oudh Cas 235 (237, 238); *Mula Ram* v. *Barhmi*, 1908 Pun L R 40: 49 Pun W R 1908; *Ram Prosad* v. *Sham Narain*, (1907) 6 Cal L Jour 22 (24, 25).

(2) *Narendra Bahadur Singh* v. *Ajudhia Prasad*, (1910) 13 Oudh Cas 28: 5 Ind Cas 443 (444); *Secretary, Chhoti Bazaar Bank* v. *Baqridi and others*, (1932) 136 Ind Cas 253 (254): 8 Oudh

O. 20, R. 3, Notes 4—5.

As to whether and how far questions decided by an order of remand can be re-opened at the hearing after return of the findings after remand, *see* Rr. 23 and 26 to O. 41.

5. **Non-compliance with Rr. 1 to 3.**—*See* Note 10 to R. 1.

The failure to date an order is no doubt an irregularity but it does not invalidate the order and does not prevent it from having a legal operation from the date on which it is made; the date can be proved by other evidence.[1]

O. 20, R. 4, Note 1.

R. 4. [S. 203.] (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of Small Cause Courts.

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Judgments of other Courts.

[1877—Ss. 201, 202, 203; 1859—S. 185.]

Synopsis.

1. Rule does not apply to Chartered High Courts.
2. "Judgment"—Meaning of.
3. Object of judgments.
4. Personal knowledge.
5. Appreciation of evidence.
6. Contents of judgments.
7. Construction of judgments.
8. Judgments of Small Cause Courts.
9. Other judgments.

Judgment adopting reasons of analogous judgment. See Note 9, Pt. (5).
"Need not contain." See Note 8, Pts. (1) and (2).
On what materials is the judgment to be based. See Note 5, Pts. (1), (7) and (8).
Oral testimony—Weight of—Considerations. See Note 5, Pts. (10), (11), (12) and (13).
Unsatisfactory and unintelligible judgment. See Note 6, Pts. (4) to (7).
Written opinions—Whether judgments. See Rule 1, Note 10, F.-N. (1).

1. **Rule does not apply to Chartered High Courts.**—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary *original civil jurisdiction*. (*See* O. 49, R. 3.) It has accordingly been held by the High Court of Bombay that though in an ordinary case, a judge in the exercise of such jurisdiction, should give his reasons for his decision, the absence of reasons would not detract from the legal validity of the decision.[1] The rule would, of course, apply to Chartered High Courts in the exercise of their *appellate* jurisdiction.[2] The rule does not apply to the Chief Court of Oudh in the exercise of its ordinary or extraordinary

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W N 1238: 1931 Notes 10 (c); *Ganga Sahai* v. *Chedu Lal*, (1881) All W N 57 (57); *Harjas* v. *Shib Dayal*, (1881) All W N 95 (95).

Note 5.

(1) *Suryanarayana* v. *Nilamani*, (1891) 1 Mad L Jour 478 (479).

Order 20, Rule 4—Note 1.

(1) *Matheran Steam Light Tramway* v. *B N Lang*, 1927 Bom 113 (115): 29 Bom L R 126: 100 Ind Cas 941: 51 Bom 267.

(2) *Ramasami* v. *The Collector of Madura*, (1879) 2 Mad 67 (70): 6 Ind App 170: 5 Cal L Rep 341: 4 Sar 50: 3 Ind Jur 420: 3 Suth 646: 3 Shome L R 36; *Muhammad Mumtaz Ahmed* v. *Zubaida Jan*, (1889) 11 All 460 (469, 470): 16 Ind App 205: 5 Sar 433 P C; *Tarakant* v. *Puddomoney*, (1866) 5 Suth W R 63

original civil jurisdiction[3] nor to the Court of the Judicial Commissioner of the North-West Frontier Province.[4] O. 20, R. 4, Notes 1—5.

2. **"Judgment"—Meaning of.**—*See* S. 2, sub-S. (9), *ante*.

3. **Object of judgments.**—The object of insisting upon a judgment in respect of a decision of the Court, is to enable an appellate or revisional Court to find out whether the Judge has applied his mind to the case, and whether the decree or order is according to law.

4. **Personal knowledge.**—A Judge cannot import his own private knowledge or opinion into a case but must decide it on the *evidence* before him.[1] If he intends to use his personal knowledge, he is bound to give evidence like any other witness.[2] A judgment based upon such knowledge without any reference to the evidence in the case is not one in accordance with law and is liable to be set aside.[3]

5. **Appreciation of evidence.**—It is a fundamental principle that the decision of a Court rests, not upon mere suspicion, or surmises or conjectures but upon legal grounds established by *legal testimony*.[1] A judgment therefore, based on the evidence of witnesses whom the opposite party had no opportunity to cross-examine,[2] or based on evidence recorded in a different suit,[3] is not a judgment that can be maintained.

An omission to make special mention of the oral evidence,[4] or to refer to every detail in the evidence[5] does not warrant a presumption that the evidence has not been adequately or reasonably considered; but where a Judge makes only a colourable pretence of considering the evidence without really having done so the judgment cannot be accepted as a proper one.[6]

On questions of fact, a judgment of the Court of the first instance, must, except as provided by O. 18, R. 15, be based upon an examination of

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(66): 10 Moo Ind App 476: 2 Sar 184: 1 Suth 631 (P C); *Kachekalyana Rangappa* v. *Kachirigajapa*, (1869) 2 Beng L R 72: 12 Moo Ind App 495: 11 Suth W R P C 33 (33): 2 Suth 206: 2 Sar 461 P C.

(3) *See* the U P Act IV of 1925, S 16 (2).

(4) *See* S 46 (2) of N-W-F Province Law and Justice Regulation (VII of 1901).

Note 4.

(1) *Lalla Mawa Lall* v. *Sri Mahato*, (1876) 25 Suth W R 152 (153); *Hurpershad* v. *Sheo Dyal*, (1875-76) 3 Ind App 259 (286): 3 Sar 611: 3 Suth 309: 26 Suth W R P C 55; *Mehroonissa* v. *Bhashyagr*, (1865) 2 Suth W R Act X 29 (29); *Meethun Bibee* v. *Busker Khan*, (1866-67) 11 Moo Ind App 213 (221): 7 Suth W R P C 27: 1 Suth 683: 2 Sar 255.

(2) *Jeshwant Singjee* v. *Jet Singjee*, (1841-46) 3 Moo Ind App 245 (260): 6 Suth W R P C 46: 1 Suth 150: 1 Sar 274; *Ronseau* v. *Pinto*, (1867) 7 Suth W R 189 (189).

(3) *Durga Prasad* v. *Ram Dyal*, (1911) 10 Ind Cas 955 (955): 38 Cal 153: 12 Cr L Jour 355; *Abdul Huq* v. *Mahomed Din*, 1923 Cal 311 (312): 67 Ind Cas 302.

Note 5.

(1) *Sreemunchunder Dey* v. *Gopalchunder Chakarbutty*, (1866-72) 11 Moo Ind App 28 (44): 7 Suth W R P C 10 (10): 2 Sar 215: 1 Suth 651; *Sheo Bahadur* v. *Beni Bahadur*, 1926 P C 97 (100): 3 Oudh W N 761: 29 Oudh Cas 305: 31 Cal W N 438: 98 Ind Cas 567 P C [Discussion about speculative theories built on medical books without any facts established by the evidence]; *Zamin Husain Khan* v. *Tasadduq Ali Khan*, 1925 Oudh 171 (172): 80 Ind Cas 692; *Sawan Singh* v. *Karim Baksh*, (1910) 8 Ind Cas 353 (354): 93 Pun Re 1910: 128 Pun W R 1910: 186 Pun L R 1910; *Nilmadhub* v. *Rajkishore Das*, (1913) 21 Ind Cas 413 (414): 18 Cal L Jour 220; *Anjumanunnissa* v. *Ashiq Ali*, 1922 Oudh 178 (183): 66 Ind Cas 222: 8 Oudh L J 139: 3 U P L R (O) 651; *Moholal* v. *Sankla*, (1904) 6 Bom L R 789 (789).

(2) *Gorachand Sircar* v. *Ram Narain Chowdury*, (1868) 9 Suth W R 587 (588).

(3) *Periyi Venkobachalu* v. *Sanji Radhabayamma*, 1925 Mad 230 (230): 47 Mad L Jour 640: 35 Mad L Tim 101: 85 Ind Cas 912.

(4) *Matiwar Rasuk* v. *Dhanu Mallu*, (1921) 59 Ind Cas 963 (964) Cal.

(5) *Abdul Qadir* v. *Narendra Mohan Ghose*, 1931 All 210 (210): 130 Ind Cas 289; *Zahid Ali* v. *Shahr Banu*, 1928 Oudh 480 (480): 5 Oudh W N 893; *Kali Sahu* v. *Kedar Mal*, (1917) 38 Ind Cas 561 (562) Pat.

(6) *Kali Sahu* v. *Kedar Mal*, (1917) 38 Ind Cas 561 (562) Pat.

O. 20, R. 4, Notes 5—6.

the evidence taken before the Judge himself, who delivers the judgment.[7] It must be based upon a consideration of the whole evidence on both sides and not merely upon some isolated piece of evidence.[8] In considering the evidence, the following points may be usefully mentioned:—

(1) It is not the proper way of appreciating the evidence to approach it with prejudice and suspect everything and everybody.[9]

(2) The mere fact that a witness is related to a party or supports the party does not necessarily make his evidence interested or unreliable: nor does the rejection of a portion of his testimony vitiate the whole testimony on that ground alone.[10]

(3) The fact that a witness had given evidence in other cases is not always a legitimate objection to his credibility though it may be a legitimate objection to a man's credit that he is a professional witness.[11]

(4) The testimony of a person who testifies that a certain conversation took place is of more value than that of one who says that it did not.[12]

(5) When the oral testimony adduced in an action is directly conflicting and irreconcilable, the only safe guide for the Judge is that afforded by the conduct of the parties, and the contents of the documents produced.[13]

6. Contents of judgments.—It is the duty of the Court to adjudicate on a claim as brought.[1] A judgment is bad if it is based on a question neither raised in the written statement nor included in any issue,[2] though it is open to a Court to find that the case of a party lies somewhere between the cases of both the parties.[3]

It is the duty of the Courts to write their judgments without unnecessary prolixity and repetition of pleadings.[4] A judgment is unsatisfactory if it is a mere catalogue of documents without any consideration of their probative value,[5] or if it simply repeats the arguments of the counsel on

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(7) *Naranbhai* v. *Naroshankar*, (1866-67) 4 Bom H C A C 98.

(8) *Tiluckdharee Singh* v. *Somoodha Singh*, (1866) 6 Suth W R 9 (10).

(9) *Mahomed Buksh* v. *Hosseini*, (1888) 15 Cal 684 (693, 697): 15 Ind App 81: 5 Sar 175: 12 Ind Jur 291.

(10) *Debi Pershad* v. *Radha Chowdhrani*, (1905) 32 Cal 84 (94, 95): 31 Ind App 160: 9 Cal W N 161: 8 Sar 708 P C.

(11) *Lal Beharee* v. *Gopee Beebee*, (1872) 18 Suth W R 285 (285) P C.

(12) *Chowdhry Deby* v. *Chowdhry Dowlut*, (1841-46) 3 Moo Ind App 347 (357): 6 Suth W R 55: 1 Sar 288: 1 Suth 161.

(13) *Kishori Lal* v. *Chunni Lal*, (1909) 1 Ind Cas 128 (132): 5 Mad L Tim 58: 9 Cal L Jour 172: 13 Cal W N 370: 11 Bom L R 196: 31 All 116: 19 Mad L Jour 186: 36 Ind App 9.

Note 6.

(1) *Ganeshi Lal* v. *Beni Pershad*, (1911) 9 Ind Cas 673 (674): 1 Pun Re 1911: 47 Pun L R 1911: 22 Pun W R 1911 [Court cannot direct parties to alter their claims]; *Sri Virada Pratap Deo* v. *Sri Brozo Kishore*, (1876) 1 Mad 69 (77, 78): 3 Ind App 154: 25 Suth W R 291: 3 Suth 263: 3 Sar 583: 11 Mad Jur 188.

(2) *Sajjad Hossain* v. *Ramlal*, (1912) 15 Ind Cas 159 (160) Cal.

(3) *Mt Jirabai* v. *Mt Ramdularibai*, 1926 Nag 48 (49): 89 Ind Cas 991; In re *Gopala Ayyar*, (1911) 12 Ind Cas 208 (208): (1911) 2 Mad W N 197; *Thakuri* v. *Kundan*, (1895) 17 All 280 (281): 1895 All W N 69.

(4) *Rajagopalan* v. *Subbarama Ayyar*, (1919) 53 Ind Cas 354 (360): 1919 Mad W N 356.

(5) *Jagan Nath* v. *Bindeshwari Prasad Minor under the guardianship of Mt Bishna*, (1917) 37 Ind Cas 435 (436): 3 Oudh L J 620.

both sides,[6] or if it is unintelligible.[7] It is not desirable that Judges should make remarks against the character of a person who is neither a party nor a witness in the proceedings before them,[8] nor should they give findings on matters which are unnecessary for the disposal of the suit.[9] The statements of their findings must be specific and precise.[10] O. 20, R. 4, Notes 6—8.

7. **Construction of judgments.**—As a general rule, where the language of a judgment is doubtful, the benefit of the doubt ought to go to the judgment-debtor.[1] All parts of the judgment should be read together and construed as a whole[2] but where the previous part of the judgment cannot be reconciled with the conclusion ultimately drawn, the former should be rejected.[3]

8. **Judgments of Small Cause Courts.**—A judgment of a Small Cause Court need not set out the *reasons* for the decision,[1] though as a matter of practice it is usual to give reasons except in unimportant cases.[2] But the judgment must set out *the points for determination* and the decision on each of those points.[2-a] A mere statement such as "issue not proved, suit dismissed,"[3] or "the plaintiff fails, suit dismissed,"[4] or "claim decreed with costs,"[4-a] or a general statement after setting out the points "I find all the issues for the plaintiff" without dealing with each point separately,[5] is not a valid judgment.

The judgment must also be sufficiently intelligible,[6] and must indicate clearly that the Judge has applied his mind to the case and that the

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(6) *Balwant Singh* v. *Baldev Singh*, 1921 Lah 119 (120): 2 Lah 271: 64 Ind Cas 929.

(7) *Harbhagwan* v. *Ahmad*, 1922 Lah 122 (122): 4 Lah L Jour 55; *Devendra Nath* v. *Annanda Hadi*, (1914) 25 Ind Cas 576 (578): 19 Cal L Jour 545.

(8) *Holi Basappa Pareppa*, In re, 1921 Bom 394 (395): 45 Bom 1127: 23 Bom L R 357: 61 Ind Cas 63.

(9) *Nanda Lal Rai* v. *Bonomali Lahiri*, (1885) 11 Cal 544 (545).

(10) *Balak* v. *Aley Hasan*, (1917) 37 Ind Cas 304 (304) All.

Note 7.

(1) *Gokaran Singh* v. *Mangli*, 1921 Oudh 138 (138): 8 Oudh L J 407: 66 Ind Cas 673.

(2) *Tarachand* v. *Ram Jeebun*, (1874) 22 Suth W R 202 (203).

(3) *Bykant* v. *Dhunput*, (1873) 19 Suth W R 104 (104, 105).

Note 8.

(1) *Deno Nath Banikya* v. *Ram Kumar Chakrabutty*, (1907) 6 Cal L Jour 527 (530, 531); *Protap Chandra Dutt* v. *Abhimanini Surini*, (1918) 48 Ind Cas 752 (753) Cal; *Baul Chandra Addya* v. *Abdul Matleb*, (1922) 67 Ind Cas 851 (851) Cal; *Narayan Sitaram* v. *Bhagu*, (1907) 31 Bom 314 (318): 9 Bom L R 327; *Siva Sewak* v. *Jangli*, 1925 Oudh 648 (648): 88 Ind Cas 376; *Shair Ali* v. *Jurawan*, 1926 Jour 147 (3): 13 Oudh L J 301: 97 Ind Cas 538; *Ahmed Ayoob* v. *The Asiatic Petroleum Co. Ltd.*, (1910) 7 Ind Cas 591 (591): 4 Sind L R 17; *Komappa Kurup* v. *Velayi Chettichiar*, 1922 Mad 360 (360): 42 Mad L Jour 583: 15 Mad L W 642: 31 Mad L Tim 124: 70 Ind Cas 791 [Dissenting from 59 Ind Cas 906]. But see *Kandaswami Chetty* v. *Ramalinga Chetty*, (1921) 59 Ind Cas 906 (907): 12 Mad L W 285.

(2) *Maung Sa* v. *Ma U Ma*, 1923 Rang 252 (252): 1 Rang 274: 2 Bur L Jour 108: 76 Ind Cas 600; *Bhudhar Singh* v. *Sheikh Sahamat*, 1925 Oudh 283 (284): 79 Ind Cas 547.

(2-a) *Dallo* v. *Jagan Lal*, 1928 All 688 (688): 110 Ind Cas 818; *Bhudar Singh* v. *Sheikh Sahamat*, 1925 Oudh 283 (284): 79 Ind Cas 547; *Hasan* v. *Jasraj*, (1911) 12 Ind Cas 740 (740): 7 Nag L R 146; *Ramachandrier* v. *Muthukaruppa Pillai*, (1896) 6 Mad L Jour 50 (51); *Kandi Ummacha* v. *Purushotama Das*, (1910) 6 Ind Cas 682 (683): 7 Mad L Tim 306; *Atma Ram* v. *Ali Baksh*, 1926 Jour 104 (3): 27 Pun L R 135: 93 Ind Cas 632; *Badri Das* v. *Ghulam Muhammad*, 1926 Jour 131 (3): 95 Ind Cas 584.

(3) *Kundan Lal* v. *Shiv Dayal*, (1928) 10 Lah L Jour 248: 108 Ind Cas 386: 1928 Notes 55 (c); *Shah Jahan* v. *Jhande Khan*, (1913) 18 Ind Cas 216 (216): 109 Pun L R 1913: 119 Pun W R 1913; *Bai Jasoda* v. *Bamansha*, (1899) 23 Bom 334 (337).

(4) *Ramachandrier* v. *Muthukaruppa Pillai*, (1896) 6 Mad L Jour 50 (51).

(4-a) *Bhudar Singh* v. *Shaikh Sahamat*, 1925 Oudh 283 (284): 79 Ind Cas 547.

(5) *Moideen* v. *Kattuparambath Moideen*, 1925 Mad 1229 (1229): 49 Mad L Jour 354: 90 Ind Cas 968.

(6) *Badlu* v. *Ram Das*, 1932 Oudh 113 (114): 9 Oudh W N 21: 136 Ind Cas 701; *Suradhani* v. *Haricharan*, 1922 Pat 337 (337, 338): 3 Pat L Tim 122: 64 Ind Cas 226: 1921 Pat H C C 298.

O. 20, R. 4, Notes 8—9.

decree or order is according to law.[7] The test whether this rule has been used or abused lies, in fact, in the answer to the question whether the judgment has been made intelligible. When the Judge has to deal with a question of fact he need not give anything more than his actual decision on the question, namely his answer to it. But in cases involving difficult questions of law or mixed questions of fact and law the Judge should set out so much of his reasoning as will make clear the road by which he has reached the conclusion.[8]

The mere fact that the judgment of a Small Cause Court does not set out the points for determination is, however, no ground for setting it aside if otherwise the judgment is intelligible and the Judge has applied his mind to the case.[9]

9. Other judgments.—Clause 2 of this rule requires that a judgment of a Court other than a Small Cause Court, should contain

(1) a concise statement of the case,

(2) the points for determination,

(3) the decision thereon, and,

(4) the reasons for such decision.[1]

In writing judgment in appealable cases, the provisions of this rule should be strictly followed.[1-a]

The judgment should state not merely the finding on the point raised, but must also state what the evidence consists of, and how it proves the plaintiff's or defendant's case.[2] A judgment unsupported by reasons cannot be accepted as legally binding on the parties.[3] But a judgment is not defective merely because specific issues were not framed, if all the points

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(7) *Badlu* v. *Ram Das*, 1932 Oudh 143 (144): 9 Oudh W N 24: 136 Ind Cas 701; *Kundanlal* v. *Shiv Dyal*, (1928) 108 Ind Cas 386 (387): 10 Lah L Jour 248: 1928 Notes 55-C; *Rajdeo* v. *Nath Prasad Misra*, 1930 All 832 (832): 1930 All L J 1090: 128 Ind Cas 766; *Shah Jahan* v. *Jhande Khan*, (1913) 18 Ind Cas 216 (216): 109 Pun L R 1913: 119 Pun W R 1913; *Samand Khan* v. *Pir Bakhsh*, 1901 Pun Re No 57; *Malik Rahmat* v. *Shiva Prasad*, (1891) 13 All 533 (536): 1891 All W N 172; *Bai Jasoda* v. *Bamansha*, (1899) 23 Bom 334 (336); *Dallo* v. *Jagan Lal*, 1928 All 688 (688): 110 Ind Cas 818 [People must be satisfied that justice has been done]; *Moolji Sicka and Co* v. *B N Ry Co, Ltd*, 1932 Cal 257 (258): 137 Ind Cas 445: 35 Cal W N 1242; *Jai Lal* v. *Bakhtawar*, (1905) 8 Oudh Cas 44 (44); *Hasan Khan* v. *Jasraj*, (1911) 12 Ind Cas 740 (740): 7 Nag L R 146.

(8) *Mariyayee Ammal* v. *Ponnuswami Chettiar*, 1932 Mad 336 (340, 343): 62 Mad L Jour 439: 55 Mad 671: 35 Mad L W 520: 137 Ind Cas 369; *Hari Mal* v. *Nikka*, 1895 Pun Re No 78; *Sarup Chand* v. *Bombay, Baroda and Central India Railway Company*, 1896 Pun Re No 41. See also *Pir Muhammad Sadruddin* v. *Khairuddin*, (1921) 59 Ind Cas 703 (704) Lah; *Chotkan* v. *Sita Ram*, 1926 Oudh 478 (479): 94 Ind Cas 397.

(9) *Ko Kaw Zan* v. *Daw Mya*, (1917) 40 Ind Cas 890 (890) Rang; *Ram Chander* v. *Jai Ram*, 1892 All W N 160 (160).

Note 9.

(1) *Ismail Khan Mahomed* v. *Hari Charan Pal*, (1904-05) 9 Cal W N 60 (66); *Mt Bhagan* v. *Bula Mal*, 1927 Lah 418 (419): 9 Lah L Jour 174: 102 Ind Cas 280: 28 Pun L R 330: *Chander Kant* v. *Hurish*, (1864) 1 Suth W R 214 (215) [Decision under S 359 of Act VIII of 1859]; *Shurbessur Ghose* v. *Sadhoo Churn*, (1871) 15 Suth W R 130 (131), (Do.); *Kalu Sarang* v. *Mt Abedannessa Khatun*, 1926 Cal 1221 (1221): 97 Ind Cas 172 [The rule will apply to *ex parte* cases also].

(1-a) *Ahmed* v. *Karori Mal*, 1907 Pun L R 27: 4 Pun W R 1907.

(2) *Trilochun Dutt* v. *Ishen Chunder Chowdhry*, (1865) 3 Suth W R 176 (176).

(3) *Nigappa* v. *Shivappa*, (1895) 19 Bom 323 (326); *Kamat* v. *Kamat*, (1884) 8 Bom 368 (371): 8 Ind Jur 687; *Purshotam Sakharam* v. *Durgoji*, (1890) 14 Bom 452 (454); *Khajah Mohamed* v. *Ashrufoonissa*, (1868) 9 Moo Ind App 492 (503): 2 Suth W R P C 13: 1 Suth 519: 2 Sar 45 P C; *Katchekalyana* v. *Kuchirijaya*, (1867-69) 12 Moo Ind App 495 (502): 2 Beng L R P C 72: 11 Suth W R P C 33: 2 Suth 206: 2 Sar 461 P C; *Nobo Chunder Banerjee* v. *Isher Chunder Mitter*, (1869) 12 Suth W R 254 (254); *Krishna Reddi* v. *Srinivasa Reddi*, (1870) 5 Mad H C R 174 (175); *Adamji* v. *Damodar Das*, 1890 Bom P J 280; *Amichand* v. *Kanhu*, 1891 Bom P J 204; *Narayan* v. *Sharafali*, 1896 Bom P J 260.

arising have in fact been determined.[4] Nor is a judgment bad, merely because it does not fully state the reasons for its conclusion but states that it adopts the reasons given in a judgment in a previous suit between the same parties, the evidence being almost the same.[5] O. 20, R. 4, Note 9.

As to the judgments of Criminal Courts, *see* Ss. 265 and 366 to 372 of the Criminal Procedure Code and the following cases.[6]

O. 20, R. 5, Notes 1—2.

R. **5.** [S. 204.] In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

Court to state its decision on each issue.

[1877—S. 204; 1859—S. 186.]

Synopsis.

1. **Chartered High Courts.**
2. **Decision on each issue necessary.**
3. **Object of judgment-**

Appealable cases—Findings on unnecessary points. See Note 2, Pts. (3) and (4).

"Sufficient for the decision of the suit." See Note 2, Pt. (5).

1. Chartered High Courts.—This rule does not apply to Chartered High Courts[1] or to the Chief Court of Oudh[2] or to the Court of the Judicial Commissioner of the North-West Frontier Province[3] in the exercise of the ordinary or extraordinary original civil jurisdiction.

2. Decision on each issue necessary.—It is imperative upon the Court to pronounce its findings upon all issues as may be necessary for the disposal of the suit.[1] There should be a finding on each issue *separately* and not on all issues together.[2] In appealable cases, it is always desirable that the Court should, as far as may be practicable pronounce its opinion on all the important points which have been raised in the case (whether such findings are necessary or unnecessary for the decision of the case),[3] and

(4) *Hussan* v. *Asiatic Petroleum Co.* (1909) 4 Ind Cas 1124 (1124): 5 Mad L Tim 215; *Ayyalammai Servaigaran* v. *Nallaswami Pillai*, (1911) 10 Ind Cas 291 (291): 19 Mad L Tim 407.

(5) *Akku* v. *Ramappa Raju*, (1912) 15 Ind Cas 434 (434): 1912 Mad W N 900.

(6) In the matter of the petitioner *Ram Das*, (1886) 13 Cal 110 (111); *Kamaruddin* v. *Sonatun*, (1885) 11 Cal 419 (450); *Shivappa*, In re, (1891) 15 Bom 11 (12, 13); *Rohimuddi* v. *Queen-Empress*, (1893) 20 Cal 353 (357); *Farkan* v. *Shomsher Mahomed*, (1895) 22 Cal 241 (243); *Kasimuddi* v. *Queen-Empress*, (1896) 1 Cal W N 169 (170); *Queen-Empress* v. *Pandeh Bhat*, (1897) 19 All 506 (508): 1897 All W N 142 F B.

Order 20, Rule 5—Note 1.

(1) See O 49, R 3.

(2) See the U P Act (IV of 1925), S 16 (2).

(3) See S 46 (2) of the N-W-F Province Law and Justice Regulation (VII of 1901).

Note 2.

(1) *Dwarakonda* v. *Dwarakonda*, (1881) 4 Mad 134 (136): 5 Ind Jur 634; *Sheikh Talib Ali* v. *Basant Rae*, (1904) 7 Oudh Cas 340 (341) [Rent Court]; *Rani Jaibans Kuar* v. *Girdhari Tewari*, (1898) 1 Oudh Cas 40 (41), (Do.).

(2) *Rajani Kant Mukerji* v. *Ramdulah Das*, (1912) 17 Ind Cas 881 (882): 17 Cal W N 55.

(3) *Mahomed Sulaiman* v. *Kumara Birendra Chandra Singh*, 1922 P C 405 (408): 32 Mad L Tim 115: 50 Cal 243: 27 Cal W N 749: 37 Cal L Jour 561: 50 Ind App 247: 74 Ind Cas 906: 14 Mad L Jour 388 P C; *Tara Kant* v. *Puddomoney*, (1866) 5 Suth W R 63 (66). *Baldeo Singh* v. *Dharam Kunwar*, (1904) 26 All 234 (235): 1904 All W N 6; *Palaniandi Chetty* v. *Kaubaraya Chetty*, (1914) 24 Ind Cas 87 (88): 1 Mad L W 416; *Lachminarayana* v. *Zahirul Said Alvi*, 1923 Nag 322 (324): 76 Ind Cas 772; *Shurno Moyee* v. *Joy Narain*, (1867) 8 Suth W R 481 (482); *Mahasukhram* v. *Bai Javer*, 1886 Bom P J 71; *Maung Shwe Hmon* v. *Maung Aung Ban*, (1893-1900) L B R 1;

O. 20, R. 5, Notes 2—3.

this is ordinarily expected in cases where evidence has been allowed to be given on all the issues.[4] The concluding words of the rule do not preclude the Judge from giving his findings on all the issues, though some of them may be unnecessary for the decision of the case,[5] though such findings should not form part of the Court's decree.[6]

3. **Object of judgment.**—*See* Note 3 to R. 4.

O. 20, R. 6.

R. 6. [S. 206.] (1) The decree *shall* agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

Contents of decree.

(2) The decree shall also state the amount of costs incurred in the suit, and by *whom or out of what property* and in what proportions such costs are to be paid.

(3) [S. 221.] The Court may direct that the costs payable to one party by *the other* shall be set off against *any* sum which is admitted or found to be due from the former to the latter.

[1877—*Cf.* S. 257; 1859—S. 189; Cf. S. 206.]

Local Amendment.

MADRAS.

After sub-Rule (2), the following be *inserted* as sub-Rule (2-A):—

"(2-A). In all cases in which an element of champerty or maintenance is proved, the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant.

Synopsis.

1. Chartered High Courts.
2. Scope of the rule.
3. Form and contents of decree.
4. Amendment of decree.
5. Construction of decree.
6. Provision for costs—Sub-Rule (2).
7. Decree not in accordance with the judgment.
8. Set off costs towards sums admitted or found due.
9. Appeal.
10. Revision.

Govinda v. *Govinda*, 1885 Bom P J 71; *Brij Raj* v. *Ram Sarup*, 1926 All 36 (39): 23 All L J 901: 6 L R A Civ 488: 90 Ind Cas 749: 48 All 44 [Court must decide every issue though question raised in the issue was one which might have been disposed of on the allegations in the plaint itself]; *Baij Nath Goenka* v. *Daleep Narain Singh*, (1920) 58 Ind Cas 489 (491): 1920 Pat H C C 261: 1 Pat L Tim 582; *Braham Deo Narain* v. *Mackenzie*, (1884) 10 Cal 1095 (1097); *Nanda* v. *Banamali*, (1885) 11 Cal 544 (545).

(4) *Tara Kant Banerjee* v. *Puddmoney Dossee*, (1866) 10 Moo Ind App 476 (488): 5 Suth W R 63: 2 Sar 184: 1 Suth 631 P C; *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*, (1889) 11 All 460 (470, 471): 16 Ind App 205: 5 Sar 433 P C; *Kaliyammal* v. *Kolandavela Goundar*, (1917) 38 Ind Cas 188 (191): 5 Mad L W 228 [Confirming its decision to one issue after evidence recorded on all issues is improper]; *Ram Niranjan Singh* v. *Ram Gobind Singh*, (1920) 57 Ind Cas 524 (524) Pat [Finding obligatory when a specific issue is raised and evidence is adduced by both parties].

(5) *Devarakonda Narasamma* v. *Devarakonda Kanajja*, (1882) 4 Mad 134 (136): 5 Ind Jur 634; *Kanhaya Lal* v. *The National Bank of India, Ltd.*, 1907 Pun Re No 121: 51 Pun W R 1907; *Ismail Khan* v. *Hari Charan*, (1905) 9 Cal W N 60 (67, 69); *Babu* v. *Akava*, 1890 Bom P J 18.

(6) *Baldeo Singh* v. *Dharam Kunwar*, (1903) 26 All 234 (236): 1904 All W N 6.

Decree for accounts—Construction. See Note 5, F.-N. (1).
Decree in respect of a religious office—Construction. See Note 5, F.-N. (1).
Form of decrees in particular cases. See Note 3, Pt. (6).
Prospective decree—Irregular. See Note 3, F.-N. (6).
Suit against legal representative. See Note 3, Pt. (5).
Suit for ejectment—Applicability of doctrine of penalties. See Note 5, F.-N. (1).

1. **Chartered High Courts.**—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction.[1] *See* O. 49, R. 3.

As to the applicability of this rule to proceedings under certain Tenancy Acts, *see* the undermentioned Acts.[2]

2. **Scope of the Rule.**—It is imperative that the decree should agree with the judgment.[1] As has been seen in Note 6 to S. 152 *ante* where the decree does not agree with the judgment, the Court has an inherent power to amend it so as to bring it into confirmity with the judgment.[2] Where, however, the decree does agree with the judgment, it cannot subsequently be altered or added to by the Court passing it, except under S. 152 or under R. 11, *infra*.[3]

Where a decree or any part of a decree is passed by consent of parties, it should always so appear on the face of the decree when drawn up.[4]

Where a judgment is pronounced, the decree must automatically follow it and the Court has no power to direct that the preparation of the decree be stopped until the payment of deficit Court-fees.[5]

3. **Form and contents of decree.**—Decrees drawn up in suits should contain all the particulars required by this rule[1] and should use the forms prescribed in Appendix D to this schedule, with such variations as the circumstances of each case may require.[2] A decree properly prepared should indicate against whom, and in favour of which of the parties, it has been made and should state the names of all the persons against whom it has been passed and who will be affected thereby; where a defendant is not one of the persons against whom the decree is made there is no decree against him.[3] If, during the pendency of the suit, the plaintiff dies and his

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Order 20, Rule 6—Note 1.

(1) *Karim Mahomed* v. *Rajooma*, (1888) 12 Bom 174 (185); *Perozshah* v. *The Sun Mills*, (1898) 22 Bom 370 (374).

(2) The Chota Nagpur Tenancy Act (VI of 1908), S 261. Sub-rules (2) and (3) of this rule apply. The Agra Tenancy Act (III of 1926), Sch 2.

Note 2.

(1) *Balgobind* v. *Sheo Kumar*, 1924 All 818 (821): 22 All L J 791: 5 L R A (Civ) 545: 82 Ind Cas 184: 46 All 864.

(2) See also *Maung Chit* v. *Maung Tha Ku*, 1923 Rang 113 (114): 4 U B R 135: 77 Ind Cas 258.

(3) *Venkatagiri Iyer* v. *Sadagopachariar*, (1904) 14 Mad L Jour 359 (367); *Raghunath Das* v. *Raj Kumar*, (1885) 7 All 276 (280): 1885 All W N 13; *Gulab Kuar* v. *Thakur Sheo Ratan Singh*, (1901) 4 Oudh Cas 82 (84).

(4) *Zahirulsaid* v. *Lachhmi Narain*, 1931 P C 107 (109): 35 Cal W N 612: 60 Mad L Jour 648: 131 Ind Cas 316: 33 Mad L W 723: 14 Nag L J 71: 27 Nag L R 139: 33 Bom L R 925: 1931 Mad W N 718 P C.

(5) *Kedar Nath Goenka* v. *Chandra Maulesh-war Prasad Singh Bahadur*, (1932) 13 Pat L Tim 301 (308): 137 Ind Cas 855: 11 Pat 532: 1932 Pat 228.

Note 3.

(1) *Thamman Singh* v. *Genga Ram*, (1879) 2 All 342 (344); *Gajraj Mati* v. *Shami Nath*, (1916) 36 Ind Cas 307 (310): 14 All L J 853.

(2) See also *Broughton* v. *Rajah Saheb*, (1873) 19 Suth W R 152 (153).

(3) *Gajraj Mati* v. *Shami Nath*, (1916) 36 Ind Cas 307 (310): 14 All L J 853; *Zoynul Abdeen* v. *Phoolash*, (1871) 15 Suth W R 126 (126).

O. 20, R. 6, Note 3.

minor son is allowed to represent him, the decree must describe the new plaintiff as "substituted plaintiff as representative of his father, the deceased plaintiff" and not as "the minor plaintiff".[4] In a suit against a legal representative, the decree should state that it is against the defendant in that character.[5] As to the form of decrees in various other kinds of suits, *see* the undermentioned cases.[6]

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(4) *Ram Bijai* v. *Jagatpal*, (1891) 18 Cal 111 (120): 17 Ind App 173: 5 Sar 590: R & J 120 P C.

(5) *Viraraghavamma* v. *Samudrala*, (1885) 8 Mad 208 (213); *Guruvappa* v. *Thimma*, (1887) 10 Mad 316 (318, 319); *Sethuvayan* v. *Muthuswami*, (1889) 12 Mad 325 (329); *Periasamy Mudaliar* v. *Sitharama Chettiar*, (1904) 27 Mad 243 (248): 14 Mad L Jour 84; *Fanindro* v. *Jugudishwari*, (1887) 14 Cal 316 (320); *Girdar* v. *Bai Shiv*, (1884) 8 Bom 309 (310); *Anund* v. *Munorut*, Marsh 611.

(6) **Suit against deceased person's estate:** *Bai Meherbai* v. *Mayan Chand*, (1904) 29 Bom 96 (101): 6 Bom L R 853. **Suit against Hindu widow.**—*Gobind Singh* v. *Baldeo Singh*, (1903) 25 All 330 (332): 1903 All W N 57; *Rachawa* v. *Shivayogapa*, (1894) 18 Bom 679 (683); *Yellawa* v. *Bhimangavda*, (1894) 18 Bom 452 (454); *Goluck* v. *Gopal*, (1864) Suth W R 250 (250); *Phool Chun* v. *Rughoobuns*, (1868) 9 Suth W R 107 (108, 109); *Muteeram Kawar* v. *Gopal Sahoo*, (1873) 20 Suth W R 187 (187): 11 Beng L R 416; *Ram Kishore* v. *Kally Kant*, (1881) 6 Cal 479 (481): 8 Cal L Rep 1. **Suit against Muhammadan widow.**—*Muhammad Ameerodeen* v. *Mozuffer Hossein*, (1870) 5 Beng L R 570: 14 Suth W R 5 (5) P C. **Suit against manager of family.**—*Venkata* v. *Kaveri*, (1884) 7 Mad 201 (203); *Arunachala* v. *Sivagiri Zamindar*, (1884) 7 Mad 328 (335): 8 Ind Jur 369; *Chalamayya* v. *Varadayya*, (1899) 22 Mad 166 (168): 9 Mad L Jour 3; *Sivasankara* v. *Parvati*, (1882) 4 Mad 96 (98). *Suit against Karnavan.*—*Thenju* v. *Chimmu*, (1884) 7 Mad 413 (416): 8 Ind Jur 496; *Subramaniya* v. *Kali*, (1887) 10 Mad 355 (356). *Suit against Uralars.*—*Kelu* v. *Paidel*, (1886) 9 Mad 473 (474). *Suit on Bill of Exchange.*—*Bank of Bengal* v. *Kartick Chunder*, (1889) 16 Cal 804 (806). **Suit for contribution.**—*Jatindramohan* v. *Guru Prosunno*, (1904) 31 Cal 597 (611, 612): 31 Ind App 94: 8 Cal W N 625: 8 Sar 645 P C [Joint decree not to be passed against all defendants]; *Rama Soonduree* v. *Anundmoyee*, (1869) 3 Suth W R 170 (170); *Pitambar* v. *Bhoyrubnath*, (1871) 15 Suth W R 52 (54); *Mahdeo* v. *Lahoree*, (1875) 24 Suth W R 250 (251); *Kristo Monee* v. *Buroda Dassi*, (1870) 14 Suth W R 143 (143); *Brojo Mohun* v. *Roodronath*, (1870) 15 Suth W R 192 (192); *Shaikh Murdan Ali* v. *Tufussal Hossein*, (1871) 16 Suth W R 78 (79); *Tavasi Talavar* v. *Palaniandi*, (1866-68) 3 Mad H C R 187 (188); *Rajput Rai* v. *Muhammad Ali*, (1873) 5 N W P 215; *Shaik Ghoolab* v. *Asseran*, (1867) 7 Suth W R 194 (194); *Kristo* v. *Anund Moyee*, (1867) 7 Suth W R 300 (301); *Mohesur* v. *Muthoor Prasad*, (1867) 8 Suth W R 514 (515); *Nobin Mohun* v. *Gopal Chunder*, (1869) 11 Suth W R 538 (539); *Rashmunjoare* v. *Radha Soonduree*, (1875) 23 Suth W R 283 (283, 284); *Bhurut* v. *Muthoora*, (1875) 23 Suth W R 421 (422); *Upendra* v. *Girindra*, (1898) 25 Cal 565 (569, 570): 2 Cal W N 425; *Guru Prosanna* v. *Jotindra Mohun*, (1908) 35 Cal 303 (309, 310): 35 Ind App 32: 7 Cal L Jour 454: 4 Mad L Tim 135 P C. *Suit for damages.*—*Triloki Nath* v. *Hurdutt*, (1882) 9 Suth W R 299 (299); *Futtoo Bibee* v. *Bhurrut Lal*, (1868) 10 Suth W R 299 (299); *Muneerun* v. *Museehun*, (1870) 13 Suth W R 139 (140). **Suit to set aside deed for fraud or under influence.**—*Thakoor Deen* v. *Syed Ali Hossein*, (1874) 21 Suth W R 340 (342): 13 Beng L R 427: 3 Sar 368: 1 Ind App 192 P C; *Ajit Sing* v. *Bijai*, (1885) 11 Cal 61 (68): 11 Ind App 211: 4 Sar 560: R & J 84: 8 Ind Jur 643 P C; *Ram Dei* v. *Abu Jafar*, (1905) 27 All 494 (498): 1905 All W N 68; *Sanmukh* v. *Jagar Nath*, 1924 All 708 (709): 46 All 531: 22 All L J 417: 5 L R A (Civ) 289: 83 Ind Cas 838; *Sadashiv Bashkar Joshi* v. *Dhakubai*, (1880-81) 5 Bom 450 (460, 462, 463); *Bhagwat Dayal Singh* v. *Devi Dayal*, (1908) 35 Cal 420 (429, 430): 35 Ind App 48: 5 All L J 184: 10 Bom L R 230: 12 Cal W N 393: 7 Cal L Jour 335: 18 Mad L Jour 100: 3 Mad L Tim 344: 14 Beng L R 49 P C; *Buniyad Husain* v. *Mata Din*, (1916) 36 Ind Cas 57 (60, 61): 3 Oudh L J 313: 19 Oudh Cas 122; *Singam Seth Sanjivi* v. *Draupadi*, (1908) 31 Mad 153 (155, 156): 3 Mad L Tim 251: 18 Mad L Jour 11; *Chattar* v. *Chote*, (1917) 40 Ind Cas 269 (270) All; *Gokha Ram* v. *Sham Lal*, 1923 Lah 268 (269): 3 Lah 426: 77 Ind Cas 174; *Rajaram* v. *Luchmun*, (1870) 4 Beng L R A (Civ) 118: 12 Suth W R 478 (481). **Suits for ejeotment.**—*Aby Bakar* v. *Venkataramana*, (1894) 18 Bom 107 (108); *Ram Narain* v. *Mt Fatema*, (1875) 23 Suth W R 399 (399); *Bodh Narain* v. *Muhammad Moosa*, (1899) 26 Cal 639 (644, 645, 646): 3 Cal W N 628. **Suit relating to endowed property.**—*Chotalal Lakhiram* v. *Manohar Ganesh*, (1900) 24 Bom 50 (54): 26 Ind App 199: 4 Cal W N 23: 2 Bom L R 516: 7 Sar 559 P C; *Srimath Daivasikamani* v. *Noor Muhammad*, (1908) 31 Mad 47 (49): 3 Mad L Tim 95: 17 Mad L Jour 553; *Joy Lall Tewaree* v. *Gossein Bhobun Geer*, (1874) 21 Suth W R 334 (335). *Suit relating to right of privacy.*—*Sheonath Rai* v. *Ali Hussain*, (1904) 1 All L J 118 (120). **Suit for possession in which enquiry is to be made as to value of improvements.**—*N V Silapani* v. *V M Ashtamurthi*, (1881) 3 Mad 382 (384) F B. **Suits for maintenance.**—*Gopikabai* v. *Dattatraya*, (1900) 24 Bom 386 (390): 2 Bom L Rep 191; *Rajah Prithee Singh* v. *Ranee Raj Kooer*, (1870) 2 N W P H C R 170; *Abdul Futteh* v. *Zabunnessa*, (1881) 6 Cal 631 (638): 8 Cal L Rep 242; *Jubbia Chitta Kooer* v. *Bhagee Kooer*, (1874) 6 N W P 41 [Prospective decree is irregular]; *Vishnoo Shambhog* v. *Manjamma*, (1885) 9 Bom 108 (110): 9 Ind Jur 271; *Mansa* v. *Jiwan*, (1887) 9 All 33 (34): 1886 All W N 248; *Ashtosh Bannerjee* v. *Lukhimoni*, (1892) 19 Cal 139 (143) F B; *Matangini* v. *Ohooney Mooney*, (1895) 22 Cal 903 (908); *Sabhanatha* v. *Lakshmi*, (1884) 7 Mad 80 (82); *Muttia* v. *Viramma*, (1887) 10 Mad 283 (286); *Chaman Lal* v. *Bapubhai*, (1898) 22 Bom 669 (672); *Hemangines* v. *Kumode*, (1899) 26 Cal 441 (447, 448, 449): 3 Cal W N 139; *Tulsha* v. *Gopal Rai*, (1884) 6 All 632 (634): 1884 All W N 208: 9 Ind Jur 155. See also *Razabai* v. *Sadu*, (1871) 8 Bom H C A C 98; *Jamnabai* v. *Raychand*, (1883) 7 Bom 225 (228): 7 Ind Jur 429; *Yellawa* v. *Bhimangavda*, (1894) 18 Bom 452 (454); *Rachawa* v. *Shivayagappa*, (1894) 18 Bom 679 (683). **Suit by co-sharer or purchaser from co-sharer for possession.**—*Wahid Alam* v. *Safat Alam*, (1890) 12 All 556 (558): 1890 All W N 130; *Nana* v. *Appa*, (1896) 20 Bom 627 (629); *Antu Singh* v. *Mandil Singh*, (1893) 15 All 412 (413): 1893 All W N 177; *Parashram* v. *Miraji*, (1896) 20 Bom 569 (570); *Nihal Singh* v. *Mal Singh*, (1915) 31 Ind Cas 862 (862): 160 Pun W R 1915; *Bhairon Rai* v. *Saran Rai*, (1904) 26 All 588 (590, 591: 1

The decree must be quite *distinct* from the judgment[7] and must be self-contained and capable of execution without reference to any other documents.[8] A copy of the judgment with the schedule of costs appended thereto does not constitute a proper decree.[9]

O. 20, R. 6, Notes 3—4.

In preparing a decree, Courts ought to clearly define and specify what their intentions are.[10] The parties and their pleaders should also see that the decrees are properly drawn up.[11]

Courts in India cannot make a decree of non-suit.[12] No decree need be drawn up in matters which are not civil suits,[13] or in cases of orders passed under S. 47 of the Code.[14] But the Court will not be deterred from making a decree by the mere fact that there may be difficulties in carrying it out[15] or because there is no specific provision for passing a decree in the particular case.[16]

In the case of appellate decrees it will be always expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of reference to the superseded decree.[17]

4. Amendment of decree.—*See* S. 152 *ante* and the undermentioned cases.[1]

All L J 183: 1904 All W N 106; *Jagar Nath Singh* v. *Jai Nath Singh*, (1904) 27 All 88 (90): 1 All L J 488: 24 All W N 194; *Rahim-ud-din* v. *Ram Lal*, (1904) 27 All 155 (155): 1904 All W N 205; *Rajaram* v. *Lalji Misra*, (1905) 2 All L J 481 (482); *Ram Jatan* v. *Jaisar*, (1894) 14 All W N 166 (167); *Babaji Lakshman* v. *Vasudev*, (1875-77) 1 Bom 95 (96): 10 Mad Jur 344: 11 Mad Jur 344; *Ramachandra Kashi* v. *Damodhar*, (1896) 20 Bom 467 (468); *Kallappa* v. *Venkatesh*, (1877-78) 2 Bom 676 (678); *Antaji* v. *Duttaji*, (1895) 19 Bom 36 (40); *Indrsa* v. *Sadu*, (1880-81) 5 Bom 505 Note: 1878 Bom P J 735; *Maruti Narain* v. *Lilachand*, (1881-82) 6 Bom 561 (566, 567); *Balaji Anant* v. *Ganesh Janardan*, (1880-81) 5 Bom 499 (501); *Sheo Dial* v. *Parbatia*, (1914) 22 Ind Cas 841 (841): 12 All L J 23.

(7) *Gela Ram* v. *Genga Ram*, (1920) 54 Ind Cas 913 (914): 1 Lah 223: 70 Pun W R 1920; *Queen-Empress* v. *Rama*, (1901) 24 Mad 13 (16).

(8) *Bhikari Sukul* v. *Gadadhar*, (1912) 15 Ind Cas 735 (738): 16 Cal L Jour 586: 17 Cal W N 87; *Kanyal Chandra Raj* v. *Kanye Lall*, (1879) 4 Cal 69 (72). See *Dwarka* v. *Kamala*, (1869) 3 Beng L R App 128: 12 Suth W R 99 (99); *Joytara* v. *Muhammad Mobaruck*, (1882) 8 Cal 975 (979): 11 Cal L Rep 399: 5 Shome L R 13.

(9) *Permasseree Dutt* v. *Jogunath*, (1871) 15 Suth W R 326 (327).

(10) *Ramlochun Das* v. *Mansur Ali*, (1868) 10 Suth W R 96 (97): 1 Beng L R (A C) 65; *Chundermonee* v. *Dhuroneedhar*, (1867) 7 Suth W R 2 (3); *Niamut Khan* v. *Phadu Baldia*, (1880) 6 Cal 319 (323): 7 Cal L Rep 227; *Nund Kishore* v. *Lalla Burjan* (1871) 15 Suth W R 154 (155); *Baboo Jugnur Nath Singh* v. *Kalee Doss Gooptu* (1875) 24 Suth W R 479 (479); *Devendra Nath Chowdhry* v. *Ananda Hadi*, (1914) 25 Ind Cas 576 (578) 19 Cal L Jour 545 [Meaning doubtful —Decree was set aside]; *Lachmi Narain* v. *Jnala Nath*, (1896) 18 All 344 (347): 1896 All W N 87.

(11) *Ram Lochun* v. *Munsur*, (1868) 10 Suth W R 96 (97); *Rustum Ally* v. *Ameer Ally Sondagar*, (1868) 10 Suth W R 487 (488); *Prince Muhammad Ruhimooddeen* v. *Baboo Beer Protab Suhai*, (1872) 18 Suth W R 303 (303); *Goluck Chunder* v *Ganga Narain*, (1873) 20 Suth W R 111 (112); *Tarsi Ram* v. *Man Singh*, (1886) 8 All 492 (495): 1886 All W N 156; *Krishto Kishore* v. *Roop Lall*, (1882) 8 Cal 687 (689): 10 Cal L Rep 609.

(12) *Banwaridass* v. *Muhammad Mashiat*, (1887) 9 All 690 (697).

(13) *Minakshi Naidu* v. *Subramania Sastri*, (1888) 11 Mad 26 (35): 14 Ind App 160: 5 Sar 54: 11 Ind Jur 393 P C.

(14) *Khirode Sundari* v. *Janendra*, (1902) 6 Cal W N 283 (284).

(15) *Purappanvanalingam* v. *Nallasivan*, (1862-63) 1 Mad H C R 415 (417).

(16) *Asma Bibi* v. *Ahmed Hussain*, (1908) 30 All 290 (295, 296): 1908 All W N 109: 5 All L J 584 [Dismissal of appeal under O 41, R 11]

(17) *Krishto Kinkur Roy* v. *Burroda Coat Roy* (1870-72) 14 Moo Ind App 465 (492): 17 Suth W R 292: 10 Beng L R 101: 2 Suth P C J 564: 3 Sar P C J 62

Note 4.

(1) *No amendment where decree is in accordance with judgment.*—*Lakho Bibi* v. *Salamat Ali*, (1898) 20 All 337 (339): 1898 All W N 59; *Ramdai Kuar* v. *Hemraj*, 1882 All W N 72 (73); *Narendra Bahadur Singh* v. *Ajudhia Prasad*, (1910) 13 Oudh Cas 28; *Jairan Sahai* v. *Kaylan Mal*, 1906 All W N 220 (220); *No limitation for bringing decree in accordance with judgment*. *Raghunath Das* v. *Raj Kumar*, (1884) 7 All 276 (289): 1885 All W N 13; *Decree not properly drawn up*— *Party not responsible*— *Manna Saw* v. *C I M K Firm*, 1928 Rang 215 (216). *Decree not agreeing with judgment*—*Person interesting should apply for amendment*—*Ram Nath Tewari* v. *Musammat Genda*,

O. 20, R. 6, Notes 5—6.

5. Construction of decree.—*See* Notes 76 and 77 to S. 47 and the cases noted below.[1]

6. Provision for costs—Sub-Rule 2.—Ordinarily the judgment does not set forth the actual amount of the costs awarded in the suit.[1] The *decree* must, however, state specifically the actual amount of costs, and by whom and in what proportions they are to be paid; and no costs can be recovered unless they are so mentioned.[2] A mere specification of the costs alone without any allotment of responsibility is not a sufficient compliance with the rule.[3]

But it is not necessary in an *appellate* decree to state specifically the sums which go to make up the costs of the first Court.[4]

(1915) 31 Ind Cas 564 (564) All; *Bunwareechand Thakoor* v. *Mudden Mohun Chuttoraj*, (1874) 21 Suth W R 41 (41) [Ought not to appeal]; *Ghulam Mohi-ud-din Khan* v. *Dhanno*, 1893 All W N 123 (124); *Harnam Chandar* v. *Muhammad Yar Khan*, (1905) 27 All 485 (486, 488): 1905 All W N 63: 2 All L J 169; *Amendment should be after notice to parties—Decree affirmed on appeal—What decree should be amended.—Onraet* v. *Sunkur Dutt*, (1870) 14 Suth W R 26 (26): 5 Beng L R App 60; *Chowdhry Wahid Ali* v. *Mullick Enaet Ali*, (1870) 14 Suth W R 288 (289): 6 Beng L R 52; *Uma Sundari Devi* v. *Bindu Bashini Choudhrani*, (1897) 24 Cal 759 (762); *What Court can amend.—Hirji Jina* v. *Naran Mulji*, (1875) 1 Bom 1 (3); *Bansi* v. *Hira Lal*, 1881 All W N 60 (61); *Dwarkanath Haldar* v. *Kamalakanth Haldar*, (1869) 3 Beng L R App 128.

Note 5

(1) Decree must be construed on its own terms.—*Budun* v. *Ram Chandra*, (1887) 11 Bom 537 (539); *Muhammad Sulaiman* v. *Muhammad Yar*, (1884) 6 All 80 (88): 1883 All W N 215; *Ollfuloonissa* v. *Akbar Ali*, (1865) 4 Suth W R (Mis) 20 (20); *Nubo Kishore* v. *Anund Mohun*, (1872) 17 Suth W R 19 (20); *Kishundeo Singh* v. *Jaglal Sahu*, 1925 Pat 291 (293): 5 Pat L Tim 603: 78 Ind Cas 774; *Radha Prasad* v. *Torab Ali*, (1891) 18 Cal 108 (110): 5 Sar 582 P C; *Sumar Ahmed* v. *Haji Ismail*, (1875-77) 1 Bom 158 (162); *Thayamalachi* v. *Rajali*, (1911) 12 Ind Cas 334 (335): 10 Mad L Tim 326: (1911) 2 Mad W N 327 [Principle applies whether decree is declaratory or executory]; *Where ambiguous reference may be made to the record.—Jawahir Mal* v. *Kistur Chand*, (1891) 13 All 343 (344): 1891 All W N 119; *Shivlal* v. *Jumuklal*, (1894) 18 Bom 542 (545); *Jagatjit* v. *Sarabjit*, (1892) 19 Cal 159 (172): 18 Ind App 165: 6 Sar 80: 15 Ind Jur 749 P C; *Promoda* v. *Alamgir*, (1912) 13 Ind Cas 82 (83) Cal; *Medhee Bey* v. *Zellal*, (1871) 15 Suth W R 530 (530); *Chunder Mohun* v. *Amrtia Chunder*, (1873) 19 Suth W R 343 (344); *Beemabai* v. *Yamunabai*, (1890) 13 Mad 313 (315); *Sankara* v. *Kelu*, (1891) 14 Mad 29 (30, 32): 1 Mad L Jour 598; *Lakshmi Kantayammi* v. *Inuganti Rajagopal Rau*, (1898) 21 Mad 344 (361): 2 Cal W N 337: 25 Ind App 102: 7 Sar 325 P C; *Yagnarayana* v. *Malayya*, (1915) 31 Ind Cas 478 (478): 1915 Mad W N 914; *Soude Srinivasappa* v. *Krishnappa*, (1887) 11 Bom 177 (179); **Construction should be in accordance with law.**—*Jirbhu Narain* v. *Rup Singh*, (1898) 20 All 397 (399): 1898 All W N 93; *Luchmeenath Singh* v. *Madho Dass*, (1870) 2 N.W.P. H C 70; *Asma Bibee* v. *Ram Kant*, (1873) 19 Suth W R 251 (251, 252); *Maqbul Fatima* v. *Lalta Prasad*, (1898) 20 All 523 (527): 1898 All W N 157 F B; *Priority over other decrees.—Ghiran* v. *Kunj Behari*, (1887) 9 All 413 (419, 420): 1887 All W N 48; *Jagrup* v. *Radhey*, (1891) 13 All 288 (289, 290): 1891 All W N 63 F B; *Declaratory decree—Executability.—Venayak Amrit* v. *Abaji Haibatrav*, (1887) 12 Bom 416 (418); *Ram Lapit Ram* v. *Chooaram*, (1879) 4 Cal L Rep 97 (99); *Hayogreeva* v. *Sami*, (1892) 15 Mad 286 (287); *Where the decree amounts to a money decree.—Soobune Singh* v. *Ishur Datt*, (1874) 21 Suth W R 150 (151); *Janki Pershad* v. *Baldeo Narain*, (1880) 3 All 216 (219, 220, 221); *Hareukh* v. *Meghraj*, (1878-80) 2 All 345 (349); *Thamman Singh* v. *Ganga Ram*, (1878-80) 2 All 342 (344); *Ramnagarasingh* v. *Ramyad*, (1879) 5 Cal L Rep 176 (178) [Declaration that plaintiff is entitled to obtain possession on payment of a certain sum is not a money decree]. *See also S 73, Note 6—Janokey Das* v. *Bindabun*, (1841-46) 3 Moo Ind App 175 (196, 197): 1 Sar 263 P C [Decree for accounts is one affirming plaintiff's rights and for further enquiry into amount due]; *Shaikh Bisharul Ali* v. *Shah Golam Nujuf*, (1865) 4 Suth W R (Mis) 13 (13) [Ordinarily however, appellate Court will not differ]; *Hirji Jina* v. *Naran Mulji*, (1875-77) 1 Bom 1 (6, 7) [Appellate Court can differ from Lower Court's construction of decree]; *Narayan Chitko* v. *Vithul Parshotham*, (1887) 12 Bom 23 (25) [Mention as to when a particular right is to become enforceable is not a condition precedent]; *Lodd Govinda* v. *Rajah of Karvetnagar*, (1915) 30 Ind Cas 357 (360): 29 Mad L Jour 219 [Courts are not bound to construe a decree in the mode in which the parties intended it to operate]; *Shrikkuli Timappa* v. *Mohablaya*, (1886) 10 Bom 435 (437) [Doctrine of penalties does not apply]; *Jivendra Nath Bose* v. *Khulna Loan & Co*, (1914) 24 Ind Cas 35 (36): 18 Cal W N 492; *Gopee Kissen* v. *Brindabun Chunder*, (1873) 19 Suth W R 41 (42); *Kalee Nath* v. *Nuboddeep Chunder*, (1872) 17 Suth W R 175 (175): *Ponnambala Tambiran* v. *Sivagnana Desika*, (1894) 17 Mad 343 (355, 356): 21 Ind App 71: 6 Sar 434 P C [Decree directing the appointment of a fit person to the religious office].

Note 6.

(1) *Venkata Jogayya* v. *Venkatasimhadri*, (1900) 24 Mad 25 (26).

(2) *Nobo Kristo Mookerjee* v. *Parbutty Churn Bhuttacharjee*, (1870) 13 Suth W R 23 (23, 24); *Leelamund Singh* v. *Court of Wards*, (1870) 14 Suth W R 387 (388).

(3) *Janokee Nath* v. *Joykishen*, (1871) 15 Suth W R 4 (5); *Mothooza Mohun* v. *Hury Kishore Roy*, (1872) 18 Suth W R 286 (286).

(4) *Raja Raj Krishno Singh* v. *Prane Debe*, (1873) 21 Suth W R 74 (75).

Where, in a suit against a minor, the Court considers that the guardian should be personally ordered to pay the costs, it should be so stated in the decree or order.[5] O. 20, R. 6. Notes 6—9.

See also S. 35 *ante*.

7. Decree not in accordance with the judgment.—Where the judgment awards costs without specifying the actual amount, the costs must be calculated according to law.[1] Where therefore, the assessment of costs is not according to law,[2] or where the decree awards costs in a case in which the judgment is silent,[3] or where the decree awards costs at a higher rate than that specified in the judgment,[4] the decree to that extent, is at variance with the judgment and can be amended under the provisions of S. 152 of the Code or under the Court's inherent powers. *See* S. 152, Note 6.

As to whether interest which is inadvertently omitted in the decree, though mentioned in the judgment, can be awarded in execution. *See* the cases noted below.[5]

8. Set-off of costs towards sums admitted or found due.—Where in suit by *A* against *B*, a decree is passed against *B* for payment of a certain sum of money to *A*, but *A* is ordered to pay the costs of *B*, *B* can set-off the amount of costs against the amount payable by him to *A*.[1] It has been held that costs made payable under *different orders* in the same suit, may be set-off against each other.[2]

A set-off cannot be allowed for costs not *actually awarded*[3] nor for sums of money which one party might get from the other on the latter's applying for delivery of possession.[4]

9. Appeal.—*See* Note 19 to S. 152 and also the undermentioned cases.[1]

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(5) *Komul Chunder* v. *Surbessur*, (1874) 21 Suth W R 298 (298); *Brijessuree Dassia* v. *Kishore Dass*, (1876) 25 Suth W R 316 (316).

Note 7.

(1) *Rani Jaibans Kuar* v. *Chouras Kuar*, (1904) 7 Oudh Cas 43 (45).

(2) *Rani Jaibans* v. *Chouras Kuar*, (1904) 7 Oudh Cas 43 (45); *Bhagwant Singh* v. *Bhao Singh*, 1932 All 337 (340): 1932 All L J 272: 136 Ind Cas 817 [Decree taxing them improperly —Decree differs from judgment]; *Bithal Das* v. *Sham- Kishen*, 1901 All W N 94 (95) [Costs incorrectly assessed by the ministerial officers].

(3) *Seetharama Pattar* v. *Parukutti*, (1894) 4 Mad L Jour 280 (281).

(4) *Harnam Chandar* v. *Muhammad Yarkhan*, (1905) 27 All 485 (486): 25 All W N 63: 2 All L J 169.

(5) *Shyama Charan* v. *Protap Chandra*, 1930 Cal 349 (350): 51 Cal L Jour 280: 84 Cal W N 907: 126 Ind Cas 764.

Note 8.

(1) *Mirza Sadik* v. *Nawab Hashim Ali Khan*, (1914) 24 Ind Cas 376 (377) Oudh [Suit for sale on mortgage]; *Sidu* v. *Bali*, (1893) 17 Bom 32 (34) [Suit for redemption]; *Brij Nath* v. *Juggernath*, (1879) 4 Cal 742 (744): 4 Cal L Rep 122 [Redemption suit]; *Ishri* v. *Gopal Saran*, (1884) 6 All 351 (357): 1884 All W N 125: 8 Ind Jur 635 [Pre-emption suit]; *Ali Husain* v. *Aminullah*, (1912) 15 Ind Cas 337 (338): 10 All L J 153: 34 All 596, (Do.); *Parmanand* v. *Gobardhan*, (1906) 28 All 676 (677, 678): 1906 All W N 198: 3 All L J 804, (Do.); *Baldeo Parshad* v. *Baldeo Singh*, (1900) 3 Oudh Cas 323 (324), (Do.); *Ram Nidh* v. *Tulshi Ram*, (1903) 6 Oudh Cas 23 (24) [Decree for possession on payment of a sum to defendant—Award of costs also to the plaintiff].

(2) *Radha Pershad* v. *Ram Parmeswar*, (1883) 9 Cal 797 (801): 10 Ind App 113: 13 Cal L Rep 22: 4 Sar 421: 7 Ind Jur 216 P C.

(3) *Huro Pershad* v. *Fool Kishoree*, (1871) 16 Suth W R 308 (309).

(4) *Deo Saran* v. *Moti Bai*, (1907) 11 Cal W N lxiv.

Note 9.

(1) *Kishen Pershad* v. *Radha Madho Pershad*, (1904) 1 All L J 701 (702): 1904 All W N 268 [Order disallowing amendment of decree—No appeal]; *Brojo Lal Rai Chowdhury* v. *Tara Prasanna Bhattacharji*, (1906) 3 Cal L Jour 188 (190) [Amendment of decree—No appeal from order of amendment].

O. 20, R. 6. Note 10.

10. Revision.—*See* Note 20 to S. 152 and Note 21 to S. 115 and also the following cases.[1]

O. 20, R. 7, Notes 1—2.

R. 7. [S. 205.] The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Date of decree.

[1877—Ss. 204, 205, 206; 1859—S. 189.]

Synopsis.

1. Chartered High Courts.
2. Date of the decree.
3. Limitation.
4. Registration Act, S. 77.

"Satisfied himself"—Pleaders to assist in preparation of—Decrees. See Rule 6, Note 3, Pt. (11).

1. Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction[1] but it has been held by the High Court of Madras that even in cases of decrees passed on the original side of the High Court, the practice is to make the decree bear the same date as that of the judgment.[2]

2. Date of the decree.—The date of the decree and the date of the *signing* of the decree are two different things. The date of the decree must correspond to the date on which the judgment is pronounced, no matter what the date of the signing of the decree may happen to be.[1] The reason is, that, it is on the date of the judgment that the Court must be deemed to have expressed what the decree is.[2] The decree, therefore, though drawn up afterwards, *relates back* to[3] and operates from[4] the date of the judgment. Thus where one of the plaintiffs dies subsequent to the date of delivery of judgment but before the decree is actually drawn up, the fact does not affect

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Note 10.

(1) *Sital Prosad* v. *Abdur Rashid*, (1908) 11 Oudh Cas 208 (210) [Can interfere when Lower Court declined to correct clerical error]; *Seetharama Pattar* v. *Parnkutti*, (1894) 4 Mad L Jour 280 (281) [Misconstruction of a rule of practice is a ground for interference].

Order 20, Rule 7—Note 1.

(1) *See Order 49, Rule 3.—Kaluram Pirchand* v. *Gangaram Sakharamshet*, (1914) 23 Ind Cas 605 (606): 16 Bom L R 67: 38 Bom 331.

(2) *Hajee Aboobuckor* v. *Official Assignee*, (1913) 21 Ind Cas 545 (545): 1913 Mad W N 868: 25 Mad L Jour 560.

Note 2.

(1) *U Po Thaw* v. *Ma Thit*, 1930 Rang 67 (68): 126 Ind Cas 543; *Anandram* v. *Nitya Nanda Barham*, (1916) 32 Ind Cas 744 (747) Cal; *Afzul Hossain* v. *Umda Bibi*, (1895) 1 Cal W N 93 (93); *Ramey* v. *Broughton*, (1884) 10 Cal 652 (660); *Narsinga Rao* v. *Bandu Krishna*, (1918) 46 Ind Cas 107 (108): 20 Bom L R 481: 42 Bom 309; *Brenhilda* v. *British India Steam Navigation Co*, (1884) 7 Cal 547 (551): 8 Ind App 159: 4 Sar 236 P C; *Bani Madhub* v. *Matungini*, (1886) 13 Cal 104 (106) F B; *Bechi* v. *Ahsanullah*, (1890) 12 All 461 (468): 1890 All W N 149; *Yamaji* v. *Antaji*, (1899) 23 Bom 442 (444); *Ramanuja Iyengar* v. *Narayana Iyengar*, (1895) 18 Mad 374 (376); *Narain* v. *Ramdulare*, 1922 Nag 113 (113): 66 Ind Cas 7; *Maung Kin* v. *Maung Sa*, (1905-06) 3 L B R 62 (64): 11 Bur L R 220; *Sagarmal Marwari* v. *Lachmisaran Misir*, 1923 Pat 129 (130): 1 Pat 771: 75 Ind Cas 879; *Perumal Maistry* v. *Paikiri Konar*, 1927 Rang 335 (335): 6 Bur L Jour 23: 101 Ind Cas 319 [A wrong entry of the date of signing of the decee can't be the basis of a contention that time for redemption is not given in accordance with Law].

(2) *Giribala* v. *Biswambhar*, 1924 Cal 1064 (1065): 40 Cal L Jour 87: 82 Ind Cas 746.

(3) *Munginiram Marwari* v. *Gursabai Nand*, (1890) 17 Cal 347 (357): 16 Ind App 195: 5 Sar 463: 13 Ind Jur 449 P C; *Ram Kanai Pal* v. *Purna Chandra*, 1921 Jour 17 (1): 34 Cal L Jour 494: 65 Ind Cas 650.

(4) *Pydel* v. *Chathappan*, (1891) 14 Mad 150 (152); *Raghunath Das* v. *Raj Kumar*, (1885) 7 All 276 (280): 1885 All W N 13.

the validity of the decree.[5] Where, however, a Court gives a judgment but refuses or is unable to give a decree, till a condition is performed and draws up a decree after the performance of the condition, it must be held that the judgment given is only a provisional one which does not become operative until the decree is prepared, and that the latter date is the *date of the judgment* as well as of the *decree*.[6]

3. Limitation.—S. 12 of the Limitation Act provides that, in computing the period of limitation for *appeal* or for review, there shall be excluded the time requisite for obtaining a copy of the decree. Suppose now that the decree is actually *signed* on a date subsequent to that on which the judgment is pronounced, and a party applies for copies of the decree and judgment after the date of the signing of the decree. Can the period between the pronouncing of the judgment and the signing of the decree, be excluded in computing the period of limitation, in addition to the period actually taken in obtaining the copies? On this point there has been a conflict of opinion. According to the practice of the Calcutta High Court, such period should be excluded as being part of the time requisite for obtaining the copy.[1] This practice has been followed by the High Court of Patna.[2] All the other High Courts have on the other hand held that such period cannot be excluded in computing the period of limitation.[3] In *Pramathanath Roy* v. *William Arthur Lee*,[4] it was held by their Lordships of the Privy Council that no period can be regarded as requisite under the Limitation Act, which need not have elapsed if the appellant had taken reasonable and proper steps to obtain an order, and that there is no warrant for the proposition that the time *actually consumed* in obtaining the decree must be deducted. Their Lordships referred to the Calcutta view but did not decide as to the correctness or otherwise thereof.

Section 12, sub-S. 2 of the Limitation Act does not apply to applications for *execution* of a decree, and even according to the Calcutta[5] and Patna[6]

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(5) *Bejoy Gopal Bose* v. *Umesh Chandra Bose*, (1902) 6 Cal W N 196 (196).

(6) *Khudadad* v. *Mario Kohan*, (1916) 34 Ind Cas 867 (868): 9 Sind L R 193. See also *Jotindra Mohan Tagore* v. *Bejoychand*, (1905) 32 Cal 483 (491); *Krishnan* v. *Nilakandan*, (1885) 8 Mad 137 (139); *Dildar Hossein* v. *Mujeedunnissa*, (1879) 4 Cal 629 (632, 633); *Anando Kishore Dass* v. *Anando Kishore Bose*, (1887) 14 Cal 50 (54): 11 Ind Jur 143.

Note 3.

(1) *Bani Madhub* v. *Matangini*, (1886) 13 Cal 104 (107); In the matter of *Chowdhry Mohendro Narain Roy*, (1872) 18 Suth W R 512 (512); *Gopal Chandra* v. *Preonath Dutt*, (1905) 32 Cal 175 (177).

(2) *Ram Asray* v. *Sheo Nandan*, (1916) 35 Ind Cas 868: 1 Pat L Jour 573: 1 Pat L W 35: 1917 Pat H C C 21 F B; *Imaman* v. *Sham Sagar*, (1919) 49 Ind Cas 664 (666) Pat F B.

(3) *Bechi* v. *Ahsanullah*, (1890) 12 All 461 (468, 469, 474): 1890 All W N 149; *Yamaji* v. *Antaji*, (1899) 23 Bom 442 (446); *Ramanuja Ayyangar* v. *Narayana Ayyangar*, (1895) 18 Mad 374 (377); *Narayanaswamy Thevan* v. *Krishnaswamy Pillai*, (1914) 25 Ind Cas 67 (67) Mad [Even though time was granted for payment of entire Court-fees]; *Seth Jagannath* v. *Gangaram*, (1900) 13 C P L R 78 (80); *Dindayal* v. *Anopi*, 1926 Nag 349 (349, 350): 22 Nag L R 60: 97 Ind Cas 307 [Explaining 1924 Nag 271]; *Raja Muhammad Mehdi Ali Khan* v. *Lal Bahadur Singh*, 1925 Oudh 600 (601): 12 Oudh L J 444: 2 Oudh W N 420: 89 Ind Cas 479; *Maung Kin* v. *Maung Sa*, (1905-1906) 3 L B R 62 (64, 65): 11 Bur L R 220 F B.

(4) 1922 P C 352 (353): 49 Ind App 307: 31 Mad L Tim 193: 68 Ind Cas 900: 49 Cal 999: 21 All L J 118: 27 Cal W N 156: 43 Mad L Jour 765: 18 Mad L W 56: 1923 Mad W N 526: 37 Cal L Jour 86 P C.

(5) *Kishori Mohan Pal* v. *Pravash Chandra Mandal*, 1924 Cal 351 (352): 72 Ind Cas 646; *Golam Gafar* v. *Goljan*, (1898) 25 Cal 109 (110); *Afzul Hossain* v. *Umda Bibi*, (1895) 1 Cal W N 93 (94); *Chhoto Rakhal Das* v. *Jogendra Narain*, (1909) 3 Ind Cas 391 (392): 10 Cal L Jour 467; *Raj Gir* v. *Iswerdhari Singh*, (1910) 5 Ind Cas 660 (662): 11 Cal L Jour 243 [Court has power to reconstruct a decree lost by fire]; *Bhajan Behary* v. *Girish Chandra*, (1913) 19 Ind Cas 410: 17 Cal W N 959. See also *Khulna Loan Co. Ltd* v. *Jnanendra Nath*, 1917 P C 85 (85): 22 Cal W N 145: 45 Ind Cas 436 P C [A decision under S 48, C P C].

(6) *Hiralal Sahu* v. *Jamuna Prasad Singh*, (1920) 57 Ind Cas 531 (532): 5 Pat L Jour 490: 1 Pat L Tim 394.

O. 20, R. 7, Notes 3—4.

High Courts, the period of limitation for an application for execution of a decree runs from the date of the judgment and not from the date on which the decree is drawn up and signed.

4. Registration Act, S. 77.—It has been held by the High Court of Madras that for the purposes of S. 77 of the Registration Act the period of 30 days is to be reckoned not from the time when the judgment is pronounced, but from the time when the decree is actually drawn up and signed.[1]

O. 20, R. 8, Note 1.

R. 8. [New.] *Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.*

Procedure where Judge has vacated office before signing decree.

Synopsis.

1. Chartered High Courts.

1. Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction (O. 49, R. 3, Cl. 5).

Where the decree was imperfect, and the judge who pronounced it had left the district and it was impossible to draw up a decree from the judgment, it was held in the undermentioned case[1] that there is no alternative but to order a new trial.

O. 20, R. 9, Note 1.

R. 9. [S. 207.] *Where* the subject-matter of the suit is immoveable property, *the decree shall contain a description of such property sufficient to identify the same*, and *where* such property *can be* identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

[1877—S. 207; 1859—S. 190.]

Decree for recovery of immoveable property.

Synopsis.

1. Scope of the rule.
2. Decree for possession of land.

Decree discrepant in area and boundaries—Whether invalid. See Note 1, Pt. (2).

Decree for possession of village—What passes under. See Note 2, Pt. (1).

1. Scope of the rule.—In suits relating to immoveable property the decree should contain a description of the property *sufficient to identify* the same and where it can be identified by *boundaries* or by *survey numbers*, the

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Note 4.

(1) *Muthia* v. *Suppan*, (1913) 20 Ind Cas 914 (915): 14 Mad L Tim 160: 38 Mad 291.

Order 20, Rule 8—Note 1.

(1) *Kishen Dyal* v. *Abdool Luteef*, (1873) 19 Suth W R 267 (268).

decree should specify such boundaries or numbers. The reason is that, otherwise, the decree may in many cases become impossible of execution by reason of the indefiniteness of the property dealt with by it.[1] O. 20, R. 9, Notes 1—2.

But the omission to comply with the strict letter of the rule does not render the decree invalid.[2] The Court can ascertain the subject upon which the decree operates, from the acts and conduct of the parties.[3]

The rule contemplates cases where the plaintiff is *able* to indicate and describe the property in suit. It does not apply to cases in which this cannot be done, *e.g.*, in suits between proprietors of contiguous lands for the *ascertainment and* fixing of boundaries, on the ground of confusion of boundaries.[4]

2. **Decree for possession of land.**—A decree for possession of a village passes with it the village account books and other documents relating to the management of the village.[1] Similarly it will pass with it any buildings or other constructions erected thereon[2] except where the defendant is not a trespasser and is entitled under law to remove the building.[3]

R. **10.** [S. 208.] *Where* the suit is for moveable property, *and* the decree *is* for the delivery of such property, *the decree* shall also state the amount of money to be paid as an alternative if delivery cannot be had. O. 20, R. 10, Note 1.

Deceee for delivery of moveable property.

[1877—S. 208; 1859—S. 191.]

Synopsis.

1. Scope of the rule.
2. "Amount of money to be paid."

1. **Scope of the rule.**—A person entitled to the delivery of moveable property from another is not bound to sue for the *delivery of the property* itself; he may sue for the *value* thereof.[1] Even if he *does* sue for the delivery

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Order 20, Rule 9—Note 1.

(1) *Ismail* v. *Lalla Dhundur*, (1876) 25 Suth W R 39 (40); *Darbaree* v. *Fatu*, (1875) 23 Suth W R 285 (285): 15 Beng L R 9 Note; *Shib Narain* v. *Ram Narain*, (1873) 20 Suth W R 142 (142) *Dwarkanath* v. *Jannobee*, (1873) 19 Suth W R 81 (82); *Dwarkanath* v. *Kunnolekant*, (1869) 12 Suth W R 99 (99): 3 Beng L R App 128; *Nathoo Singh* v. *Ram Baksh*, (1872) 18 Suth W R 34 (35); *Sristeedhur* v. *Kalee Das*, (1875) 24 Suth W R 479 (479); *Kangal Chandra Ruj* v. *Kanye Lall Ruj*, (1878) 4 Cal 69 (72); *Muhammad Sulaiman* v. *Muhammad Yar*, (1883) 6 All 30 (33): 1883 All W N 215; *Ram Lochun* v. *Munsoor Ali*, (1868) 10 Suth W R 96 (97): 1 Beng L R A C 65 [Decree for possession of a share of lands without specifying the share by boundaries is only a decree for an undivided share]. 19 Cal 312 (321, 322): 19 Ind App 69: 6 Sar 113 P C; *Bhujobat Singh* v. *Ramadhin*, (1874) 22 Suth W R 330 (331) [12 W R 99, explained] *Doyal* v. *Kauri*, (1914) 25 Ind Cas 534 (536) Cal; *Bharat Chandra Das* v. *Ramananda Deb*, (1916) 32 Ind Cas 862 (865) Cal [There is no error in leaving the ascertainment of boundaries to be decided in execution proceedings].

(2) *Abdul* v. *Khanumal*, (1910) 6 Ind Cas 941 (942): 4 Sind L R 184; *Virjivandas Madhavdas* v. *Md Ali Khan*, (1880) 5 Bom 208 (213); *Gordhan Das* v. *Raghunandan Das*, (1905) Pun Re No 74: 182 Pun L R 1905: 117 Pun W R 1905 [Decreed as the property 'in suit' whose plaint gives all the necessary details]; *Kalee Dabee* v. *Modhoosoodan*, (1871) 16 Suth W R 171 (172); *Robert Watson & Co* v. *Judistir Bauri*, (1899) 3 Cal W N 287 (*n*); *Khemamoyee* v. *Shoshee Bhusan*, (1868) 9 Suth W R 94 (96).

(3) *Secretary of State* v. *Durbijoy Singh*, (1892)

(4) *Kavasji* v. *Hormasji*, (1905) 29 Bom 73 (76, 78, 79): 6 Bom L R 782; *Wake* v. *Conyers*, (1759) 1 W & T L C (7th Edn) 170 (172); *Speer* v. *Crawter*, (1817) 2 Merivale 410 (417); *Miller* v. *Warmington*, (1820) 1 J & W 484 (492).

Note 2.

(1) *Bhavani Devi* v. *Dev Rae*, (1887) 11 Bom 485 (487).

(2) *Ram Dhone* v. *Ishanee*, (1865) 2 Suth W R 123 (125); *Juggut Mohinee* v. *Lwarka Nath Bysack*, (1882) 8 Cal 582 (590, 591).

(3) *Thakoor Chander Poramanick* v. *Ramdhone Bhuttacharjee*, (1866) 6 Suth W R 228 (229): Beng L R Sup Vol 595; *Ismail Kani Rowthan* v. *Nazarali Sahib*, (1903) 27 Mad 211 (217): 14 Mad L Jour 25.

Order 20, Rule 10—Note 1.

(1) See *Bhonajee* v. *Mt Saraswati*, 1921 Nag 176 (178): 75 Ind Cas 833.

O. 20, R. 10. Notes 1—2.

of the property, the decree need not always be for the delivery of the property in the first instance; the Court may, in proper cases, decree only the value of the property as damages.[2] Thus where the defendant is not in possession of the property claimed, the Court need not decree delivery thereof but may pass a decree for the value of such property.[3] But where the Court considers it proper to direct a restoration of the property, the decree should also state the amount of money to be paid as an alternative if delivery cannot be had.[4]

The giving of the alternative remedy does not, however, give the decree-holder any option of refusing to take delivery of the property and of insisting upon the money portion of the decree; he cannot execute his decree without having recourse to the procedure prescribed by O. 21, R. 31.[5] Nor can the judgment-debtor claim any option of either surrendering the property or paying the money decreed.[6]

The words "moveable property" in the rule, mean, *specific* moveable property such as is referred to in Arts. 48 and 49 of the Limitation Act.[7] A suit for the recovery of a certain quantity of grain payable under a *Karar* for maintenance, is not one for specific moveable property within the meaning of this rule.[8]

No decree can be passed under this rule for delivery of property against *several defendants* jointly unless there is a *combination* among them; if it is found that anyone of them took possession of the property, the decree should be made against him only, and to the extent of the property taken by him.[9]

2. **"Amount of money to be paid".**—The money to be paid as an alternative is the value of the property together with damages for the time the plaintiff has been kept out of it.[1] Where the plaintiff valued the property claimed at Rs. 1,360-0-0 and produced evidence to show that this was the value, but the defendant simply refused to accept the valuation and would not produce the articles, which, he did not deny were in his possession, it was held that, under the circumstances, the valuation made by the plaintiff ought to be accepted by the Court.[2]

Where a decree is passed in terms of an award ordering delivery of moveable property, and a part of such property is lost subsequently before delivery, the decree cannot be modified by the Court by inserting in it an order to pay the value of the property so lost.[3]

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(2) *Mussammat Rukman* v. *Ganga Ram*, 1880 Pun Re No 81.

(3) *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Co*, (1915) 29 Mad L J 342: 2 Mad L W 805: 18 Mad L Tim 236: 30 Ind Cas 840: 1915 Mad W N 644; *Murugesa Mudali* v. *Jotharam*, (1899) 22 Mad 478 (479).

(4) See *Mt Rukman* v. *Genga Ram*, 1880 Pun Re No 81; *Kasheenath* v. *Debkristo*, (1871) 16 Suth W R 240 (243, 244).

(5) *Bal Mukunda* v. *Bengal Nagpur Ry*, 1927 Cal 652 (653): 31 Cal W N 850: 103 Ind Cas 710.

(6) *Manavikraman* v. *Moyaukutti Mudaliar*, (1903) 18 Mad L Jour 444 (444).

(7) *Murugesa* v. *Jotharam*, (1899) 22 Mad 478 (481).

(8) *Bhonajee* v. *Mt Saraswati*, 1924 Nag 176 (178): 75 Ind Cas 833.

(9) *Mahabir Saran* v. *Lala Baldeo Sahai*, (1909) 1 Ind Cas 205 (206, 207) Cal.

Note 2.

(1) *Bombay Trading Corporation* v. *Mirzah Mahomed*, (1873) 19 Suth W R 123 (125): 10 Beng L R 345; *Kashi Nath Kooer* v. *Deb Kristo Ramanooj Doss*, (1871) 16 Suth W R 240 (243, 244).

(2) *Anandchandra* v. *Dhanrupmal*, 1907 All W N 227 (227); *Armory* v. *Delamire*, 1 Strange 505: 1 S M L C 356 (1903) Edn: 43 Eng Rep 664.

(3) *Ahmed Bin Sheikhessa Khalifa* v. *Shaik Essabin Khalifa*, (1893) 17 Bom 657 (661).

If there is a dispute as to the property claimed, the Court must, of course, determine it before passing the decree; it cannot leave the matter to be settled in *execution*.[4] O.20,R.10, Note 2.

O.20,R.11.

R. **11**. [S. 210] (1) *Where and in so far as* a decree *is* for the payment of money, the Court may for any sufficient reason *at the time of passing the decree* order that *payment of* the amount *decreed* shall be *postponed or shall be made* by instalments, with or without interest, *notwithstanding anything contained in the contract under which the money is payable.*

Decree may direct payment by instalments.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that *payment of* the amount decreed *shall be postponed or shall be made* by instalments on such terms as to the payment of interest, the attachment of the property of the *judgment-debtor*, or the taking of security from him, or otherwise, as it thinks fit.

Order after decree, for payment by instalments.

[1877—S. 210; 1859—S. 194.]

Local Amendments.

MADRAS.

Substitute the following *for* Rule 11:—

"**11.** (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which money is payable.

(2) After the passing of any such decree, the Court may, on the application of the judgment-debtor and *after notice* to the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit."

NAGPUR.

In sub-Rule (2) of Rule 11 in Order 20 *for* the words "and with the consent of the decree-holder", the words "and after notice to the decree-holder" shall be *substituted*.

RANGOON.

The following amendment shall be made to the second sub-section of R. 11:—

For the words "and with the consent of the decree-holder", *substitute* the words "and after notice to the decree-holder."

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(4) *Sheo Gobind* v. *Sham Narain*, (1875) 7 N-W P H C R 75.

O.20, R.11, Notes 1—2

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Decree must be for the payment of money.
4. "The Court."
5. Postponement of payment.
6. Order for payment by instalments.
7. Sufficient reason.
8. "Notwithstanding anything contained in the contract under which money is payable."
9. "With or without interest."
10. Order for instalments after decree—Sub-Rule (2).
11. Taking of security.
12. Limitation for application under sub-Rule (2).
13. Limitation for execution of decree passed under this rule.
14. Appeal.

Appeal—Court-fee. See Note 14, Pt. (5).
Decrees under O. 34, R. 6—Applicability of rule. See Note 3, Pt. (1).
Decree with a default clause—Limitation. See Note 13, Pts. (2), (3) and (4).
Default clause—Waiver. See Note 13, Pts. (10) to (14).
Instalment decree—When not to be passed. See Note 7, Pts. (2) to (7).
Proper Court to act under this rule. See Note 4, Pt. (1).
Rent decrees under the Bengal Tenancy Act—Applicability of rule. See Note 2, Pt. (5)
Rule whether applies to mortgage decrees. See Note 2, Pt. (2).

1. Legislative changes.—

1. The words "shall be postponed" in sub-Rules (1) and (2) are new. Owing to the absence of these words in the old Code, the Court could not order that the decree amount shall not be paid until the expiration of a fixed time.[1]
2. The words "notwithstanding anything contained . . . . payable" are also new. *See* Note 7, *infra*.
3. For the words "in all decrees" the words "where and in so far as a decree" have been substituted.
4. The proviso in the old section has been omitted.

2. Scope of the rule.—Where a decree in a suit is for the payment of money, the Court may, under this rule, order the payment of the decree amount to be postponed or to be made in instalments.[1] If it decides to pass such order *at the time of passing* the decree, it may do so if there are sufficient grounds therefor [sub-R. (1)[1-a]]. *After the passing of the decree*, it can pass such an order, only if the decree-holder gives his consent thereto [sub-Rule (2)].[1-b]

The rule applies to decrees for the *payment of money*. It does not apply to decrees for recovery of money by sale of property, as in the case of mortgage-decrees.[2] But independently of this rule, a decree may, in a suit on

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Order 20, Rule 11—Note 1.

(1) *Bachchu* v. *Madad Ali*, (1878-80) 2 All 649 (651).

Note 2.

(1) See also *Poma Dongra* v. *William Gillespie*, (1907) 31 Bom 348 (353): 9 Bom L R 143.

(1-a) *Pestonji* v. *Jamsethji*, 1926 Bom 250 (251): 28 Bom L R 138: 94 Ind Cas 9: 50 Bom 262.

(1-b) *Chandan* v. *Tirla*, (1880) 3 All 809 (811): 1881 All W N 78: 6 Ind Jur 318 [Decree-holder's remedy against the surety held barred]; *Ravi Chand* v. *Moti Lal*, (1866-67) 4 Bom H C 77; *Shankarappa* v. *Danapa*, (1880-81) 5 Bom 604 (608); *Digumbree* v. *Nundgopal*, (1864) 1 Suth W R (Mis) 1 (1); *Gopi Mal* v. *Ahmed Hassan*, (1879) Pun Re No 144. But see *Judoobunsee* v. *Makhan Comaree*, (1864) 1 Suth W R (Mis) 6 (6) [Peculiar circumstances].

(2) *Hardeo Dass* v. *Hukam Singh*, (1879) 2 All 320 (322): 4 Ind Jur 415; *Binda Prasad* v. *Madho Prasad*, (1878-80) 2 All 129 (132, 133): 3 Ind Jur 518; *Shankarappa* v. *Danapa*, (1880-81) 5 Bom 604 (608); *Mahadaji* v. *Hari*, (1883) 7 Bom 332 (335); *Balwant* v. *Babaji*, (1886) Bom P J 90; *Amir Chand* v. *Karm*, (1887) Pun Re No 49; *Bachchu* v. *Madad Ali*, (1899) 2 All 649 (651) [Decree in suit to enforce a lien on an annuity called Nankar]. See however, *Bhola Singh* v. *Kishore Chand*, (1913) 20 Ind Cas 8 (10): 147

a mortgage or for partition, be passed on a *compromise* between the parties, providing for payment by instalments and for sale of the mortgaged property in default.[3] O.20, R.11, Notes 2—6

This rule does not apply to cases coming under the Dekkhan Agriculturists' Relief Act[4] or rent decrees under the Bengal Tenancy Act.[5] In a suit for arrears of rent under the Agra Tenancy Act against a person other than a permanent tenure-holder or a fixed rate tenant, the Revenue Court cannot make a decree payable by instalments under this rule.[6]

3. Decree must be for the payment of money.—A decree for deficiency passed under O. 34, R. 6 of the Code is only a decree for the payment of money within the meaning of this rule.[1]

4. "The Court."—It is the Court which *passed the decree* that can act under this rule.[1] In cases coming under the Dekkhan Agriculturists' Relief Act, however, it is provided by S. 15-B of that Act that the Court which *carries out the decree* can order the payment by instalments or extend the time for payment.[2]

5. Postponement of payment.—Under S. 210 of the old Code, there was a conflict of opinion as to whether the Court could make an order *postponing* the payment under a decree.[1] The introduction of the words "shall be postponed" in this rule makes it clear, that such an order can be passed.

A judgment-debtor who has enjoyed the benefit of the arrangement for delay in execution by virtue of an order passed under this rule, cannot subsequently resile from such arrangement.[2]

6. Order for payment by instalments.—*See* Note 2 above.

A decree payable in instalments on a certain condition (*e.g.*, that the defendant should mortgage certain property by way of security) is not illegal on that ground.[1] As to the construction of decrees for payment of money in instalments, *see* the undermentioned cases.[2]

Pun L R 1913: 157 Pun W R 1913. See also *Karvalho* v. *Burbibi*, (1878-79) 3 Bom 202 (203): 4 Ind Jur 32 [Where it is not clear whether a decree was passed simply for recovery of money].

(3) See *Abir Pramanik* v. *Jahor Mahomed*, (1907) 34 Cal 886 (890-891): 6 Cal L Jour 95: 11 Cal W N 879; *Vishnu* v. *Sadashiv*, 1925 Bom 509 (510): 27 Bom L R 943: 89 Ind Cas 889; *Mustafa Begam* v. *Sirajul Nisa*, (1916) 32 Ind Cas 693 (693) All [Partition].

(4) *Bhagirathibai* v. *Hari Ravji Chiplunkar*, (1895) 19 Bom 318 (320).

(5) *Shib Narain* v. *Bykuntha Nath*, (1907) 11 Cal W N 857 (858).

(6) *Harak Chand* v. *Mt Najida Begum*, 1932 All 486 (437): 1932 All L J 315: 138 Ind Cas 254.

Note 3.

(1) *Bidhasekhar* v. *Mahtabuddin*, (1911) 11 Ind Cas 736 (736): 15 Cal W N 1083.

Note 4.

(1) *Chidambaram Chettiar* v. *Krishna Vathiyar*, (1917) 37 Ind Cas 836 (838, 840, 841): 40 Mad 233: 21 Mad L Tim 24: 5 Mad L W 132: 1917 Mad W N 44: 32 Mad L Jour 13; *Gandharap* v. *Sheodarshan*, (1890) 12 All 571 (577): 1890 All W N 197; *Mahadaji* v. *Hari*, (1883) 7 Bom 332 (335); *Gobardhan Prasad* v. *Bishnunath Prasad*, 1921 Pat 340 (340): 2 Pat L Tim 80: 1920 Pat H C C 229: 58 Ind Cas 393; *Gobardhan Das* v. *Dan Dayal*, 1932 All 273 (282): 1932 All L J 365: 138 Ind Cas 583.

(2) *Bhagirathibai* v. *Hari Ravji Chiplunkar*, (1895) 19 Bom 318 (320).

Note 5.

(1) *Palaniappa* v. *Velayutha*, (1910) 5 Ind Cas 421 (422): 1910 Mad W N 1: 7 Mad L Tim 151 [Yes under its inherent powers]; *Tata Chadu* v. *Ramachandra*, (1884) 7 Mad 152 (154) No; *Bachchu* v. *Madad Ali*, (1880) 2 All 649 (650) (No).

(2) *Subbaraya* v. *Ramaswami*, (1912) 13 Ind Cas 204 (205): 22 Mad L Jour 166: 11 Mad L Tim 18: (1912) 1 Mad W N 9 and 458.

Note 6.

(1) *Sheo Sahai* v. *Hara Prashad*, 1927 Oudh 236 (236): 1 Luck Cas 75: 101 Ind Cas 816.

(2) *Shamkishen* v. *Run Bahadur*, (1888) 15 Cal 751 (755): 12 Ind Jur 255; *Ballishen Das* v. *Run Bahadur*, (1884) 10 Cal 305 (310, 311): 10 Ind App 162: 13 Cal L Rep 392: 7 Ind Jur 554: 4 Sar 465 P C; *Mansadebi* v. *Jiwan-*

O.20, R.11, Notes 7—8.

7. **Sufficient reason.**—The Court has a discretion, under this rule, to order payment of the decree amount in instalments. But such discretion should, as in the case of the exercise of all discretion under the Code, be exercised in a *judicial* and not in an arbitrary manner.[1] The *onus* is on the defendant to show that he is entitled to the indulgence under this rule: where he has opposed the claim on frivolous grounds and effected a fraudulent conveyance of his property, subsequent to the institution of the suit, he deserves no consideration at the hands of the Court especially where the interest agreed upon between the parties is moderate.[2] Nor should a decree be passed the effect of which is to stay execution unconditionally,[3] or to make the instalments extend over a long period without guaranteeing satisfaction or making any provision for the payment of interest.[4] Again, the mere fact that the defendant is unable to pay or is hard pressed or embarrassed,[5] or that his estate is under the management of Court of Wards,[6] or that he is expecting to get a cross decree against the plaintiff in a pending litigation which would enable him to claim a set-off,[7] is not a sufficient reason to enable the Court to order payment by instalments or to postpone payment.

Where, however, the rate of interest is exhorbitant or unconscionable,[8] or where the decree for immediate payment will deprive the defendant of his means of livelihood,[9] or where the defendant has made payments towards principal and interest, which exceed the principal sum,[10] a decree for instalments can be properly passed. Again a lender who abandons his proper remedy in order to avoid the consequence of the original contract is not entitled to the relief prayed for under this rule, if it would be a hardship to the judgment-debtor.[11]

8. **"Notwithstanding anything contained in the contract under which money is payable".**—Where an instalment bond provided for payment by instalments, with a default clause to the effect that the whole sum would be due immediately on default, and a suit was brought for the whole amount on default, it was held by the Bombay High Court under S. 210 of the old Code, that the Court had no jurisdiction to ignore the express contract of the parties

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lal, (1887) 9 All 33 (34): 1886 All W N 248 [Decree for maintenance by payment of a fixed rate per mensem for life stands exactly on the same footing as a decree ordering payment by instalments—But see 15 Ind Cas 389].

Note 7.

(1) *Balgobindram Bhakat* v. *Chhedilal Saha*, (1910) 6 Ind Cas 552 (552, 553): 11 Cal L Jour 431; *Mohesur* v. *Jhubbo*, 2 Hay 68; *Subatullah* v. *Thompson*, 1 Hyde 98; *Ramgopal* v. *Ram Tonoo*, (1866) 6 Suth W R 89 (89).

(2) *Gela Ram* v. *Jhangi Ram*, (1923) 71 Ind Cas 303 (304).

(3) *Sundaram Mudaliar* v. *O Muthuswami Pillai*, 1925 Mad 908 (909): 21 Mad L W 635: 88 Ind Cas 439.

(4) *Jafree Begum* v. *Ahmed Hossein*, (1866) 1 Agra 270 [Instalments extending over 20 years]; *Binda* v. *Madho*, (1878-80) 2 All 129 (131, 134): 3 Ind Jur 518 [Instalments extending over 10 years]; *B Hurgobind* v. *Hurkho*, (1866) 1 Agra H C R 116 [Instalments hardly sufficient to cover interest].

(5) *Sundaram Mudaliar* v. *Muthuswami Pillai*, 1925 Mad 908 (909): 21 Mad L W 635: 88 Ind Cas 439; *Binda* v. *Madho*, (1878-80) 2 All 129 (131, 134): 3 Ind Jur 518; *Md Akbar Khan* v. *Kasturachand*, (1906) 2 Nag L R 179 (187); *Bal Gobind Ram* v. *Chhedilal Saha*, (1910) 6 Ind Cas 552 (553): 11 Cal L Jour 431; *Bishen Chand* v. *Jang Bahadur*, 1882 All W N 102 (102).

(6) *Wali Dad Khan* v. *Mani Ram*, 1923 Lah 256 (256): 73 Ind Cas 800: 5 Lah L Jour 571.

(7) *Chuniram Kanhaiya Lal* v. *Bhagwan Das*, 1926 Lah 604 (605): 7 Lah 393: 27 Pun L R 562: 97 Ind Cas 769.

(8) *Poma Dongra* v. *Gilespie*, (1907) 31 Bom 348 (353): 9 Bom L R 143.

(9) *Thomas A Chapple* v. *E Y Mamsa Brothers*, 1925 Rang 33 (33): 3 Bur L Jour 97: 82 Ind Cas 827.

(10) *Govindjee* v. *Ko Po Vee*, (1911) 11 Ind Cas 891 (893): 4 Bur L Tim 203.

(11) *Alaneappa Chetty* v. *Mirajam Bee*, (1900-1902) 1 L B R 81 (81) [Equitable mortgage].

as to the consequences of such default and pass a decree for instalments.[1] The introduction of the words "notwithstanding anything contained in the contract under which money is payable" in the present rule now makes it clear that the Court has a discretion to pass a decree for instalments notwithstanding the contract between the parties. In their Statements of Objects and Reasons, the Special Committee observe as follows:— **O.20, R.11. Notes 8—10.**

> "The Committee have added words to sub-Rule (1) of this rule in order to override the ruling of the Bombay High Court in the case of *Raghu Govind Paranjpe* v. *Dipchand* (I. L. R. 4 Bom. 96), as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India."

9. "With or without interest".—The granting or refusal of interest, and the rate at which it is to be granted on the instalments ordered to be paid, are in the *discretion* of the Court.[1] Where no interest is provided for in an instalment decree, it must, under the provisions of S. 34 of the Code be deemed to have been refused, and cannot be granted by the executing Court.[2] Where however, interest is provided for in the decree, but the *rate* is not mentioned, the Court can, in execution grant the usual *Court rate* of interest.[3]

10. Order for instalments after decree—Sub-R. 2.—As has been seen in Note 2 *ante*, no order for instalments can be made after the passing of the decree under this sub-rule unless the decree-holder gives his *consent* thereto. But the consent need not be an express one. It was held in the undermentioned case that the non-opposition by the decree-holder after notice to him may amount to consent within this rule.[1]

An order for postponement or for instalments this sub-rule does not amount to a variation of the decree itself[2] and can be made in execution proceedings[3] or even when an appeal is pending from the decree.[4] Nor does the rule direct the decree to be amended by virtue of such order.[5] Where default is committed in the payment of instalments ordered to be paid, the Court can grant relief against forfeiture,[6] though it cannot alter the terms

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Note 8.

(1) *Ragho Gobind Paranjpe* v. *Dip Chand*, (1879-80) 4 Bom 96 (100): 4 Ind Jur 577. See also *Baldeo Das* v. *Dassundhi Khan*, 1901 Pun L R 187; *Luchmenath Doogur* v. *Haradhun Mookerjee*, 2 Hay 95.

(1884) 7 Mad 152 (154, 155).

(2) *A Khatoon* v. *Meer Mahomed Hossein*, (1878) 2 Cal L Rep 143 (146). See however *Gobardhan* v. *Dan Dayal*, 1932 All 273 (280): 1932 All L J 365: 138 Ind Cas 583 F B.

(3) *Sidagavada* v. *Ramachandra*, 1924 Bom 118 (119).

(4) *Balakrishnan* v. *Krishnamurthi*, 1927 Mad 116 (420): 52 Mad L Jour 182: 38 Mad L Tim 143: 1927 Mad W N 202: 100 Ind Cas 841.

(5) *Perumal Naicker* v. *Dawood Rowther*, (1916) 34 Ind Cas 393 (394) Mad [Such order, however, was held in substance to be one amending the decree—This view it is submitted is not correct. A decree cannot be varied or altered except under S 152 on review].

(6) *Narsinha Gopal* v. *Balvant Madho*, 1922 Bom 170 (171): 46 Bom 463: 61 Ind Cas 570: 23 Bom L R 1238. See also *Krishna Rao* v. *Balvant*, 1925 Bom 404 (405): 27 Bom L R 678: 89 Ind Cas 217.

Note 9.

(1) *Carvalho* v. *Nurbibi*, (1879) 3 Bom 202 (203): 4 Ind Jur 32 [6 per cent. interest awarded —High Court refused to interfere].

(2) See Note 17 to S 34. See also *Surno Moyee Dassee* v. *Kishan Goonaree Bibee*, (1870) 14 Suth W R 324 (324).

(3) See Note 17 to S 34. See also *Madhub Lal* v. *Nogan*, (1880) 6 Cal L Rep 231 (232). See also *Narendra Chandra Lahiri* v. *Charu Chandra Singh*, (1910) 5 Ind Cas 63 (64): 14 Cal W N 116 [Compromise decree for instalments].

Note 10.

(1) *Tata Charlu* v. *Konadala Ram Chandra*,

O.20, R.11. Notes 10—13.

of the decree either with regard to the decretal amount or the rate of interest which is to be paid thereon.[7]

Where parties agree after decree that the decretal amount should be paid by instalments and the Court accepting the compromise, passes an order striking off the execution proceedings, the Court must be deemed to have passed an order under the provisions of this sub-rule.[8] But unless recognised by the Court in some form, the arrangement between the parties will not, by itself, amount to a direction by the Court under this rule[9] and cannot be enforced in execution.[10]

11. Taking of security.—The security that may be taken under sub-R. 2 for the due performance of the decree can be enforced in *execution* and O. 34, R. 14 is no bar thereto.[1]

Where by an order under the sub-R. 2 the judgment-debtor was to execute a mortgage to the decree-holder the subsequent adjudication of the judgment-debtor as an insolvent could not affect the rights of the decree-holder to have the mortgage executed in his favour.[2]

12. Limitation for application under sub-R. 2.—An application under this sub-rule for postponement or for payment in instalments of the decree amount should be made within six months of the decree, under Article 175, Schedule I of the Limitation Act.[1] But if an order for instalments is actually passed on a time-barred application, it is not a nullity. It must be assumed that the Court, by oversight decided the question of limitation wrongly.[2] Where there has been an appeal from a decree the time for the application for an order for instalments runs only from the date of the decree of the *appellate Court* even though the latter confirmed the judgment of the lower Court and dismissed the appeal.[3]

13. Limitation for execution of decree passed under this rule.—Where a decree is payable by instalments without any provision therein as to what

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(7) *Raghunath* v. *Narayan*, 1926 Bom 368 (368): 28 Bom L R 543: 95 Ind Cas 267; *Meheroonnissa* v. *R Raoshan Jehan*, (1872) 17 Suth W R 396 (397, 400); *Kristo Komul* v. *Huree Sirdar*, (1870) 13 Suth W R 44 (47) F B; *Ram Runjun* v. *Jokhurujumah Khan*, (1875) 23 Suth W R 129 (130).

(8) *Banarsi Das* v. *Ramzan Raj Bibi*, 1923 Lah 381 (382): 73 Ind Cas 671; *Joti* v. *Bhuban*, (1885) 11 Cal 143 (145); *Kedar Nath* v. *Kulman Sardar*, (1907) 5 Cal L Jour 25 (26, 27): *Ganga* v. *Murlidhar*, (1882) 4 All 240 (242): 1882 All W N 24; *Champat Rai* v. *Pitambar Das*, (1884) 6 All 16 (18): 1883 All W N 174: *Makund Ram* v. *Makund Ram*, (1884) 6 All 228 (230): 1884 All W N 41: 8 Ind Jur 523; *Nabi Bakhsh* v. *Gori Mal*, 1900 Pun Re No 96: 23 Pun L R 1901 [Application after decree for an order for payment by instalments was treated as one under this sub-rule]. See *Jagobundhoo Dass* v. *Hori Rawoot*, (1888) 16 Cal 16 (18) [But a mere order for stay for 15 days to enable judgment-debtor to pay is not an order under this rule].

(9) *Abdul Rahaman* v. *Bullaram*, (1887) 14 Cal 348 (350): 11 Ind Jur 377.

(10) *Debi Rai* v. *Gokul Prasad*, (1881) 3 All 585 (588, 589): 1881 All W N 42 F B; *Ramlakhan Rai* v. *Bakhtom Rai*, (1884) 6 All 623 (625).

Note 11.

(1) *Official Receiver* v. *Nagaratna*, 1926 Mad 194 (197, 200): 49 Mad L Jour 643: 1925 Mad W N 907: 92 Ind Cas 497; *Vishnu* v. *Sadashiv*, 1925 Bom 509 (510): 27 Bom L R 943: 89 Ind Cas 889; *Surno Moyee* v. *Kishen Coomaree*, (1870) 14 Suth W R 324 (324) [Sale of property in execution is to be preferred to realisation through a Receiver].

(2) *Allan Brothers* v. *Shaik Jooman & Sons*, 1925 Rang 189 (191): 2 Rang 673: 85 Ind Cas 291: 4 Bur L Jour 32.

Note 12.

(1) See also *A Rahman Sodagur* v. *Bullaram Marwani*, (1887) 14 Cal 348 (350): 11 Ind Jur 377; *Banarsi Das* v. *Ramzan*, 1924 Lah 342 (344): 72 Ind Cas 477; *Nanak Chand* v. *Anant Ram*, 1894 Pun Re No 26.

(2) *Gobardhan Das* v. *Dau Dayal*, 1932 All 273 (281): 1932 All L J 365: 138 Ind Cas 583 F B.

(3) *Abdul Karim* v. *Maung San Kyaw*, 1932 Rang 54 (55): 135 Ind Cas 858.

is to happen on default of payment of such instaiments regularly, the period of limitation for enforcing the payment of each instalment runs from the date on which it falls due and the period of limitation is three years from such date under Article 182, Cl. 7 of the Limitation Act.[1] O.20, R.11, Note 13.

Where, however, a default clause is inserted in the decree to the effect that on failure to pay one instalment, the whole of the decretal amount *shall become due* or that the decree-holder *shall be entitled* to execute the decree for the whole amount, the following questions arise for consideration:—

(1) Whether time for the execution of the decree for the whole amount runs from the date of the *first* default,

(2) Whether such default can be *waived* by the decree-holder,

(3) What constitutes waiver.

On the first point, it has been held by the High Courts of Allahabad and Patna that where an instalment decree provides that on default of payment of one instalment the whole *shall* be recoverable, time for the recovery of the whole amount runs from the date of the *first* default, but that where the decree provides that on such default the decree-holder *might* or is at *liberty* to execute the decree for the whole amount, the decree-holder has an *option* to execute the decree or not for the whole amount and limitation does not run from the date of the first default if he does not exercise his option.[2] This distinction between decrees providing that on default the decree-holder *shall* execute and decrees providing that the decree-holder *may* execute for the whole amount has not been accepted by other High Courts and according to them, time runs from the date of the first default whether the provision in the decree is that the decree-holder shall execute or whether it is that the decree-holder may execute for the whole amount on default of payment of instalments.[3] In any view, if the decree-holder *has elected* to exercise the option, time, for the whole amount, will run from the date of the default.[4]

On the second point, it was held in the undermentioned cases[5] that where the decree provides that the decree-holder *shall* execute his decree on

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Note 13.

(1) *Utamram* v. *Girdhari Lal*, (1869) 6 Bom H C A C 45; *Ram Sudoy* v. *Rajbullubh*, (1871) 15 Suth W R 547 (547); *Tincowree* v. *Umbika Chunder*, (1875) 23 Suth W R 41 (41); *Lakshmibai* v. *Madhavrav*, (1888) 12 Bom 65 (67); *Kuppammal* v. *Sammatha Iyer*, (1895) 18 Mad 482 (483); *Sakharam* v. *Ganesh*, (1879) 3 Bom 193 (198); *Panamchand* v. *Bhivraj*, (1869) 6 Bom H C R 33; *Kaveri* v. *Venkamma*, (1891) 14 Mad 396 (398).

(2) *Shankar Prasad* v. *Jalpa Prasad*, (1894) 16 All 371 (372-373); 1894 All W N 115; *Kishan* v. *Aman*, (1895) 17 All 42 (45); 1894 All W N 198; *Budhu Lal* v. *Rekkhab*, (1889) 11 All 482 (485, 486); 1889 All W N 186; *Kanchan Singh* v. *Sheo Prasad*, (1878-80) 2 All 291 (293); *Lachmi Narain* v. *Sarju Parshad*, (1917) 38 Ind Cas 634 (635); 15 All L J 102; 39 All 230; *Manindra Nath* v. *Kanhai Ram*, (1918) 48 Ind Cas 728; 1919 Pat H C C 46; 4 Pat L Jour 365; *Zahur Khan* v. *Baktawar*, (1905) 7 All 327 (330); 1885 All W N 26; *Sham Lal* v. *Kanahia Lal*, (1882) 4 All 316 (317); 1882 All W N 47.

(3) *Hurri Pershad Chowdhry* v. *Nasib Singh*, (1893) 21 Cal 542 (547); *Hurronauth Roy* v. *Mahcroollah Moollah*, (1867) 7 Suth W R 21 (22); Beng L R Sup Vol 618 F B, *Mon Mohan Rai* v. *Durga Charun Gooee*, (1888) 15 Cal 502 (507) [Dissenting from 13 Cal L Rep 213 and referring to 5 Cal 97; 7 Cal 56; 9 Cal 857 and 14 Cal 352]; *Bholanand* v. *Padmanand*, (1902) 6 Cal W N 348 (350); *Chand* v. *Hyder*, (1879) 24 Cal 281 (282, 286); 1 Cal W N 229; *Rai Chand* v. *Dhondu Lexman*, (1918) 47 Ind Cas 313 (314); 20 Bom L R 773; 42 Bom 728; *Appaya* v. *Papayya*, (1881) 3 Mad 256 (258); 6 Ind Jur 190.

(4) *Pandurang* v. *Mahader*, 1931 Bom 263 (263); 33 Bom L R 459; 132 Ind Cas 437. *Bir Narain* v. *Darpa Narain*, (1893) 20 Cal 71 (78).

(5) *Shib Dat* v. *Kalka Prasad*, (1878-80) 2 All 443 (444); 4 Ind Jur 580; *Judhistir Patro* v. *Nobin Chandra*, (1886) 13 Cal 73 (75); *Hate Devchand* v. *Narofi*, 1894 Bom P J 407.

O.20, R.11, Note 13.

default, the default cannot be waived so as to affect limitation. The general view, however, is that the default can be waived by the decree-holder, and that on such waiver, time will run only from the date of the next default which is not waived.[6] According to the Calcutta High Court the principle of waiver by acceptance of subsequent payments has been engrafted upon the general rule as an *exception* in certain cases and that, if the right to enforce payment of the whole sum due upon default has been waived, "then the penalty having been waived the parties are remitted to the same position as they would have been in, if no default had occurred".[7] According to the Bombay High Court, the operation of subsequent payment and acceptance should not be treated as an exception to the general rule, but as analogous to the doctrine of *estoppel* under which "if each of the parties, has by his acts intentionally caused the other to believe that the payment was a regular satisfaction of the obligation and the parties acted on that belief, neither can afterwards deny the regularity".[8] This view has been adopted in the cases cited below.[9]

On the third point the following views have been expressed:—

(1) There can be no waiver save by payment and acceptance of overdue instalments.[10]

(2) The acceptance of a *portion* of an overdue instalment is not sufficient to constitute waiver.[11]

(3) The acceptance of an overdue instalment does not *necessarily* amount to a waiver in all cases. It depends upon the facts and circumstances of each case[12] though payments accepted will be *evidence* of waiver.[13]

(4) Mere abstinence from suing cannot amount to waiver of the default.[14]

See also Articles 75 and 132 of the Limitation Act and the undermentioned cases under those articles.[15]

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(6) *Moumohun* v. *Durga Churn*, (1888) 15 Cal 502 (505, 506, 507); *Rajeswara* v. *Hari Babandhu*, (1896) 19 Mad 162 (164); *Buddhu Lal* v. *Rekhhab Das*, (1889) 11 All 482 (485): 1889 All W N 186; *Gopal Mal* v. *Firm, Gopal Singh*, 1926 Lah 632 (632): 96 Ind Cas 784; *Radha Prosad* v. *Bhagwan Rai*, (1883) 5 All 289 (292, 293): 1883 All W N 33. See also the cases in foot-notes (8) and (9) below.

(7) *Mon Mohan Rai* v. *Durga Churn Gooee*, (1888) 15 Cal 502 (505).

(8) *Kashiram* v. *Pandu*, (1903) 27 Bom 1 (11, 13, 20): 4 Bom L R 688 F B [Overruling 2 Bom 366 and dissenting from 17 Bom 555].

(9) *Ballabhdas* v. *Dalip Singh*, (1911) 12 Ind Cas 741 (744): 7 Nag L R 147; *Bhagwandas* v. *Meahraj*, (1918) 45 Ind Cas 324 (324): 11 Sind L R 120; *Shafi Mahomed* v. *Choitram*, (1919) 52 Ind Cas 801 (813): 13 Sind L R 37.

(10) *Hurri Pershad* v. *Nasib Singh*, (1894) 21 Cal 542 (547).

(11) *Mohesh Chandra* v. *Prosanna Lal*, (1904) 31 Cal 83 (87): 8 Cal W N 66; *Srinivasa* v. *Sheo Gobind*, (1913) 20 Ind Cas 156 (157) Cal.

(12) *Kashiram* v. *Pandu*, (1903) 27 Bom 1 (11, 13, 20): 4 Bom L R 688; *Ballabhdas* v. *Dalip Singh*, (1911) 12 Ind Cas 741 (744): 7 Nag L R 147; *Bhagwan Dass* v. *Meghraj*, (1918) 45 Ind Cas 324 (324): 11 Sind L R 120.

(13) *Rajeswara Rau* v. *Hari Babandhu*, (1895) 19 Mad 162 (164).

(14) *Hurri Pershad* v. *Nasib Singh*, (1894) 21 Cal 542 (547); *Raichand Motichand* v. *Dhond Laxuman*, (1918) 42 Bom 728: 20 Bom L R 773: 47 Ind Cas 313 (314); In re *Cheni Bash* v. *Kadum Mundal*, (1879) 5 Cal 97 (100): 4 Ind Jur 517; *Girindra Mohan Roy* v. *Bocka Das*, (1909) 36 Cal 394: 13 Cal W N 1004: 9 Cal L Jour 226: 1 Ind Cas 49 (52); *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty*, (1903) 31 Cal 297 (299).

(15) *Gyae Chund* v. *Jawahur*, (1870) 2 N W P H C R 83 [Payment and acceptance of an overdue instalment is waiver]; *Mumford* v. *Peal*, (1878-80) 2 All 857 (864, 865) [Acceptance of payment after default does not constitute waiver]; *Ajudhia* v. *Kunjal*, (1908) 30 All 123 (125): 5 All L J 72: 1908 All W N 36; *Maharaja of Benares* v. *Nand Ram*, (1907) 29 All 431 (433): 4 All L J 336: 1907 All W N 139; *Baburam* v. *Jodha*, (1913) 18 Ind Cas 690 (691): 11 All L J 89 [First default starts limitation]; *Wezarat Husain* v. *Mohan Lal*, 1921 All 318 (320): 43 All 38: 58 Ind Cas 7: 18 All L J 776, (Do.); *Ramkrishna* v. *Bavaji Santaji*, (1868-69) 5 Bom H C R A C 35 [Acceptance of overdue payments

O.20, R.11. Note 14.

14. Appeal.—An order passed under this rule *refusing* to allow the payment of the decretal amount in instalments is not appealable under O. 43, R. 1. It must be regarded as a matter separate from, and not forming part of the decree.[1] An order *granting* a decree for instalments or postponing the time for payment of the decretal amount under sub-R. 1 will of course be incorporated in the decree itself and can therefore be attacked in an appeal against the *decree*.[2] If, however, it is not so incorporated it will not be appealable.[2-4] An order for instalments made under sub-R. (2) must necessarily be one made *after* the decree and on the *consent* of the decree-holder. No appeal can lie against such consent order.[3] In Rangoon, however, by virtue of the amendment of sub-R. (2), an order can be passed after decree for payment in instalments, after *notice* to the decree-holder and *without his consent*. The order not being a *consent* order, and being one in execution discharge or satisfaction of the decree within the meaning of S. 47 is appealable as a *decree*.[4]

As to the Court-fee payable on a memorandum of appeal against an instalment-decree, *see* the case noted below.[5]

O.20, R.12.

R. **12**. [Ss. 211 and 212.] (1) *Where* a suit is for the recovery of possession of immoveable property and *for rent or* mesne profits[2], the *Court* may *pass a decree*

Decree for *possession and* mesne profits.

(*a*) *for* the possession of the property;

(*b*) *for* the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit *or directing* an inquiry *as to such rent or* mesne profits;

(*c*) *directing an inquiry as to* rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the *decree-holder*,

(ii) *the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court*,[10] *or*

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is waiver]; *Kankuchand* v. *Rustomji*, (1896) 20 Bom 109 (113) [Mere inaction, delay and even the receipt of an overdue instalment does not *per se* amount to a waiver]; *Rup Narain* v. *Gopinath*, (1907) 11 Cal W N 903 (904); *Girindra Mohan* v. *Bocha Das*, (1909) 36 Cal 394 (403, 404): 13 Cal W N 1004: 9 Cal L Jour 226: 1 Ind Cas 49 [Mere abstinence from suing does not amount to a waiver]; *Papamma Row Garu* v. *Toleti Venkaiya*, (1869-70) 5 Mad H C R 198 (199); *Sitarama* v. *Cotta Krishnasami*, (1913) 21 Ind Cas 24 (27): 38 Mad 374: 1913 Mad W N 676: 25 Mad L Jour 264 [Refraining to sue will not itself constitute waiver].

Note 14.

(1) *Prem Nath* v. *Bana Mal*, 1928 Lah 931 (931): 10 Lah L Jour 453: 113 Ind Cas 239.

(2) *Md Ibrahim* v. *Subbiah*, (1913) 20 Ind Cas 673 (673): 6 Bur L Tim 133: 7 L B R 71; *Bhup Chand* v. *Ude Ram*, 1922 Lah 355 (355): 66 Ind Cas 147: 27 Pun W R 1922: 5 Lah L Jour 135; *Maung Po Maik* v. *Kasi Chettiar*, 1931 Rang 152 (152): 133 Ind Cas 233; *Bidhusekhar* v. *Sudhurn*, (1911) 11 Ind Cas 736 (737): 15 Cal W N 1083 [Discretion will not be interfered with in second appeal].

(2-a) See *Maing Po Maik* v. *Kasi Chettiar*, 1931 Rang 152 (152): 133 Ind Cas 233.

(3) *Saya Hattie* v. *Ma Pua Sa*, 1926 Rang 192 (192): 4 Rang 247: 5 Bur L Jour 143: 97 Ind Cas 1037.

(4) *Saya Hattie* v. *Ma Pua Sa*, 1926 Rang 192: 4 Rang 247: 5 Bur L Jour 143: 97 Ind Cas 1037; *U Shwe Yone* v. *Ma Yhal Ma*, 1929 Rang 191 (192): 119 Ind Cas 751.

(5) *Gobind Lal* v. *Rao Baldeo Singh*, (1914) 24 Ind Cas 931 (932): 226 Pun L R 1914: 128 Pun W R 1914: 12 Pun Re 1915.

O.20, R.12, Note 1.

(iii) the expiration of three years from the date of the decree,[11] whichever event first occurs.

(2) *Where an inquiry is directed under clause* (b) *or clause* (c), *a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.*

[1877—Ss. 211, 212; 1859—Ss. 196, 197. *See* Ss. 2 (12) & 144.]

Local Amendment.

MADRAS.

Add the following to Rule 12:—

"(3) Where an appellate Court directs such an inquiry, it may direct the Court of First Instance to make the inquiry; and in every case the Court of First Instance shall, on the application of the decree-holder, inquire and pass the final decree."

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Rule applies only where specific interest in land is claimed.
4. Enquiry as to mesne profits is no longer a proceeding in execution.
5. Mesne profits.
6. Interest forming part of mesne profits.
7. Value of mesne profits if affects jurisdiction.
8. Court-fees.
9. Right to apply for ascertainment of future mesne profits when arises.
10. Notice of relinquishment—Sub-clause (c).
11. Three years from the date of the decree.
12. Limitation.
13. Res judicata.
14. Order after preliminary decree determining period and mode of accounting, if a decree.
15. Appeal.

Calculation of mesne profits cultivation expenses, deduction of. See Note 5, Pt. (31).
Case remanded by Appellate Court—Procedure. See Note 15, Pt. (2).
"Decree." See Note 2, Pt. (8).
Decree for mesne profits against co-sharers. See Note 5, Pt. (6-a).
Decree for mesne profits—When becomes operative. See Note 8, Pt. (1).
First application for mesne profits dismissed for default—Subsequent application if maintainable. See Note 4, F.-N. (4).
Form of decree for possession and mesne profits. See Note 2, Pt. (10).
Mesne profits—Court whether could award more than is claimed. See Note 5, F.-N. (20).
Non-mention of period during which mesne profits is awarded—Effect. See Note 11, Pts. (3) and (4).
Persons liable for mesne profits. See Note 5, Pts. (8) to (11).
Relinquishment without notice—Whether amounts to delivery. See Note 10, Pt. (2).
Suit by a member of a joint Hindu family—Rule, if applicable. See Note 3, Pt. (1).
Suit for mesne profits alone. See Note 2, Pt. (1) and Note 13, Pt. (1).
"The Court" See Note 2, Pt. (4).

1. Legislative changes.—

1. The provisions of Section 244, Cls. (*a*) and (*b*) of the Code of 1882, which enacted that any question relating to the ascertainment of mesne profits as to which the decree directed an enquiry, were to be determined by the

executing Court, have been omitted under the present Code. The result is that such an enquiry is no longer a proceeding *in execution* but is one *in suit*.[1] The substantial change under the new Code is, as pointed out by Sir John Wallis, C.J., "that the award of mesne profits in all cases, is to be by a *preliminary decree* and that when ascertained, they are to be embodied in a *final decree*, whereas under Sections 211 and 212 (of the old Code) they were to be ascertained in execution."[2] In other respects this rule corresponds to Sections 211 and 212 of the old Code, except that sub-Clause (*ii*) in Clause (*c*) has been newly added for the benefit of the judgment-debtor. **O.20, R.12, Notes 1—2.**

2. The explanation to Section 211 of the old Code which contained the definition of mesne profits has been re-enacted in Section 2, Cl. (12) of the present Code.

2. Scope of the rule.—This rule deals with the decree to be passed in a suit for *possession* of immoveable property *and* for mesne profits, past and future, against a person in *wrongful possession* of such property. It does not apply to suits for *mesne profits* alone[1] or for damages which are not *mesne profits*.[2] But a suit for a declaration of title and in the *alternative* for possession and mesne profits is within this rule.[3]

In so far as this rule enables the Court to pass a decree for *future* mesne profits (*i.e.*, profits accruing subsequent to the institution of the suit) it is an exception to the general rule that a Court has no jurisdiction to give the plaintiff a decree on a cause of action that had not accrued to him at the date of the suit.[4] The object of enabling the Court to pass such a decree is to avoid multiplicity of suits.[5] But the rule is only a *directory* and not a mandatory one. It does not compel the plaintiff to claim future mesne profits. Nor is the Court bound to pass a decree for such *mesne* profits.[6] (*See* Note 13 *infra*). In cases falling within this rule, the Court may pass

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Order 20, Rule 12—Note 1.

(1) *Harnandan Rai* v. *Baliram*, 1931 Pat 1 (4): 12 Pat L Tim 127: 130 Ind Cas 785; *Ram Golam* v. *Chintaman*, 1926 Pat 218 (223): 1926 Pat H C C 49: 7 Pat L Tim 313: 93 Ind Cas 939: 5 Pat 361 F B; *Rudra Pratab* v. *Sarda Mahesh*, 1925 All 588 (589): 47 All 543: 23 All L J 458: 87 Ind Cas 822: 6 L R All (Civ) 359.

(2) *Doraiswami Ayyar* v. *Subramania Ayyar*, (1917) 42 Ind Cas 929 (931): 22 Mad L Tim 484: 33 Mad L Jour 699: 1917 Mad W N 847: 6 Mad L W 784: 41 Mad 188 F B.

Note 2.

(1) *Chaku Modan Isana* v. *Dullabh Dwarka*, (1872) 9 Bom H C R 7; *Abdul Wahid Khan* v. *Shalukha Bibi*, (1894) 21 Cal 496 (503, 504): 21 Ind App 26: 6 Sar P C J 399: R & J 134 P C; *Giri Narain* v. *Modhusudan*, (1913) 18 Ind Cas 751 (752): 17 Cal W N 324.

(2) *Dino Nath Chuckerbutty* v. *Protab Chunder Goswami*, (1900) 27 Cal 30 (34): 4 Cal W N 79 [Damages against person not in wrongful possession]; *Moula Baksh* v. *Satrughan Deb*, (1914) 23 Ind Cas 595 (596) Cal [Suit for injunction and damages]; *Khub Lal* v. *Raghubans Narayan*, 1928 Pat 565 (566): 7 Pat 491: 9 Pat L Tim 720. See also *Yado* v. *Ambashankar*, 1926 Nag 260 (262): 92 Ind Cas 75. See *Shib Kumar* v. *Kali Prasad*, (1868) 1 Beng L R 167 (167) [Bengal Rent Act X of 1859—Share in an upanchovki jumma is not in the nature of mesne profits].

(3) *Sheikh Yakub* v. *Tazimudhi Mullick*, (1917) 41 Ind Cas 842 (844): 26 Cal L Jour 105; See *Elahi* v. *Ram Narain*, (1911) 10 Ind Cas 117 (117): 16 Cal W N 288.

(4) *Khub Lal Singh* v. *Raghu Bans Narayan Singh*, 1928 Pat 565 (566): 7 Pat 491: 9 Pat L Tim 720; *Yado* v. *Ambashankar*, 1926 Nag 260 (262): 92 Ind Cas 75; *Kengam Swami* v. *Subbamma*, 1930 Mad 30 (33, 37): 57 Mad L Jour 728: 30 Mad L W 810: 124 Ind Cas 290: 53 Mad 838; *Nasibunnissa* v. *Ahmadiunnissa*, 1921 Lah 85 (88): 2 Lah 383: 66 Ind Cas 494..

(5) *Ram Golam* v. *Chintaman*, 1926 Pat 218 (223): 1926 Pat H C C 49: 7 Pat L Tim 313: 93 Ind Cas 939: 5 Pat 361 F B; *Ram Dayal* v. *Madan Mohan Lal*, (1899) 21 All 425 (432): 19 All W N 153. See also *Mt Nasib-un-nissa* v. *Mt Ahmadi-un-nissa*, 1921 Lah 85 (88): 2 Lah 383: 66 Ind Cas 494 [Claim not contested—Must be granted]; *Veerayya* v. *Salleya*, 1923 Mad 168 (169): 16 Mad L W 752: 69 Ind Cas 389 [Do—Absence of issue no ground for refusal].

(6) *Ram Karan Singh* v. *Nakched Ahir*, (1931) 133 Ind Cas 298 (300, 301): 1931 All L J 673: 1931 All 429 (F B); *Abdul Majid* v. *Abdul Aziz*, (1897) 19 All 155 (161-165): 24 Ind App 22: 7 Sar 111 [Under the Code of 1882].

O.20, R.12, Notes. 2—3

(1) a decree *for possession* of the immovable property. (This is a *final* decree, and subject to just objections, is capable of being executed),

(2) either a final decree for *past mesne profits*, or a preliminary decree for such profits, directing an enquiry as to the amount thereof, and

(3) a preliminary decree, directing an enquiry as to the amount of *future mesne profits*.

Where an enquiry is directed as mentioned above, a *final* decree in respect of such mesne profits is to be passed in accordance with the result of such enquiry.[7]

A decree ordering the delivery of possession and directing an enquiry as to mesne profits will thus be partly preliminary and partly final.[8] Where a decree is passed for past and future mesne profits *without directing an enquiry* the decree is not *preliminary* but *final*.[9]

As to the proper way of framing a decree under this rule, *see* Form No. 33, App. D, Sch. I.[10]

3. **Rule applies only where specific interest in land is claimed.**— This rule applies only to suits for land or other property in which the plaintiff has a *specific interest*. It will not apply, for instance, to a suit by a member of a Hindu joint family, for a partition of the joint property inasmuch as the plaintiff has no specific interest in such property until decree,[1] and the defendants cannot be said to be in wrongful possession of any property of the plaintiff. Where, however, the family has been living under a *clear arrangement* that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares, the right to mesne profits will arise if the enjoyment of those shares is, in any way, disturbed.[2]

Apart from this rule, however, a member of a joint Hindu family who is *excluded* from participation of the profits of family property may be entitled to *an account* of the management of the property from the persons in possession and to a share of such profits. Such a right is not a right to *mesne profits* received by a person in wrongful possession, but is appurtenant to the plaintiff's right under Hindu Law in his share of the lands.[3] In fact a member

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(7) *Ramalinga* v. *Andalinga*, 1931 Mad 717 (718): 34 Mad L W 99: 61 Mad L Jour 424: 134 Ind Cas 181: 54 Mad 980.

(8) *Satish Chandra* v. *Sarat Kamini Devi*, 1929 Cal 383 (383): 118 Ind Cas 852; Kumud Lal v. *Ramani Mohan*, (1914) 25 Ind Cas 436 (437): 19 Cal L Jour 346; *Ramanna* v. *Babu*, (1913) 18 Ind Cas 586 (591): 37 Mad 186: 13 Mad L Tim 79: 1913 Mad W N 114: 24 Mad L Jour 96; *Prosonno* v. *Asutosh*, (1914) 18 Cal W N 450 (454): 20 Ind Cas 685: 19 Cal L Jour 451; *Veeraraghava Row* v. *Malla Pragada Gurunadha Rao*, (1915) 30 Ind Cas 246 (246): 2 Mad L W 688: 1915 Mad W N 793 [Decree for possession alone can be executed].

(9) *Muthu Alagappa* v. *Ahmed Ibrahim*, 1925 Mad 1276 (1276): 22 Mad L W 347: 90 Ind Cas 789.

(10) *Ganga Prasad* v. *Hemangini*, (1917) 37 Ind Cas 997 (998) Cal.

Note 3.

(1) *Pirthi Pal* v. *Jewahir Singh*, (1886) 14 Cal 493 (509): 14 Ind App 87: 4 Sar 758: 11 Ind Jur 232: R & J 97 P C; *Lachman* v. *Ramchandra*, (1875) 1 Bom 561 (570); *Amritrao* v. *Govind*, (1913) 21 Ind Cas 590 (591): 9 Nag L R 145. But see *Venkammamidi Mahalakshmamma* v. *Venkamamidi Rajamma*, (1918) 43 Ind Cas 458 (458) Mad [Where the point was conceded; the suit does not seem to be one for partition between *co-parceners*].

(2) *Shankar* v. *Hardeo*, (1889) 16 Cal 397 (412): 16 Ind App 71: 5 Sar 299: 13 Ind Jur 93: R & J 108 (P C).

(3) *Ramaswami Ayyar* v. *Subramania Ayyar*, 1923 Mad 147 (149): 16 Mad L W 297: 43 Mad L Jour 406: 46 Mad 47: 74 Ind Cas 804; *Damodar Das* v. *Uttam Ram*, (1893) 17 Bom 271 (279); *Krishna* v. *Subbanna*, (1884) 7 Mad 564 (569): 8 Ind Jur 504 [Mana-

of a Hindu family suing for partition and for profits, is really suing *for an account of the profits received* by the manager or the persons in possession, so that the proceeds so received by the latter which are also divisible property, may be divided and his share therein also given to him.[4]

4. Enquiry as to mesne profits is no longer a proceeding in execution. —The assessment of mesne profits is, under the present rule, a proceeding in the suit, it has nothing to do with the execution-department.[1] The enquiry is a continuation of the *suit* which results in a final decree.[2] No application for the ascertainment of mesne profits can be entertained in the execution-department under the present Code.[3] But if the Court passing the decree erroneously gives a direction to the plaintiff to apply for the ascertainment of mesne profits in execution, is such a direction *ultra vires* and is the executing Court bound to ascertain such profits? The High Court of Calcutta[4] has held that such a direction is *ultra vires* and that the executing Court can decline to carry out the direction. The High Courts of Bombay[5] and Madras[6] have, on the other hand, held that the decree is not a nullity but that the case was one of a mere irregularity in the *exercise* of jurisdiction, and that the executing Court is bound to enquire into the mesne profits as per the direction in the decree.

Applying the principle laid down by the Judicial Committee in *Lachminarain* v. *Balmakund*[6-a] that when once a preliminary decree has been passed the suit cannot be dismissed unless and until the decree is varied or reversed

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ger bound to account to infant plaintiff suing for partition].

(4) *Ramaswami Ayyar* v. *Subramania Ayyar*, 1923 Mad 147 (149): 16 Mad L W 297: 43 Mad L Jour 406: 46 Mad 47: 74 Ind Cas 801. See *Bhirav* v. *Sitaram*, (1895) 19 Bom 532 (536, 537) [The words "mesne profits" in this decision must be taken to have been used only in the sense of a right to account"]. See also *Appa Rao* v. *Court of Wards*, (1882) 5 Mad 236 (238): 9 Ind App 125: 6 Ind Jur 383: 4 Sar 345 P C; *Venkata* v. *Court of Wards*, (1878) 2 Mad 128 (137): 7 Ind Cas 38: 6 Cal L Rep 153: 4 Sar 81: 3 Suth 725: 4 Ind Jur 138: 3 Shome L R 175; *Konerrao* v. *Gurrav*, (1880) 5 Bom 589 (595).

Order 20, Rule 12—Note 4.

(1) *Collector of Etawah* v. *Bindraban*, 1931 All L J 413 (413): 1931 All 538; *Mt Saraswati Bahuria* v. *Suraj Narain Chaudhuri*, 1928 Pat 278 (279): 9 Pat L Tim 258: 109 Ind Cas 611 [Court can appoint a Commissioner to ascertain mesne profits]. See *Fatima* v. *Abdul Majid*, (1892) 14 All 531 (536): 1892 All W N 151 [The direction for ascertainment need not be contained in the decree]; *Udit Narain* v. *Gur Prasad*, 1927 Oudh 220 (220): 101 Ind Cas 843.

(2) *Rudra Pratab* v. *Sarda*, 1925 All 588 (589): 23 All L J 458: 6 L R A (Civ) 359: 87 Ind Cas 322: 47 All 543; *Shankar* v. *Gangaram*, 1928 Bom 236 (237): 30 Bom L R 503: 52 Bom 360: 109 Ind Cas 734; *Vythinada* v. *Vythinada*, (1909) 4 Ind Cas 1040 (1041): 33 Mad 78: 6 Mad L Tim 187; *Dodda Basappa* v. *Puddi Earappa*, 1927 Mad 71 (72): 97 Ind Cas 567. *Janakinath Singha Roy* v. *Nirode Baran Roy*, 1926 Cal 175 (175): 90 Ind Cas 811; *Debendra Nath* v. *Khirode Chandra*, (1910) 5 Ind Cas 272 (273) Cal; *Mahomed Abdul* v. *Mahtab*, (1917) 41 Ind Cas 231 (232): 2 Pat L Jour 394; *Kedarnath Goenka* v. *Anant Prasad Singh*, 1925 P C 117 (117): 48 Mad L Jour 482: 1925 Mad W N 313: 2 Oudh W N 353: 41 Cal L Jour 339: 6 Pat L Tim 366: 27 Bom L R 848: 4 Pat 507: 52 Ind App 188: 22 Mad L W 7: 88 Ind Cas 482: 30 Cal W N 361 [Under old Code, one in execution]; *Muhammad Umar Jan* v. *Zinat*, (1903) 25 All 385 (387): 1903 All W N 80; *Radha Prasad* v. *Lal Saheb*, (1891) 13 All 53 (65): 17 Ind App 150: 5 Sar 600 P C; *Narayan* v. *Sono*, (1899) 24 Bom 345 (349): 1 Bom L R 846; *Krishnan* v. *Nilakandan*, (1885) 8 Mad 137 (139); *Puran Chand* v. *Roy Radha Kishen*, (1892) 19 Cal 132 (136); *Anando Kishore* v. *Anando Kishore*, (1886) 14 Cal 50 (53, 54): 11 Ind Jur 143; *Harmanoje Narain Singh* v. *Ram Prosad Singh*, (1907) 6 Cal L Jour 462 (467); *Dildar* v. *Mujeedunnissa*, (1879) 4 Cal 629 (632); *Mt Bibee Meher Jan* v. *Mt Bibee Gerda*, (1876) 25 Suth W R 270 (270); Mt *Fuzeelun* v. *Keramut Hossein*, (1874) 21 Suth W R 212 (213); *Prasanna Kumar* v. *Ashutosh Roy*, (1913) 20 Ind Cas 685 (686): 18 Cal W N 450.

(3) *Midnapur Zamindary Co* v. *Naresh Narain*, (1911) 11 Ind Cas 939 (940): 39 Cal 220: 16 Cal W N 109.

(4) *Ganga Prasad* v. *Hemangini*, (1917) 37 Ind Cas 997 (998) Cal [Second application for ascertainment of mesne profits when the first application is dismissed for default will not lie].

(5) *Lakshmibai* v. *Ravji*, 1929 Bom 217 (218, 219): 31 Bom L R 400: 118 Ind Cas 700.

(6) *Kengam Swamy* v. *Vaddadi Subbamma*, 1930 Mad 30 (31, 35): 57 Mad L Jour 728: 30 Mad L W 810: 124 Ind Cas 290: 53 Mad 838.

(6-a) 1924 P C 198: 35 Mad L Tim 143: 5 L R P C 171: 47 Mad L Jour 441: 20 Mad L W 491: 4 Pat 61: 51 Ind App 321: 22 All L J 990: 26 Bom L R 1129: 40 Cal L Jour 439: 29 Cal W N 391: 1924 Mad W N 707: 5 Pat L Tim 623: 81 Ind Cas 747.

O.20, R.12, Notes 4—5.

in appeal, the High Courts of Madras[7] and Patna[8] have held that a suit cannot be dismissed for default in prosecuting an application for the ascertainment of mesne profits under this rule. On the same principle it has been held that the suit does not abate by reason of the death of the defendant after the preliminary decree and pending enquiry into mesne profits.[9] A contrary view was, however, assumed by the High Court of Calcutta in the undermentioned case.[10] (*See also* O. 22, R. 3.)

After a preliminary decree, the practice is that the suit should be adjourned to a definite date for further hearing.[11]

5. **Mesne profits.**—The expression "mesne profits" is defined by S. 2, Cl. (12) as—

> "the profits which a person in *wrongful possession* of property actually received or might, with ordinary diligence, have received therefrom, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession."

The object of awarding a decree for mesne profits is to *compensate* the person entitled to be in possession for his having been kept out of possession and thus deprived of the profits of the property.[1] But the very foundation of the cause of action for mesne profits is *wrongful possession* of the defendant.[2] No decree for mesne profits can therefore be passed against a person who is *not in possession* at all,[3] or who is in *rightful* possession.[4]

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(7) *Alluri Timmaraju* v. *Alluri Narasimha Raju*, 1928 Mad 522 (523, 524, 525): 1928 Mad W N 222: 54 Mad L Jour 665: 28 Mad L W 152: 109 Ind Cas 528; *Mantina Ramachandra Raju* v. *Sri Raja Mautiripragoda Bhujanga Rao*, 1924 Mad 473 (473): 19 Mad L W 69: 1924 Mad W N 115: 79 Ind Cas 635: 33 Mad L Tim 261: 46 Mad L Jour 46; *Kanchumarthi Latchayya* v. *Kauntamukkla Suryaprakasa Rao*, 1928 Mad 1165 (1166, 1168): 115 Ind Cas 825 [Withdrawal without leave of the Court of an application for mesne profits—No bar to a fresh application].

(8) *Bhatu Ram* v. *Fogul Ram*, 1926 Pat 141 (142): 5 Pat 223: 92 Ind Cas 629: 7 Pat L Tim 340: 1925 Pat H C C 357: The undermentioned cases before the decision of the P C is no longer good law; *Kapilman Missir* v. *Kokilman Missir*, (1921) 62 Ind Cas 747 (749): 1921 Pat H C C 25; *Purnachandra Ray* v. *Jogendra Nath*, (1919) 50 Ind Cas 262 (264): 29 Cal L Jour 470; *Ram Kishore* v. *Gopi Kant*, (1901) 28 Cal 243 (245): *Upendra Chandra* v. *Sakhi*, (1912) 15 Ind Cas 709 (710): 16 Cal L Jour 3.

(9) *Mt Bhatia* v. *Abdus Shakur*, 1931 Pat 57 (58): 11 Pat L Tim 796: 129 Ind Cas 84; *Perumal Pillai* v. *Perumal Chetty*, 1928 Mad 914 (918): 28 Mad L W 164: 1928 Mad 434: 55 Mad L Jour 253: 51 Mad 701: 112 Ind Cas 116 F B.

(10) *Janakinath Singha Ray* v. *Nirodbaran Ray*, 1930 Cal 422 (423, 424): 57 Cal 148: 124 Ind Cas 817.

(11) *Latchayya* v. *Suryaprakasa Rao*, 1928 Mad 1165 (1168): 115 Ind Cas 825.

Note 5.

(1) *Abdul Gafur* v. *Raja Ram*, (1901) 23 All 252 (255): 1901 All W N 80; *Radha Churn* v. *Zumureennissa*, (1868) 11 Suth W R 83 (84): 2 Beng L R A C 67; *Mobarak Ali* v. *Boistub Churn*, (1869) 11 Suth W R 25 (25): 2 Beng L R A C 159; *Arfoonnissa Chowdhrain* v. *Rukeeboonissa*, (1868) 9 Suth W R 457 (458); *Thavasi* v. *Arumugam*, (1915) 28 Ind Cas 1 (3): 30 Mad L Jour 326: 2 Mad L W 157: 1915 Mad W N 170; *Lep Singh* v. *Nimar Khosia*, (1894) 21 Cal 244 (247) [Trespasser liable to person entitled to possession though not owner]; *Vinayak* v. *Abaji*, (1888) 12 Bom 416 (418) ["Mesne profits" is different from a periodical payment *in aeternum*. Word "mesne" implies a terminus *ad quem* as well as *a quo*, the terminus being usually the date of decree].

(2) *Rajah Promode Nath Roy* v. *Secretary of State for India in Council*, 1927 Cal 182 (189): 53 Cal 992: 31 Cal W N 112: 99 Ind Cas 428; *Kali Charan* v. *Ashutosh*, (1917) 38 Ind Cas 660 (665): 25 Cal L Jour 140; *Maharaja Mahtabchund Bahadoor* v. *Sheero Coomaree Debee*, 1864 Suth W R Gap 380 (381); *Mohammad Hadi* v. *Parbati*, 1922 Oudh 91 (92): 25 Oudh Cas 2: 9 Oudh L J 312: 68 Ind Cas 549 [Voidable transaction—When avoided is treated as void from the outset]; *Khub Lal* v. *Raghubans*, 1928 Pat 565 (566): 7 Pat 491: 9 Pat L Tim 720; *Sivarama Ayyar* v. *Alagappa Chetty*, (1915) 31 Ind Cas 211 (212): 2 Mad L W 946: 1915 Mad W N 845; *Ram Chunder* v. *Obhai Charan*, (1872-1892) L B R 451; *Umamoyi Burmoneea* v. *Tarini Prasad Ghose*, (1867) 7 Suth W R 225 (226, 228); *Luchuman Singh* v. *Mt Bibee Miriam*, (1866) 5 Suth W R 219 (220); *Abdul Kareem Biswas* v. *Mr. J D Campbell*, (1867) 8 Suth W R 172 (174).

(3) *Nandan Ram* v. *Jiva Ram*, (1917) 41 Ind Cas 23 (24) All.

(4) *Subbier* v. *Ranga Ayyangar*, (1899) 9 Mad L Jour 163 (164); *Manian* v. *Kuthuri Nattath Kottayil Raman*, 1921 Mad 609 (610): 41 Mad L Jour 15: 13 Mad L W 449: 62 Ind Cas 724. See also cases cited in foot-notes (5).

O.20, R.12, Note 5.

The following cases are instances of *rightful* possession:—

(1) The possession of a possessory mortgagee so long as the mortgage subsists.[5]

(2) The possession of the defendant against whom a conditional decree has been passed to the effect that on payment of a certain sum the plaintiff is to get possession and such payment has not been made.[6]

(3) The possession of a co-sharer of joint property, in the absence of proof of ouster or exclusion of another co-sharer.[6-a]

(4) The possession of a person who has entered on the land as a trespasser, but from whom the owner has accepted rent.[7]

The following cases are instances of wrongful possession:—

(1) The possession of a mortgagor after the date of a foreclosure decree against him.[8]

(2) The possession of a person declared by a decree to be in wrongful possession.[9]

(3) The possession of a defaulter after the confirmation of the sale of the property under the Bengal Revenue Sales Act.[10]

(4) The possession of a person against whom a decree for possession has been passed.[11]

Where *A*, the manager of a joint Hindu family alienates the family property for no necessity to *X*, and at the instance of *B* another member of the family, the sale is held not binding on him, is *X* liable for any mesne profits and if so from what period? If, as has been seen in Note 3, *ante*, *B* can have no *specific interest* in the family property until partition and consequently cannot sue the manager for past mesne profits under this rule, it is conceived

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(6) and (7); *Perumal Udayar* v. *Krishnama Chettiar*, (1894) 17 Mad 251 (252, 253) [Defendant's possession under revenue sale not wrongful—No liability for damages, but to an account of stewardship]. See also *Holloway* v. *Guneshur*, (1906) 3 Cal L Jour 182 (185, 186) [Possession in execution of decree subsequently set aside].

(5) *Maung Mya* v. *Maung Kya Thi*, 1930 Rang 152 (152): 127 Ind Cas 374.

(6) *Banwarilal* v. *Mahesh*, (1919) 49 Ind Cas 540 (543): 21 Oudh Cas 228: 41 All 63: 23 Cal W N 577: 6 Oudh L J 168: 1919 Mad W N 490: 45 Ind App 284; *Maroti* v. *Abhiman*, 1921 Nag 132 (132): 61 Ind Cas 543.

(6-a) *Raghubans Narain Singh* v. *Khub Lal Singh*, 1931 P C 209 (211): 35 Cal W N 949: 61 Mad L Jour 186: 12 Pat L Tim 737: 133 Ind Cas 730: 58 Ind App 299: 1931 Mad W N 1301: 35 Mad L W 49: 11 Pat 22 P C [But compensation can be awarded, though not as mesne profits]; *Debnarayan* v. *Kali Das*, (1871) 6 Beng L R (App) 70: 14 Suth W R 397; *Chundun Singh* v. *Mt Nirto*, (1868) 3 Agra 11; *Majid Mia* v. *Munshi Mia*, 1926 Cal 860 (861): 94 Ind Cas 255; *Gora Chand* v. *Keshab Chunder*, (1914) 23 Ind Cas 122 (123) Cal [Where there is ouster, the ousted person can sue for mesne profits]; *Amrutrao* v. *Trimbakrao*, 1929 Nag 291 (294): 118 Ind Cas 869: 12 Nag L J 131, (Do.).

(7) *Mitra Sen Singh* v. *Mt Janki Kuar*, 1924 P C 213 (215): 46 All 728: 51 Ind App 326: 23 All L J 172: 6 L R P C 12: 26 Bom L R 1134: 40 Cal L Jour 468: 47 Mad L Jour 591: 20 Mad L W 566: 35 Mad L Tim 247: 27 Oudh Cas 208: 82 Ind Cas 946: 29 Cal W N 533: 3 Pat L R Civ 169 P C.

(8) *Woomesh Chunder Roy* v. *Markund Mookerjee*, (1869) 12 Suth W R 35 (36): 3 Beng L R App 99; *Suroop Chunder* v. *Mohender Chunder*, (1874) 22 Suth W R 539 (540); *Baisuddin Chowdhry* v. *Khodu Newaz*, (1883) 12 Cal L Rep 479 (483, 484).

(9) *Shaikh Nasoo* v. *Mahatal Bebee*, (1865) 4 Suth W R 7 (7).

(10) *Harek Chand* v. *Sahanatulla*, 1931 Cal 805 (806): 35 Cal W N 395: 135 Ind Cas 875

(11) *Nago* v. *Multanmal*, 1927 Nag 9 (10): 97 Ind Cas 1029 [Decree for possession under S 9 of the Specific Relief Act]. See also *Ram Chunder* v. *Ram Chunder*, (1875) 23 Suth W R 226 (226) [Possession by intermediate holders is wrong(ful)].

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he cannot also on the same grounds claim *mesne profits* from a purchaser from the manager, until partition. It will also follow that after the institution of a suit by *B* for partition and mesne profits. his share becomes a specified interest from that date and mesne profits can be awarded against the purchaser from that date. This is the result arrived at in the undermentioned cases[12] but the *grounds* of the decision therein. it is respectfully submitted, are not correct. Their Lordships proceed on the view that possession under a voidable sale is rightful possession until set aside and that therefore mesne profits can be awarded only from the *institution of the suit* where the plaintiff repudiates the transaction. Where a transaction is held not binding on a person and is therefore set aside against him, (it must be deemed to be not binding on him from the *very beginning* of the transaction and not merely from the date of suit). In *Satgur Prasad* v. *Harnarain Das*[13] where *A* sued *B* for setting aside a deed executed by *A* to *B* on the ground of undue influence and fraud, it was held by their Lordships of the Privy Council that if the document was set aside, the defendant would be liable for mesne profits from the date when he got into possession under the deed. and not merely from the *institution of the suit.*

Extent of liability.—The period for which mesne profits can be awarded is clearly confined to the period during which the defendant *was in possession*[14] or to the period during which he was active in keeping the plaintiff out of possession.[15] Thus, if the defendant is deprived of possession by virtue of an order of attachment under S. 146 of the Code of Criminal Procedure,[16] or is dispossessed by another trespasser,[17] he cannot be held liable for the period during which he had no possession. A transferee from the defendant *pendente lite* is liable for mesne profits[18] but his liability starts only from the period *he entered into possession.*[19]

Principles relating to assessment.—"Mesne profits" observed Lord Hobhouse in delivering the judgment of the Board in *Grish Chunder* v. *Shoshi*

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(12) *Bhirgee Nath* v. *Narsing Tewari.* (1916) 35 Ind Cas 475 (477, 478): 39 All 61: 14 All L J 1161; *Ramaswami Ayyar* v. *Venkatarama Ayyar,* 1924 Mad 81 (83): 46 Mad 815: 45 Mad L Jour 203: 18 Mad L W 183: 1923 Mad W N 786: 75 Ind Cas 406; *Ganesa Ayyar* v. *Amirthaswami Odayar,* (1918) 44 Ind Cas 605 (608): 23 Mad L Tim 245: 1918 Mad W N 892.

(13) 1932 P C 89 (91): 9 Oudh W N 196: 136 Ind Cas 108: 59 Ind App 147: 62 Mad L Jour 451: 36 Cal W N 461: 34 Bom L R 771: 55 Cal L Jour 255: 35 Mad L W 667: 1932 Mad W N 502: 1932 All L J 297: 7 Luck 64 P C.

(14) *Mandan Kapali* v. *Krishna Charan Kapali,* 1931 Cal 663 (664): 35 Cal W N 305: 132 Ind Cas 685; *Jogesh Chandra Roy* v. *The Secretary of State,* (1919) 53 Ind Cas 124 (125) Cal; *Hera Lal* v. *Girdharee,* (1867) 8 Suth W R 450 (454); *Bayjnath Pershad* v. *Badhoo Singh,* (1868) 10 Suth W R 486 (487): 2 Beng L R S N 16; *Muzhur Ali* v. *The Nawab Nazim of Bengal,* (1867) 7 Suth W R 308 (309); *Amritrao* v. *Govind,* (1913) 21 Ind Cas 590 (592): 9 Nag L R 145 [As against a wrong doer possession relates back to the time when the right to enter accrued]; *Venkata Rao* v. *The Court of Wards,* (1879) 7 Ind App 38 (51): 2 Mad 128: 6 Cal L Rep 153: 4 Sar 81: 3 Suth 725: 4 Ind Jur 138: 3 Shome L R 175 P C.

(15) *Googly* v. *Chundee,* (1874) 21 Suth W R 246 (247); *Indurjeet Singh* v. *Radhey Singh,* (1874) 21 Suth W R 269 (270); *Churn Singh* v. *Rangoo,* (1871) 15 Suth W R 221 (222) [Mere obstruction without dispossession not enough]; *Bhawanee Deen* v. *Mohun Sahoo,* (1869) 1 N W P H C 273.

(16) *Chhaganmull* v. *Amanatulla,* 1924 Cal 1010 (1012): 51 Cal 853: 39 Cal L Jour 447: 83 Ind Cas 549. See also *Muhammad Shamgoya Rowther* v. *Omandu Pillai,* 1924 Mad 224 (225): 18 Mad L W 649: 1923 Mad W N 779: 76 Ind Cas 76 [Suit for mesne profits by party defeated in S 145 proceedings—Need not vacate Magistrate's order].

(17) *Abbas* v. *Fazih-ud-din,* (1897) 24 Cal 413 (416); *Soni* v. *Maghashiram,* (1920) 55 Ind Cas 48 (50): 18 Nag L R 195: 1923 Nag 108; *Haradhun* v. *Joykisto,* (1869) 11 Suth W R 444 (444); *Kalicharan Sinha* v. *Ashutosh Sinha,* (1917) 38 Ind Cas 660 (663, 665): 25 Cal L Jour 140 [Trespasser's heir not liable for period during which possession was with executor].

(18) *Midnapore Zemindary Co* v. *Naresh Narain Roy,* (1911) 11 Ind Cas 939 (940): 16 Cal W N 109: 39 Cal 220.

(19) *Damodar* v. *Miller,* 1921 Pat 102 (102): 6 Pat L Jour 166: 1921 Pat H C C 294: 2 Pat L Tim 563: 61 Ind Cas 754.

Shikreswar, [I. L. R. 27 Cal. 951 (967) P. C.], "are in the nature of damages which the Court may mould according to the justice of the case". The assessment of mesne profits is therefore a matter for the exercise of *Judicial discretion* in each case.[20] The question to be decided is the amount of profits which the wrongdoer while in possession received or which without wilful default he *might* have received.[21] *The test* is, as pointed out by their Lordships of the Judicial Committee, not what the plaintiff has lost by his exclusion but what the defendant has or *might* reasonably have made by his wrong- **O.20, R.12, Note 5.**

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(20) *Pankunni* v. *Raman*, 1931 Mad 650 (651, 652): 1931 Mad W N 576: 34 Mad L W 305: 61 Mad L Jour 596: 54 Mad 955: 135 Ind Cas 305 F B: *Hogg* v. *Dinomath*, (1867) 8 Suth W R 447 (447): *Surja Pershad Narain* v. *Reid*, (1902) 29 Cal 622 (625): 6 Cal W N 409; *Ganesa Ayyar* v. *Amirthasami Odayar*, (1918) 44 Ind Cas 605 (608): 23 Mad L Tim 245: 1918 Mad W N 892; *Shere Bahadur* v. *Dariao Kuar*, (1877-78) 3 Cal 645 (653): 3 Sar 769: 3 Suth 472: 2 Ind Jur 67: R & J 47 P C: *Sarkies* v. *Prosonomoyee*, (1881) 6 Cal 794 (808): 8 Cal L Rep 76: 4 Shom L R 134; *Sri Virada Prataga* v. *Brozo Kishore*, (1876-78) 1 Mad 69 (84): 3 Ind App 154: 25 Suth W R 291: 3 Suth 263: 3 Sar 583: 11 Mad Jur 188 P C; *Kalee Nath Doss* v. *Rajah Meah*, (1874) 22 Suth W R 406 (407): *Juggurnath Sahoo* v. *Mahomed Hossein*, (1875) 14 Beng L R 386: 23 Suth W R 99 (102): 2 Ind App 48: 3 Sar 419: 3 Suth 61 P C; *Maniyam Kuppana* v. *Kuppana Goundan*, (1915) 29 Ind Cas 195 (198): 1915 Mad W N 319 [*A* executing sale deed to *B* and giving possession but not registering the sale deed—Subsequent suit by *A* for mesne profits from *B*—No mesne profits were awarded]: *Jainabe* v. *Ghulam Mohiuddin*, 1923 Nag 55 (56): 69 Ind Cas 545 [Court bound to enquire]: *Mahipathi Surya Rao* v. *Subbayamma Rao*, (1911) 21 Mad L Jour 965 (968): 10 Mad L Tim 295: 12 Ind Cas 385: (1911) 2 Mad W N 308 [Respective income of plaintiff and defendant in one fash is *prima facie* evidence]: *Kishen Pershad Singh* v. *Mr Le Crowdy*, (1875) 23 Suth W R 15 (16) [To be decided upon evidence]: *Ramchandra* v. *Zibda*, (1894) 7 C P L R 59 (61) [And not by striking average]: *Shridhar Laxman Dhekne* v. *Jagardhan Bapuji Kurwade*, 1923 Bom 37 (39), 72 Ind Cas 993 [No evidence to show receipt of profits—No decree can be passed]: *Mahomed Azmul* v. *Chedee Lal*, (1869) 12 Suth W R 104 (105) [Case of landlord dispossessing ryot]: *Huruck Lal* v. *Sreenibash*, (1871) 15 Suth W R 428 (428), (Do.): *Gopal Chunder* v. *Bhoboon Mohan*, (1903) 30 Cal 536 (538), (Do.): *Gulam Mohiuddin* v. *Dayabhai Chimanlal*, 1923 Bom 398 (398): 25 Bom L R 447: 73 Ind Cas 442 [Tenant holding over]: *Munna Lal* v. *Buchchulal*, (1914) 22 Ind Cas 7 (8) All, (Do.): *Mt Mariam Begam* v. *Mt Mungi*, 1928 Sind 173 (174) [Held, tenant liable for mesne profits]: *Mahabir Prasad* v. *Radha Pershad*, (1891) 18 Cal 540 (544): 6 Sar 16 P C [Mesne profits relating to alluvial land—Court can presume cultivation]: *Hari Saran* v. *Bhubaneswari*, (1889) 16 Cal 49 (60): 15 Ind App 195: 5 Sar 198: 12 Ind Jur 373 P C [Minor liable for mesne profits]. As for actual mode of calculation, see *Sooriah Row* v. *Rajah Enoogunty Sooriah*, (1837-41) 2 Moo Ind App 72 (80, 81, 82): 5 Suth W R P C 125 P C; *Syud Ahmed* v. *Rajah Syud Enayet*, (1864) 1 Suth W R Mis 20 (20); *Bijoy Gobind* v. *Kalee Prosunno*, (1871) 16 Suth W R 294 (294); *Buneead Singh* v. *Sadaseeb*, (1865) 2 Suth W R Mis 50 (50) [Award limited to the amount claimed in plaint]: *Baboojan Jha* v. *Byjanath Dutt Jha*, (1880) 6 Cal 472 (475): 7 Cal L Rep 539: 4 Shom L R 94: 5 Ind Jur 413: *Gauri Prasad* v. *Reilly*, (1883) 9 Cal 112 (115): 12 Cal L Rep 41 [Court can award more than is claimed provided the deficient Court-fee is paid]: *Jadoomony* v. *Hafez Mahomed*, (1882) 8 Cal 295 (297): 6 Ind Jur 413, (Do.): *Sooriah Rao* v. *Cota Ghery Boochiah*, (1866) 5 Suth W R 127 (128): 2 Moo Ind App 113 P C [Court cannot give mesne profits more than claimed although a greater amount may be proved]: *Gooroo Dass* v. *Bungshee Dhur*, (1871) 15 Suth W R 61 (62), (Do.): *Kurob Lal* v. *Forbes*, (1867) 7 Suth W R 140 (141): *Hurro Gobind* v. *Digumburee Debia*, (1868) 9 Suth W R 217 (218): *Pearee Soonduree* v. *Eshan Chunder*, (1871) 16 Suth W R 302 (302). But see *Luckhee Kant* v. *Deen Dyal*, (1870) 14 Suth W R 82 (83).

(21) *Deuan Abdul Alim* v. *Syeda Amatul Bibi*, 1930 Cal 308 (310): 33 Cal W N 904: 125 Ind Cas 641: *Raja Promode Nath Roy* v. *Secretary of State*, 1927 Cal 182 (189): 53 Cal 992: 31 Cal W N 112: 99 Ind Cas 428; *Darsan Singh* v. *Bhawani Koer*, (1913) 19 Ind Cas 974 (978): 17 Cal W N 984; *Anukul* v. *Nabin*, (1912) 15 Ind Cas 1 (2) Cal: *Biresshur Dutt* v. *Baroda Prosad Ray*, (1911) 11 Ind Cas 504 (505): 15 Cal W N 825; *Kishnanand* v. *Partab Narain*, (1884) 10 Cal 785 (791): 11 Ind App 88, 4 Sar 531: 8 Ind Jur 335: R & J 89 P C: *Shambhu Nath Khettri* v. *Satish Chandra*, 1921 Cal 363 (365): 25 Cal W N 369: 66 Ind Cas 49; *Purnananda Datta* v. *Abinash Chandra*, (1918) 46 Ind Cas 624 (627) Cal: *Thakoor Das* v. *Nobin Kristo*, (1874) 22 Suth W R 126 (128): *J P De Silva* v. *Syud Tharance*, (1868) 9 Suth W R 374 (375): *Doorga Soonduree* v. *Shibeshuree Debia*, (1867) 8 Suth W R 101 (102): *Dwarkanath* v. *Ram Dun*, (1867) 8 Suth W R 103 (104, 105): *Mary Smith* v. *Sona Bibee*, (1865) 2 Suth W R Mis 10 (11): *Chunder Coomer* v. *Kashee Nath*, (1866) 5 Suth W R Mis 37 (38): *Madhub Chander Dutt* v. *Haradhun Paul*, (1870) 14 Suth W R 294 (295): *Nursingh Roy* v. *John Andersun*, (1873) 19 Suth W R 125 (126), *Dalel Kunwar* v. *Ambika*, (1903) 25 All 266 (269): 1903 All W N 34: *Matukdhari* v. *Ali Naqi*, (1888) 10 All 15 (18): 1887 All W N 242: *Ganga Prasad* v. *Gajadhar Prashad*, (1878-80) 2 All 651 (653): *Mohan Lall* v. *Government*, (1867) 2 Agra Mis 6: *Hanuman Das* v. *Komeroonissa Begum*, Marsh 122: Suth W R 40: 1 Ind Jur O S 42: 1 Hay 266 F B: *Md Hajra* v. *Tarasoonderee*, 1 Hay 577: Marsh 201: *Muhammad Abdul Gafur Rowther* v. *Muhammad Samsuddin Rowther*, 1925 Mad 297 (299): 47 Mad L Jour 730: 92 Ind Cas 139; *Thattathil Ahmmad* v. *Muthedath Avuthraman*, (1898) 8 Mad L Jour 273 (274): *Thavasi* v. *Arumugam*, (1915) 28 Ind Cas 1 (3): 30 Mad L Jour 326: 2 Mad L W 157: 1915 Mad W N 170: *Tilakdhari Singh* v. *Ram Prasad Singh*, (1921) 62 Ind Cas 25 (27) Pat: *Damodar Narain* v. *S A Miller*, 1921 Pat 102 (103): 6 Pat L Jour 166: 1921 Pat H C C 294: 2 Pat L Tim 563: 61 Ind Cas 754; *Nga Lu Pe* v. *Nga Shwe Yun* 1906 U B R Civil Procedure 50; *U Min Din* v. *U Po Thaung*, 1928 Rang 102 (104): 6 Rang 60: 109 Ind Cas 689.

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ful possession,[22] what the plaintiff might have made or the character of possession before trespass can only be relevant as evidence of what the defendant might with ordinary diligence have received.[23] A trespasser cannot say that he kept the land waste and that therefore he is not liable for mesne profits.[24]

The principles by which the Courts should be guided in awarding and assessing mesne profits are that the possession which has been wrongfully retained should not be a source of profit to the wrongful possessor, and that the person wrongfully kept out of possession is put in the same position financially as if right had been done.[25]

Where the trespasser is in actual possession the mesne profits should be awarded on the basis of the *actual* profits received or which might have been received with ordinary diligence less the deductions referred to below.[26] Where, however, the trespasser is not in actual possession, but has himself leased it to third persons, he will be liable only to the extent of the rent which he *actually* received from his lessee, unless it can be shown that he might, with ordinary diligence, have received more rent.[27] But

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(22) *Harry Kempson Gray* v. *Bhagu Mian*, 1930 P C 82 (83): 1930 All L J 128: 34 Cal W N 257: 58 Mad L Jour 215: 7 Oudh W N 303: 31 Mad L W 425: 121 Ind Cas 540: 32 Bom L R 525: 57 Ind App 105: 9 Pat 621: 1930 Mad W N 580: 11 Pat L Tim 717: 53 Cal L Jour 208 P C; *Gurudas Kundu* v. *Kumar Hemendra*, 1929 P C 300 (302): 56 Ind App 290: 34 Cal W N 89: 58 Mad L Jour 74: 31 Mad L W 7: 50 Cal L Jour 369: 57 Cal 1: 121 Ind Cas 525: 32 Bom L R 148 P C. **The following cases cannot be considered good law after the Privy Council decision:—** *Luckhy Narain* v. *Kally Puddo*, (1879) 4 Cal 882 (883): 4 Cal L Rep 60: 4 Ind Jur 238; *Teluck Chand* v. *Soudaminee*, (1875) 23 Suth W R 108 (109); *Bhyro Chunder Mojoomdar* v. *Roman Dose Mukerjee*, (1869) 11 Suth W R 461 (462): 3 Beng L R A C 88; *Bhoyrub Chunder* v. *Huro Prosunno Bhuttacharjee*, (1872) 17 Suth W R 257 (258); *Promothonath* v. *Tripoora Soonduree*, (1868) 10 Suth W R 463 (463); *Raghu Nandan* v. *Jalpa Puttap*, (1899) 3 Cal W N 748 (749); *Tirpoora Soonduree* v. *C Promotho Nath*, (1869) 11 Suth W R 533 (533); *Chardon* v. *Ajeet Singh*, (1869) 12 Suth W R 52 (54); *Watson* v. *Pyari Lal Shaha*, (1871) 7 Beng L R 175; *Gooroo Dyal Mundur* v. *Baboo Gopal Singh*, (1875) 24 Suth W R 271 (272); *Shistee Pershad Chuckerbutty* v. *Kunla Kant Roy*, (1872) 17 Suth W R 348 (348); *Nursingh Roy* v. *Anderson*, (1871) 16 Suth W R 21 (22); *Soudaminee Dabee* v. *Anund Chunder*, (1870) 13 Suth W R 37 (37, 38): 7 Beng L R 178 Note; *Seth Dhanraj and Seth Ram Lall* v. *Lalloo Guzur*, (1895) 8 C P L R 58 (60); *Brindabun Chunder* v. *Roberts*, 1862 Beng L R Sup Vol 1004-n; *Bishessuree* v. *Mohun*, (1866) 5 Suth W R Mis 35 (35).

(23) *Harry Kempson Gray* v. *Bhagu Mian*, 1930 P C 82 (83): 1930 All L J 128: 34 Cal W N 257: 58 Mad L Jour 215: 7 Oudh W N 303: 31 Mad L W 425: 121 Ind Cas 540: 32 Bom L R 525: 57 Ind App 105: 9 Pat 621: 1930 Mad W N 580: 11 Pat L Tim 717: 53 Cal L Jour 208 P C; *Lachmi Narain* v. *Mazhar Abbas*, (1908) 35 Cal 1000 (1005): 12 Cal W N 650; *Maharaja of Vizianagaram* v. *Alam*, (1912) 16 Ind Cas 126 (127): 9 All L J 774.

(24) *Arumugam* v. *Muthu Karuppayee*, (1915) 28 Ind Cas 1 (3): 30 Mad L Jour 826: 2 Mad L W 157, 1915 Mad W N 170.

(25) *Dalgleish* v. *B Nandan Misser*, (1917) 39 Ind Cas 516 (517): 1 Pat L W 421: 1917 Pat H C C 146.

(26) *Easin Sheikh* v. *Sikandar Sheikh*, 1926 Cal 847 (847): 94 Ind Cas 118; *Laljee Shahay Singh* v. *F O Walker*, (1902) 6 Cal W N 732 (734); *Sarda Charan Sen* v. *Banka Behari Das*, 1928 Cal 474 (475): 108 Ind Cas 584; *Teluck Chand* v. *Soudamini Dasi*, (1887) 4 Cal 566 (569): 3 Cal L Rep 456; *Ohhaganlal* v. *Sardar*, 1923 Nag 64 (64): 69 Ind Cas 560; *Sri Ram* v. *Ram Parghash*, (1909) 12 Oudh Cas 154 (155): 2 Ind Cas 835; *Doorga* v. *Surut Soondari*, (1882) 8 Cal 332 (335): 9 Ind App 1: 6 Ind Jur 146: 4 Sar P C J 304 P C; *Ranee Asmed Koer* v. *Moharanee Indurjeet*, (1868) 9 Suth W R 445 (447): Beng L R Sup 1003 F B; *Ram Bijai* v. *Jagatpal*, (1891) 18 Cal 111 (119): 17 Ind App 173: 5 Sar 590: R & J 120 P C; *Lallu Singh* v. *Gur Narain*, 1926 All 404 (404): 92 Ind Cas 768 ["Future mesne profits from date of suit" includes also collections by defendants *after* suit of arrears though due for periods *before* suit]. See also *Harnarain* v. *Gajraj Singh*, 1930 Oudh 51 (52): 119 Ind Cas 366, (Do.).

(27) *Gurudas Kundu* v. *Kumar Hemendra*, 1929 P C 300 (302): 56 Ind App 290: 34 Cal W N 89: 58 Mad L Jour 74: 31 Mad L W 7: 50 Cal L Jour 369: 57 Cal 1: 121 Ind Cas 525: 32 Bom L R 148 P C; *Maharaj Bahadur Singh of Baluchar* v. *Raja Bhupendra Narayan Singh*, 1926 Cal 1233 (1235): 44 Cal L Jour 182: 98 Ind Cas 198; *Majid Mia* v. *Munshi Mia*, 1926 Cal 860 (861): 94 Ind Cas 255; *Ma Kin Kywe* v. *Maung Tun Myat*, 1927 Rang 116 (117): 5 Bur L Jour 236: 101 Ind Cas 371; *Ranee Asmed Koer* v. *Moharanee Indurjeet*, Beng L R Sup Vol 1003: 9 Suth W R 445 (447); *Brindabun Chander Sircar* v. *Roberts*, 1862 Beng L R Sup Vol 1004 Note; *Lachmeswar Singh* v. *Chairman, Darbhanga Municipality*, (1891) 18 Cal 99 (107): 17 Ind App 90: 5 Sar P C J 564 P C; *Rugho Nath Dobey* v. *Huttee Dobey*, (1866) 1 Agra Misc 17; *Mt Rookumee Koer* v. *Ram Thukul Roy*, (1872) 17 Suth W R 156 (157); *Ijjatulla Bhuyan* v. *Chandra Mohan Banerjee*, (1908) 7 Cal L Jour 197 (199, 200): 12 Cal W N 285 [*Khamar land*]; *Enaet Ali* v. *B Subhnath Misser*, (1871) 15 Suth W R 258 (259) [Julkar land]; *Kamini Kumar* v. *Krishna*, (1911) 10 Ind Cas 312 (313): 16 Cal L Jour

the lessee himself, will, it is conceived, be also liable, as a person in wrongful possession, to the extent of the *actual profit* realised by him.[28] **O.20, R.12, Note 5.**

Illustration.

B trespasses upon the land belonging to *A* and subsequently lets it out to *C* for a rental of Rs. 300 per annum. *C* gets a gross profit of Rs. 700 and the expenses of cultivation amount to Rs 150, *A* sues *B* and *C* for possession and mesne profits. *B* will be liable to pay *A* Rs. 300, the rent which he received from *C*, and *C* will be liable for Rs. 250, the net profit realised by him after deducting the expenses of cultivation and after deducting the rent paid to *B*. But *B* and *C* cannot be made liable *jointly* and severally, for the total of the profits realised by both of them together.[29]

Deductions.—In awarding mesne profits it is proper that the following deductions should be made from the gross profits of the defendant in possession.

(1) Public charges such as government rent, revenue or cesses which are made for the preservation of the estate.[30]

(2) The costs of cultivation.[31]

The expenses of *collecting* the rents and profits cannot however be allowed in favour of the wrongful possessor unless he entered on the property in the exercise of a *bona fide* claim of right.[32]

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93 [Godown]. But see *Govind Madho* v. *Dhanu*, (1918) 43 Ind Cas 53 (53) Nag [Trespasser held liable to actual profits though he had leased the land to another. This is not good law].

(28) This can be inferred from the Privy Council decision in *Gurudas Kundu* v. *Kumar Hemendra Kumar*, 1929 P C 300 (303): 56 Ind App 290: 34 Cal W N 89: 58 Mad L Jour 74: 31 Mad L W 7: 50 Cal L Jour 369: 57 Cal 1: 121 Ind Cas 525: 32 Bom L R 148; *Bhupendra Narain Sinha Bahadur* v. *Rajeswar Prasad Bhakat*, 1931 Cal 802 (804): 35 Cal W N 367: 135 Ind Cas 876; *Mudun Mohun* v. *Ram Das*, (1880) 6 Cal L Rep 357 (359).

(29) *Gurudas Kundu* v. *Kumar Hemendra*, 1929 P C 300 (303): 56 Ind App 290: 34 Cal W N 89: 58 Cal L Jour 74: 31 Mad L W 7: 50 Cal L Jour 369: 57 Cal 1: 121 Ind Cas 525: 32 Bom L R 148 P C [Reversing 1927 Cal 182 on this point]; *Ram Bilas Singh* v. *Amir Singh*, (1921) 61 Ind Cas 425 (428): 1 Pat L Tim 235; *Krishna Mohun* v. *Kunjo Behari*, (1881) 9 Cal L Rep 1 (6); *Ramratan* v. *Asvini*, (1910) 6 Ind Cas 69 (73): 11 Cal L Jour 503: 14 Cal W N 849: 37 Cal 559 [Effect of release of some of the joint tort-feasor considered]; *Salimulla* v. *Sibsundari*, (1910) 8 Ind Cas 707 (707) Cal; *Bulwant Singh* v. *Sheo Sahoye*, (1865) 2 Suth W R Mis 51 (52); *Fuzul Mahomed Mundul* v. *Raj Coomaree Debee*, (1866) 6 Suth W R 113 (114); *Collector of Bograh* v. *Shama Sunkur*, (1866) 6 Suth W R 230 (230); *Suttya Nundo* v. *Suroop Chunder*, (1870) 14 Suth W R 76 (77); *Gunesh Dutt* v. *Bulwant Singh*, (1870) 14 Suth W R 175 (176). See also *Biddya Moyee* v. *Ram Lal Misser*, (1872) 17 Suth W R 148 (149): 8 Beng L R App 80 [Izaradar liable with his Zamindar]. The following cases are no longer good law:—*Shama Sunkur Chowdhry* v. *Sreenath Banerjee*, (1869) 12 Suth W R 354 (354); *Ajoodhya Das* v. *Lalljee Pandey*, (1873) 19 Suth W R 218 (219); *Krishna* v. *Kunjo*, (1882) 9 Cal L Rep 1 (4); *Muddun Mohun* v. *Ram Das*, (1880) 6 Cal L Rep 357 (359).

(30) *Dakhina Mohan* v. *Saroda Mohan*, (1894) 21 Cal 142 (148): 20 Ind App 160: 6 Sar 366: 17 Ind Jur 576 P C; *Mahipati Surya Rao* v. *Subbayamma Rao*, (1911) 12 Ind Cas 385 (386): 21 Mad L Jour 965: 10 Mad L Tim 295: (1911) 2 Mad W N 308; *Dungarmal* v. *Jai Ram*, (1902) 24 All 376 (380): 1902 All W N 90; *Abdul Gafur* v. *Raja Ram*, (1901) 23 All 252 (256, 259): 1901 All W N 80; *Altaf Ali* v. *Lalji Mal*, (1875-80) 1 All 518 (521): 2 Ind Jur 500; *Shitab Dei* v. *Ajudhia Prasad*, (1888) 10 All 13 (14-15): 1887 All W N 269; *Tilukchand* v. *Soudamani Dasi*, (1879) 4 Cal 566 (569): 3 Cal L Rep 456; *Umashanker* v. *Pandit Ramlal*, 1924 Nag 427 (428): 20 Nag L R 112: 83 Ind Cas 738; *Krishna Pal Singh* v. *Ranjit Singh*, (1919) 50 Ind Cas 895 (896): 41 All 517: 17 All L J 510; *Kachar Ala Chela* v. *Oghadbhai*, (1893) 17 Bom 35 (39); *Kalee Debee* v. *Modhoo Soodun*, (1871) 16 Suth W R 171 (172, 173); *Ram Nath* v. *Digumbar*, (1865) 3 Suth W R Mis 30 (30); *Baboo Purmessuree Pershad Narian Singh* v. *Aghu Singh*, (1868) 7 Suth W R 78 (78, 79); *Ramu Shettithi* v. *Maniappu Shettithi*, (1916) 33 Ind Cas 520 (520) Mad.

(31) *Sankara Rayamma* v. *Andusmalli Venkatrathnam*, (1913) 18 Ind Cas 615 (615): 24 Mad L Jour 30: 1913 Mad W N 804; *Baldeo Rai* v. *Rao Ekbal Singh*, (1919) 51 Ind Cas 747 (748): 4 Pat L Jour 301; *Mc Arthur* v. *Cornwall*, 1892 App Cas 75, cited in 23 All 252.

(32) *Altaf* v. *Lalji Mal*, (1877) 1 All 518 (521): 2 Ind Jur 500 F B; *Shitab Deb* v. *Ajudia*, (1888) 10 All 13 (15): 1887 All W N 269; *Abdul Ghafur* v. *Raja Ram*, (1900) 22 All 262 (265): 1900 All W N 57; *Raja Sashikanta* v. *Raja Sarat Chandra*, 1921 Cal 699 (707): 34 Cal L Jour 415: 70 Ind Cas 6; *Mr Charles Palmer* v. *Mohunt Bal Gobind Doss*, (1867) 7 Suth W R 230 (231); *Sreenath Bose* v. *Nobin Chunder Bose*, (1868) 9 Suth W R 473 (474) [Allowance should be made for expenditure of capital for extraordinary profits]; *Thakoor Doss Acharjee Chuckerbatty* v. *Shoshee Bhoosun Chatterjee*, (1872) 17 Suth W R 208 (208); *Gooroo-*

O.20, R.12, Notes 5—6.

Onus of proof.—It is for the plaintiff who comes into Court with a claim for mesne profits to establish first his right to immediate possession.[33] The *onus* of proving the amount of profits actually received is on the person receiving them but the burden of proving the profits, the person in occupation might with ordinary diligence have received therefrom, is on the person claiming them.[34] If the plaintiff lets in *prima facie* evidence to show that the profits were somewhere about the sum he alleges, the burden of proving that they were less shifts to defendant.[35]

6. **Interest forming part of mesne profits.**—Mesne profits, as defined by the old, as well as this Code, include interest on such profits. But this does not mean that the Court is obliged, in every case, to award interest.[1] It may refuse interest having regard to the circumstances of the case.[2] Under the old Code, where mesne profits were left to be ascertained in *execution* the executing Court could grant interest even though the decree was silent in respect thereof.[3] Under the present Code, however, the executing Court is not

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doss Roy v. *Anund Moyee*, (1871) 15 Suth W R 203 (203); *Besunesooree Dabea* v. *Tarasoundaree Brahminee*, Marsh 201: 1 Hay 577; *Rohan Singh* v. *Durga Baksh Singh*, 1929 Oudh 55 (56); *Umashankar* v. *Pandit Ramlal*, 1924 Nag 427 (428): 20 Nag L R 112: 83 Ind Cas 738; *Ahmed Rezah* v. *Enayet Hossein*, 1 Hay 277 [Defendant cannot take credit for rent uncollected]; *Dungar Mal* v. *Jai Ram*, (1902) 24 All 376 (380): 1902 All W N 90; *Abdul Ghafar* v. *Raja Ram*, (1901) 23 All 252 (256, 259): 1901 All W N 80; *Arfoonnissa* v. *Rukeeboonissa*, (1868) 9 Suth W R 457 (459); *Vidyaram* v. *Mohan*, (1909) 2 Ind Cas 464 (465): 6 All L J 327; *Sharafuddin Khan* v. *Fatehyab Khan*, (1898) 20 All 208 (209): 1898 All W N 23. *Collection expenses if awarded is usually 5 to 10 per cent. Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*, (1900) 27 Cal 951 (969, 970): 27 Ind App 110: 4 Cal W N 631: 10 Mad L Jour 356: 2 Bom L R 709: 7 Sar 687 P C; *Raja Rai Bhagwat Dayal Singh* v. *Ram Ratan Sahu*, 1922 P C 91 (93): 26 Cal W N 257: 35 Cal L Jour 121: 15 Mad L W 481: 24 Bom L R 336: 1922 Mad W N 102: 65 Ind Cas 69: 20 All L J 26: 42 Mad L Jour 243: 3 Pat L Tim 229 P C; *Kishen* v. *Suraj*, (1912) 16 Ind Cas 866 (867) Oudh; *Ijatulla Bhuyan* v. *Chandra Mohan*, (1908) 7 Cal L Jour 197 (200): 12 Cal W N 285; *Becharam Das* v. *Brojonath Pal Chowdhry*, (1868) 9 Suth W R 369 (370); *Gooroo Doss* v. *Anund Moyee*, (1871) 15 Suth W R 203 (203). See also *Ramachandrudu* v. *Venkata Narasimha Garu*, 1923 Mad 557 (557): 44 Mad L Jour 486: 17 Mad L W 545: 32 Mad L Tim 364: 1923 Mad W N 437: 73 Ind Cas 670 [Suit by occupancy ryots against landholder—Rent to be deducted].

(33) *Mohideen Rawther* v. *Jayarama Aiyar*, 1921 Mad 42 (44, 46): 44 Mad 987: 40 Mad L Jour 38: 1921 Mad W N 43: 62 Ind Cas 284: 13 Mad L W 281; *Dwarkaram* v. *Joyessur*, (1874) 21 Suth W R 276 (276, 277); *Kunhi Kurumban* v. *Uppu Kottu Parambil Lakshmi*, 1928 Mad 387 (389): 111 Ind Cas 378; *Ishan Chandra* v. *Ainuddin*, (1901) 5 Cal W N 720 (722).

(34) *Ramakka* v. *Nagasan*, 1925 Mad 145 (146): 47 Mad 800: 48 Mad L Jour 89: 92 Ind Cas 792; *Mahammad Abdul Gufur* v. *Muhammad Samsuddin*, 1925 Mad 297 (297): 47 Mad L Jour 730: 92 Ind Cas 139; *Mr F E Oman* v. *Ram Gopal Mojoomdar*, (1872) 18 Suth W R 251 (251); *Dinobundhoo Nundee* v. *Keshub Chunder*, (1865) 3 Suth W R Mis 25 (25).

(35) *Jai Lal Sao* v. *Lal Fateh Singh*, 1924 Nag 117 (118): 20 Nag L R 52: 75 Ind Cas 826; *Indurjeet Singh* v. *Radhey Singh*, (1874) 21 Suth W R 269 (270); *Brojendro Coomar Roy* v. *Madhub Chunder Ghose*, (1882) 8 Cal 343 (351); *Rajah Deonarain Singh* v. *Naek Pershad*, (1870) 2 N W P H C 217 [Jummabandi papers filed by patwaris *prima facie* evidence]; *Puran Chunder Roy* v. *Juggesur Mookerjee*, (1872) 17 Suth W R 298 (299), (Do.).

Note 6.

(1) *Kishanand* v. *Kunwar Partab*, (1884) 10 Cal 785 (791): 11 Ind App 88: 4 Sar 551: 8 Ind Jur 335: R & J 80 P C; *Raja Narendra Lal Khan* v. *Bomkesh Mitter*, (1919) 53 Ind Cas 227 (229): 30 Cal L Jour 205; *Ram Charan* v. *Annanda Moyee*, (1914) 18 Cal W N 76 n; *Gundo Anandrav* v. *Krishna Rav*, (1867) 4 Bom H C R 55; *Chaku* v. *Dullabh Dwarka*, (1872) 9 Bom H C R 7; *Bengal Coal Co* v. *Dareembah*, Marsh (1862) 105; *Sumboolal* v. *Collector of Surat*, (1859) 8 Moo Ind App 1 (42): 4 Suth W R 55: 1 Suth 387: 1 Sar 713.

(2) *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*, (1900) 27 Cal 951 (967): 10 Mad L Jour 356: 27 Ind App 110: 4 Cal W N 631: 2 Bom L R 709: 7 Sar 687 P C; *Vidya* v. *Mohan*, (1909) 2 Ind Cas 464 (465): 6 All L J 327; *Gangama Naick* v. *Vserappa Chetty*, 1931 Mad 513 (520): 131 Ind Cas 833; *Naina* v. *Arumuga*, (1915) 31 Ind Cas 387 (388): 2 Mad L W 1129; *Maharaj Bahadur Singh of Balucher* v. *Rajah Bhupendra Narayan Singh*, 1926 Cal 1233 (1235): 44 Cal L Jour 182: 98 Ind Cas 198; *Suraj Prasad Pandey* v. *Somra Mahto*, 1921 Pat 430 (432): 2 Pat L Tim 648: 68 Ind Cas 903.

(3) *Girish Chunder* v. *Shoshi Shikhreshwar*, (1900) 27 Cal 951 (967): 10 Mad L Jour 356: 27 Ind App 110: 4 Cal W N 631: 2 Bom L R 709: 7 Sar 687 P C; *Sashikanta Acharya* v. *Sarat Chandra Rai Chowdhury*, 1921 Cal 699 (707): 34 Cal L Jour 415: 70 Ind Cas 6 [Following 27 Cal 951]; *Harmanoje Narain Singh* v. *Ramprosad Singh*, (1907) 6 Cal L Jour 462 (470, 471), (Do.); *Banwari Lal* v. *Mussammat Rama*, (1912) 17 Ind Cas 915 (916): 10 All L J 533, (Do.); *Beni Prasad* v. *Narain Das*, (1910) 5 Ind Cas 529 (531) All, (Do.); *Narpat* v. *Har Gayan*, (1903) 25 All 275 (276): 1903 All W N 42, (Do.); *Mahomed Zafaryab*

empowered to ascertain the mesne profits and cannot award any interest where both the *preliminary* and the *final* decree are silent on the matter.[4] The reason is that the duty of the executing Court is simply to carry out the decree and not to *add to* it or *vary* it in any way. But when the *preliminary* decree is silent as to interest, the Court can award interest in the *final* decree. **O. 20, R. 12, Notes 6—8.**

If mesne profits are payable month to month, then interest also should be calculated from month to month.[5] The rate of interest usually awarded by the Court is six per cent.[6] and the period for which the interest should be calculated is from the date of the preliminary decree upto the happening of any one of the events mentioned in Cl. (*c*).[7]

7. Value of mesne profits if affects jurisdiction.—*See* Note 5 to S. 6.

8. Court-fees.—Under S. 11 of the Court-Fees Act, (VII of 1870) where the amount of *past* mesne profits (*i.e.*, profits before the date of the suit) decreed or ascertained is in excess of the amount claimed in the plaint, execution of the decree will not be allowed unless the deficient Court-fee is paid.[1] But the Court has no jurisdiction to levy Court fee on the *application* to ascertain the profits after the preliminary decree.[2] The fee can be levied only

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Khan v. *Abdul Razzaq Khan*, 1928 All 532 (534): 26 All L J 820: 9 L R A (Rev) 238: 50 All 857: 111 Ind Cas 238, (Do.); *Taj Begam* v. *Sarvi Begam*, (1917) 37 Ind Cas 674 (680): 14 All L J 1171 [Interest denied in the decree—Execution Court cannot allow].

(4) *Pankunni* v. *Raman*, 1931 Mad 650 (652): 1931 Mad W N 576: 34 Mad L W 305: 61 Mad L Jour 596: 54 Mad 955: 135 Ind Cas 305 F B [Overruling 1927 Mad 954 and 1926 Mad 952]. See also *Hurro Durga* v. *Surut Sundari*, (1882) 8 Cal 332 (336): 9 Ind App 1: 4 Sar 304: 6 Ind Jur 146 P C [Case under 1859 Code]; *Seth Gokul Das* v. *Murli*, (1878) 3 Cal 602: 5 Ind App 78: 2 Cal L Rep 156: 3 Sar 802: 3 Suth 515: 2 Ind Jur 329 P C, (Do.); *Forester* v. *Secretary of State*, (1877-78) 3 Cal 161 (170): 4 Ind App 137: 3 Suth 405: 3 Sar 717: 1 Pun Re 1877 P C, (Do.); *Abdul Ghafur* v. *Raja Ram*, (1900) 22 All 262 (265): 1900 All W N 57.

(5) *Narpat Singh* v. *Har Gayan*, (1903) 25 All 275 (276): 1903 All W N 42; *Munceram Acharjee* v. *Sreemathy Turungo*, (1867) 7 Suth W R 173 (173); *Luckhy Narain* v. *Kally Puddo*, (1879) 4 Cal 882 (884): 4 Cal L Rep 60: 4 Ind Jur 238.

(6) *Lalta Prasad* v. *Sri Ganeshji*, 1922 All 117 (118): 20 All L J 348: 67 Ind Cas 219: 44 All 579; *Sashikanta* v. *Surat Chandra*, 1921 Cal 699 (707): 34 Cal L Jour 415: 70 Ind Cas 6 [*Bona fides* of trespasser to be considered when awarding interest]; *Ijjatulla Bhuyan* v. *Chandra Mohan*, (1907) 7 Cal L Jour 197 (201): 12 Cal W N 285; *Nugent* v. *Modee*, (1841) 3 Moo Ind App 220 (227): 1 Sar 270 P C [Court can award interest though not prayed in the plaint]; *Ameer Husain* v. *Muhammad Ejaz Husain*, 1929 Oudh 134 (145): 6 Oudh W N 51: 117 Ind Cas 456 [Rate of interest in the discretion of the Court]; *Hurro Doorgachowdhrany* v. *Maharanee Shurrat Soondery Dabea*, (1879) 3 Cal L Rep 517 (518, 519) [Interest can be calculated upon the rental at the end of each year]; *B Coomar Roy* v. *M Chunder Ghose*, (1882) 8 Cal 343 (349), (Do.); *Radharaman* v. *Surnomoyi*, (1903) 30 Cal 506 (507): 7 Cal W N 437 [12 per cent awarded]; *Malaraju* v. *Narayanaswami*, (1912) 14 Ind Cas 396 (398): 11 Mad L Tim 90: 22 Mad L Jour 253: 1912 Mad W N 101 [3¾ per cent held proper]; *Dwarka Nath* v. *Debendra Nath Tagore*, (1906) 33 Cal 1232 (1235) [No analogy to S 34]; *Hurropersaud Roy* v. *Shamapershaud Roy*, (1877-78) 3 Cal 654 (660, 661): 5 Ind App 31: 1 Cal L Rep 499: 3 Sar 782: 3 Suth 495: 2 Ind Jur 284 [Interest Act no bar]; *Chhaber Singh* v. *Radhu Ram*, 1921 Lah 234 (235): 4 Lah L Jour 333: 68 Ind Cas 807 [12 per cent awarded]; *Subramania* v. *Varadarajulu*, (1910) 7 Ind Cas 710 (711): 8 Mad L Tim 356 [Appellate Court cannot award interest when lower Court did not award the same].

(7) *Sri Ganeshji* v. *Lalta Prasad*, 1924 All 801 (802): 22 All L J 768: 5 L R All (Civ) 583: 82 Ind Cas 312: 46 All 842; *Girish Chunder* v. *Shoshi Shikhareswar*, (1900) 27 Cal 951 (969): 10 Mad L Jour 356: 27 Ind App 110: 4 Cal W N 631: 2 Bom L R 709: 7 Sar 687 P C; *Satish Chandra* v. *Sasi Kanta Acharya*, 1930 Cal 525 (526): 52 Cal L Jour 173: 126 Ind Cas 717; *Girish Chunder* v. *Sasi Sekhareshwar*, (1906) 33 Cal 329 (334, 335); *Ijjatulla* v. *Chandra Mohan*, (1908) 7 Cal L Jour 197 (201): 12 Cal W N 285; *Mudun Mohan Singh* v. *Ram Dass*, (1880) 6 Cal L Rep 357 (360): *H Chowdhrain* v. *Sharrat Soondery Dabea*, (1879) 4 Cal 674 (676): 3 Cal L Rep 417: *Mobaruk Ali* v. *Boistab Churn*, (1869) 11 Suth W R 23 (25) [Under the Code of 1859—Not good law]; *Hurro Govind* v. *Digumburee*, (1868) 9 Suth W R 217 (218), (Do.); *Doorga Soondaree Debia* v. *Shibessuree Debia*, (1868) 10 Suth W R 391 (391), (Do.); *Harakhpan Misser* v. *Jagdeo Misser*, 1924 Pat 781 (783): 4 Pat 57: 5 Pat L Tim 626: 1924 Pat H C C 265: 3 Pat L R Civ 32: 84 Ind Cas 272.

Note 8.

(1) *Jitendranath Roy* v. *Rasik Lal Sen*, (1915) 27 Ind Cas 300 (303) Cal; *Dawood* v. *Rahman*, (1921) 62 Ind Cas 175 (176): 10 L B R 276: 13 Bur L Tim 165; *Kewal Kishen* v. *Soukari*, (1897) 24 Cal 173 (176): 1 Cal W N 243.

(2) *Ram Golam Sahu* v. *Chintaman Singh*, 1926 Pat 218 (224): 1926 Pat H C C 49: 7 Pat L Tim 313: 93 Ind Cas 939: 5 Pat 361

O.20, R.1 Notes 8—9.

after ascertainment and before execution. Nor can the Court refuse to execute the decree for *possession* because the Court-fee due in respect of mesne profits is not paid.[3]

No Court-fee is payable on *future* mesne profits (*i.e.*, profits after the institution of the suit) under S. 11 of the Court-Fees Act.[4] In Madras, however, that section has been amended by Madras Act V of 1922 by which such profits are chargeable with Court-fee and the decree will not be executed until such fee is paid.

Where a Court-fee is payable on mesne profits, it is to be calculated *ad valorem* on the amount claimed or decreed.[5]

9. Right to apply for ascertainment of future mesne profits when arises.—The right to apply for future mesne profits arises on the happening of any one of the three events mentioned in Cl. (c) and not on the date of the preliminary decree itself.[1] Where a decree for possession is made conditional on the payment of a certain sum of money, the decree-holder will not be entitled to mesne profits until such payment is made.[2]

Decree silent as to future mesne profits.—Where the right to future mesne profits is *negatived* in the preliminary decree, the Court has no jurisdiction to award the same in a *final* decree.[3] Similarly where the decree is *silent* as to the mesne profits it cannot be awarded in execution.[4] But where the decree simply says "the claim of this suit be decreed with costs and mesne profits" the plaintiff will be entitled to such profits up to the date of his re-admission into the land.[5] Where a right to mesne profits is found in the judgment but no such direction is found in the decree (which ought to have been drawn

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F B; *Sheodhin Singh* v. *Norangi Lal Ram Marwari*, (1931) 129 Ind Cas 662 (663, 664) Pat. See also *Dwarka Nath* v. *Debendra Nath*, (1906) 33 Cal 1232 (1233).

(3) *Ramalinga Sethupathi Ambalam* v. *Andiappan Ambalam*, 1931 Mad 717 (720): 134 Ind Cas 181: 34 Mad L W 99: 61 Mad L Jour 424: 54 Mad 980.

(4) *Ram Krishna* v. *Bhimabai*, (1891) 15 Bom 416 (418); *Bhupendra Kumar* v. *Purna Chandra*, (1914) 24 Ind Cas 232 (232) Cal; *Periannan* v. *Nagappa*, (1907) 30 Mad 32 (34): 16 Mad L Jour 543: 2 Mad L Tim 23 [Case before Act V of 1922 (Madras)]; *Saminatha* v. *Muthuswami*, (1910) 5 Ind Cas 880 (880): 20 Mad L Jour 98, (Do.); *Maiden* v. *Janakiramayya*, (1898) 21 Mad 371 (372), (Do.). See however *Sheodhin Singh* v. *Norangi Lal Ram Marwari*, (1931) 129 Ind Cas 662 (663, 664) Pat.

(5) *Collector of Etawah* v. *Bindraban*, 1931 All L J 413 (413): 1931 All 538; *Balaramu Naidu* v. *Sangan Naidu*, 1923 Mad 19 (19): 45 Mad 280: 42 Mad L Jour 184: 30 Mad L Tim 83: 69 Ind Cas 722: 14 Mad L W 730; *Ram Bilas* v. *Amir*, (1920) 55 Ind Cas 24 (25) Pat; *Narain Prasad* v. *Kameshwar*, (1918) 43 Ind Cas 489 (489): 3 Pat L Jour 101; *Nand Kumar* v. *Bilasram*, (1917) 40 Ind Cas 579 (580): 1 Pat L W 781: 3 Pat L Jour 67.

Note 9.

(1) *Harakhpan* v. *Jagdeo*, 1924 Pat 781 (782): 4 Pat 57: 5 Pat L Tim 626: 1924 Pat H C C 265: 3 Pat L Rep (Civ) 32: 84 Ind Cas 272; *Hussain Sahib* v. *Hammad Saheb*, 1923 Mad 43 (43): 16 Mad L W 312: 1922 Mad W N 562: 31 Mad L Tim 180: 74 Ind Cas 812.

(2) *Subraya Bhatta* v. *Sripathi Bhatta*, (1928) Mad W N 51 (52): 1928 Notes 12 (a).

(3) See *Pankunni Menon* v. *Raman Menon*, 1931 Mad 650 (651): 1931 Mad W N 576: 34 Mad L W 303: 61 Mad L Jour 596: 54 Mad 955: 135 Ind Cas 305 F B.

(4) *Syud Shah Ameer* v. *Syud Shah Zameer*, (1872) 18 Suth W R 122 (123); *Sadasiva Pillai* v. *Ramalinga Pillai*, (1875) 24 Suth W R 193 (195): 2 Ind App 219: 15 Beng L R 383: 3 Sar 319: 3 Suth 190 P C; *Eckowri* v. *Bijoy Nath*, (1870) 4 Beng L R A C 111: 13 Suth W R 11 (13); *Bhoobunnessurree* v. *Manson*, (1874) 22 Suth W R 160 (161); *Broughton* v. *Perhlad Sen*, (1873) 19 Suth W R 154 (155); *Janokee Nath Mookerjee* v. *Raj Kristo Singh*, (1871) 15 Suth W R 292 (293); *Gannu Lal* v. *Ram Sahai*, (1885) 7 All 197 (197): 1884 All W N 332; *Ishari Pershad* v. *Ram Narain*, (1901) 6 Cal W N 672 (674).

(5) *Gurudas Kundu Chowdhry* v. *Kumar Hemendra Kumar Roy*, 1929 P C 300 (301): 56 Ind App 290: 34 Cal W N 89: 58 Mad L Jour 74: 31 Mad L W 7: 50 Cal L Jour 369: 57 Cal 1: 121 Ind Cas 525: 32 Bom L R 148 P C; *Fakharuddin* v. *Official Trustee*, (1882) 8 Cal 178 (190): 8 Ind App 197: 4 Sar 270: 10 Cal L Rep 176: 4 Shom L R 202 P C; *Muhammad Junaid* v. *Aulia Bibi*, (1921) 61 Ind Cas 947 (951): 42 All 497: 18 All L J 613.

up in accordance with the judgment) it was held by the High Court of Calcutta that there was nothing wrong in the Court assessing mesne profits on an application for such ascertainment without a formal amendment of the decree, and passing a final decree on such assessment.[6]

10. Notice of relinquishment.—Sub-Clause (c).—The relinquishment of possession by the judgment-debtor *with notice* to the decree-holder *through Court* absolves him from further liability in respect of future mesne profits.[1] The mere filing of a petition without notice[2] is not enough to escape liability unless the decree-holder waives the notice.[3] In the undermentioned case[4] it was held that notice of relinquishment given at a time when it was too late for cultivation was not sufficient to absolve the defendant from liability.

11. Three years from the date of the decree.—The period of three years mentioned in sub-Cl. (*iii*), Cl. (*c*) should be reckoned from the date of the preliminary decree, and where the same has been appealed from, the date of the appellate decree.[1] The words "*whichever event first occurs*" clearly indicates that the *maximum* period for which future mesne profits can be awarded is three years from the date of the decree finally passed.[2] If the decree without specifying any period simply awards possession with *Wasilat* from a particular date the decree-holder is ordinarily entitled to mesne profits up to the date of re-delivery of possession to him[3] unless the period of three years elapses before such re-delivery.[4]

12. Limitation.—A suit for the recovery of past mesne profits is governed by Art. 109 of the Limitation Act, 1908, and should be filed within three years from the date of the wrongful receipt of the profits.[1] But so long

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(6) *Monmatha Nath Dutt* v. *Matilal Mitra*, 1929 Cal 719 (721): 33 Cal W N 614: 122 Ind Cas 220.

Note 10.

(1) *Sashikanta* v. *Sarat Chandra*, 1921 Cal 699 (706): 34 Cal L Jour 415: 70 Ind Cas 6.

(2) *Malladi Rama Sonayajulu* v. *Brundavanam Pramanya*, (1911) 12 Ind Cas 272 (272): (1911) 2 Mad W N 258.

(3) *Shambhu Nath* v. *Satish Chandra*, 1921 Cal 363 (365): 25 Cal W N 369: 66 Ind Cas 49.

(4) *Naina* v. *Arumuga*, (1915) 31 Ind Cas 387 (387): 2 Mad L W 1129.

Note 11.

(1) *Radhnath* v. *Chandi Charan*, (1903) 30 Cal 660 (665): 7 Cal W N 486; *Sashi Kanta* v. *Sarat Chandra*, 1921 Cal 699 (705): 34 Cal L Jour 415: 70 Ind Cas 6; *Satish Chandra Chakravarti* v. *Sarat Kamini Devi*, 1929 Cal 383 (384): 118 Ind Cas 852; *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh*, (1901) 23 All 152 (158): 27 Ind App 209: 2 Bom L R 978: 5 Cal W N 52: 10 Mad L Jour 290: 7 Sar 788 P C [If appeal to Privy Council, from date of Privy Council's decree]; *Nand Kumar Singh* v. *Bilasram Marwari*, (1918) 43 Ind Cas 855 (856): 3 Pat L Jour 116: 1917 Pat H C C 377: 4 Pat L W 100, (Do.); *Joykurun Lal* v. *Ranee Asmudh Kooer*, (1866) 5 Suth W R 125 (125), (Do.); *Mashook Ali* v. *Jowala Bukhsh*, (1870) 2 N W P 290 (290), (Do.); *Abdul Alim* v. *Amatul Bibi*, 1930 Cal 308 (309, 310): 33 Cal W N 904: 125 Ind Cas 641, (Do.).

(2) *Trailokya* v. *Jogendra*, (1908) 35 Cal 1017 (1019); *Krishnan* v. *Kunhi Moidin Kutti*, (1899) 9 Mad L Jour 334 (335); *Venkata Kumara Mahipati Surya Rao* v. *Subbayamma Rao*, (1914) 24 Ind Cas 484 (485): 1 Mad L W 443.

(3) *Fakharuddin Mahomed* v. *Official Trustee*, (1882) 8 Cal 178 (190): 8 Ind App 197: 4 Sar 270: 10 Cal L Rep 176: 4 Shome L R 202 P C; *Bijai Bahadur* v. *Bhup Indar*, (1897) 19 All 296 (299): 1897 All W N 62; *Raja Promode Nath Roy* v. *Secretary of State*, 1927 Cal 182 (184, 187): 53 Cal 992: 31 Cal W N 112: 99 Ind Cas 428; *Kishan* v. *Suraj*, (1912) 16 Ind Cas 866 (866, 867) Oudh; *Dhurn Narain* v. *Bundhoo*, (1869) 12 Suth W R 75 (75); *Raesoonissa Begum* v. *Sharoda Soonduree*, (1871) 16 Suth W R 25 (27); *Bunsee Singh* v. *Mirza Nusuf Ali*, (1874) 22 Suth W R 328 (328).

(4) *Baijnath Goenka* v. *Nanda Kumar Singh*, 1925 P C 113 (113, 114): 28 Cal W N 55: 84 Ind Cas 267: 22 Mad L W 85 P C; *Vidya Ram* v. *Mohan Lal*, (1909) 2 Ind Cas 464 (465): 6 All L J 327; *Uttamram* v. *Kishoredas*, (1900) 24 Bom 149 (153): 1 Bom L R 638; *Narayan* v. *Sono*, (1900) 24 Bom 345 (349, 350): 1 Bom L R 846.

Note 12.

(1) *Kishanand* v. *Partab Narain*, (1884) 10 Cal 785 (791): 11 Ind App 88: 4 Sar 551: 8 Ind Jur 335: R & J 80 P C; *Hays* v. *Padmanand*, (1905) 32 Cal 118 (122); *Abbas* v. *Fassihuddin*, (1897) 24 Cal 413 (415); *Raghu Singh* v. *Shew Prasad Rai*, (1912) 17 Ind Cas 121 (123): 16 Cal L Jour 135; *Peary Mohan* v. *Khelaram*, (1908) 35 Cal 996 (998): 13 Cal W N 15: 8 Cal L Jour 181: 4 Mad L Tim 419:

O.20, R.12, Notes 12—14.

as a suit is pending there is no limitation to an *application* for ascertainment of mesne profits.[2] The reason is that it is neither an application for execution, nor is such application one which is required by law to be made as a condition precedent to the ascertainment of mesne profits.[3] The High Court of Madras has, however, taken the view that such an application is governed by Art. 181 of the Limitation Act, 1908.[4]

13. **Res judicata.**—*See also* Note 125 to S. 11 and Note 24 to O. 2, R. 2. Where the decree is *silent* as to future mesne profits a subsequent suit therefor is not barred by *res judicata*.[1] Even where the preliminary decree *contains a direction* relating to the ascertainment of mesne profits, a subsequent suit for such profits will not be barred, even though the plaintiff omitted to apply for a final decree.[2]

14. **Order after preliminary decree determining period and mode of accounting if a decree.**—An order passed in supplemental proceedings after the preliminary decree with regard to the mode of accounting and the period for which the defendant is liable for mesne profits amounts, according to the

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1 Ind Cas 157 P C; *Basantakumari* v. *Kamikshyakumari*, (1906) 33 Cal 23 (28): 32 Ind App 181: 2 Cal L Jour 238: 15 Mad L Jour 320: 7 Bom L R 904: 10 Cal W N 1: 2 All L Jour 810; *Ragho* v. *Dwaraka Das*, 1924 Lah 738 (741): 10 Pun W R 1923: 79 Ind Cas 687. *For cases under the Limitation Act of* 1859 *see the following cases:—Baboo Issureenund* v. *Parbutty Churn*, (1865) 3 Suth W R 13 (13); *Maharaj Koer* v. *Mr J Furlong*, (1865) 3 Suth W R 38 (38); *Lalla Gobind* v. *Monohar Misser*, (1864) 1 Suth W R 65 (66); *Baboo Ram Suran* v. *Baboo Gooroo Dyal*, (1864) 1 Suth W R 83 (84); *Luchman Singh* v. *Mst Bibee Miriam*, (1866) 5 Suth W R 219 (220); *Rajaram Rem Butt* v. *Bhoobundal*, (1866) 6 Suth W R 78 (78); *Fuzul Mahomed Mundul* v. *Raj Coomaree Debee*, (1866) 6 Suth W R 113 (114); *Muneeram Acharjee* v. *Sreemutty Turungo*, (1867) 7 Suth W R 173 (173); *Hurrehur Mookerjee* v. *Mollah Abdullur*, (1872) 17 Suth W R 209 (209); *Juggut Chunder* v. *Shib Chunder*, (1874) 22 Suth W R 255 (255); *Rani Kattama* v. *Subbarama Ayyan*, (1868-69) 4 Mad H C R 302 (306).

(2) *Bhatu Ram* v. *Fogul Ram*, 1926 Pat 141 (143): 1925 P H C C 357: 92 Ind Cas 629: 5 Pat 223: 7 Pat L Tim 346; *Monmatha Nath* v. *Matilal Mitra*, 1929 Cal 719 (721): 33 Cal W N 614; *Prasanno Kumar Panja* v. *Ashutosh Roy*, (1913) 20 Ind Cas 685 (687): 18 Cal W N 450; *Puran Chand* v. *Roy Radha Kishen*, (1891) 19 Cal 132 (138, 139) F B; *Prayag Singh* v. *Raja Singh*, (1898) 25 Cal 203 (205); *Fatima Bibi* v. *Abdul Majid*, (1892) 14 All 531 (536, 537); *Kumar Kamakhya Narayan Singh* v. *Akloo Singh*, 1929 Pat 368 (368): 8 Pat 482: 117 Ind Cas 647: 10 Pat L Tim 762; *Waliya Bibi* v. *Nazar Hasan*, (1903) 26 All 623 (625): 1 All L Jour 344. But see *Ram Kishore Ghose* v. *Gopikant Shaha*, (1900) 28 Cal 243 (245) [Case under 1882 Code]. But see *Gangadhar* v. *Balakrishna*, 1921 Bom 404 (405, 406): 45 Bom 819: 23 Bom L R 263: 61 Ind Cas 418.

(3) *Shankar* v. *Gangaram*, 1928 Bom 236 (237): 30 Bom L R 503: 52 Bom 360: 109 Ind Cas 734; *Thana Zalaji Shet Marwadi* v. *Dhana Jachrji*, 1923 Bom 268 (269): 77 Ind Cas 497 [Art 181 does not apply].

(4) *Thimmaraju* v. *Narasimha Raju*, 1928 Mad 522 (522): 1928 Mad W N 222: 54 Mad L Jour 665: 28 Mad L W 152: 109 Ind Cas 528 [Obiter Per Jackson, J]; *Ramana Reddi* v. *Babu Reddi*, (1913) 37 Mad 186 (195, 196, 197): 18 Mad L Tim 79: 1913 Mad W N 114: 18 Ind Cas 586: 24 Mad L Jour 96 [Quære].

Note 13.

(1) *Lakshmi Bai* v. *Jagannath*, 1932 Bom 222 (223): 34 Bom L R 447: 56 Bom 292: 138 Ind Cas 579 [Not following earlier decisions in 58 Ind Cas 419]; *Kalidass* v. *Keshab Lal*, 1931 Cal 788 (789): 58 Cal 1040: 134 Ind Cas 1042; *Surendra Narain Mitra* v. *Dejindra Prosad Mitra*, (1915) 29 Ind Cas 464 (465): 23 Cal L Jour 215; *Kengam Swamy* v. *Subbamma*, 1930 Mad 30 (32, 38): 57 Mad L Jour 728: 30 Mad L W 810: 124 Ind Cas 290: 53 Mad 838; *Ram Chandra* v. *Bhujanga*, 1924 Mad 473 (474): 46 Mad L Jour 46: 19 Mad L W 69: 33 Mad L Tim 261: 1924 Mad W N 115: 79 Ind Cas 635; *Subramanian* v. *Mg Po*, (1912) 14 Ind Cas 801 (802): 5 Bur L Tim 33 [For cases under the old Code which held that a second suit for future mesne profits not barred]. See *Baboo Gour Kishen Singh* v. *Sahay Fukeer Chund*, (1867) 7 Suth W R 364 (365); *Fakharuddin Mahomed* v. *Official Trustee*, (1881) 8 Cal 178 (190): 8 Ind App 197: 4 Sar 270: 10 Cal L Rep 176: 4 Shom L R 202; *Ram Ghulam* v. *Dwarka Rai*, (1884) 7 All 170 (173): 1884 All W N 319; *Ram Shunker* v. *Mt Lalee Baee*, (1867) 2 Agra 268; *Hur Churan Lal* v. *Toorab Khan*, (1870) 2 N-W P H C 176; *Jagatjit* v. *Sarabjit*, (1892) 19 Cal 159 (173): 18 Ind App 165: 6 Sar 80: 15 Ind Jur 749: R & J 125; *Kalka Singh* v. *Paras Ram*, (1895) 22 Cal 434 (443): 22 Ind App 68: 5 Mad L Jour 14: 6 Sar 545: R & J 137; *Chunder Coomar Roy* v. *Ganesh Chandar Das*, (1886) 13 Cal 283 (290); *Ram Manickya* v. *Jagganath Gope*, (1879) 5 Cal 563 (565); *Ram Roop* v. *Sheo Golam*, (1876) 25 Suth W R 327 (328); *Abdool Ali* v. *Asruffan*, (1876) 25 Suth W R 215 (215, 216); *Syud Shah Ameer* v. *Syud Shah Zameer*, (1872) 18 Suth W R 122 (123); *Shambho Mohan* v. *Tripoora*, (1869) 12 Suth W R 126 (127); *Ram Lochan* v. *Munsoor Ali*, (1869) 11 Suth W R 339 (340); *Byjnath* v. *Badhoo*, (1868) 10 Suth W R 486 (486): 2 Beng L R S N 16; *Huro Mohinee Chowdhrain* v. *Dhun Monee Chowdhrain*, (1868) 10 Suth W R 62 (64): 1 Beng L R A C 138; *Jamayat Singh* v. *Nihal Chand*, 1890 Pun Re No 60.

(2) *Sobhanadri* v. *Rami Reddi*, 1929 Mad 785 (786): 57 Mad L Jour 515: 30 Mad L W 738.

High Court of Calcutta[1] to another *preliminary decree*, but according to the High Court of Allahabad[2] only to an *interlocutory order* in a pending suit. [For fuller discussion, *see* note 10 to S. 2, Cl. (2).] O.20, R.12, Notes 14—15.

15. Appeal.—Under the old Code the ascertainment of mesne profits was done in execution and the order relating thereto was appealable as having the force of a decree under S. 244 (S. 47). Under the present Code, the ascertainment is made in the *suit itself* and the result of it should be embodied in a *final decree* which is appealable as such.[1]

When the decree of the trial Court dismissing a suit for possession and mesne profits is reversed in appeal, the appellate Court should not remand the case for enquiring into the mesne profits but should pass a preliminary decree for possession directing an enquiry into mesne profits under this rule.[2] *Vide also* the amendment made to this rule by the High Court of Madras.

R. **13.** [S. 213.] (1) *Where* a suit is for an account of any property and for its due administration[2] under the decree of the Court, the Court shall, before *passing* the final decree, *pass a preliminary decree*, *ordering* such accounts and inquiries to be taken and made, and *giving* such other directions as it thinks fit. O.20, R.13.

Decree in administration suit.

(2) In the administration by the Court of the property of any *deceased* person, if such property proves to be insufficient for the payment in full of his debts[8] and liabilities, the same rules shall be observed as to the respective rights of secured[9] and unsecured creditors and as to debts and liabilities provable,[10] and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, *within the local limits of the Court in which the administration suit is pending* with respect to the estates of persons adjudged *or declared* insolvent; and all persons who in any such case would be

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Note 14.

(1) *Raja Peary Mohan* v. *Manohar*, 1924 Cal 160 (162): 27 Cal W N 989: 38 Cal L Jour 255: 74 Ind Cas 373; *Sarat Chandra Rakshit* v. *Subashini Devi*, 1930 Cal 89 (91): 56 Cal 550: 120 Ind Cas 807. But see *Dalgliesh* v. *Nandan Misser*, (1912) 13 Ind Cas 186 (186) Cal.

(2) *Rudra Pratab Singh* v. *Sarda Mahesh Prasad Singh*, 1925 All 588 (589): 23 All L J 458: 6 L R A (Civ) 359: 87 Ind Cas 322: 47 All 543. See also *Md Fariduddin Ahmad* v. *Shankar Sahai*, 1932 Oudh 271 (272): 9 Oudh W N 339: 138 Ind Cas 30.

Note 15.

(1) *Shanker* v. *Gangaram*, 1928 Bom 236 (238): 30 Bom L R 503: 52 Bom 360: 109 Ind Cas 734 [Dismissal of an application for final decree as barred amounts to a decree and is appealable]; *Rudra Pratab* v. *Sarda Mahesh*, 1925 All 588 (589): 23 All W N 458: 6 L R A (Civ) 359: 87 Ind Cas 322: 47 All 543; *Nand Kumar* v. *Bhas Ram*, (1918) 43 Ind Cas 855 (856): 1917 Pat H C C 377: 4 Pat L W 100: 3 Pat L Jour 116. See also *Khub Lal Singh* v. *Raghubans Narayan Singh*, 1928 Pat 565 (566): 7 Pat 491: 9 Pat L Tim 720; *Sarat Chandra Roy* v. *Mohamed Khalil Mandal*, (1910) 5 Ind Cas 387 (388): 11 Cal L Jour 501; *Bhup Indor* v. *Bijai*, (1901) 23 All 152 (157): 27 Ind App 209: 2 Bom L R 978: 5 Cal W N 52: 10 Mad L Jour 290: 7 Sar 788 P C.

(2) *Subba Goundan* v. *Krishnamachari*, 1922 Mad 112 (114, 115): 1922 Mad W N 269: 15 Mad L W 537: 42 Mad L Jour 372: 45 Mad 449: 30 Mad L Tim 217: 68 Ind Cas 869. See also *Dwarka Lal* v. *Nirunder Narain*, (1874) 22 Suth W R 461 (461); *Mt B Bodlun* v. *Syed Fuzloor Rahman*, (1875) 23 Suth W R 449 (450); *Rajah Leelanund* v. *Maharaja Lakshmissar Singh*, (1867-70) 13 Moo Ind App 490 (496): 14 Suth W R (P C) 23: 5 Beng L R 605: 2 Suth 353: 2 Sar 599 P C.

O.20, R.13, Notes 1—2.

entitled to be paid out of such property, may come in under the *preliminary* decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

[1877—S. 213.]

Synopsis.

1. Analogous law.
2. Administration suits.
3. Hindu Law.
4. Muhammadan Law.
5. Who may file an administration suit.
6. Plaint in administration suits.
7. Decree in administration suits.
8. Estate insufficient to pay all the debts Sub-R. (2).
9. Rights of secured creditors.
10. Provable debts and liabilities under the Insolvency Act.
11. Barred debt.
12. Court-fees.
13. Appeal.

Costs out of estate. See Note 7, Pt. (5).
Inapplicability to suits against Administrator-General. See Note 8, F.-N. (1).
Jurisdiction. See Note 2, Pts. (6) and (7).
Principles of distribution. See Note 10.
Priority for individual creditors in execution. See Note 7, Pt. (2).
Secured creditor whether affected. See Note 7, Pt. (2-a) and Note 8.
Suits by creditors. See Note 5, Pt. (3).
Suits by executors. See Note 5, Pt. (4).

1. Analogous law.—This rule corresponds to S. 34 and Part I, Sch. I, of the Administration of Estates Act, 1925, (15 Ger., 5 Cap. 23). The main difference between Part I, Sch. I and this rule consists in the addition of the words "and as to the priorities of debts and liabilities" after the words "contingent liabilities respectively". *See* Note 8, *infra*.

2. Administration suits.—"Administration" means the management of the estate of a deceased person who has left no executor.[1] It consists in:—

(*i*) payment of the funeral expenses of the deceased.

(*ii*) Collection, realisation and preservation of assets.

(*iii*) Payment of debts and legacies.

(*iv*) Acts in respect of adverse claims to assets.

(*v*) Dealings with creditors and legatees.

(*vi*) Distribution finally among the heirs and next of kin.[2]

The object of an administration suit is to have the estate administered under a decree of Court. In such a suit the whole administration and (settlement of the estate) are assumed by the Court: the assets are marshalled and a decree is made for the benefit of creditors and other persons entitled to the property.[3]

Order 20, Rule 13—Note 2.

(1) *Encyclopaedia of American & English Law* Vol I, p 643 referred to in 32 Bom 381 (384).

(2) *Mt Amirbi* v. *Abdul Rahim*, 1928 Mad 760 (762): 55 Mad L Jour 266: 28 Mad L W 583: 110 Ind Cas 276.

(3) *Sasi Bhushan Bose* v. *Manindra Chandra*, (1917) 38 Ind Cas 835 (837): 44 Cal 890: 24 Cal L Jour 448: 21 Cal W N 810; *T S Ramasami Aiyar* v. *M A Rangasami Aiyar*, 1931 Mad 683 (684): 61 Mad L Jour 933: 1931 Mad W N 916: 134 Ind Cas 1137: 34 Mad L W 429: 55 Mad 21.

Thus the suit is, in essence, one for an account and application of the estate of the deceased, for the satisfaction of the dues of all the creditors.[4] It cannot be dismissed at the preliminary stage except where the plaint discloses no cause of action or the suit is premature.[5] O.20, R.13, Notes 2—4.

An administration suit is not a suit *relating to immovable property* and, therefore, the Court is not incompetent to administer properties, or to deal with questions of title in respect of properties situate *outside* its jurisdiction.[6] Again the jurisdiction of the Court, as to such a suit, does not depend upon the fact whether the deceased is one to whose estate the Succession Act applies.[6-a]

Though sub-S. (1) does not *expressly prohibit* the filing of an administration suit in respect of the property of a *living* person, it has been held by the High Court of Bombay that such a suit is *not* maintainable.[7]

Before the Court takes upon itself the administration of the property, the preliminary decree for administration should be passed.[8] The Court may also make an order for grant of maintenance *pendente lite* but this power has to be exercised with caution.[9]

3. **Hindu Law.**—An administration suit is filed only in respect of the estate of the deceased and therefore if the property of a Hindu passes by *survivorship*, there is no *estate* of the deceased left for administration and a suit for administration is not maintainable.[1]

See also the undermentioned case.[2]

4. **Muhammadan Law.**—Under the Muhammadan Law, the funeral expenses of the deceased should be defrayed first from out of the assets, then his debts and then the legacies. The residue is to be thereafter distributed amongst the heirs of the deceased.[1] A suit by the heirs or the creditors or the legatees of a deceased Muhammadan for the enforcement of their claims against the estate of the deceased, becomes essentially a suit for *administration*,[2] though

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(4) *Sasi Bhushan Bose* v. *Manindra Chandra*, (1917) 38 Ind Cas 835 (837): 44 Cal 890: 24 Cal L Jour 448: 21 Cal W N 310; *T S Ramasami Aiyar* v. *M A Rangasami Aiyar*, 1931 Mad 683 (683): 61 Mad L Jour 933: 1931 Mad W N 916: 134 Ind Cas 1137: 34 Mad L W 429: 55 Mad 21.

(5) *Balak Bala Dasei* v. *Jadu Nath Das*, 1931 Cal 45 (48): 34 Cal W N 634: 57 Cal 1358: 129 Ind Cas 566.

(6) *Benode Behari* v. *Nistarainee Dassi*, (1906) 33 Cal 180 (191, 192): 2 Cal L Jour 189: 7 Bom L R 887: 32 Ind App 193: 15 Mad L Jour 331: 9 Cal W N 961; *Mt Amir Bi* v. *Abdul Rahim*, 1928 Mad 760 (763): 55 Mad L Jour 266: 28 Mad L W 583: 110 Ind Cas 276; *Srinivasa Murthy* v. *Venkata Varada*, (1906) 29 Mad 239 (280): 16 Mad L Jour 238: 1 Mad L Tim 71 [Affirmed in 34 Mad 257].

(6-a) *Mussammat Rukman* v. *Brij Mohan Lal*, 1881 Pun Re No 68.

(7) *Gangaram* v. *Nagindas*, (1908) 32 Bom 381 (384, 385): 10 Bom L R 519.

(8) *Grimault & Co* v. *Premji*, (1930) Bom 336 (336): 32 Bom L R 414: 125 Ind Cas 910.

(9) *Fazlur Rahman* v. *Kali Muzafar*, (1918) 48 Ind Cas 533 (534) Pat.

Note 3.

(1) *Gangaram* v. *Nagindas*, (1908) 32 Bom 381 (385): 10 Bom L R 519.

(2) *Dose Thimmanna Bhutta* v. *Krishna Tantri*, (1906) 29 Mad 508 (510): 16 Mad L Jour 413.

Note 4.

(1) *Narsingh Dass* v. *Najmooddin Hossein*, (1882) 8 Cal 20 (24): 10 Cal L Rep 225: 6 Ind Jur 193.

(2) *Md Sharafat* v. *Shahzadi Wahida Sultan Begum*, (1915) 28 Ind Cas 191 (194): 19 Cal W N 502: 21 Cal L Jour 319 [Muhammadan widow can have her claim to dower settled only by administration suit]; *Kuratul Ain Bahadur* v. *Broughton*, (1897) 1 Cal W N 336 (338) [Heirs opposing probate may maintain suit for administration against administrator *Pendente-lite*]; *Muttyjan* v. *Amed Ali*, (1882) 8 Cal 370 (373, 374): 10 Cal L Rep 346 [Creditors suit—Treated as administration suit]; *Assamathem Nessa* v. *Roy Luchmeeput Singh*, (1879) 4 Cal 142 (159): 2 Cal L Rep 223: 1 Shom L R 219 F B, (Do.); *Mst Nuzeerun* v. *Moulvie Ameerooddeen*, (1875) 24 Suth W R 3 (4), (Do.).

O.20, R.13, Notes 4—7.

in such cases, partition of the estate may be an incident thereof,[3] and even the heirs of the deceased who are not parties to such a suit, are bound by the proceedings and cannot claim anything but what remains after the debts of the deceased have been paid.[4]

5. **Who may file an administration suit.**—A suit for administration of the estate may be instituted by any person *interested* in the estate. Thus the following persons may maintain a suit for administration:—

(*i*) Any person entitled to a share in the deceased's estate, such as next of kin.[1]

(*ii*) A legatee or an annuitant.[2]

(*iii*) *A creditor of the deceased.*—But the creditor should sue on behalf of himself and of all the creditors.[3]

(*iv*) An executor or administrator, where there are disputes between the heirs or the legatees and where there is a doubt as to the manner in which he should administer the estate.[4]

An order for administration will not be made in a suit therefor, unless the plaintiff proves his claim or establishes his right to bring the suit.[5] But it is not obligatory on the Court to pass a decree for administration, if the defendant before decree satisfies the plaintiff's claim. It may dismiss the suit.[6]

6. **Plaint in administration suits.**—As to the form of plaint in such suits, *see* App. A, Forms Nos. 41—44.

7. **Decree in administration suits.**—In drawing up decrees in administration suits the forms prescribed in the Code should be followed as far as possible.[1] For forms of preliminary decrees, *see* Sch. I, App. D, Forms Nos. 17 and 19, *infra*, and for forms of final decrees, *see* Forms Nos. 18 and 20, *infra*. In a suit by a creditor for administration, it cannot be held that the other creditors are represented by the plaintiff in the sense that they are, in effect *parties* to the suit.[1-a] But a decree for the administration of the estate of a deceased person is a decree in favour of all creditors and persons entitled to the effects of the deceased, and therefore a creditor who has attached property of the deceased is not entitled to any priority in respect of his claims, and will only rank among other creditors.[2] But the pendency of an administration

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(3) *Mt Amir Bi* v. *Abdul Rahim*, 1928 Mad 760 (762, 763): 55 Mad L Jour 266: 28 Mad L W 583: 110 Ind Cas 276.

(4) *Amir Dulhin* v. *Baij Nath*, (1894) 21 Cal 311 (317, 318).

(5) (1887) 36 Ch D 269 C A.

(6) *Athalur Malakondiah* v. *Thatha Lakshminarasimhulu*, (1914) 26 Mad L Jour 312 (314): 1 Mad L W 372: 28 Ind Cas 134.

Note 5.

(1) *Mt Amir Bi* v. *Abdul Rahim*, 1928 Mad 760 (762): 55 Mad L Jour 266: 28 Mad L W 583: 110 Ind Cas 276.

(2) *Wollaston* v. *Wollaston*, (1877) 7 Ch D 58: 47 L J Ch 117: 37 L T 631: 26 W R 77; *Daniels, C P* 7 Edn, 195 Fol: 26 Mad L Jour 312.

(3) *Dhunraj* v. *Broughton*, (1875) 15 Beng L R 296; *Oriental Bank Corporation* v. *Gobindlall Seal*, (1884) 10 Cal 713 (734); *Worraker* v. *Pryer*, (1876) 2 Ch D 109: 45 L J Ch 273: 24 W R 269.

(4) *Trimbak* v. *Narayan*, (1909) 3 Ind Cas 164 (165): 33 Bom 429: 11 Bom L R 495.

Note 7.

(1) *Ajoy Kumari Debi* v. *Manindra Nath*, (1905) 32 Cal 561 (565, 566). See also *Ma Chit Su* v. *National Bank of India*, 1925 P C 261 (262): 6 L R P C 185: 1925 Mad W N 847: 91 Ind Cas 432: 23 Mad L W 399: 80 Cal W N 769: 50 Mad L Jour 644 [Change in form of preliminary decree was recommended].

(1-a) *Ramasami Aiyar* v. *Rangasami Aiyar*, 1931 Mad 683 (684): 61 Mad L Jour 933: 1931 Mad W N 916: 134 Ind Cas 1137: 34 Mad L W 429: 55 Mad 21.

(2) *Soobul Chunder* v. *Russick Lall*, (1868) 15 Cal 202 (209, 210): 12 Ind Jur 307.

suit will not debar a *secured* creditor from enforcing his security.[2-a] After the passing of the preliminary decree it is not proper for the Court to sanction a compromise to which all parties to the suit are not parties,[3] or to discharge the receiver appointed by the Court and direct him to make over the estate to the plaintiff.[4] O.20, R.13, Notes 7–10.

The plaintiff in an administration suit is entitled to get his costs from out of the estate.[5]

8. Estate insufficient to pay all the debts—Sub-R. (2).—Where the estate of the deceased in respect of which administration by Court is sought, is *insufficient* to pay all the debts of the deceased in full, sub-R. (2) will apply. Under that sub-rule, the Law of Insolvency in respect of the following heads should be observed in the administration of such estates:—

(*i*) As to the respective rights of secured and unsecured creditors

See Ss. 28 and 47 of the Provincial Insolvency Act, 1920, and S. 48 and Cls. 9—17 of Sch. II of the Presidency Towns Insolvency Act, 1909.

(*ii*) As to the debts and liabilities of the estate proveable.

See Ss. 45, 46 of the Provincial Insolvency Act, 1920, and Ss. 46 and 48 of the Presidency Towns Insolvency Act, 1909; and

(*iii*) As to the valuation of annuities and future and contingent liabilities

See S. 34 of the Provincial Insolvency Act, 1920, S. 46 of the Presidency Towns Insolvency Act.

The object of this sub-rule is not to apply *all* rules of insolvency to insolvent estates but only the rules in respect of the three heads mentioned above.[1]

9. Rights of secured creditors.—*See* Note 8, *supra*.

10. Provable debts and liabilities under the Insolvency Act.—The dividends due to the creditors should, in an administration suit, be calculated on the amount of the debt at the *date of the preliminary decree* and not at the date of *proof*.[1] Unsecured creditors are entitled to interest up to the date of the preliminary decree and not up to the date of payment,[2] but secured creditors are entitled to interest from the proceeds of the sale of secured property up to the date of payment.[3] The general principle governing the position of cre-

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(2-a) *Kristomohiny* v. *Bama Churn*, (1881) 7 Cal 733 (735): 9 Cal L Rep 344.

(3) *Ajoy Kumari* v. *Manindra Nath*, (1905) 32 Cal 561 (565, 566).

(4) *Bhugwan* v. *Heera Lall*, (1901) 5 Cal W N 417 (419).

(5) In the Goods of *Premchand Moonshee, deceased, Bidhatree* v. *Multy Lall*, (1894) 21 Cal 832 (837).

Note 8.

(1) *The Bank of Upper India* v. *The Administrator-General of Bengal*, (1918) 47 Ind Cas 529 (530, 533): 45 Cal 653: 22 Cal W N 798; *Navajee* v. *Administrator-General of Madras*, (1914) 38 Mad 500 (503): 22 Ind Cas 566 [This rule is inapplicable to suits against Administrator-General].

Note 10.

(1) *The Agra & Masterman's Bank, Ltd* v. *T M Robinson*, (1871) 6 Beng L R App 140.

(2) *Ramasubba Raju* v. *Seshamma*, 1929 Mad 242 (248): 112 Ind Cas 621.

(3) *Ramasubba Raju* v. *Seshamma*, 1929 Mad 242 (243): 112 Ind Cas 621.

O.20, R.13, Notes 10—13.

ditors of an estate under administration by the Court, is that creditors will, on due cause shown, be let in at any time, *while the fund is in Court* except where they have been guilty of remissness in the assertion of their claim and other creditors are prejudiced thereby.[4] *See* Ss. 45—50 of the Provincial Insolvency Act, 1920, and Sch. II, Rr. 2, 9, 11, 15, 23—27 of the Presidency Towns Insolvency Act, 1909.

11. Barred Debt.—A creditor whose claim is barred before the preliminary decree cannot come in and claim to be paid out of the estate.[1-a] If a debt is *due* to the deceased by the next of kin, but is barred by limitation, it has been held in England that an executor can retain a share, inasmuch as the debt still existed though only the *remedy* is barred[1] This rule has also been followed in India.[2]

12. Court-fees.—A suit for administration is in the nature of a suit for an account and the plaint is chargeable with Court-fee under S. 7 (*iv*) (*f*) of the Court Fees Act, 1870.[1] A creditor who comes in with a claim after a preliminary decree has been passed in the administration suit need not pay any Court-fee on such claim.[2]

13. Appeal.—An order directing an account to be taken in an administration suit was not a decree under the old Code and was not appealable.[1] Under the present Code, a preliminary decree directing accounts to be taken will of course be appealable under S. 96 of the Code.

O.20, R.14. *Decree in* pre-emption suit.

R. **14.** [S. 214.] (1) *Where the Court decrees a claim to* pre-emption[2] in respect of a particular sale of property and the purchase money has not been paid into Court, the decree shall—

(*a*) specify a day on or before which *the purchase-money* shall be so paid,[6] and

(*b*) *direct* that on payment *into Court*[9] of such purchase-money, together with the costs (if any) decreed against *the plaintiff*, *on or before the day referred to in clause* (a), *the defendant shall deliver* possession of the property *to the plaintiff*, *whose*

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(4) *Rose* v. *Sreemuthy Biddadhurry Dassee*, (1905) 9 Cal W N 167 (169, 170).

Note 11.

(1-a) *Ramasami* v. *Rangasami*, 1931 Mad 683 (684): 61 Mad L Jour 933: 1931 Mad W N 916: 134 Ind Cas 1137: 34 Mad L W 429: 55 Mad 21.

(1) *Courteney* v. *Williams*, 3 Hare 539: 15 L J Ch 204: R R 64, p 403 Ref 7 Cal 644; In re *Cordwell's Estate*, 20 Eq 644 Ref 2 Bom 75; In re *Aherman*, (1891) 3 Ch 212; *Taylor* v. *Wade*, (1894) 1 Ch 671; In re *Wheeler*, (1904) 2 Ch 66: 73 L J Ch 576: 91 L T 227: 52 W R 586.

(2) *Lokenath* v. *Odoychurn*, (1881) 7 Cal 644 (649); *Dhanjibhai* v. *Navazbai*, (1878) 2 Bom 75 (81, 82).

Note 12.

(1) *Sasi Bhushan Bose* v. *Manindra Chandra*, (1917) 44 Cal 890 (895, 896): 24 Cal L Jour 448: 38 Ind Cas 835: 21 Cal W N 310; *Khatija* v. *Shaikh Adam Husen Ally*, (1915) 29 Ind Cas 949 (950): 17 Bom L R 574: 39 Bom 545; *Shujauddin* v. *Ashaibai*, (1915) 26 Ind Cas 342 (343): 1914 Pun Re No 100: 239 Pun L R 1915; *Abad Ali* v. *Jamiruddin*, (1888) 13 Cal L Rep 160 (161).

(2) *Ramasami* v. *Rangasami*, 1931 Mad 683 (684): 61 Mad L Jour 933: 1931 Mad W N 916: 134 Ind Cas 1137: 34 Mad L W 429: 55 Mad 21.

Note 13.

(1) *Sreenath* v. *Radhanath*, (1883) 9 Cal 773 (777): 7 Ind Jur 650.

O.20, R.14, Notes 1—2.

title thereto shall be deemed to have accrued[8] *from the date of such payment*, but that, if *the purchase-money* and *the* costs (*if any*) are not so paid, the suit shall *be* dismissed with costs.

(2) *Where the Court has adjudicated upon rival claims to pre-emption,*[15] *the decree shall direct,—*

(*a*) *if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule* (1) *shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and,*

(*b*) *if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.*

[1877—S. 214.]

Synopsis.

1. Legislative changes.
2. Pre-emption.
3. Pre-emption under Muhammadan Law.
4. Pre-emption by custom.
5. Pre-emption by contract.
6. "Shall specify a day before which purchase-money shall be paid."
7. Extension of time.
8. Plaintiff's title when accrues.
9. Payment into Court.
10. Tender of money if sufficient.
11. "On or before the day referred to."—See Note 7, supra.
12. Right to rents and profits.
13. Vendor's title in pre-emption suits.
14. Set-off of costs against purchase-money.
15. Rival pre-emptors—Sub-Rule (2).
16. Appeal.

Conditional decrees under this rule. See Note 16, Pt. (4).
Effect of non-payment—If the decree should state. See Note 7, Pts. (7) and (8).
Inapplicability where vendee not entitled to immediate possession. See Note 8, Pts. (6) and (7).
Miscellaneous cases. See Note 4, F.-N. (4).
Payment of costs under this rule. See Note 9, Pts. (6) and (7).
Payment of money and rights thereto. See Note 9, Pt. (9) and F.-N. (10).
Value for jurisdiction. See Note 2, F.-N. (6).

1. Legislative changes.—

(1) The words "whose title thereto shall be deemed to have accrued from the date of such payment" are new. *See* Note 8, *infra*.

(2) Sub-Rule (2) is new.

2. Pre-emption.—The right of pre-emption is the right of a person to purchase property before opportunity to purchase it is offered to others.[1-a] Such a right may, however, be defeated by waiver or acquiescence on the part of the claimant.[1]

Order 20, Rule 14—Note 2.

(1-a) *The Concise Oxford Dictionary.*

(1) *Baijnath Ram Goenka* v. *Ramdhary.* (1908) 35 Cal 402 (411): 35 Ind App 60: 7

O.20, R.14 Notes 2—3.

The doctrine of pre-emption does not apply to *execution sales*, apparently because, the would-be pre-emptor can, in such a case, as well have bid at the auction.[2]

The right of pre-emption arises only on a *sale* of immovable property.[3]

Where a plaintiff having a right to pre-empt joins with himself, in a suit for pre-emption, a *stranger*, he forfeits his right to pre-empt,[4] but not so where the other persons joined are members of the plaintiff's family.[5] *See also* the undermentioned cases.[6]

3. Pre-emption under Muhammadan Law.—The Muhammadan Law is the only system which provides substantive rules relating to pre-emption.[1] In the Madras Presidency, the right of pre-emption under the Muhammadan Law is not recognised on the ground of its being opposed to public policy, which favours the free and unrestricted transfer of property.[2]

Cal L Jour 318: 18 Mad L Jour 116: 12 Cal W N 419: 10 Bom L R 253: 3 Mad L Tim 349 [Delay in asserting right to pre-emption construed as *waiver*]; *Ajaib Nath* v. *Mathura Prasad*, (1889) 11 All 164 (174): 1889 All W N 48 [Acquiescence in mortgage by conditional sale is not relinquishment of right of pre-emption upon conditional sale becoming absolute]; *Mere fact that negotiations are made with vendee without resorting to suit does not amount to waiver.*—*Muhammad* v. *Abdul Hasan*, (1894) 16 All 300 (302): 1894 All W N 91 *Muhammad Yunus* v. *Muhammad Yusuf*, (1897) 19 All 334 (336): 1897 All W N 93.

(2) *Kanhai Lal* v. *Kalka Prasad*, (1905) 27 All 670 (677): 1905 All W N 149: 2 All L J 390 [*Private* sale by Receiver is not a compulsory sale and right of pre-emption exists]; *Ferasut Ali* v. *Ashootosh Roy*, (1871) 15 Suth W R 455 (456).

(3) *Harnarain* v. *Ram Prasad*, (1892) 14 All 333 (335): 1892 All W N 39 [Gift—No right of pre-emption]; *Dewanutulla* v. *Kazem Molla*, (1888) 15 Cal 184 (186) [Perpetual lease—No right of pre-emption]; *Parsashth Nath* v. *Dhanai Ojha*, (1905) 32 Cal 988 (991): 9 Cal W N 874 [Sham sale—No right of pre-emption]. See also *Abdur Razzaq* v. *Mumtaz Husain*, (1903) 25 All 334 (336): 1903 All W N 63 [No suit for pre-emption will lie, the basis of which is a decree for pre-emption in another suit].

(4) *Rajjo* v. *Lalman*, (1883) 5 All 180 (181, 183): 1882 All W N 210: 7 Ind Jur 485; *Bhawani Prasad* v. *Dhamru*, (1883) 5 All 197 (200, 201): 1882 All W N 217: 7 Ind Jur 487; *Bhupal Singh* v. *Mohan Singh*, (1897) 19 All 324 (326): 1897 All W N 72.

(5) *Bhurey Mal* v. *Nawal Singh*, (1882) 4 All 259 (260): 1882 All W N 16; *Mustaq Ahmad* v. *Amjad Ali*, (1897) 19 All 311 (311): 1897 All W N 121.

(6) *Ram Sahai* v. *Gaya*, (1885) 7 All 107 (111): 1884 All W N 224 [Decree for pre-emption—Property transferred by decree-holder—He *can* thereafter execute the decree]; *Ram Sahai* v. *Gaya*, (1885) 7 All 107 (109): 1884 All W N 224 [Transferee of pre-emption decree cannot execute it]; *Umrao Singh* v. *Dalip Singh*, (1901) 23 All 129 (130): 1901 All W N 18 [Guardian of minor is competent to exercise or refuse to exercise on behalf of the minor a right of pre-emption]; *Ramsarup* v. *Sital Prasad*, (1904) 26 All 549 (553): 1 All L J 279: 1904 All W N 128 [In suit for pre-emption vendor is not a necessary party]; *Baldeo* v. *Har Ratan*, (1911) 9 Ind Cas 414 (414) Oudh [Jurisdiction of Court is to be decided by the valuation set forth in the plaint]; *Agar Singh* v. *Raghuraj Singh*, (1887) 9 All 471 (473): 1887 All W N 99 [Price alleged in deed of sale not true contract price—Vendor and vendee concealing real price—The Court should ascertain the market price at the time of the sale]; *Ram Nath* v. *Badri Narain*, (1897) 19 All 148 (152): 1897 All W N 20 [Sale to two one of whom alone is liable to be pre-empted—Interests separable—Pre-emption only of his interest allowable]; *Serh Mal* v. *Hukam Singh*, (1893) 20 All 100 (102): 1897 All W N 206 [Land having been sold to stranger subsequently re-sold by the stranger before suit to a co-sharer having equal rights with those seeking pre-emption—No right of pre-emption]; *Janki Prasad* v. *Ishar Das*, (1899) 21 All 374 (379): 1899 All W N 126 [Right to pre-empt must subsist both at the time of the sale and at the time of the institution of suit]; *Ram Gopal* v. *Piari Lal*, (1899) 21 All 441 (444, 445): 1899 All W N 163 [Right to pre-empt lost during pendency of suit—Suit to be dismissed]; *Ujagar-lal* v. *Jia Lal*, (1896) 18 All 382 (384): 1896 All W N 112 [Claimant for pre-emption under *Wajib-ul-arz* forfeits his right by mortgaging his share to a stranger in contravention of the *wajib-ul-arz*]. Contra *Rajjo* v. *Lalman*, 5 All 180 (182). *Durga Prasad* v. *Nawazish Ali*, (1876) 1 All 591 (592) [Plaint in suit for pre-emption not stating plaintiff's readiness and willingness to pay any amount which Court might find to be actual price. It is discretionary with the Court to grant a decree]. See also *Naubat Singh* v. *Kishan Singh*, (1881) 3 All 753 (755): 1881 All W N 54; *Hulasi* v. *Sheo Prasad*, (1884) 6 All 455 (456): 1884 All W N 166 [Every suit for pre-emption must include whole of the property subject to pre-emption conveyed by one transfer]. See also *Durga Prasad* v. *Munshi*, (1884) 6 All 423 (426, 427); *Muhammad Wilayat Ali* v. *Abdul Rab*, (1889) 11 All 108 (117): 1889 All W N 17: 13 Ind Jur 233 [Claimant disqualified to sue as to part, cannot claim the remainder].

Note 3.

(1) *Zamir* v. *Daulat*, (1883) 5 All 110 (113, 117): 1882 All W N 199; *Rajjo* v. *Lalman*, (1883) 5 All 180 (182): 1882 All W N 210: 7 Ind Jur 485.

(2) *Ibrahim* v. *Muni Mir*, (1870) 6 Mad H C R 26 (31): 1 Weir 514.

O.20, R 14, Notes 3—5.

The following are some of the cases bearing upon the Muhammadan Law of pre-emption.[3] *See also* the Punjab Pre-emption Act (I of 1913). S. 11, the Agra Pre-emption Act, 1922, and the Oudh Laws Act, 1876.

4. Pre-emption by custom.—A right of pre-emption is recognised by custom among Hindus in Behar[1] Gujarat[2] and the United Provinces.[3] *See also* the following cases.[4]

5. Pre-emption by contract.—Pre-emption can be claimed on the basis of a contract between the person claiming to pre-empt and the vendor, if the vendee has notice of such contract. (*See* Transfer of Property Act, S. 40.[1])

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(3) *Muhammad Husain* v. *Niamatunissa*, (1898) 20 All 88 (89): 1897 All W N 193 [Sunnis—Plaintiff dying before suit—Right does not survive to his heirs—But see *Sayyad* v. *Sitaram*, 12 Ind Cas 720 (720)]; *Najm-un-nissa* v. *Ajaib Ali Khan*, (1900) 22 All 343 (350, 351): 1900 All W N 102 [Sale invalid—No right of pre-emption]; *Begam* v. *Muhammad Yakub*, (1894) 16 All 344 (351, 352): 1894 All W N 101 [Sale of land—Value exceeding Rs. 100—Price paid and possession delivered to transferee—No sale deed executed—Transaction complete and right of pre-emption arose]; *Karim* v. *Priyo Lal*, (1906) 28 All 127 (129): 1905 All W N 217: 2 All L J 619 [Owner of the dominant tenement has in respect of a sale of the servient tenement a right of pre-emption]; *Abdul Rahim* v. *Kharag Singh*, (1893) 15 All 104 (106): 1892 All W N 240 [Vicinage would give no right of pre-emption under Mahomedan Law]; *Karim Baksh* v. *Khuda Baksh*, (1894) 16 All 247 (251): 1894 All W N 70 [No right of pre-emption in respect of thoroughfare]; *Saligram* v. *Rhubardyal*, (1888) 15 Cal 224 (226) [Alienation in favour of co-sharer and stranger jointly—Co-sharer also loses his right of pre-emption]; *Rujjab Ali* v. *Chandi Churn*, (1890) 17 Cal 543 (547) F B [Formalities]; *Jug Deb Singh* v. *Mahomed Afzal*, (1905) 32 Cal 982 (986): 9 Cal W N 826 [Suit for pre-emption brought by Sunni claimant against a Shia vendor and Hindu purchasers is governed by the Sunni Hanafi law]; *Abbas Ali* v. *Maya Ram*, (1890) 12 All 229 (231, 234): 1890 All W N 93 [Shia law—Property owned by more than two sharers —No right of pre-emption]; *Qurban Husain* v. *Chote*, (1900) 22 All 102 (104, 105): 1899 All W N 198 [Muhammadan of the Shia sect cannot maintain claim for pre-emption based on the ground of vicinage under the Muhammadan law when both the vendor and vendee were Sunnis].

Note 4.

(1) *Jadu Lal* v. *Janki Koer*, (1912) 15 Ind Cas 659 (662): 39 Cal 915: 39 Ind App 101: 15 Cal L Jour 483: 16 Cal W N 553: 9 All L J 525: 14 Bom L R 436: 23 Mad L Jour 28: 11 Mad L Tim 361: 1912 Mad W N 486 P C; *Jadu Lal* v. *Janki Koer*, (1908) 35 Cal 575 (585); *Fakir Rawot* v. *Sheikh Emmambaksh*, 1863 Beng L R Sup Vol 35: Suth W R 143 (145) F B.

(2) *Gordhandas* v. *Prankor*, (1869) 6 Bom H C A C 263.

(3) See for instance *Deokinandan* v. *Sri Ram*, (1890) 12 All 234 (254, 258).

(4) *One co-parcener has no right of pre-emption against another*:—*Moheshee Lal* v. *Christian*, (1866) 6 Suth W R 250 (252); *Nowbut Lal* v. *Jewan Lal*, (1879) 4 Cal 831 (835): 2 Cal L Rep 319: 4 Ind Jur 178: 1 Shome L R 212 F B; *Digambur Misser* v. *Ram Lal*, (1887) 14 Cal 761 (766): 12 Ind Jur 94. *Persons entitled to pre-empt*:—*Phulman Rai* v. *Dani Kuari*, (1875-78) 1 All 452 (453) [Hindu widow]; *Md Yusuf Ali Khan* v. *Dal Kuar*, (1898) 20 All 148 (150): 1897 All W N 226 [Hindu daughter]; *Mannu Lal* v. *Muhammad Ismail*, (1904) 26 All 574 (579): 30 Ind App 212: 6 Bom L R 761: 9 Cal W N 129: 2 All L J 769 P C [Non-residing co-sharer entitled to pre-empt]. **Persons not entitled to pre-empt**.—*Sheobalak Singh* v. *Lachmidhar*, (1901) 23 All 427 (428): 1901 All W N 120 [Hissadar of superior class not entitled to pre-emption upon sale to hissadar of inferior class]; *Kallian Mal* v. *Madan Mohan*, (1895) 17 All 447 (450): 1895 All W N 93 [Vendor who is not a co-sharer]; *Dakhni Din* v. *Rahimunnissa*, (1894) 16 All 412 (414): 1894 All W N 134, (Do.); *Hussain Bakhsh* v. *Damar Singh*, (1904) 26 All 547 (548): 1904 All W N 118, (Do.); *Parsakth Nath Tewari* v. *Dhanai Ojha*, (1905) 32 Cal 988 (990): 9 Cal W N 874 [Persons not born or domiciled in the district in which the land is situated]; *Dila Kuari* v. *Jagarnath Kuari*, (1884) 6 All 17 (19): 6 Ind Jur 40: 1883 All W N 177 [Maintenance holder]. **Classes of persons entitled to pre-empt**:—*Sukhdeo Singh* v. *Bahadur Singh*, (1904) 26 All 544 (545): 1 All L J 272: 1904 All W N 104: *Abdul Shakur* v. *Mendai*, (1901) 23 All 260 (261): 1901 All W N 63 [Classes of persons entitled to pre-empt—No implication of subordination]; *Benishankar* v. *Mahpal Bahadur*, (1887) 9 All 480 (483): 1887 All W N 71 [Recorded co-sharer to be preferred to person claiming to be co-sharer by virtue of benami purchase]; *Narain Das* v. *Ram Saran*, (1898) 20 All 419 (420): 1898 All W N 94 [Wajib-ul-arz—Co-sharers and owners of separate plots of *muafi* land]. **Miscellaneous**:—*Dalganjan Singh* v. *Kalka Singh*, (1900) 22 All 1 (10, 28, 29, 32: 1899 All W N 111 F B [Perfect partition extinguishes co-sharer's right of pre-emption]; *Chakauri Devi* v. *Sundari Devi*, (1906) 23 All 590 (592): 3 All L J 338: 1906 All W N 144 [Generally custom to be presumed to be co-extensive with Muhammadan Law]; *Chatur Singh* v. *Kalyan Singh*, (1901) 23 All 32 (33): 1900 All W N 188 [*Ekjadi*, meaning of]; *Deokinandan* v. *Sri Ram*, (1890) 12 All 234 (254) [Custom ordinarily co-extensive with Mahomedan Law]. See also *Fakir Rawot* v. *Sheikh Emambaksh*, 1863 Beng L R Sup Vol 35: Suth W R 143 (145) F B; *Lakhraj Bharathi* v. *Anrud Tiwari*, (1906) 28 All 434 (435): 1906 All W N 80 [Custom need not be immemorial]; *Md Ahsanullah* v. *Shamsunnissa Bibi*, (1914) 24 Ind Cas 425 (426): 36 All 456: 12 All L J 681 [Claim can be based in the alternative on contract, custom or Mahomedan Law]; *Nehchul* v. *Than Singh*, (1870) 2 N W P H C 222 [Claims to pre-emption based on contract as well as custom may be united in one suit].

Note 5.

(1) *Harris Paik* v. *Jahuruddi Gazi*, (1898) 2 Cal W N 575 (576); *Kalimuddin Bhuya* v. *Reazuddin Ahmad*, (1909) 4 Ind Cas 743 (744): 14 Cal W N 295: 10 Cal L Jour 626.

O.20, R.14, Notes 5—7.

Thus, a right of pre-emption in respect of a property may be conferred on a mortgagee thereof.[2] The price in such cases may or may not be fixed beforehand.[3] It has been held that the right cannot be enforced against an execution purchaser of the equity of redemption.[4]

6. **"Shall specify a day before which purchase money shall be paid".**—It is necessary, under this rule that the decree should *specify a day* before which the purchase money shall be paid.[1] It is not a compliance with the rule to say that the money should be paid within a certain period; the *date* by which the amount should be paid should be specified.[2]

Where the vendee has paid off encumbrances on the property the amount should be included in the "purchase money" unless he has paid off the encumbrance in bad faith or improvidently.[3]

7. **Extension of time.**—The general principles embodied in O. 20, R. 3 apply to pre-emption decrees under this rule and hence, S. 148 does not enable the Court to enlarge the period fixed by the decree for paying the purchase money.[1] But where the last day allowed to the plaintiff to deposit the purchase money is a holiday, the money may be deposited on the next Court day on general principles of law.[2]

Effect of appeal on time fixed for payment.—The mere presentation of an appeal does not operate as a stay of proceedings in the lower Court (O. 41,

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(2) *Bimal Jati* v. *Biranja Kuar*, (1900) 22 All 238 (240, 242): 1900 All W N 49. See *Bawa Lehna Singh* v. *Jagan Nath*, 1888 Pun Re No 138 [In this case the mortgagee was held to have waived his right].

(3) *Orby* v. *Trigg*, (1721) 9 Modern 2, referred to in 22 All 238 (241, 242) and 24 Mad 449 (459).

(4) *Vithal* v. *Maruti*, (1900) 7 Ind Cas 663 (663): 34 Bom 567: 12 Bom L R 582. See also *Ammotti* v. *Kunhayan*, (1892) 15 Mad 480 (481, 482): 2 Mad L Jour 231 [Refusal to bid at the Court auction precludes enforcement of right afterwards].

Note 6.

(1) *Kashi Nath* v. *Mukta Prasad*, (1884) 6 All 370 (373): 1884 All W N 119: 8 Ind Jur 688; *Baghela* v. *Sallo*, (1913) 18 Ind Cas 994 (996): 3 Pun Re 1913: 226 Pun L R 1913. *Prior to the Code of* 1877 *there was difference of opinion on the point*: see *Ahsan Ali* v. *Sabokee Bibee*, (1868) 10 Suth W R 53 (54); *Sheikh Ewaz* v. *Mokuna Bibi*, (1875-78) 1 All 132 (134): 10 Mad Jur 346: 11 Mad Jur 346; *Hingan Khan* v. *Ganga Pershad*, (1879) 1 All 293 (295, 296): 1 Ind Jur 410.

(2) *Jagat Narain Lal* v. *Sheikh Hawaldar*, 1926 All 158 (158): 6 L R (All) Civ 597: 90 Ind Cas 287: 24 All L J 63; *Wasawa Singh* v. *Lal Singh*, 1906 Pun Re No 48: 104 Pun L R 1906: 11 Pun W R 1906; *Himmun* v. *Faujan*, 1921 Lah 6 (9): 3 Lah L Jour 310: 67 Ind Cas 772 F B.

(3) *Baldeo Singh* v. *Deputy Commissioner of Kheri*, 1924 Oudh 1 (1, 5, 6): 10 Oudh L J 112: 74 Ind Cas 503.

Note 7.

(1) *Bachulal* v. *Rajaram*, (1913) 19 Ind Cas 347 (347): 16 Oudh Cas 5; *Narendra* v. *Ajudhia*, (1910) 5 Ind Cas 443 (444): 13 Oudh Cas 38; *Muhammad* v. *Charag*, (1910) 8 Ind Cas 812 (813): 22 Pun L R 1911: 140 Pun W R 1910; *Khan Muhammad* v. *Ahman*, 1924 Lah 359 (359): 73 Ind Cas 891; *Suranjan* v. *Rambahal*, (1913) 21 Ind Cas 585 (586): 35 All 582: 11 All L J 950; *Hasibunnissa* v. *Mahmudunnissa*, (1915) 27 Ind Cas 419 (419): 17 Oudh Cas 377; *Kaniz* v. *Bande Hussain*, (1915) 28 Ind Cas 458 (459): 2 Oudh L J 162; *Ram Lal Dube* v. *Har Narain*, (1891) 13 All 400 (403): 1891 All W N 150; *Janga Singh* v. *Lachmi Narain*, (1920) 57 Ind Cas 488 (492): 23 Oudh Cas 254: 7 Oudh L J 378: 4 U P L R (Oudh) 171. See also *Jug Ram* v. *Jewa Ram*, (1909) 3 Ind Cas 497 (498): 6 All L J 647. But see the following two cases.—*Abu Muhammad Mian* v. *Mukut Pertap Narain*, (1916) 34 Ind Cas 88 (89): 20 Cal W N 860: 1 Pat L Jour 92: 2 Pat L W 400; *Naba* v. *Pathana*, (1913) 18 Ind Cas 86 (87): 60 Pun Re 1913: 53 Pun L R 1913: 72 Pun W R 1913 [Money sent by money order delay due to post office—Time may be extended under S 148]. Compare also *Bhaghela* v. *Mt Sallo*, (1913) 18 Ind Cas 994 (996): 3 Pun Re 1913: 226 Pun L R 1913 [Inherent power costs not directed to be paid within any specific period time extended].

(2) *Mahomed Jan* v. *Shiam Lal*, 1924 All 218 (220): 22 All L J 110: 4 L R (All) Civ 88: 46 All 328: 78 Ind Cas 1014 [Overruling *Fateh Mahomed* v. *Sita*, 1922 All 278 (279) and *Hirde Narayan* v. *Alam*, 41 All 47]; *Dabi Din* v. *Muhammad Ali*, (1881) 3 All 850 (851): 1881 All W N 100; *Mt Muchul Kooer* v. *Laljee*, (1870) 2 N W P 112; *Shams-ud-din* v. *Pir Baksh*, (1877) Pun Re No 31; *Baghela* v. *Mt Sallo*, (1913) 18 Ind Cas 994 (995): 3 Pun Re 1913: 226 Pun L R 1913; *Ganga Dhar* v. *Anrudh Singh*, (1908) 11 Oudh Cas 144 (146); *Pat Ram* v. *Eduin Howard*, 1931 Lah 388 (389): 33 Pun L R 91: 134 Ind Cas 201.

R. 5). Hence, the time for payment fixed by a pre-emption decree is not extended by the fact that an appeal has been preferred against the decree,[3] though the appellate Court, may, if it thinks fit, enlarge the time.[4] Where the appeal is dismissed or the decree of the lower Court is varied and the appellate decree is silent about the extension of time, there is a conflict of opinion as to whether the time fixed by the original decree is to be calculated from the date of the appellate decree. *See* Note 9 to S. 148 *ante* and the undermentioned case.[5] Where, however, the appellate Court *increases* the sum to be paid by the plaintiff in a pre-emption suit and he deposits the excess amount ordered *within a reasonable time after the appellate decree*, the payment is a valid one.[6]

Effect of failure to deposit within the time allowed.—On the plaintiff's default in paying the purchase money within the time allowed, the suit should be dismissed,[7] though the decree does not contain a specific provision to that effect.[8] But where the plaintiff has appealed against the *very condition* in the decree that he should pay the purchase money within a certain period, the appellate Court should not dismiss the suit simply on the ground of non-payment within the time so fixed.[9]

Where a suit for pre-emption by a son *in his own individual capacity* is dismissed owing to his failure to pay the purchase money within the time allowed, a fresh suit by his father, for pre-emption, in assertion of his own individual right is not barred.[10]

8. Plaintiff's title when accrues.—The pre-emptor's title to the property accrues from the date of the payment of the purchase money into the Court and not from the date of the sale or of the decree.[1] Nor is a registered instrument necessary for passing the title.[2] The words "whose title thereto shall be deemed to have accrued from the date of such payment" have been newly inserted in this rule to make this clear and to supersede the opinion expressed by the Madras High Court in the undermentioned case[3] that a regis-

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(3) *Jaggar Nath Pande* v. *Jokhu Tewari*, (1896) 18 All 223 (226): 1896 All W N 43.

(4) *Parshadi Lal* v. *Ram Dial*, (1878-80) 2 All 744 (745); *Sheo Pershad* v. *Thakoor Rai*, (1868) 3 Agra 254; *Girdhari Singh* v. *Bhupal Singh*, 1923 All 516 (517): 45 All 456: 74 Ind Cas 745; *Jaggar Nath* v. *Jokhu Tewari*, (1896) 18 All 223 (226): 1896 All W N 43; Cf *Sarab Dial* v. *Nathu*, 1894 Pun Re No 137 [No authority to extend time on application before hearing appeal]. See also *Thakur Das* v. *Tulsi Das*, 1890 Pun Re No 70 F B; *Vide also* O 41, R 32.

(5) *Bankey Behari Lal* v. *Abdul Rahman*, 1932 Oudh 63 (66): 8 Oudh W N 1267: 135 Ind Cas 695 [Where the decree is set aside, failure to pay within the prescribed period does not extinguish the right of pre-emption].

(6) *Guptar* v. *Debi Saran*, (1915) 26 Ind Cas 65 (66): 36 All 514: 12 All L J 842.

(7) *Hingan Khan* v. *Ganga Prasad*, (1875) 1 All 293 (295): 1 Ind Jur 410; *Jaggarnath* v. *Jokhu*, (1896) 18 All 223 (227): 1896 All W N 43; *Tura Baz* v. *Hamid and Co*, (1918) 48 Ind Cas 470 (470): 92 Pun L R 1918.

(8) *Gurdit Singh* v. *Hukam Singh*, 1903 Pun Re No 53: 167 Pun L R 1903; *Buta Singh* v. *Chanda Singh*, 1898 Pun Re No 47; *Jai Kishen* v. *Bholanath*, (1882) 14 All 529 (531): 1892 All W N 106; *Chidda* v. *Imdad Hussain*, 1888 All W N 4 (5).

(9) *Kurshed-un-nissa* v. *Alim-un-nissa*, (1912) 17 Ind Cas 868 (868): 10 All L J 421.

(10) *Tahir Khan* v. *Megha Khan*, 1885 Pun Re No 1.

Note 8.

(1) *Lachman Singh* v. *Natha Singh*, 1930 Lah 273 (277): 31 Pun L R 274: 11 Lah 128: 12 Lah L Jour 45: 128 Ind Cas 58 [Overruling 25 Pun Re 1908]; *Anrup Misir* v. *Ramharakh Misir*, 1929 All 953 (954): 1929 All L J 1049: 51 All 998 [Title does not date from decree]; *Hakim Vilayat Ali* v. *Abdus Salam*, 1895 All W N 13 (14); *Nadir Ali* v. *Wali*, 1925 Lah 202 (203): 5 Lah 486: 85 Ind Cas 182 [Title does not date from sale]; *Hadayat Ullah* v. *Ghulam Mohammad*, 1923 Lah 529 (530): 73 Ind Cas 444; Contra *Bhoga Singh* v. *Gurmukh Singh*, (1902) Pun Re No 98 F B [Title dates from sale—This case should be deemed as overruled by 1930 Lah 273 (277) F B].

(2) *Ram Lal* v. *Harpal*, 1929 All 237 (238): 1929 All L J 423: 115 Ind Cas 113.

(3) *Ramasami* v. *Chinnan*, (1901) 24 Mad 449 (463): 11 Mad L Jour 132.

O.20, R.14, Notes 8—9.

tered instrument is necessary for passing title to the pre-empted property.[4] It has been held that where, at the time of the deposit in Court, there are crops on the land, they also pass to the pre-emptor.[5]

Although the rule says that on payment of the purchase money into the Court, the defendant shall deliver possession of the property to the plaintiff, this does not apply to the following cases:—

(*a*) Where the property is in the possession of a usufructuary mortgagee,[6]

(*b*) Where the pre-emptor is already in possession of the property.[7]

9. **Payment into Court.**—The payment of purchase money into Court may be made in currency notes.[1] But Government promissory notes are not "money" and the deposit thereof is not valid.[2] A payment made out of Court to the vendee is sufficient compliance with the decree, provided the vendee certifies to the Court *within the period allowed for payment* the fact of his receipt of the money,[3] but not otherwise.[4]

A payment is not valid if it is not a payment of the *full amount* stated in the decree, however small may be the sum by which it falls short.[5]

Where the decree directs the payment of the purchase money *and* costs within a specified time, the payment of the purchase money alone within the time limited is not enough; the costs also must be deposited within that time.[6] But this is not so where though costs are awarded, no time limit is fixed for their payment.[7]

The plaintiff does not forfeit his right of pre-emption by raising the purchase money by a mortgage of the property sought to be pre-empted.[8]

On payment into the Court, the money stands to the credit of the vendee and the pre-emptor's rights are not affected by the fact that a creditor of his, attaches the money and is allowed by the Court to remove it.[9]

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(4) *See* Notes on clauses by Select Committee.

(5) *Bapu* v. *Vithoba*, 1923 Nag 327 (328): 76 Ind Cas 193.

(6) *Raghubir Singh* v. *Jodha Singh*, 1923 All 507 (508): 73 Ind Cas 646: 21 All L J 417: 15 All 482: 4 L R A (Civ) 223.

(7) *Sita Ram* v. *Madho*, (1914) 28 Ind Cas 876 (876): 12 All L J 521; *Krishna Menon* v. *Kesavan*, (1897) 20 Mad 305 (310).

Note 9.

(1) *Ishhar* v. *Sahib Ram*, 1892, Pun Re No 67.

(2) *Thakur Das* v. *Tulsi Das*, 1890 Pun Re No 70.

(3) *Sukhpal Singh* v. *Abdul Rahman*, 1921 All 159 (160): 19 All L J 493: 63 Ind Cas 889; *Sher Shah* v. *Sher Jang*, 1889 Pun Re No 21.

(4) *Abdul Fatteh* v. *Fattch Ali*, (1916) 35 Ind Cas 363 (364): 73 Pun Re 1916: 121 Pun W R 1916: 137 Pun L R 1916.

(5) *Mehr Din* v. *Brij Lal*, 1928 Lah 250 (251): 81 Ind Cas 329 [One Rupee]; *Kanyalal* v. *Shaft Khan*, (1913) 18 Ind Cas 600 (601): 3 Pun W R 1913: 141 Pun L R 1913 [One anna]; *Ishar Singh* v. *Peshwari Rai*, 1924 Lah 384 (385): 69 Ind Cas 516 [About Rs 2].

(6) *Khan Mohammad* v. *Ahman*, 1924 Lah 359 (359): 73 Ind Cas 891; *Tehl Singh* v. *Ruldu*, 1884 Pun Re No 96.

(7) *Baghela* v. *Musst Sallo*, (1913) 18 Ind Cas 994 (996): 3 Pun Re 1913: 226 Pun L R 1913. See also *Nilkanth* v. *Mahabir Singh*, 1924 Oudh 104 (105): 26 Oudh Cas 345: 74 Ind Cas 558 [Payment of costs not made condition precedent to enforcement of right]. See also the following cases:—*Balmukund* v. *Pancham*, (1888) 10 All 400 (405, 406): 1888 All W N 74: 13 Ind Jur 73: *Bhagwana* v. *Goru*, (1910) 6 Ind Cas 954 (954, 955): 56 Pun Re 1910: 133 Pun L R 1919.

(8) *Lakhpat Singh* v. *Babu Ram*, (1917) 40 Ind Cas 35 (35) All; *Bela Bibi* v. *Akbar Ali*, (1902) 24 All 119 (128): 1901 All W N 183.

(9) *Buksha* v. *Tofer Ali*, (1873) 20 Suth W R 216 (217) [Execution purchaser in possession—Money paid by pre-emptor is for his benefit]; *Abdussalam* v. *Wilayat Ali*, (1897) 19 All 256

See also the undermentioned cases.[10]

10. Tender of money if sufficient.—A tender of the purchase money to the Court within the time limited is sufficient compliance with the decree, although, through the laxity of the Court officials or other such cause, the actual deposit is made later on.[1] But a tender to the Court after its usual working hours is not valid.[2]

11. "On or before the day referred to."—*See* Note 7, *supra.*

12. Right to rents and profits.—The rights of a pre-emptor are different from those of an ordinary purchaser. Under a pre-emption decree the right to possession of the property and the consequential right to mesne profits accrue to the pre-emptor only from the date when he pays the amount of the purchase money finally declared by the Court. Till then the original purchaser retains possession and is entitled to the rents and profits.[1] As to whether the vendee is entitled to the crops on the land existing on the date of payment, *see* Note 8, *ante.*

13. Vendors' title in pre-emption suits.—A pre-emptor is not entitled in a pre-emption suit to put the vendor to proof of his title to the property which he purports to sell. The principle of pre-emption is substitution. A pre-emptor is, therefore, bound to take the title which the vendee was ready to take.[1]

14. Set-off of costs against purchase money.—The rule does not provide for cases where costs, instead of being awarded against the pre-emptor, were awarded in *his favour* by the decree. Under the doctrine of equitable set-off, he is entitled to deduct such costs when depositing the purchase money.[1]

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(258): 1897 All W N 81; *Sant Singh* v. *Ghasita*, 1902 Pun Re No 21, 179 Pun L R 1901; *Jowala Sahai* v. *Ram Rakka*, 1896 Pun Re No 78. See also *Najib* v. *Shiva Gopal*, (1913) 21 Ind Cas 67 (68): 11 All L J 668 [Decree appealed against—Money lies in Court at peril of party ultimately found entitled to it]. Cf *Sheo Gopal* v. *Najib Khan*, (1914) 23 Ind Cas 869 (871): 12 All L J 732: 36 All 398 [In this case pre-emptor was asked to make up the deficit as he had benefited by the payment to his creditor].

(10) *Jam Hamid Ali* v. *Kaim Din*, (1917) 37 Ind Cas 806 (807): 26 Pun W R 1917 [Compromise decree in pre-emption suit—Plaintiff required to hand over certain land to defendant within a certain period. Ceasing to cultivate with a view to hand over possession was held sufficient compliance]; *Ajhoodhia Shookool* v. *Jewbodh Shookool*, (1873) 6 N W P H C 46 [Deposit with request that it should be retained till mutation of names in favour of plaintiff—*Held*, that deposit was not saddled with condition precluding payment before mutation and was valid].

Note 10.

(1) *Prabhu* v. *Nihala*, (1916) 36 Ind Cas 183 (183): 123 Pun W R 1916: 72 Pun L R 1917; *Gaya Baksh Singh* v. *Tilak Singh*, (1915) 28 Ind Cas 379 (380): 2 Oudh L J 151; *Ganga Dhar* v. *Anrudh Singh*, (1908) 11 Oudh Cas 114 (145); *Mir Zaman* v. *Piyao*, 1884 Pun Re No 79; *Nathu* v. *J Imamdin*, 1880 Pun Re No 31.

(2) *Muhammad* v. *Charag*, (1910) 8 Ind Cas 812 (813): 140 Pun W R 1910: 22 Pun L R 1911; *Janga Singh* v. *Lachmi Narain*, (1920) 57 Ind Cas 488 (492): 7 Oudh L J 378: 23 Oudh Cas 254: 2 U P L R (Oudh) 171. See also *Ajodhia Prasad* v. *Gobind Prasad*, (1923) 21 All L J 63 (64): 1923 All 250: 71 Ind Cas 1034: 45 All 276: 4 L R A (Civ) 90 [Payment into the treasury without informing the Court not a due compliance].

Note 12.

(1) *Deonandan Prasad* v. *Ramdhari*, 1916 P C 179 (181): 44 Cal 675: 44 Ind App 80: 15 All L J 375: 19 Bom L R 437: 25 Cal L J 573: 21 Cal W N 786: 32 Mad L Jour 459: 22 Mad L Tim 196: 6 Mad L W 65: 1917 Mad W N 470: 1 Pat L W 527: 39 Ind Cas 958 (2) P C; *Deokinandan* v. *Sri Ram*, (1890) 12 All 234 (237) F B; *Sri Kishen* v. *Atma Ram*, (1897) 19 All 261 (264, 266): 1897 All W N 45 F B.

Note 13.

(1) *Sahodra* v. *Bageshri*, (1915) 29 Ind Cas 1000 (1000): 37 All 529: 13 All L J 711.

Note 14.

(1) *Kapuria* v. *Wali Muhammad*, 1922 Lah 142 (143): 23 Pun L R 1922: 65 Ind Cas 250: 4 Lah L Jour 354: 2 Lah 294: 111 Pun L R 1921; *Bahadar* v. *Jalal*, 1888 Pun Re No 70; *Baldeo* v. *Baldeo*, (1900) 3 Oudh Cas 323 (324); *Ali Husain* v. *Aminullah*, (1912) 15 Ind Cas 337 (338): 10 All L J 153: 34 All 596; *Bechai* v. *Shami*, (1911) 10 Ind Cas 454 (455) All; *Permanand* v. *Gobardhan*, (1906) 3 All L J 804 (806, 807): 28 All 676: 1906 All W N 198; *Ishri* v. *Gopal*, (1884) 6 All 351 (357): 1884 All W N 125: 8 Ind Jur 635. See also *Brijnath* v. *Juggarnath*, (1879) 4 Cal 742 (743): 4 Cal L Rep 122 [Redemption suit].

O.20, R.14, Notes 15—16.

15. **Rival pre-emptors—Sub-R. (2).**—Sub-R. (2) is new and prescribes the form of decree to be passed where there are rival pre-emptors. Under the old Code, Courts decided such cases on general principles suited to the emergencies of each case.[1] The present rule enables rival claimants to pre-emption to join as plaintiffs in a suit for pre-emption and to obtain, in that suit, a decision not only as to their right to pre-empt but also as to their rival claims.[2] But where the plaintiffs do not ask the Court to adjudicate upon their respective rights *inter se*, a joint decree may be passed and if the amount is deposited in compliance with the decree, the defendant has no concern in the way in which the property, is to be shared by the plaintiffs; but the mere fact that a joint decree is passed in favour of all has not the necessary result of passing title to all the joint decree-holders even if only one of them pays the amount. In order to determine in what proportion the joint plaintiffs are to share the property, the circumstances under which the payment was made must in each case be enquired into.[3]

16. **Appeal.**—A plaintiff who has obtained a decree for pre-emption conditional on his paying a certain sum within a certain period, may appeal against the decree whether or not he has deposited the money in Court within the time limited.[1] Nor does a vendee forfeit his right of appeal against a pre-emption decree merely because he has withdrawn the money deposited by the plaintiff.[2] A plaintiff depositing purchase money in Court under a pre-emption decree is entitled to a refund of the amount on the reversal of the decree in appeal.[3] A decree with a condition that unless the purchase money is paid within the time fixed the suit shall stand dismissed is a complete decree and a subsequent order dismissing the suit is not a decree against which an appeal can be preferred.[4] Further, an order passed on an application for payment of the pre-emptive money in compliance with a decree under R. 14 is not appealable under S. 47 of the Code as it is not an order relating to execution, discharge or satisfaction of a decree.[5]

Note 15.

(1) See the following cases.—*Kashi Nath* v. *Mukhta Prasad*, (1884) 6 All 370 (373, 375): 1884 All W N 119: 8 Ind Jur 688; *Hulasi* v. *Sheo Prasad*, (1884) 6 All 455 (456): 1884 All W N 166; *Arjun Singh* v. *Sarfaraz Singh*, (1888) 10 All 182 (187): 1888 All W N 55; *Ajaib Nath* v. *Mathura Prasad*, (1889) 11 All 164 (167): 1889 All W N 48; *Mahabir Prasad* v. *Debi Dial*, (1875-78) 1 All 291 (293): 1 Ind Jur 409; *Abdulla* v. *Amanatulla*, (1899) 21 All 292 (296): 1899 All W N 82; *Jairam* v. *Mahabir*, (1885) 7 All 720 (729): 1885 All W N 206; *Lekhraj* v. *Sripat*, (1885) All W N 329 (329); *Gokal* v. *Bhola*, (1892) Pun Re No 29; *Karim Baksh* v. *Khuda Bakhsh*, 1881 Pun Re No 20; *Mohkam Din* v. *Karimullah*, (1881) Pun Re No 102; *Salig Ram* v. *Kali Shankar*, (1905) 27 All 465 (467): 1905 All W N 50: 2 All L J 690.

(2) *Mohammad Wajid Ali Khan* v. *Puran Singh*, 1929 P C 58 (61): 49 Cal L Jour 141: 1929 All L J 85: 56 Mad L Jour 304: 29 Mad L W 423: 33 Cal W N 318: 56 Ind App 80: 1929 Mad W N 220: 114 Ind Cas 601: 51 All 267 P C.

(3) *Anrup Misir* v. *Ram Harakh*, 1929 All 953 (954): 1929 All L J 1049: 51 All 998.

Note 16.

(1) *Hazari Singh* v. *Piran*, 1900 Pun Re No 92; *Jaggar Nath Pande* v. *Joku Tewari*, (1896) 18 All 223 (226): 1896 All W N 43; *Wazir Khan* v. *Kale Khan*, (1894) 16 All 126 (128): 1894 All W N 3; *Kodai* v. *Jai Sri Singh*, (1891) 13 All 189 (190, 192) F B; *Kodai Singh* v. *Jaisri Singh*, (1891) 13 All 376 (378, 380, 381) F B; *Malik Akbar Ali* v. *Hassan Ali*, 1895 Pun Re No 67; *Umrao Singh* v. *Mohammad Karim Baksh*, 1890 Pun Re No 161. See also *Kurshed Un-nissa* v. *Alim-un-nissa*, (1912) 17 Ind Cas 868 (868): 10 All L J 421.

(2) *Sunder Dass* v. *Dhanpat Rai*, 1907 Pun Re No 16: 104 Pun L R 1908: 127 Pun W R 1907.

(3) *Bhagwan Singh* v. *Ummatul Hasmain*, (1896) 18 All 262 (264): 1896 All W N 42; *Bahal Singh* v. *Nait Ram*, (1913) 19 Ind Cas 1 (2) All [But not to interest].

(4) *Janga Singh* v. *Lachmi Narain*, (1920) 57 Ind Cas 488 (490): 7 Oudh L J 378: 23 Oudh Cas 254: 2 U P L R (Oudh) 171 [Dissenting from *Bharat* v. *Dharam*, 21 Ind Cas 193 (194)].

(5) *Muhammad Ali* v. *Debi Din*, (1882) 4 All 420 (422): 1882 All W N 94: 7 Ind Jur 106. See *Gaya Baksh* v. *Tilak Singh*, (1915) 28 Ind Cas 379 (380): 2 Oudh L J 151. See also *Anrup Misir* v. *Ram Harakh Misir*, 1929 All 953 (955, 956, 957): 1929 All L J 1049: 57 All 998 [Deposit of the pre-emption money within time fixed by the Court is neither proceeding in execution of decree nor step-in-aid of it]. But see *Saghar Mal* v. *Hyat*, 1898 Pun Re No 38.

O.20, R.15, Note 1.

R. **15.** [S. 215.] *Where a* suit is for the dissolution of a partnership, *or the taking of partnership accounts*, the Court, before *passing a final decree*, may pass *a preliminary decree declaring the proportionate shares of the parties*, fixing the day on which the partnership shall stand dissolved *or be deemed to have been dissolved*, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

Decree in suit for dissolution of partnership.

[1877—S. 215.]

Synopsis.

1. Scope of the rule.
2. Preliminary decree directing the taking of accounts.
3. Mode of taking accounts.
4. "Fixing the day on which the partnership shall stand dissolved."
5. Defendan's right to what is found due to him.
6. Court-fee in partnership suits.
7. Appeal.
8. Letters Patent Appeals.

"May pass". See Note 1, Pt. (1).

1. Scope of the rule.—This rule contemplates the passing of a preliminary decree in suits for dissolution of partnership so as to enable the Court to pass a final adjudication of the specific rights of the parties. The words "may pass a preliminary decree" show that the passing of such a decree is in the judicial discretion of the Court. While, on the one hand, it will be an improper exercise of the discretion to pass a preliminary decree where the shares of the parties in, and the fact and date of dissolution of, the partnership are admitted,[1] on the other hand, where such facts are not admitted, the Court *ought* to pass a preliminary decree defining and declaring the rights of the parties before giving a final adjudication in the suit.[2] In *Ramchunder Shaha* v. *Manick Chunder Banikya*,[3] Pontifex, J., observed as follows:—

> "At the first hearing of the suit, really what the Court had to determine was, whether there had been a partnership, and what were its conditions: was it dissolved, or ought it to be dissolved: and who were the parties interested in the partnership, and in what shares: and upon determining these questions, it ought, in the first instance to have directed that accounts should be taken as set forth in Form No. 132 (now Form No. 21, Appendix D), subject, of course, to any such alterations as the nature of the case might require. It is only after taking these accounts and obtaining the report of the officer of the Court, or, if there is no such officer, when the Judge himself has arrived at a decision on the accounts, that a final decree should

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Order 20, Rule 15—Note 1.

(1) *Mt Merha* v. *Kundan Lal*, (1914) 25 Ind Cas 146 (151): 17 Oudh Cas 193.

(2) *Baboo Janokey Doss* v. *Bindabun Das*, (1841-46) 3 Moo Ind App 175 (197): 1 Sar 263; *Mun Mohinee* v. *Ichamoyee*, (1871) 15 Suth W R 352 (353) [In a suit of the nature of the one for dissolution of a partnership, it is incorrect to make an absolute decree for a specific sum of outstanding balances, without anything to guide the Court in fixing the amount].

(3) (1881) 7 Cal 428 (430): 9 Cal L Rep 157.

O.20, R.15, Notes 1—4.

be made according to Form No. 133 of the Fourth Schedule of the Code (now Form No. 22 of Appendix D)."

If, however, the Court has passed an order defining and declaring the said rights, the mere fact that no formal decree has been drawn up in those terms will be a mere irregularity not vitiating the trial.[4]

Under S. 265 of the Contract Act as it originally stood, a partner had to *apply* to the *District Court* to wind up the business of the firm to provide for the payments of its debts and to distribute the surplus according to the shares of the partners respectively and there was a conflict of opinion as to whether a *suit* for such relief in the ordinary Court lay.[5] The section was amended by the Indian Contract Amendment Act, (IV of 1886), and under the section as it now exists a suit for dissolution of partnership can be brought in the ordinary Courts like any other suit.[6]

2. Preliminary decree directing the taking of accounts.—Besides making the declarations as to the rights of the parties referred to in Note 1 above the Court should, in the preliminary decree, direct an account to be taken of the dealings and transactions of the partnership, of the credits, property and effects due and belonging to it: and should if need be, appoint a receiver for realising the partnership property.[1]

As to the nature of the rights conferred by such a decree, *see* the cases cited below.[2]

3. Mode of taking accounts.—The Court may itself take the accounts of the partnership or appoint a commissioner for the purpose. In the latter case the Court may give directions, if any are required, as to the mode of taking accounts. It may call upon either party to furnish a statement of particulars relating to the business and its transactions.[1] All the account books and other documents relating to the partnership and in the possession of either party should be produced.[2] Sufficient time should be given to the parties for the purpose and evidence should be taken if necessary.[3]

4. "Fixing the day on which the partnership shall stand dissolved".—The preliminary decree should fix a day on which the partnership should stand dissolved or be deemed to have been dissolved. The fixing of the day is

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(4) *Firm of Murli Mal Dayal Chand* v. *Lachhman*, (1914) 22 Ind Cas 526 (527): 72 Pun L R 1914: 45 Pun W R 1914.

(5) *Suit not barred.*—*Kalian Das* v. *Ganga Sahai*, (1883) 5 All 500 (503): 1883 All W N 100; *Jaipal Singh* v. *Matadin Ram*, (1883) All W N 205 (205); *Adarji Dorabji* v. *Erakshah*, (1884) 8 Bom 272 (277): 8 Ind Jur 580; *Kisandas Hajarimal* v. *Gulab Chand*, (1884) 8 Bom 494 (496); *Suit barred.*—*P. Doss Mullick* v. *R Lall Mullick*, (1881) 7 Cal 157 (161): 8 Cal L Rep 329; *Ram Chunder* v. *Manick Chunder*, (1881) 7 Cal 428 (433): 9 Cal L Rep 157.

(6) See *Shankar Lal* v. *Ram Babu*, (1918) 45 Ind Cas 31 (32): 40 All 446: 16 All L J 305 [A suit by a surviving partner against the representative of a deceased partner for partnership accounts].

Note 2.

(1) *Thirukumaresan* v. *Subbaraya*, (1897) 20 Mad 313 (315, 316); *Mulchand* v. *Piyare Lal*, 1903 Pun Re No 23: 1903 Pun L R 77.

(2) *Dhanaraju* v. *Motilal*, 1929 Mad 641 (647): 29 Mad L W 823: 52 Mad 563: 116 Ind Cas 343: 57 Mad L Jour 264 F B.

Note 3.

(1) *Ram Chunder* v. *Manick Chundar*, (1881) 7 Cal 428 (433): 9 Cal L Rep 157.

(2) *Dwarkanath Sarkar* v. *Mahomed Akbar*, 1914 P C 33 (33): 18 Cal W N 1025: 27 Mad L Jour 192: 1 Mad L W 697: 1914 Mad W N 876: 16 Mad L Tim 521: 21 Cal L Jour 1: 17 Bom L R 5: 24 Ind Cas 307 P C [Accounts taken by a Commissioner appointed for that purpose, without production or discovery of partnership books and documents are not properly taken].

(3) *Radha Kisen* v. *Tirathram*, (1918) 43 Ind Cas 718 (721): 41 Pun L R 1918: 31 Pun W R 1918 [It will not do to pass an *ex parte* final decree on the mere statements of the plaintiff].

a judicial act and should not be done arbitrarily. Ordinarily if a notice of dissolution has been given by one of the partners the dissolution will be declared as and from that date.[1] Otherwise and in the absence of any other circumstance, the dissolution should be ordered to date from the plaint.[2] It can be ordered to date from the judgment only in exceptional cases.[3] O.20, R.15, Notes 4—8.

5. Defendants' right to what is found due to him.—If, on the taking of accounts, it is found that any balance is due to the defendant the Court can pass a decree in his favour for the amount.[1]

6. Court-fee in partnership suits.—The plaint or memorandum of appeal in a partnership suit is chargeable with an *ad valoram* Court-fee, the valuation being fixed under S. 7, Cl. (*iv*) (*f*) of the Court Fees Act.[1]

The defendant in such a suit is not bound either to value *his* claim or to pay any Court-fee. If, however, on the taking of accounts any amount is found due to him, he is bound to pay Court-fee thereon before a decree for the amount is passed in his favour.[2]

7. Appeal.—An appeal lies from a preliminary decree passed under this rule.[1] But mere directions given to the commissioner in the matter of taking accounts are not decrees and are not appealable.[2]

8. Letters Patent Appeal.—An order appointing the Official Receiver as the Receiver in a partnership suit was held by the Rangoon High Court to be a judgment within the meaning of Cl. 13 of the Letters Patent and as such appealable.[1] The same High Court has, however, held that orders by way of directions to the Commissioner in the matter of taking accounts are not "judgments" within the meaning of the said clause of the Letters Patent and hence not appealable.[2]

Note 4.

(1) *Sambasiva Ayyar* v. *Ganapathi Ayyar*, (1918) 45 Ind Cas 727 (728) Mad.

(2) *Sambasiva Ayyar* v. *Ganapathi Ayyar*, (1918) 45 Ind Cas 727 (728) Mad.

(3) *Lyon* v. *Tweddell*, (1881) 45 J P 680 referred in 45 Ind Cas 727.

Note 5.

(1) *Goswami Krishna Chandra Deoji* v. *Durga Panda*, (1910) 5 Ind Cas 211 (212): 7 All L J 105; *Permanand* v. *Jayat Narain*, (1910) 6 Ind Cas 162 (163): 7 All L J 543; *Ram Charan* v. *Bulaqi*, 1924 All 854 (855): 22 All L J 783: 83 Ind Cas 880: 5 L R A Civ 563: 46 All 858. But see *Misri Lal* v. *Banarsi Lal*, (1906) 3 All L J 233 (234): 26 All W N 111 [Not accepted as good law]; *Surendra Nath* v. *Atul Chandra*, (1907) 34 Cal 892 (895): 7 Cal L Jour 87; *Beragi Ram* v. *Raja Ram*, (1911) 10 Ind Cas 250 (253): 1911 Pun L R 163: 214 Pun W R 1911; *Devi Chand* v. *Parbhu Lal*, 1926 All 582 (583): 24 All L J 694: 96 Ind Cas 67 [When once there has been a preliminary decree ordering the taking of accounts, if the plaintiff desires to withdraw his claim but the defendant desires the case to proceed, the proper course is to transpose the plaintiff to the position of defendant and make the defendant plaintiff].

Note 6.

(1) *Bhola Nath*, In the matter of, (1910) 6 Ind Cas 832 (832): 7 All L J 546: 32 All 517; *Ladubhai* v. *Revichand*, (1881-82) 6 Bom 143 (146); *Kakaram* v. *Ram Saran*, 1901 Pun Re No 13: 137 Pun L R 1901.

(2) *Beragi Ram* v. *Baja Ram*, (1911) 10 Ind Cas 250 (253): 163 Pun L R 1911: 214 Pun W R 1911; *Fateh Mahomed* v. *Ramzan Khan*, (1915) 27 Ind Cas 316 (317): 8 S L R 122.

Note 7.

(1) *Biswa Nath Chaki* v. *Banikanta*, (1896) 23 Cal 406 (408, 412); *Kaka Ram* v. *Ram Saran*, 1901 Pun Re No 13: 1901 Pun L R 137.

(2) *Udhardas* v. *Devidas*, 1928 Sind 100 (101): 107 Ind Cas 214.

Note 8.

(1) *Arumugam* v. *Kanappa*, 1927 Rang 139 (140): 5 Rang 99: 101 Ind Cas 791.

(2) *Yeo Eng* v. *Beng Seng & Co*, 1925 Rang 43 (45): 2 Rang 469: 84 Ind Cas 291.

O.20. R.16, Notes 1—2.

Decree in suit for account between principal and agent.

R. **16.** [S. 215-A.] *In* a suit for an account of pecuniary transactions between a principal and *an* agent, and in *any* other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before *passing* its *final* decree, pass *a preliminary decree* directing such accounts to be taken as it thinks fit.

Synopsis.

1. Scope of the rule.
2. Shall pass a preliminary decree.
3. Suit by principal—Right of agent to the amount found due to him.
4. Valuation for Court-fee and jurisdiction.
5. Appeal.
6. Stay of proceedings.

Final decree, ex parte—Right of defendant to re-open accounts. See Note 2, F.-N. (5).

"In any other suit." See Note 1, Pts. (2) and (3).

Suit for delivery of account papers. See Note 2, F.-N. (7).

'Where it is necessary." See Note 2, Pt. (4).

1. Scope of the rule.—The rule applies to the following kinds of suits *viz.*:—

(1) Suits for accounts between principal and agent.[1]

(2) Suits in which plaintiff has a right to a rendition of accounts from the defendant;[2] and

(3) Suits in which it is necessary that an account should be taken in order to ascertain the amount due to or from any party.[3]

The purpose of a preliminary decree in such suits is merely to ascertain whether the defendant is liable to account to the plaintiff,[4] and the preliminary judgment, therefore, need not be exhaustive or specify all details.[5]

2. Shall pass a preliminary decree.—Where the plaintiff has established that the defendant was his agent[1] or that the defendant is otherwise liable to account to him,[2] it is the duty of the Court to pass a preliminary decree directing an account to be taken of the transactions between the parties. But

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Order 20, Rule 16—Note 1.

(1) *Harjimal & Sons* v. *Dhanpatmal Dewachand*, 1924 Sind 42 (43): 15 Sind L R 16: 62 Ind Cas 537.

(2) *F A Gregory* v. *Albert*, (1919) 49 Ind Cas 441 (442): 21 Pun W R 1919; *Allahabad Bank, Ltd* v. *Simla Banking Industrial Co, Ltd*, 1929 Lah 182 (184): 11 Lah L Jour 115: 114 Ind Cas 321; *Kunja Behary Singh* v. *Madhub Chandra Ghose*, (1896) 23 Cal 884 (890) F B.

(3) *Fateh Lal* v. *Mr Charles Edward Gray*, (1916) 36 Ind Cas 210 (210) All; *Abadi* v. *Hahi*, (1913) 18 Ind Cas 336 (336): 11 All L J 152 [Suit to recover balance of *anamat* money retained in the hands of defendant for payment to creditors].

(4) *Jai Krishna* v. *New Mofussil Co*, 1926 Nag 393 (396): 95 Ind Cas 171.

(5) *Narendra Krishna Chakraburty* v. *Ashutosh Bhattachari*, 1931 Cal 358 (359): 35 Cal W N 17: 132 Ind Cas 195.

Note 2.

(1) *Hurronath* v. *Krishna Coomar*, (1887) 14 Cal 147 (153, 154, 158): 13 Ind App 123: 4 Sar 751: 10 Ind Jur 475 P C; *Rajhunath* v. *Gunpatji*, (1905) 27 All 374 (377): 1905 All W N 3: 1 All L J 722; *Bharat Chandra* v. *Kiran Chandra*, 1925 Cal 1069 (1072): 52 Cal 766: 90 Ind Cas 944; *Annoda Pershad* v. *Dwarka Nath*, (1881) 6 Cal 754 (756): 8 Cal L Rep 321; *Degamber* v. *Kallyanath*, (1981) 7 Cal 654 (656): 9 Cal L Rep 265.

(2) *Ajudhia Baksh* v. *Sheomangal*, 1883 All W N 218 (218); *Ram Das* v. *Bhagwat Das*, 1905 All W N 1 (1): 1 All L J 347.

no such decree need be passed if the liability to account is not established[3] or if the necessity for accounts is not made out.[4]

A preliminary decree in a suit contemplated by this rule finally declares the liability of the defendant for such sum as may be found due[5] but does not terminate the suit.[6]

For the procedure to be observed in taking accounts, *see* the cases cited below.[7]

3. Suit by principal—Right of Agent to the amount found due to him.—If, in a suit by the principal, accounts between him and the agent are taken and nothing is found due to the principal but something is found due to the agent, a decree can be passed in defendant's favour for the amount, on his paying the necessary Court-fee.[1]

4. Valuation of Court-fee and jurisdiction.—Suits for accounts are governed by the provisions of S. 7, Cl. (*iv*) (*b*) of the Court Fees Act.[1] The plaintiff's valuation will be the value both for the purposes of the Court-fee and for the purpose of jurisdiction.[2] If a defendant appeals against the whole preliminary decree in such a suit, he will be bound by the valuation given in the plaint.[3]

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(3) *Nalani Kumar* v. *Gadadhar*, 1929 Cal 418 (421): 49 Cal L Jour 245: 120 Ind Cas 100; *Srinibash* v. *Nagendra Nath*, (1900) 4 Cal W N 105 (107) [The *trespasser is not liable to account but is liable for damages* therefore no preliminary decree for account can be passed against him].

(4) *Bharat Chandra* v. *Kiran Chandra Rai*, 1925 Cal 1069 (1074): 52 Cal 766: 90 Ind Cas 944; *Har Narain* v. *Balwant Singh*, (1915) 28 Ind Cas 452 (453) All [It is only where it is necessary, in order to ascertain the amount of money due to or from any parties, that an account should be taken, that the Court shall before passing the final decree, pass a preliminary decree directing such account to be taken, as it thinks fit]; *Nallaperumal Chetti* v. *Valliyappa Chetty*, 1930 Mad 721 (722): 53 Mad 475: 59 Mad L Jour 316: 123 Ind Cas 7: 32 Mad L W 143 [In every suit for an account of pecuniary transactions, it is not imperative for the Court to pass a preliminary decree in the first instance. It can be dispensed with where the facts are so simple that the taking of accounts would only involve unnecessary and unprofitable delay]; *Pandurang* v. *Gunwant Rao*, 1928 Nag 299 (300): 109 Ind Cas 385 [The mere fact that a preliminary decree was not passed under O 20, R 16, Civil Procedure Code, in a suit for a accounts, will not render the decree passed in the suit illegal, if nobody has been prejudiced by the correct procedure not being adopted and a decison has been arrived at after framing proper issues and taking evidence upon the incomings and outgoings].

(5) *Jasoda Dass* v. *Rameshari*, (1912) 13 Ind Cas 374 (375): 14 Cal L Jour 603 [Final decree passed, *ex parte*—Defendant must be given an opportunity to be heard as to how much is due from him].

(6) *Baldev Singh* v. *Krishnan*, 1931 Lah 268 (269): 135 Ind Cas 42.

(7) *Pratab Bahadur* v. *Chitpal Singh*, (1892) 19 Cal 174 (178 to 181): 19 Ind App 33: 6 Sar 93: R & J 124 P C; *Annoda Pershad Roy* v. *Dwarkanath Gangopadhya*, (1881) 6 Cal 754 (758): 8 Cal L Rep 321; *Degambur Mozumdar* v. *Kallynath Roy*, (1881) 7 Cal 654 (657): 9 Cal L Rep 265; *Hurrinath Rai* v. *Krishna Kumar Bakshi*, (1887) 14 Cal 147 (158): 13 Ind App 123: 10 Ind Jur 475: 4 Sar 751 P C; *Ram Coomar* v. *Kalee Coomar*, (1868) 10 Suth W R 279 (280) [Suit for delivery of account papers—Court should direct delivery of them]; *Woomanath Roy* v. *Sreenath Singh*, (1871) 15 Suth W R 260 (261); *Jugger Nath* v. *Ghutter Narain*, (1872) 17 Suth W R 409 (410); *Sushee Shekhur* v. *Suleem Biswas*, (1874) 22 Suth W R 191 (192); *Jaikrishna* v. *New Moffussil Co*, 1926 Nag 393 (396): 95 Ind Cas 171 [Objection to particular item should be taken when question as to accounts is tried]; *Kalanand Singh* v. *Sri Pershad*, (1913) 19 Ind Cas 901 (902): 19 Cal L Jour 152: 17 Cal W N 1060 [Unless fraud and undue influence are proved accounts cannot be re-opened]; *Williamson* v. *Barbour*, 9 Ch D 529; *Boofainat Boo* v. *Sha Nagar*, (1887) 11 Bom 78 (85).

Note 3.

(1) *Parmanand* v. *Jagat*, (1910) 6 Ind Cas 162 (163): 32 All 525: 7 All L J 543; *Surandera Nath* v. *Atul Chandra*, (1907) 34 Cal 892 (894, 895): 7 Cal L Jour 87; *Misri Lal* v. *Benarsi Lal*, (1906) 3 All L J 233 (234): 1906 All W N 111.

Note 4.

(1) *Bhagat Ram* v. *Gokul Chand*, 1908 Pun Re No 150: 191 Pun W R 1908 [Appeal].

(2) See S 8 of the Suits Valuation Act, 1887. See also *Khushal Chand* v. *Nagindas*, (1888) 12 Bom 675 (677); *Bhagant Rai* v. *Mehta*, (1894) 18 Bom 40 (42).

(3) *Srinivasa* v. *Perinderamma*, (1916) 33 Ind Cas 602 (602): 39 Mad 725: 30 Mad L Jour 402 F B.

O.20, R.16, Notes 5—6.

5. **Appeal.**—An appeal lies from a preliminary decree in a suit for accounts.[1] Notwithstanding a final decree has been passed in the case; the final decree will however be subject to the result of the appeal from the preliminary decree.[2] *See* Notes S. 97, *ante*.

6. **Stay of proceedings.**—An appellate Court, in which an appeal from the preliminary decree is pending can stay further proceedings under the preliminary decree (such as enquiry into accounts), pending the hearing of the appeal.[1]

O.20, R.17, Note 1.

R. **17.** [New.] *The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as* prima facie *evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.*

Special directions as to accounts.

[R. S. C., O. 33, R. 3.]

Synopsis.

1. Scope of the rule.
2. Settled accounts.
3. Omission to give directions in preliminary decree.

Books of account as prima facie evidence. See Note 1.

1. **Scope of the rule.**—The rule is new and corresponds to O. 33, R. 3 of the English Rules of the Supreme Court. It, however, enacts no new provision of law: but only recognises an already existing practice in the matter of taking accounts. It is in the discretion of the Court to give special directions or not under this rule.[1] Under the English Practice the Court may treat the account books as *prima facie* evidence in partnership cases.[2] Similarly account books kept by a trustee may be ordered to be taken as *prima facie* evidence against the *cesti qui trust* if the latter has had access to these books.[3] In other cases special directions should be obtained from the Court,[4] and such directions will be given if the ordinary proof of accounts is not available owing

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Note 5.

(1) *Harjimal* v. *Dhanpat Mal*, 1921 Sind 42 (44): 15 Sind L R 16: 62 Ind Cas 537.

(2) *Akhtar* v. *Tasadduk*, (1912) 16 Ind Cas 157 (159): 34 All 493: 10 All L J 19; *Ramnath* v. *Basanta*, (1913) 19 Ind Cas 630 (631): 17 Cal W N 868: 18 Cal L Jour 209.

Note 6.

(1) *Balkishen Shau* v. *Khugnu*, (1904) 31 Cal 722 (724): 8 Cal W N 572 F B.

Order 20, Rule 17—Note 1.

(1) *Harjimal* v. *Dhanpat Mal*, 1921 Sind 42 (43): 15 Sind L R 16: 62 Ind Cas 537; *Municipal Committee of Nasik* v. *Collector of Nasik*, (1915) 28 Ind Cas 589 (591): 39 Bom 422: 17 Bom L R 324.

(2) *Gething* v. *Keighley*, (1878) 9 C D 547 (551, 552) 47 L J Ch 45: 27 W R 283.

(3) *Banks* v. *Cartwright*, (1865) 15 W R 417.

(4) *Cookes* v. *Cookes*, (1863) 3 N R 97: 11 W R 871: 9 Jour (N S) 843: 8 L T 532; *Newberry* v. *Benson*, (1854) 23 L J Ch 1003.

to lapse of time or other causes[5] or if the accounts are beyond the control of the accounting party.[6] O.20, R.17, Notes 1—3.

2. **Settled accounts.**—In proceedings by way of taking accounts, a settled account may be set up or pleaded in the absence of any special directions on the matter, in the preliminary decree.[1]

3. **Omission to give directions in preliminary decree.**—Though the necessary directions in the matter of taking accounts are generally given in the preliminary decree, yet the omission of such directions in the decree will only amount to a mere irregularity.[1] In fact this rule contemplates such directions being given subsequently also.

Decree in suit for partition of property or separate possession of a share therein.

R. **18.** [New.] *Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—* O.20, R.18.

(1) *if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section* 54;

(2) *if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.*

Synopsis.

1. Scope of the rule.
2. Jurisdiction of Court and Collector. See S. 54, Note 7, ante.
3. Moveable property.
4. Joint Hindu family property.
5. Preliminary decree.
6. "Giving such further directions."
7. Final decree.
8. Stamp for final decree.
9. Appeal.

A second preliminary decree. See Note 9, F.-N. (2).

Decree for joint possession—Construction. See Note 5, F.-N. (2).

Execution of partition decree—Limitation. See Note 7, Pt. (3).

Mesne profits. See Note 6, Pt. (1) and Note 5, R. 12.

Partition suits—Costs. See Note 5, F.-N. (2).

"Shall declare the rights of the several parties." See Note 4, Pt. (2).

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(5) *Ewart* v. *Williams*, (1857) 7 De G M & G 68: 24 L J Ch 366: 3 Eq R 171: 3 W R 46 [But not merely to save expenses].

(6) *Turner* v. *Corney*, (1841) 5 Beav 515.

Note 2.

(1) *Harjimal* v. *Dhanpat Mal*, 1921 Sind 42 (43): 15 Sind L R 16: 62 Ind Cas 537.

Note 3.

(1) *Holgate* v. *Shuth*, (1885) 28 C D 111 C A: 54 L J Ch 436: 51 L T 673: 49 J P 228 C A.

O.20, R.18, Notes 1—5.

1. Scope of the rule.—Sub-R.1 refers to partition decrees relating to an "estate assessed to Government Revenue" referred to in S. 54 of the Code, while sub-R. 2 deals with partition decrees relating to any *other* immoveable property or to *moveable* property. In the former case, the rule does not contemplate the passing of a *preliminary* and of a final decree.[1] The Court has merely to pass a decree *declaring* the rights of the several parties interested in the property, the actual partition so as to affect the Government Revenue, being left to be made by the Collector.[2] In the latter case, *i.e.*, a case coming under sub-R. 2, the Court *may* pass a preliminary decree if the separation cannot be made conveniently without further inquiry. *See* Note 5, *infra*.

2. Jurisdiction of Court and Collector.—*See* S. 54, Note 7, *ante*.

3. Moveable property.—Where in a suit for partition of moveable property, the plaintiff files a list of properties, and the defendant either denies that they are liable to partition or that they exist, it is incumbent on the Court, before passing a preliminary decree, to determine the following points[1]:—

(1) Whether such properties exist, and if so in whose possession;

(2) Whether they are partible; and

(3) What is their value.

4. Joint Hindu family property.—*See* the undermentioned cases.[1]

5. Preliminary decree.—In cases coming under sub-R. 2, the Court *may* pass a preliminary decree. It is not obligatory to do so in every case. For instance, it is not necessary if the shares can be ascertained without difficulty in execution.[1] But where a partition cannot be conveniently made without further enquiry, a preliminary decree may be passed declaring the rights of the several parties interested in the property leaving the actual partition to be made later on.[2] It has been held that it would be premature to decide in the preliminary decree whether certain property in the defendant's possession about which partition is claimed is available for partition or not, and that the question

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Order 20, Rule 18—Note 1.

(1) *Somnath* v. *Ram Bilas*, (1914) 24 Ind Cas 113 (114): 1 Oudh L J 193.

(2) *Shankar Das* v. *Behari Lal*, 1925 Lah 445 (446): 7 Lah L Jour 239: 6 Lah 442: 89 Ind Cas 932: 26 Pun L R 564; *Somnath* v. *Ram Bilas*, (1914) 24 Ind Cas 113 (114): 1 Oudh L J 193.

Note 3.

(1) *Ram Samujh Singh* v. *Bikramajit Singh*, (1919) 50 Ind Cas 876 (878): 6 Oudh L J 142. See also *Sheo Gobind* v. *Sham Narain*, (1875) 7 N W P 75.

Note 4.

(1) *Mamma Reddi Sati Raju* v. *Mamma Reddi Ammayi*, (1915) 28 Ind Cas 543 (544): 2 Mad L W 325 [Preliminary decree for partition affects severance in status]; *Murarrao* v. *Sitaram*, (1899) 23 Bom 184 (187) [Suit for partition by purchaser—Court need not determine shares of other co-parceners]; *Abdul Kadar* v. *Bapubhai*, (1899) 23 Bom 188 (190) [Suit for partition by member of joint Hindu family—Others can have their respective shares determined and allotted to them on payment of proper Court-fee]; *Musammat Lorandi* v. *Mst Nihal*, 1925 Lah 403 (405): 6 Lah 124: 26 Pun L R 759: 95 Ind Cas 701 [Hindu daughters in joint possession of life interest can have partition]; *Shankar Baksh* v. *Hardeo Baksh*, (1889) 16 Cal 397 (405): 16 Ind App 71: 5 Sar 299: 13 Ind Jur 93: R & J 108 P C [Partition of talukdari estate belonging to Hindu family—Form of decree]; *Pirthipal* v. *Jowahir*, (1887) 14 Cal 493 (504): 14 Ind App 37: 4 Sar 758: 11 Ind Jur 232: R & J 97 P C, (Do.).

Note 5.

(1) *Sultan Singh* v. *Bahadur Singh*, (1912) 17 Ind Cas 390 (390): 246 Pun L R 1912.

(2) *Satya Kumar* v. *Satya Kirpal*, (1909) 3 Ind Cas 247 (252): 10 Cal L Jour 503 [Parties to bear costs in partition suits—In exceptional cases defendant must be made liable]; *Dwarka* v. *Ram Pat*, (1914) 24 Ind Cas 235 (235): 12 All L J 696: 36 All 461 [Decree for joint possession is a preliminary decree]. Cf *Bisheshwar Gir Goshain* v. *Satish Chandra*, 1929 Oudh 117 (119): 112 Ind Cas 205 [Decree for joint possession cannot be construed as a preliminary decree for partition].

should be left to be decided at the enquiry subsequent to the preliminary decree.[8] After a preliminary decree has been passed in a partition suit, the proper course for the plaintiff desiring an absolute separation of his share, is to apply for a final decree and not to bring a fresh *suit* for that purpose.[4] There is no limitation for such an application inasmuch as the rule does not contemplate any such application being made by the party, and it is the duty of the *Court* to pass the final decree after the necessary enquiries.[5] In fact the Court cannot, after a preliminary decree has been passed in a partition suit, dismiss it for default in depositing the fee for a commissioner to make a final partition; all that the Court can do in such a case is to adjourn the proceedings *sine die*.[6]

Any party to the suit whose interest it is, that further proceedings be taken, may move the Court to pass a final decree; but ordinarily it is the plaintiff who moves.[7]

Under the old Code it was not necessary to pass first a preliminary decree and then a final decree in a partition suit.[8] It was, however, usual to pass an interlocutory *order* declaring the rights of the several parties interested in the property and then a decree. *See* the undermentioned cases.[9] As to whether there can be more than one preliminary decree in a case, *see* the discussion under S. 2 (2), Note 10. As to the maintainability of an appeal against a preliminary decree after the final decree has been passed, *see* S. 97, Note 5, *ante*.

6. "Giving such further directions".—These words include also directions for inquiry as to future mesne profits or interest, and it is in the *preliminary decree* that such directions should be given. Where such decree is silent as to future mesne profits or interest, can the final decree award the same or direct an inquiry in respect of it? As regards *mesne profits* it has been held that it cannot be done. The reason is that R. 12 and this rule should be read together and inasmuch as, under R. 12, the final decree can only provide for mesne profits where an enquiry into the same has been directed by the preliminary decree, the same principle will apply to cases coming under this rule.[1] Where, however, the final decree does wrongly direct such an en-

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(3) *Lachhmanarain* v. *Ram Saran*, 1925 Pat 433 (433): 6 Pat L Tim 152: 86 Ind Cas 785.

(4) *Lalta Prasad* v. *Brahma Din*, 1929 Oudh 456 (457): 6 Oudh W N 804: 121 Ind Cas 287: 5 Luck 280 [Distinguishing 13 All 309].

(5) *Lalta Prasad* v. *Brahma Din*, 1929 Oudh 456 (457): 6 Oudh W N 804: 121 Ind Cas 287: 5 Luck 280 [Following *Tajurmal* v. *Bande Raza*, 60 Ind Cas 433].

(6) *Lachmi Narain Tiwari* v. *Ramsaran Tiwari*, 1925 Pat 433 (434): 6 Pat L Tim 152: 86 Ind Cas 785; *Sundararajamma* v. *Ramulu*, 1932 Mad 519 (522): 36 Mad L W 414.

(7) *Lachmi Narain* v. *Balmakund*, 1924 P C 198 (198): 35 Mad L Tim 143: 5 L R P C 171: 47 Mad L Jour 441: 20 Mad L W 491: 4 Pat 61: 51 Ind App 321: 81 Ind Cas 747: 22 All L J 990: 26 Bom L R 1129: 40 Cal L Jour 439: 29 Cal W N 391: 1924 Mad W N 707: 5 Pat L Tim 623 P C.

(8) *Ramasamy Iyer* v. *Subramaniya Iyer*, 1923 Mad 147 (148): 16 Mad L W 297: 48 Mad L Jour 406: 46 Mad 47: 74 Ind Cas 804.

(9) *Shah Muhammad Khan* v. *Hanwant Singh*, (1898) 20 All 311 (312, 313): 1898 All W N 45 [Interlocutory order of declaratory nature to be made]; *Chidambaram* v. *Gouri Nachiar*, (1878-80) 2 Mad 83 (87): 6 Ind App 177: 5 Cal L Rep 6: 4 Sar 55: 3 Suth 654: 3 Ind Jur 470 P C [Contents of interlocutory order]; *Gyan Chunder* v. *Durga Churn Sen*, (1881) 7 Cal 318 (320): 8 Cal L Rep 415, (Do); *Krishnaswamy* v. *Rajagopal*, (1895) 18 Mad 73 (87): 4 Mad L Jour 212, (Do.); *Krishnamachariar* v. *Kuppammal*, (1908) 31 Mad 540 (542): 5 Mad L Tim 222: 4 Ind Cas 1131 [Appointment of Commissioner to make partition not obligatory]; *Dwarka Nath* v. *Barinda Nath*, (1895) 22 Cal 425 (432), (Do.); *Latchmanan* v. *Ramanathan*, (1900) 28 Mad 127 (129): 14 Mad L Jour 436 [Art. 181 not applicable to application for decree]; *Imdad Ali* v. *Boonyad Ali*, (1870) 14 Suth W R 92 (93).

Note 6.

(1) *Gulusam Bibi* v. *Ahmadasa Rowther*, (1919) 51 Ind Cas 140 (141, 142, 143): 9 Mad L W 541: 42 Mad 296: 1919 Mad W N 284; *Bapa Lakshmamma* v. *Koteswara Rao*, 1931 Mad W N 846 (847).

O.20, R.18, Notes 6—9.

quiry, the defect does not amount to a want of jurisdiction and the executing court cannot go behind it.[2] As to the maintainability of a separate suit for mesne profits where the decree in the partition suit is silent on the point, *see* S. 11, Note 125 and the undermentioned case.[3]

As regards *interest*, where the preliminary decree in a partition suit directs accounts to be taken but is silent as to interest, it has been held by the Bombay High Court[4] that it is competent to the Court to award by its final decree, interest in a proper case. The learned judges base their decisions on certain English cases, according to which, a Court has "power on further directions to order payment of interest on a sum found due from a defendant although the decree declaring the liability contains no direction for payment of interest or the statement of claim does not ask for it." It was also pointed out that the case of taking an account under the present rule is similar to the case of taking an account in an administration suit under O. 20, R. 13 and that, if the forms of preliminary and final decrees in administration suits (Appendix D, Forms 17 and 18) are looked at, it will be clear that the legislature does recognise that even where the preliminary decree does not contain any direction as to interest, yet, in the final decree interest may be awarded.

7. **Final Decree.**—Where subsequent to the preliminary decree, one of the co-sharers dies and the other parties become entitled to increased shares, the final decree may award them the increased shares.[1] In working out preliminary decrees for partition, the Court may, instead of making an actual division of all the property, give one co-pareener a charge over the share of another for any difference in favour of the former.[2] A decree for partition is a joint decree in favour of all the shareholders and therefore execution proceedings taken by one of them are sufficient to keep the decree alive in favour of all.[3] *See also* the undermentioned case.[4]

8. **Stamp for Final Decree.**—A final decree for partition is an instrument of partition within S. 2 (15) of the Stamp Act, and is chargeable with stamp duty under Sch. I, Art. 45 of that Act.[1]

9. **Appeal.**—Under the present Code a preliminary decree in a partition suit is appealable under S. 96 of the Code and, if not appealed against, cannot be questioned in the appeal from the final decree [*vide* Ss. 2 (2), 96 and 97]. Under the old Code there was only one decree in a partition suit though the decree might be preceded by an interlocutory *order* declaring the

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(2) *Bapa Lakshmamma* v. *Koteswara Rao*, 1931 Mad W N 846 (847).

(3) *Lakshmi Bai* v. *Jagannath*, 1932 Bom 222 (224): 34 Bom L R 447: 56 Bom 292: 138 Ind Cas 579.

(4) *Kesarlal Girdhari Lal* v. *Jagu Bhai Hiralal*, 1925 Bom 406 (408, 409): 49 Bom 282: 27 Bom L R 226: 94 Ind Cas 686.

Note 7.

(1) *Krishna Lal Jha* v. *Mandeswar*, 1921 Pat 296 (297): 2 Pat L Tim 215: 59 Ind Cas 872.

(2) *Arunachallam Chettiar* v. *Pratapasimha Rajah Sahib*, 1930 Mad 988 (990): 129 Ind Cas 63: 1930 Mad W N 644: 60 Mad L Jour 79: 33 Mad L W 391.

(3) *Sheikh Kurshed* v. *Nubbee Fatima*, (1877-78) 3 Cal 551 (552): 2 Cal L Jour 187.

(4) *Yeshwantrao* v. *Dattatraya Krishna*, (1918) 45 Ind Cas 201 (202) Nag [Construction—Partition—Consent decree—Direction to account—Execution].

Note 8.

(1) *Jotindra Mohan* v. *Bejoy Chand*, (1905) 32 Cal 483 (491); *Thiruvengadathan* v. *Mangayya*, (1911) 12 Ind Cas 775 (776): (1911) 2 Mad W N 516: 35 Mad 26; *Bala Ram* v. *Ram Krishna*, (1905) 29 Bom 366 (369) 7 Bom L R 308.

rights of the several parties interested in the property. As to the appealability of such order and other connected questions under the old Code, *see* the undermentioned cases[1] which are not of any practical importance now. An order on an application for the appointment of a Commissioner to work out the shares in a decree for partition, is not appealable.[2]

O.20,R.18, Note 9.

O.20, R.19, Notes 1—2.

R. 19. [S. 216.] (1) *Where* the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Decree when set-off is allowed.

(2) *Any decree passed in a suit in which a set-off is claimed shall* be subject to the same *provisions* in respect of appeal *to which it would have been subject if no set-off had been claimed.*

Appeal from decree relating to set-off.

(3) The provisions of this *rule* shall apply whether the set-off is admissible under *Rule* 6 *of Order VIII* or otherwise.

[1877—S. 216; 1859—S. 195.]

Synopsis.

1. Where defendant has been allowed a set-off.
2. Appeal from decree relating to set-off.
3. Decree for defendant claiming set-off.
4. Applicability of rule to equitable set-off (sub-R. 3).

1. Where defendant has been allowed a set off.—The rule applies only where the defendant has been allowed a "set-off" against the plaintiff's claim, and not in any other case. Thus the rule does not apply to a case where in determining the defendant's liability for mesne profits deductions are made for costs or expenses of cultivation.[1]

2. Appeal from decree relating to set off.—Under the second paragraph of S. 216 of the old Code corresponding to sub-R. (2) of the present rule, the *forum* of appeal in relation to the defendant's claim of set-off depended upon the sum *claimed by him* and not upon the valuation of the suit made by

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Note 9.

(1) *Joyadishury* v. *Kailash Chandra*, (1897) 24 Cal 725 (735, 736, 738, 739): 1 Cal W N 374 [In appeal against final decree appellant can take objection to such order]; *Krishnaswamy Iyengar* v. *Rajagopala Iyengar*, (1895) 18 Mad 73 (87): 4 Mad L Jour 212 [Interlocutory order declaring rights is appealable]; *Bepin Behari* v. *Lall Mohan*, (1886) 12 Cal 209 (212), (Do.); *Bholanath* v. *Sonamoni Dasi*, (1886) 12 Cal 273 (275): 10 Ind Jur 334, (Do.); *Dulhin Golab Koer* v. *Radha Dulari Koer*, (1892) 19 Cal 463 (467) F B, (Do.); *Boloram* v. *Ram Chundra Dey*, (1896) 23 Cal 279 (283), (Do.); *Bhoobun Moyi* v. *Shurut Sundery*, (1886) 12 Cal 275 (279) [Interlocutory order by which rights of some of the parties alone are determined is not appealable]; *Latchmanan Chetty* v. *Ramanathan Chetty*, (1905) 28 Mad 127 (129): 14 Mad L Jour 436 [Order refusing application to appoint Commissioner for partition, purporting on face of it to be an order under S 244 was *held* to be appealable].

(2) *Srinivasa Mudali* v. *Ramaswamy Mudali*, (1915) 30 Ind Cas 380 (381): 2 Mad L W 693: 18 Mad L Tim 145: 1915 Mad W N 725; *Bhartendu* v. *Yaqub Husain*, (1913) 18 Ind Cas 701 (701): 11 All L J 120: 35 All 159 [Civil Procedure Code does not contemplate the passing of a second preliminary decree]; *Narain* v. *Balgobind*, (1911) 11 Ind Cas 517 (517): 8 All L J 604: 33 All 528.

Order 20, Rule 19—Note 1.

(1) *Tiluck Chand* v. *Sowdaminee*, (1876) 25 Suth W R 275 (275).

O 20. R.19, Notes 2—4.

the plaintiff.[1] This has been amended under the present rule so as to give effect to the view that appeals from decrees relating to set-off should lie to the Courts to which appeals in respect of the original claim of the plaintiff would lie.[2]

A preliminary order disposing of a claim of set-off made by the defendant is not a decree and is not appealable by itself but can be attacked in an appeal from the decree.[3]

3. **Decree for defendant claiming set off.**—Where the amount due to the defendant by the plaintiff is found to exceed that due to the plaintiff by the defendant, the Court may not only dismiss the suit, but may pass a decree in favour of the defendant against the plaintiff.[1]

The question has arisen as to whether a decree may be passed in favour of the defendant *in a suit for accounts*, where, on taking accounts, it is found that the balance is in defendant's favour. In such a case it was observed by Phillips, J., in the undermentioned Madras case[2] that there is really no "set-off" pleaded to which the present rule may apply. The High Courts of Allahabad[3] and Calcutta[4] have, on the other hand, held that a decree may be passed in favour of the defendant in such a case under O. 20. Rr. 15 and 16. In one of the Calcutta cases[5] it was even said that it was a case of equitable set-off and that R. 19 itself might apply.

4. **Applicability of rule to equitable set off (Sub-R. 3).**—O. 8. R. 6 provides only for a *legal* set-off being allowed. But the present rule applies also to *equitable* set-off and provides for a decree being passed giving effect to such set-off.[1] As to the distinction between the two types of claims, *see* Notes under O. 8. R. 6.

O.20. R.20

Certified copies of judgment and decree to be furnished.

R. **20.** [S. 217.] Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

[1877—S. 217; 1859—S. 198.]

Note 2.

(1) *Naubut Pattak* v. *Mahesh Narayan Lal*, (1905) 32 Cal 654 (659): 1 Cal L Jour 364; *Ramjiwan Mal* v. *Chand Mal*, (1888) 10 All 587 (594, 599): 1888 All W N 258.

(2) Notes on clauses.

(3) *Sheo Pershad* v. *Indore Malwa United Mills*, (1917) 39 Ind Cas 508 (511): 62 Pun Re 1917: 65 Pun W R 1917.

Note 3.

(1) *Nawbut* v. *Mahesh*, (1905) 32 Cal 654 (659): 1 Cal L Jour 364.

(2) *Narasimha Rao* v. *Zamindar of Tiruvur*, (1919) 53 Ind Cas 234 (237): 42 Mad 873: 37 Mad L Jour 193: 10 Mad L W 183: 1919 Mad W N 628: 26 Mad L Tim 276 [It could however be treated as a case of *equitable* set-off].

(3) *Permanand* v. *Jagat Narain*, (1910) 6 Ind Cas 162 (163): 32 All 525: 7 All L J 543; *Ram Charan* v. *Bulaqi*, 1924 All 854 (855): 22 All L J 783: 5 L R (All) Civ 563: 46 All 858: 83 Ind Cas 880 [Suit for partnership accounts—Distinguishing *Misri Lal* v. *Banarsi Lal*, 3 All L J 233 (234)].

(4) *Narendra Krishna Chakraburty* v. *Ashutosh Bhattacharji*, 1931 Cal 358 (359): 35 Cal W N 17: 132 Ind Cas 195; *Surendra* v. *Atul Chandra*, (1907) 34 Cal 892 (895, 896): 7 Cal L Jour 87.

(5) *Narendra Krishna* v. *Ashutosh Bhattacharji*, 1931 Cal 358 (359): 35 Cal W N 17: 132 Ind Cas 195.

Note 4.

(1) *Nand Ram* v. *Ram Prasad*, (1905) 27 All 145 (147): 1904 All W N 198: 1 All L J 529; *Niaz Gul Khan* v. *Durga Prasad*, (1893) 15 All 9 (11): 1892 All W N 115; *Gobind* v. *Trimbak*, (1896) Bom P J 728; *Vyravan* v. *Nataraja*, (1916) 82 Ind Cas 80 (81): 39 Mad 939: 3 Mad L W 24: 30 Mad L Jour 59.

Local Amendments.

ALLAHABAD.

Add the following to O. 20:—

21. (1) Every decree and order as defined in Section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly, what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance, with the provisions of Rules 7 and 8.

(5) When the Judge signs the decree, he shall make an autograph note stating the date on which the decree was signed.

RANGOON.

The following shall be *added* as Rules 21 and 22:—

Certificate to be issued to Land Records Department when interests in land are affected.

21. As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey has been affected thereby, the Court of first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate. A copy of the certificate in every such case should also be sent to the Sub-Registrar within whose sub-district the land or any part thereof is situate.

Form of certificate.

22. The certificate shall be in the prescribed form, and shall be signed by the presiding officer of the Court.

O.20, R.20. Note 1.

Synopsis.

1. Certified copies of judgment and decree to be furnished.

1. Certified copies of Judgment and decree to be furnished.—An application for copies under this rule is to be made to the *Court* which has decided the case and such an application must be deemed to be a proceeding before the Court, although the Court may have delegated its functions in the matter to some other officer. Hence, an offence committed in connection with such an application comes within the purview of Ss. 195 and 476 of the Criminal Procedure Code.[1] *See also* the undermentioned cases.[2]

ORDER XXI.

EXCUTION OF DECREES AND ORDERS.

PAYMENT UNDER DECREE.

O. 21, R. 1. Modes of paying money under decree.

R. 1. [S. 257.] (1) All money payable under a decree shall be paid as follows, namely:—

(*a*) into the Court whose duty it is to execute the decree; or—

(*b*) out of Court to the decree-holder; or

(*c*) otherwise as the Court which made the decree directs.

(2) *Where any payment is made under clause* (*a*) *of sub-rule* (1), *notice of such payment shall be given to the decree-holder.*

[1877—S. 257; 1859—S. 206.]

Local Amendment.

NAGPUR.

In Rule 1, sub-R. (1), *after* the words "a decree", *insert* the words "or an order",

For Cl. (*a*) of sub-R. (1), *substitute* the following clause:—

"(*a*) by deposit in, or by postal money order to, the Court whose duty it is to execute the decree or order; or";

In Cl. (*c*) of sub-R. (1), *after* the word "decree", *insert* the words "or order"; and to sub-R. (2), *add* the following proviso:—

"Provided that when the payment is made by money order, the notice may be given by registered post by the judgment-debtor direct to the decree-holder."

Synopsis.

1. Legislative changes.
2. Retrospective operation of the rules of this order. See Note 3 to Preamble.
3. Scope and applicability of the rule.
4. Payment into Court.
5. Who should make payment.

Order 20, Rule 20—Note 1.

(1) *Faqir Singh* v. *Emperor*, 1928 Lah 759 (761): 112 Ind Cas 356: 29 Cr L Jour 1028.

(2) *Varjivan* v. *Ali Daji*, (1864) 1 Bom H C R 165 [Parties entitled to copies and not merely translations]; *Ibrahim Fatte Ali* v. *Chandra Bhan*, (1870) 7 Bom H C 130 [Rule applies to Small Cause Courts]; *Bama Churn*, In re, (1878) 2 Cal L Rep 553 (554) [Right of strangers to obtain copies]; *Rajah Nilmonee Singh Deo* v. *Chinibas Mahanti*, (1873) 20 Suth W R 405 (406): 12 Beng L R App 8.

6. Effect of payment.
7. Decree directing payment to decree-holder.
8. Payment out of Court to decree-holder.
9. Notice of payment.

Court closed on last day for payment in—Procedure. See Note 4, Pts. (2) and (3).
Inexecutable decrees, applicability of rule. See Note 3, Pt. (2).
Liability for interest. See Note 3, F.-N. (1) and Note 6, Pt. (2); Note 8, Pt. (2).
"Money payable under a decree." See Note 3, Pt. (3).
Tender by debtor to be unconditional. See Note 8, Pt. (2).

1. Legislative changes.—
Clause (2) of the rule is new.

2. Retrospective operation of the rules of this order.—*See* Note 3 to Preamble, *ante*.

3. Scope and applicability of the rule.—The judgment-debtor is bound to pay the decretal debt in one of the modes specified in the rule. He cannot be relieved from such liability on the ground that the decree-holder is dead.[1]

The rule does not apply to decrees that are *inexecutable* as where a compromise decree provides that on default in payment, the decree-holder shall have the right to file a *suit*.[2] Nor does the rule apply to money payable under an *order*, though such orders are *executable*, under the provisions of S. 36, like decrees. Thus where a party is ordered to pay the costs of the day to the opposite side, he cannot deposit the costs in Court under this rule.[3] Under S. 11 of the Charitable and Religious Trusts Act, XIV of 1920, the provisions of the Code, relating to execution of decrees are applicable to execution of orders under that Act.

4. Payment into Court.—Where a payment under a decree has to be made *only into Court*, as in the case of pre-emption decrees under O. 20, R. 14, and the Court is closed on the last day for making such payment, the maxim *lex non cogit ad impossibilia*[1] will apply and the payment can be made on the day the Court re-opens.[2] It has been held by all the High Courts except the High Court of Allahabad that the same rule will apply even where the decree amount may be paid to the *decree-holder* or *into Court*, inasmuch as the judgment-debtor is entitled to choose the method of payment.[3] The High Court of

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Order 21, Rule 1—Note 3.

(1) *Narendra Chandra Lahiri* v. *Charu Chandra Singh*, (1910) 5 Ind Cas 63 (64): 14 Cal W N 146 [Liable for interest on the whole of the amount due].

(2) *Kunj Behari* v. *Bindeshri Prasad*, 1929 All 207 (207): 1929 All L J 286: 115 Ind Cas 796: 51 All 527.

(3) *Shanks* v. *Secretary of State*, (1889) 12 Mad 120 (122).

Note 4.

(1) "The law does not compel a man to do that which he cannot possibly perform."

(2) *Dabi Din Rai* v. *Muhammad Ali*, (1881) 3 All 850 (851): 1881 All W N 100; *Bisheshar Naik* v. *Sahibuddin*, (1884) All W N 217 (217): *Mahomed Hashim* v. *Radhakishun*, 1925 All 687 (687): L R 6 A 287: 87 Ind Cas 620; *Hossein Ali* v. *Donzelle*, (1880) 5 Cal 906 (909): 6 Cal L Rep 239 [Payment under S 52 of Bengal Act VIII of 1869 had to be made in Court]. See also *Kunj Behari Singh* v. *Bindeshri Prasad*, 1929 All 207 (207): 1929 All L J 286: 115 Ind Cas 796: 51 All 527.

(3) *Madhav Appa Shet* v. *Ravji Vithu*, (1899) 1 Bom L R 644 (644); *Wana Ravji* v. *Natu Marha*, (1910) 7 Ind Cas 992 (992): 35 Bom 35: 12 Bom L R 818; *Surendra Narayan* v. *Saurawini Dasi*, (1906) 10 Cal W N 535 (539): 3 Cal L Jour 339; *Aravamudu* v. *Samiyappa*, (1898) 21 Mad 385 (387); *Sankaran Unni* v. *Raman*, 1925 Mad 743 (744): 21 Mad L W 469: 1925 Mad W N 566: 87 Ind Cas 560: 48 Mad L Jour 596; *Chinna Nadan* v. *Arumugam Chetty*, 1927 Mad 1196 (1196, 1197): 106 Ind Cas 562 [There is no distinction in this respect between a compromise decree and any other decree].

O. 21, R. 1, Notes 4—7.

Allahabad is of the opinion that in such cases, the judgment-debtor cannot get the time for payment extended by choosing to pay the amount only in Court.[4]

An arbitrator is not an officer of the Court and a payment to him is not a payment into Court.[5] Where a Receiver appointed in an administration suit was not authorised to receive certain payments to be made by *X* but the latter made the payments to the Receiver who misappropriated it, it was held by the Privy Council, that *X* was not discharged from liability, by reason of such payment.[6]

5. **Who should make payment.**—A payment into Court under this rule can be made only by the judgment-debtor, his agent, or his representative. A payment made by a *stranger* will not have the effect of satisfying the decree unless the decree-holder consents thereto.[1] But a payment made by the mortgagee of a party liable to pay is effective, though he is not a party to the suit.[2] In execution of a decree for money obtained by *A* against *B*, a Receiver was appointed to collect certain amounts due to *B* by *C*. *C* paid the amount into the hands of the Receiver, who absconded and did not pay the money into Court. It was held that the payment by *C* to the Receiver did not discharge the judgment-debtor from liability under the decree.[3]

6. **Effect of payment.**—A payment into Court towards a decree debt operates as a discharge of the decree debt to that extent[1] and where interest has been awarded on the decree amount, it will cease to run on the sum deposited.[2] But if, after having made the payment, he prevents the sum reaching the hands of the decree-holder, he will be liable for interest until the money is available to the decree-holder.[3]

If money is paid into Court under process of execution and the decree-holder or his agent is present, the Court should cause it to be paid to him immediately.[4]

7. **Decree directing payment to decree-holder.**—Even where the decree directs the payment to be made to the decree-holder, payment into Court is a valid compliance with the decree[1] unless perhaps the Court directs that payment should *not* be made otherwise than by payment to the decree-holder.[2]

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(4) *Kunj Behari Singh* v. *Bindeshri Prasad Singh*, 1929 All 207 (207): 1929 All L J 286: 51 All 527: 115 Ind Cas 796.

(5) *U Po San* v. *Ma Ngwe Hnit*, 1924 Rang 263 (264): 3 Bur L Jour 6: 80 Ind Cas 238.

(6) *Mt Brij Indar Kuar* v. *Thakur Jai Indar*, 1932 P C 191 (193): 63 Mad L Jour 658: 137 Ind Cas 900: 59 Ind App 311: 1932 All L J 747: 34 Bom L R 1188: 56 Cal L Jour 48: 36 Cal W N 882: 1932 Mad W N 830: 9 Oudh W N 571 P C.

Note 5.

(1) *Kasturi Ayyangar* v. *Arunachalam Chettiar*, (1916) 34 Ind Cas 350 (352): (1916) 1 Mad W N 195.

(2) *Mahomed Rahimtullah Haji Joosab* v. *Esmail Allarakhia*, 1924 P C 133 (135): 46 Mad L Jour 567: 5 L R P C 105: 26 Bom L R 549: 1924 Mad W N 422: 51 Ind App 236: 48 Bom 404: 34 Mad L Tim 99: 80 Ind Cas 411: 22 All L J 931: 29 Cal W N 584 P C.

(3) *Muthia Chetty* v. *Orr*, (1897) 20 Mad 224 (228) [Per Shephard, J].

Note 6.

(1) *Muthia Chetty* v. *Orr*, (1897) 20 Mad 224 (229); *Bhyrubnath Shaha* v. *Kunhya Lal Roy*, (1873) 20 Suth W R 131 (131).

(2) *Amtul Habib* v. *Mohammed Yusuf*, (1918) 43 Ind Cas 520 (521): 40 All 125: 16 All L J 15.

(3) *Oliver Ruby Brown* v. *G I P Ry Co*, 1929 Nag 227 (228): 115 Ind Cas 165: *Rajendra Kishore* v. *Pershad Sen*, (1878) 2 Cal L Rep 183 (184).

(4) *Muttuvelu* v. *Samu Pillai*, (1869-70) 5 Mad H C App. II.

Note 7.

(1) *Wana* v. *Natu*, (1910) 7 Ind Cas 992 (992): 35 Bom 35: 12 Bom L R 818; *Sankaran Unni* v. *Raman*, 1925 Mad 743 (744): 48 Mad L Jour 596: 21 Mad L W 469: 87 Ind Cas 560: 1925 Mad W N 566.

(2) *Dhanu Singh* v. *Kesheoprasad*, 1923 Nag 246 (246, 247): 19 Nag L R 116: 72 Ind Cas 388.

O. 21, R. 1, Notes 8—9.

8. Payment out of Court to decree-holder.—A payment made to the decree-holder out of Court also discharges the decree.[1] But the decree-holder is not bound to accept a sum in part satisfaction of his decree and the refusal to receive it will not deprive him of his right to interest.[2] Where a payment out of Court is made through post before a certain fixed date but does not reach the decree-holder within that date the payment is not effective.[3]

The language of the rule is only permissive and does not prohibit a payment to an *agent* or representative of the decree-holder and hence a payment out of Court may be made to the decree-holder's agent or representative, or in the case of members of a Hindu joint family, to the manager of the family.[4] Where, however, decree is a joint one, a payment to one decree-holder does not amount to an acquittance by the others. The other decree-holders will be entitled to execute the decree in respect of their shares.[5]

9. Notice of payment.—The question of notice of payment into Court to the decree-holder is material only where the decree awards *interest*. Where no interest has been awarded by the decree and the decretal amount is paid into Court, it operates as a discharge of the decree, even if no notice is given to the decree-holder.[1] But if the decree *awards interest* then the decree-holder is entitled to interest till the *date of notice*.[2] Notice of such payment must be in writing and be served on the decree-holder in the way prescribed for the service of summons.[3] Even if the judgment-debtor fails to give notice of the fact of payment it is the duty of the Court to inform the decree-holder about it when he next applies for execution of the decree.[4]

Clause (2) of this rule does not apply to redemption decrees. They are governed by O. 34, R. 8, which does not require any such notice to be given.[5]

O. 21, R. 2.

Payment *out of Court* to decree holder.

R. **2.** [S. 258.] (1) *Where* any money payable under a decree[3] *of any kind*[4] is paid out of Court[5], or the decree is otherwise adjusted[6] in whole or in part[7] to the satisfaction of the decree-holder, the decree-holder shall certify[12] *such payment or adjustment*

Note 8.

(1) *Muhammad Husain* v. *Ram Sarup*, (1887) 9 All 9 (10): 1886 All W N 292; *Bertola* v. *Jeewun Ram*, (1871) Pun Re No 29.

(2) *Kunhya Singh* v. *Tooydun Singh*, (1867) 7 Suth W R 20 (20).

(3) *Inayatullah* v. *Hashmatullah*, (1918) 46 Ind Cas 193 (194): 16 All L J 472.

(4) *Duraiswami* v. *Venkatarama*, (1911) 12 Ind Cas 503 (505): 21 Mad L Jour 1088: 10 Mad L Tim 370: (1911) 2 Mad W N 420; *Unao Commercial Bank, Ltd* v. *Mohar Gobind Rai*, 1930 All 659 (660): 1930 All L J 945: 129 Ind Cas 382 [Attaching decree-holder is a representative of the decree-holder and a payment can be made to him out of Court].

(5) *Md Sher* v. *Nabi Khan*, (1916) 35 Ind Cas 157 (158): (1916) 1 Mad W N 471: 3 Mad L W 579: 31 Mad L Jour 93: 20 Mad L Tim 381; *Surendra Kumar* v. *Abhay Kumar Das*, 1930 Cal 78 (79): 126 Ind Cas 124.

Note 9.

(1) *Tata Iron & Steel Co. Ltd* v. *Baidyanath*, 1924 Pat 118 (119): 2 Pat 754: 76 Ind Cas 55.

(2) *Ramaraya Shanbogue* v. *Sharbett Venkataramayya*, (1919) 50 Ind Cas 410 (410, 411): 42 Mad 576: 1919 Mad W N 458: 26 Mad L Tim 295; *Kalee Das* v. *Puran Kumaree*, (1871) 16 Suth W R 304 (304); *Rangpur Raiyat Bank, Ltd* v. *Hesabuddin*, 1932 Cal 111 (111): 135 Ind Cas 799: 35 Cal W N 544.

(3) *Baliram* v. *Ghasiram*, 1925 Nag 52 (54): 81 Ind Cas 1001.

(4) *Narayan* v. *Ganpatrao*, 1921 Nag 148 (149): 67 Ind Cas 242.

(5) *Ambi* v. *Valia Thamburatti*, 1924 Mad 102 (102): 18 Mad L W 686: 33 Mad L Tim 101: 1923 Mad W N 753: 75 Ind Cas 566: 45 Mad L Jour 687.

O. 21, R. 2. to the Court whose duty it is to execute the decree, *and the Court shall record the same*[19] *accordingly.*

(2) The judgment-debtor also may inform the Court[15] of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified ; and if, after service of such notice, the decree-holder fails to *show cause* why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, *which* has *not* been certified *or recorded* as aforesaid, shall not be recognized[21] by any Court *executing the decree.*[22]

[1877—S. 258; 1859—S. 206.]

Local Amendment.

MADRAS.

In sub-Rule (2), *after* the word "judgment-debtor" *insert* the expression—

"or his legal representative or his surety for the decree debt."

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. "Money payable under a decree."
4. "Decree of any kind."
5. "Is paid out of Court."
6. "Or the decree is otherwise adjusted."
7. Adjustment in part.
8. Oral adjustments.
9. When and with whom payment or adjustment should be made.
10. Payment to one of several decree-holders.
11. Adjustment by guardian of minor party.
12. "The decree-holder shall certify."
13. Effect of certifying without being paid.
14. Certification by one of several joint and decree-holders.
15. "The judgment-debtor may also inform Court . . . . and apply."
16. "Judgment-debtor"—Meaning of.
17. Certification—Form of.
18. Limitation for certification.
19. "Shall record the same."
20. Notice.
21. Uncertified payment or adjustment not to be recognised by Court executing the decree.
22. "Court executing the decree."
23. Court acting under O. 21, R. 16.
23-a. Court dealing with application under O. 21, Rr. 90, 95, 97 and 98.
24. Suit by judgment-debtor based upon an uncertified payment or adjustment.
25. Suit by decree-holder based on uncertified payment or adjustment.
26. Effect of fraud.
27. Effect on limitation.
28. Operation as estoppel.
29. Remedies of the judgment-debtor.
30. Suit for damages.
31. Restitution of uncertified payment on reversal of decree in appeal.
32. Criminal proceedings.
33. Appeal and revision.

Assignee of the decree—Whether comes within the rule. See Note 9, Pt. (1).

Certificate—In which Court to be filed. See Note 15, Pt. (7).

Compromise—Whether and when sufficient adjustment. See Note 6, Pt. 4, F.-N. (4).
Judgment-debtor pleading agreement with assignee of decree. See Note 2, F.-N. (4).
Money paid twice over by judgment-debtor—Refund to be in execution. See S. 47, Note 35, Pt. (5).
Rule whether confined to parties only. See Note 2, Pts. (5) to (8).
"Show cause." See Note 20, Pt. (2).
"Such payment or adjustment." See Note 22, F.-N. (6).

O. 21, R. 2. Note 1.

1. Legislative changes.—

1. In sub-R. (1) after the words 'payable under a decree' the words 'of any kind' have been added. *See* Note 4, *infra*.
2. The words 'as a payment or adjustment of the decree' which occurred in the old Code in sub-R. (3) after the word 'recognised' have been omitted. *See* Note 27, *infra*.
3. The words 'or if any payment is made in pursuance of an agreement of the nature mentioned in S. 257-A' after the words 'to the satisfaction of the decree-holder' have been omitted. S. 257-A of the old Code has also been omitted. It ran as follows:—

"Every agreement to give time for the satisfaction of a judgment debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

Every agreement for the satisfaction of a judgment debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.

Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment debt; and the surplus, if any, shall be recoverable by the judgment-debtor."

The omission of S. 257-A from the present Code, renders the undermentioned decisions[1] now merely of academic interest. The effect of the omis-

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Order 21, Rule 2—Note 1.

(1) **In the following cases the agreement was held to be void as being contrary to S. 257-A**—*Fateh Ram* v. *Babu Sham Lal*, (1909) 2 Ind Cas 991 (991): 6 Mad L Tim 180: 6 All L J 726; *Debi Rai* v. *Gokul Prasad*, (1881) 3 All 585 (588): 1881 All W N 42; *Mukund Ram* v. *Mukund Ram*, (1884) 6 All 228 (230); *Ramlakhan Rai* v. *Bakhtaur Rai*, (1884) 6 All 623 (625): 1884 All W N 207; *Sant Lal* v. *Sri Kirshan Das*, 1895 All W N 149 (150); *Daulat Singh* v. *Pandu*, (1885) 9 Bom 176 (179); *Vishnu Vishwanath* v. *Hur Patel*, (1888) 12 Bom 499 (501); *Naru Koli* v. *Chima Bosle*, (1888) 13 Bom 54 (55); *Heera* v. *Pestonji*, (1898) 22 Bom 693 (698, 700): Chitty's S C C R 580; *Dhanram Rapha* v. *Ganpat Sadashir*, (1903) 27 Bom 96 (100): 4 Bom L R 872; *Bhagchand* v. *Radha Kisan*, (1904) 28 Bom 62 (65): 5 Bom L R 672; *Raichand Motichand* v. *Naran Bhika*, (1904) 28 Bom 310 (313, 314): 6 Bom L R 62; *Govind* v. *Sakharam Narayan*, (1904) 28 Bom 383 (391): 6 Bom L R 344; *Chatru* v. *Kondaji Vithal*, (1914) 22 Ind Cas 284 (285): 38 Bom 219: 15 Bom L R 1129; *Gopalsahu* v. *Brij Kishore Pershad*, (1901) 32 Cal 917 (920): 9 Cal W N 1004; *Sirdar Amir Singh* v. *Jawahir Singh*, 1880 Pun Re No 48; *Narayana Deru* v. *Venkataramanayya*, (1891) 1 Mad L Jour 332 (333, 334); *Venkata* v. *Koran*, (1903) 26 Mad 19 (26): 12 Mad L Jour 113; *Seetaramayya* v. *Tadapalli Sodemma*, (1918) 45 Ind Cas 16 (17): 7 Mad L W 503: 1918 Mad W N 292: 24 Mad L Tim 16.

In the following cases it was held that an agreement made with the sanction of Court under S 257-A is valid and enforceable in execution; *Muhammad Sulaiman* v. *Jukki Lall*, (1889) 11 All 228 (232, 233): 1889 All W N 53; *Sitaram* v. *Dasarath*, (1883) 5 All 492 (495): 1883 All W N 68; *Champat Rai* v. *Pitambar Das*, (1884) 6 All 16 (17): 1883 All W N 174; *Krishna* v. *Vasudev*, (1896) 21 Bom 808 (820) [Impliedly sanctioned]; *Thakoor Dyal Singh* v. *Sarju Pershad Misser*, (1893) 20 Cal 22 (24); *Gokhai Padhan* v. *Gonesh Lal*, (1912) 17 Ind Cas 936 (939): 17 Cal W N 565: 16 Cal L Jour 404; *Ameerunissa Khatoon* v. *Meer Mahomed*, (1878) 2 Cal L Rep 143 (145); *Ohajju* v. *Gulab*, (1886) Pun Re No 61; *Bunvari Lal* v. *Abdul Ghafar Khan*, (1909) 1 Ind Cas 48 (49): 5 Pun L R 1909: 4 Pun W R 1909; *Lakshmana* v. *Sukiya Bai*, (1884) 7 Mad 400 (401) [Impliedly sanctioned]. See also *Gandharap Singh* v. *Sheodarshan Singh*, (1890) 12 All 571 (575): 1890 All W N 197 [Sanction could be given only by Court which passed the decree]: S 257-A applies only as between parties to the decree; *Yella* v. *Munisami*, (1883) 6 Mad 101 (102); *Ramji Pandu* v. *Mahomed Walli*, (1889) 13 Bom 671 (672): *Kesu Shivaram Marwadi* v. *Genu Babaji*, (1899) 23 Bom 502 (505); *Vishnu* v. *Har Patel*, (1888) 12 Bom 499 (501); *Harakchand* v. *Totaram*, 1889 Bom P J 377; *Lalji* v. *Gaya*, (1903) 25 All 317 (320, 321): 1903 All W N 45; *Bank of Bengal* v. *Vyabhoy Gangji*, (1892) 16 Bom 618 (625); *Shripatrao* v. *Govind Narayan*, (1889) 14 Bom 390 (392) [Section related only to debts enforceable in execution]; *Hukum Chand* v. *Taharunnessa*, (1889) 16 Cal

O. 21, R. 2, Notes 1—2.

sion is that the legality of such arrangements between parties after decree must be tested like other agreements.[2]

2. Scope and applicability of the rule.—The object of this rule is to ensure that the Court executing the decree shall not be troubled with any disputes between the parties with regard to any payment or adjustment unless the same has been duly certified or recorded.[1] Sub-R. 1 contemplates a certification by the *decree-holder* and a record by the Court of the payment or adjustment: sub-R. 2 contemplates an application by the *judgment-debtor*. In this case *notice* is to be given to the decree-holder and the Court should give a *judicial decision* whether the payment or adjustment should be recorded as certified.[2] Lastly sub-R. (3) imposes a bar upon the Court executing the decree and prevents it from recognising any payment or adjustment which has not been certified or recorded as certified as required by the rule.[3]

The prohibition under sub-R. 3 will apply only when the parties to a transaction entered into for the purpose of satisfying or adjusting a decree stand, to one another, at the date of such transaction, in the *relation of judg-*

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504 (507); *Hurkisen Das* v. *Nibaran Chunder*, (1901) 6 Cal W N 27 (30); *Jhabar* v. *Modan*, (1885) 11 Cal 671 (672); *Atma Singh* v. *Banke Ram*, 1908 Pun Re No 29: 61 Pun L R 1907: 71 Pun W R 1907 F B; *Juji* v. *Annai*, (1894) 17 Mad 382 (388); *Mt Ohunna Bai* v. *Kamarali*, (1893) 6 C P L R 133 (135); *Mohammad Zakir* v. *Girdhari Lal*, (1901) 4 Oudh Cas 284 (288).

(2) *Debendra Narain Sinha* v. *Sourindra Sinha*, (1914) 24 Ind Cas 891 (892) (Cal); *Subbaraya* v. *Ramaswamy*, (1911) 13 Ind Cas 204 (205): 22 Mad L Jour 166: 11 Mad L Tim 18: 1912 Mad W N 9 and 458; *Raj Kunwar* v. *Dwarka Prasad*, 1925 Oudh 364: 12 Oudh L J 156: 86 Ind Cas 907: 28 Oudh Cas 255.

Note 2.

(1) *Ellis Enas Pavloo Charry* v. *Kitter Phillip Gowrya*, 1922 Bom 380 (380, 381): 46 Bom 226: 64 Ind Cas 490: 23 Bom L R 981.

(2) *Shri Prakash* v. *Allahabad Bank*, 1929 P C 19 (22, 23): 29 Mad L W 161: 33 Cal W N 267: 56 Mad L Jour 233: 1929 All L J 33: 6 Oudh W N 29: 56 Ind App 30: 31 Bom L R 289: 114 Ind Cas 581: 3 Luck 684 P C.

(3) *Shri Prakash* v. *Allahabad Bank*, 1929 P C 19 (22): 29 Mad L W 161: 33 Cal W N 267: 56 Mad L Jour 233: 1929 All L J 33: 6 Oudh W N 29: 56 Ind App 30: 31 Bom L R 289: 114 Ind Cas 581: 3 Luck 684 P C; *Frank Coombs* v. *Mufassil Bank, Ltd, Gorakhpur*, 1929 All 674 (675): 115 Ind Cas 139; *Taj Singh* v. *Jagan Lal*, (1916) 35 Ind Cas 234 (234): 38 All 289: 14 All L J 370; *Janki Prasad* v. *Thakur Dass*, (1912) 13 Ind Cas 21 (22) All; *Mehbunnissa Begum* v. *Mehmedunnissa Begum*, 1925 Bom 309 (309): 27 Bom L R 403: 49 Bom 548: 95 Ind Cas 687 F B; *Ellis Enas Pavloo Gharry* v. *Kitter Phillip*, 1922 Bom 380 (380, 381): 46 Bom 226: 64 Ind Cas 490: 23 Bom L R 981; *Munmohan Das* v. *Vizbai*, (1889) 13 Bom 171 (176): 13 Ind Jur 304; *Prasanna Kumar* v. *Lal Mian*, (1920) 55 Ind Cas 669 (671) (Cal); *Romesh Chandra* v. *Kala Ganji*, (1919) 50 Ind Cas 331 (332) (Cal); *Trilochan* v. *Rakkeswar*, (1912) 14 Ind Cas 839 (842): 15 Cal L Jour 423; *Hari Charan De* v. *Hari Charan Datta*, (1910) 6 Ind Cas 43 (44) (Cal); *Ram Doyal* v. *Ram Hari*, (1893) 20 Cal 32 (36); *Durga Prasad* v. *Mohan Singh Roy*, (1898) 25 Cal 86 (89); *Kelee Pershad* v. *Khetternath*, (1865) 4 Suth W R Mis 11 (11); *Md Kazen* v. *Kaloo Bibee*, (1878) 20 Suth W R 150 (150): 11 Beng L R 405; *Dwarka Nath* v. *Unnoda Churn*, (1867) 8 Suth W R 318 (320); *Bhya Boopnath Sahee* v. *Kunwan*, (1867) 7 Suth W R 134 (134); *Gunga Gobind* v. *Makhun Lal*, (1868) 9 Suth W R 362 (362); *Bhoobun Mohun Bannerjee* v. *Sadhoo Churn Sircar*, (1871) 15 Suth W R (O.C.) 5 (6); *Mulchand* v. *Champa*, 1925 Lah 566 (567): 87 Ind Cas 635: 26 Pun L R 250; *Dulla* v. *Karm*, 1878 Pun Re No 26; *Nilakanta Subudhi* v. *Ramachandra Deo*, 1932 Mad 250 (252): 35 Mad L W 161: 137 Ind Cas 394 [Payment by judgment-debtor to decree-holder after latter's adjudication as insolvent uncertified—Cannot be recognised as against receiver]; *Bolla Brahmadu* v. *Ruddaraju Venkataraju*, (1916) 33 Ind Cas 71 (72, 73) (Mad); *Alathoor Badrudeen* v. *Gulam Moideen*, (1911) 12 Ind Cas 562 (563): 10 Mad L Tim 396: (1911) 2 Mad W N 473: 24 Mad L Jour 541: 36 Mad 357; *Veerappa Chettiar* v. *Arumugam Poosari*, (1907) 17 Mad L Jour 527 (528); *Ganapathy Ayyar* v. *Chenga Reddy*, (1906) 29 Mad 312 (313): 16 Mad L Jour 33; *Chedumbara* v. *Ratna Ammal*, (1878) 3 Mad 113 (114); *Fatimunnisa* v. *Asghar Husain*, 1928 Oudh 195 (198): 5 Oudh W N 68: 108 Ind Cas 105: 3 Luck 170; *Jagrani Kuer* v. *Moona Kuer*, (1928) 110 Ind Cas 244 (245): 1928 Notes 22 (e); *Kedar Nath* v. *Chandika Prasad*, 1926 Oudh 620 (620): 91 Ind Cas 979; *Harihar Prasad* v. *Shankar Dayal*, 1924 Oudh 208 (208): 10 Oudh L J 351: 77 Ind Cas 337; *Radha Kant Lal* v. *Musamat Parbati Kuer*, 1921 Pat 135 (137, 138): 6 Pat L Jour 887: 2 Pat L Tim 765: 63 Ind Cas 535; *Mussamat Sukhdei Kumari* v. *Mahamaya Prasad Singh*, (1918) 48 Ind Cas 765 (767) (Pat); *Meyappa Chettiar* v. *U Tun Hla*, 1931 Rang 148 (149): 9 Rang 104: 132 Ind Cas 713 [The Court has no power to stay the confirmation of the sale of the judgment-debtor's properties on the basis of such an adjustment]; *M S S Chettiar* v. *Ma Tin Tin*, 1925 Rang 349 (350): 4 Bur L Jour 179: 92 Ind Cas 677; *Sayyid Muhammad Nur* v. *Ko Law Pan*, (1914) 22 Ind Cas 963 (964): (1913) 1 U B R 191; *U Po Thaing* v. *Maung Ba U*, (1911) 11 Ind Cas 780 (781): 4 Bur L Tim 162. See also *Madho Singh* v. *Ram Prasad*, (1890) 10 All W N 68 (69); *Thakoor Lal Misree* v. *Kanye Lall Tewaree*, (1867) 7 Suth W R 510 (510). But see *Krishnaji Kesava Pundit* v. *Subbaraya Takker*, (1871-74) 7 Mad H C R 387 (391) [Case under Code of 1859]; *Dudha Mahajan* v. *Kaluram Narayan Dass*, (1866-67) 4 Bom H C (A C) 120.

O. 21, R. 2, Note 2.

ment-debtor and judgment-creditor.[4] Thus where *A*, a transferee decree-holder applied for execution of the decree and *B*, the judgment-debtor objected on the ground that he had transferred certain immoveable property to *A* in consideration of his paying the judgment debt to the original decree-holder and that *A* having discharged the debt had got the decree transferred to himself, instead of entering up satisfaction of the decree, and had fraudulently applied for execution, it was held that there must be an enquiry into the truth of *B's* allegations.[4a] But there is nothing in the wording of this rule to limit the payment to the *decree-holder only*. Thus, where a compromise decree directed the payment of money to a third party and the payment was not certified to the Court, it was held that it could not be relied upon in execution.[5]

S. 71 of the Dekkhan Agriculturists' Relief Act (Bombay) expressly excludes the application of this rule to cases governed by it, and therefore, an executing Court governed by that Act, can take cognisance of an uncertified payment or adjustment.[6] As to whether this rule applies to proceedings under the Bengal Tenancy Act, *see* the undermentioned cases.[7] S. 80 of the Agra Tenancy Act III of 1926 deals with certification under this rule. This rule clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder and when no other interests have come into being. When once a sale in execution has been effected, a third party's interest intervenes which cannot be disregarded. Therefore after a sale is duly held the Court cannot refuse to confirm the sale on the ground that the decree-holder and the judgment-debtor say that the decree has been satisfied out of Court and the only method by which the sale can be set aside is by the procedure prescribed in O. 21, R. 89.[8] After a decree has been satisfied and the decree-holder has certified such satisfaction, there is no subsisting decree and a sale held in ignorance of the satisfaction is void and liable to be set aside.[9] But if the satisfaction is not certified, the sale is not vitiated and cannot be impeached.[10]

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(4) *Rama Ayyan* v. *Sreenivasa Pattar*, (1896) 19 Mad 230 (232, 233): 5 Mad L Jour 218; *Butchia Chetty* v. *Tayar Rao Naidu*, 1931 Mad 399 (400): 1930 Mad W N 1152: 32 Mad L W 919: 129 Ind Cas 818: 54 Mad 184: 60 Mad L Jour 721; *Gangayya* v. *Venkataramayya*, 1923 Mad 230 (231): 16 Mad L W 988: 44 Mad L Jour 80: 1923 Mad W N 51: 31 Mad L Tim 423: 72 Ind Cas 839; *Ponnusami Nadar* v. *Lakshmanan Chettiar*, (1911) 12 Ind Cas 657 (662): 10 Mad L Tim 442: (1911) 2 Mad W N 568: 22 Mad L Jour 170: 35 Mad 659 [Per Sundara Iyer, J]; *Brajabashi Modak* v. *Manik Chandra Modak*, 1927 Cal 694 (696): 31 Cal W N 921: 104 Ind Cas 4 [Agreement by judgment-debtor with the proposed assignee can be pleaded, in an application for execution by the assignee]; *Mussammat Kishen Devi* v. *Mussammat Nihali*, 1888 Pun Re No 137. See also *Tegh Singh* v. *Amin Chand*, (1883) 5 All 269 (271): 1883 All W N 18. See also *Kulathu Ayyar* v. *Vaithilingam Ayyar*, 1927 Mad 876 (877): 26 Mad L W 349: 39 Mad L Tim 207: 1927 Mad W N 297: 105 Ind Cas 163.

(4-a) *Rama Ayyan* v. *Sreenivasa Pattar*, (1896) 19 Mad 230 (232): 5 Mad L Jour 218.

(5) *Mahadeo Prasad* v. *Hamidan*, 1923 All 271 (271): 21 All L J 97: 71 Ind Cas 457: 45 All 304: 4 L R A (Civ) 117.

(6) *Chhagan Lal* v. *Parasuram*, 1921 Bom 142 (142, 143): 45 Bom 1128: 23 Bom L R 473: 62 Ind Cas 219.

(7) *Protab Chunder Singh* v. *Kanaye Lal Dass*, (1865) 3 Suth W R Act X 7, (7, 8) [Not applicable]; *Ram Chunder Roy* v. *Ram Churn Bukshee*, (1868) 9 Suth W R 372 (373), (Do.); *Gour Gobind Sircar* v. *Huree Mohun Banerjee*, (1874) 22 Suth W R 204 (204) [Applicable].

(8) *Nanhelal* v. *Umrao Singh*, 1931 P C 33 (35): 33 Bom L R 450: 53 Cal L Jour 187: 35 Cal W N 381: 14 Nag L R 28: 1931 All L J 257: 60 Mad L Jour 423: 1931 Mad W N 281: 33 Mad W N 419: 8 Oudh W N 585: 130 Ind Cas 686: 58 Ind App 50: 27 Nag L R 95 [Overruling 1922 Nag 148]; *Sharafan* v. *Mohammad Habibuddin*, (1911) 10 Ind Cas 148 (150): 13 Cal L Jour 535: 15 Cal W N 685 [Approved in 1931 P C 33]; *Satia Nand* v. *Jhangi Ram*, 1932 Lah 238 (239): 33 Pun L R 146; *Shivaram* v. *Manu Lal*, 1928 Pat 40 (43, 44): 104 Ind Cas 753 [But if decree-holder is purchaser, sale may be set aside].

(9) *Maung Po Kyin* v. *Annamalay Chetty*, (1911) 9 Ind Cas 452 (452): 4 Bur L Tim 12.

(10) *Lakshan Chandra* v. *Ram Dass*, 1929 Cal 374 (376): 33 Cal W N 795: 49 Cal L Jour 441: 118 Ind Cas 857 [Judgment-debtor failing to have adjustment recorded can neither sue to

O. 21, R. 2, Notes 2—3.

For cases under S. 206 of the Code of 1859 corresponding to this rule, *see* the undermentioned cases.[11]

3. **"Money payable under a decree."**—A mortgage decree is a decree for the payment of money within the meaning of this rule even though it contains a further direction for the sale of the mortgaged properties on default of payment. The adjustment of such a decree out of Court must be certified under this rule.[1] But where a mortgagee decree-holder is in possession of the mortgaged properties under the original contract of mortgage or by virtue of the terms of the decree, income received by the mortgagee from the mortgaged property is not "money payable under a decree" and does not therefore require to be certified.[2] Where, in a suit for possession by *A* against *B*, his tenant who set up a right to hold the land under a *mirasi* tenure, the Court declared in favour of *B* and directed payment of rent as before, it was held that rents paid by *B* to *A* out of Court were not "moneys payable under the decree".[3]

The words "money payable under a decree" do not mean any money which the party *may* pay if he chooses, but money which is recoverable by a party in execution against the party liable to pay it. Thus, where a decree merely provided that if one party paid within a certain time a certain sum of money to the other party, the latter was to reconvey certain property to the former and that if default was made in payment, the latter was to enjoy the property with absolute rights, it was held that it was not a decree under which payment of money can be compelled in execution, and that this rule did not apply, so as to bar the Court from recognising an uncertified adjustment out of Court.[4]

As to adjustments or payments made between the dates of preliminary and final decrees in mortgage suits, *see* O. 34, R. 5, Note 14.

An award under the Indian Arbitration Act when filed in Court is a *decree* for the purposes of S. 47 of the Code and this rule consequently applies to adjustments of such awards.[5]

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set aside the sale on the footing of adjustment, nor apply under S. 47—Suit is barred by S. 47 enquiry in execution barred by this rule—Remedy is by way of suit for damages]; *Trilochan Hazra* v. *Bakkeswar Ta*, (1912) 14 Ind Cas 839 (842): 15 Cal L Jour 423 [Sale not vitiated]. But see *Ghasi Ram* v. *Dalel Singh*, (1918) 45 Ind Cas 222 (224): 5 Oudh L J 92 [Sale vitiated by fraud and is therefore a nullity].

(11) *Bykunt Ghose* v. *Kishen Chunder Ghose*, (1865) 2 Suth W R (Mis) 43 (43). See also *Bala Krishna Pandharinath* v. *Bapu Yesaji*, (1895) 19 Bom 204 (206) [Change effected by S 27 of Amending Act VII of 1888 is retrospective]; Ex parte *Chimnanji Bala Krishna*, (1866-67) 4 Bom H C 85. See also *Brindabun Chunder Sircar Chowdhry* v. *Khoshal Chunder Dutt*, (1865) 2 Suth W R (Mis) 2 (2).

Note 3.

(1) *Vaidhinadasami Iyer* v. *Somasundaram Pillai*, (1905) 28 Mad 473 (476, 477, 478): 15 Mad L Jour 126 [Overruling 24 Mad 412]; *Hakim Singh* v. *Ram Singh*, (1908) 30 All 248 (250): 1908 All W N 103: 5 All L J 272; *Nistarini Dasi* v. *Kazm Ali*, (1910) 7 Ind Cas 258 (259, 260): 12 Cal L Jour 65; *Hiramony Biswas* v. *Musa Khan*, (1910) 7 Ind Cas 625 (626): 16 Cal L Jour 169; *Harish Chandra Mondol* v. *Jagabandhy Dutta*, (1908) 7 Cal L Jour 581 (584, 585): 12 Cal W N 282: 8 Mad L Tim 202; *Kaka Ram* v. *Haveli Ram*, 1930 Lah 814 (815): 126 Ind Cas 518; *Mangar Sahu* v. *Bhatoo Singh*, (1920) 57 Ind Cas 473 (474): 5 Pat L Jour 672: 1 Pat L Tim 416; *Lachman Singh* v. *Mardan Singh*, 1923 Nag 20 (20): 68 Ind Cas 443 [As to whether mortgage decrees are decrees for payment of money generally, see note 6 to S 73].

(2) *Gajjala Yella Reddi* v. *Syed Muhamad Ali*, (1916) 38 Ind Cas 675 (676): 39 Mad 1026; *Ramasami Naick* v. *Ramasami Chetty*, (1907) 30 Mad 255 (265): 2 Mad L Tim 167: 17 Mad L Jour 201 [But appropriation of income received under a different contract of mortgage requires to be certified].

(3) *Kedari* v. *Gajai*, (1894) 18 Bom 690 (692).

(4) *Narayanasami Naidu* v. *Rangasami Naidu*, 1926 Mad 749 (751): 50 Mad L Jour 547: 95 Ind Cas 731: 49 Mad 716: 24 Mad L W 235.

(5) *Official Receiver* v. *Tirathdas Mewaram*, 1927 Sind 66 (75): 97 Ind Cas 821; *Donald Graham Oo* v. *Kewal Ram*, 1921 Sind 132 (134): 16 Sind L R 245: 79 Ind Cas 477.

O. 21, R. 2, Notes 4—6.

4. "Decree of any kind".—Under the old Code, the High Court of Calcutta[1] and the Chief Court of Punjab[2] held that S. 258 of that Code applied to any kind of decree and not merely to money decrees. The High Court of Madras,[3] on the contrary, held that S. 258 was applicable only to *decrees under which money is payable* and not to other kinds of decrees. Under the present Code the High Courts of Bombay[4] and Calcutta[5] have held that the addition of the words "of any kind" after the word "decree" in sub-R. (1) makes it clear that the provisions of this rule are not confined to money decrees only, but apply to *every kind of decree.* The High Court of Madras[6] has held that the effect of the change is not to make the rule applicable to all kinds of decrees, whatever be the nature of the relief granted, but that it applies only to cases where *money is payable* under the decree, whether they are accompanied by other reliefs or not, inasmuch as the words "the decree is otherwise: . . " can only mean the decree under which any money is payable. The effect of the additional words according to that High Court is that where the decree provides for payment of money as well as other reliefs, such as possession or partition of immoveable property, an adjustment of such a decree cannot be recognised unless certified in the manner provided by this rule.[7]

5. "Is paid out of Court."—This rule deals only with *voluntary* payment out of Court. Where a judgment-debtor pays the amount decreed to the officer of the Court under pressure of process, the payment does not require to be certified under this rule.[1]

6. "Or the decree is otherwise adjusted".—An adjustment of a decree is an agreement which extinguishes the decree as such in whole or in part, and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree.[1] But a transaction by

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Note 4.

(1) *Baba Mohamad* v. *Webb*, (1881) 6 Cal 786 (788): 8 Cal L Rep 36 [Decree for possession]; *Rajah Padmanand Singh* v. *Madhu Singh*, (1899) 3 Cal W N 187 (N); *Raj Luckhee Chowdhrain* v. *Tewaree Chowdhry*, (1872) 18 Suth W R 520 (521).

(2) *Lachu* v. *Kishen Lal*, 1906 Pun Re No 44: 82 Pun L R 1907: 81 Pun W R 1906 [Decree for foreclosure].

(3) *Sankara Nambiar* v. *Kanara Kurup*, (1899) 22 Mad 182 (184): 8 Mad L Jour 175 [Decree for possession].

(4) *Charry* v. *Gourya*, 1922 Bom 380 (381): 46 Bom 226: 64 Ind Cas 490: 23 Bom L R 981.

(5) *Shaikh Niamat* v. *Shaikh Jalil*, 1928 Cal 715 (716, 717).

(6) *Narayanasami Naidu* v. *Rangasami Naidu*, 1926 Mad 749 (751): 50 Mad L Jour 547: 95 Ind Cas 731: 49 Mad 716: 24 Mad L W 235. See also *Krishna Hande* v. *Padmanabha Hande*, (1913) 21 Ind Cas 177 (178): 14 Mad L Tim 233: 1913 Mad W N 802: 25 Mad L Jour 442 [Decree for delivery of paddy certification not necessary]; *Kelu Nair* v. *Meenakshi*, (1913) 21 Ind Cas 639 (642): 15 Mad L Jour 586: 14 Mad L Tim 574 [Adjustment of decree for possession—Certification not necessary].

(7) *Mazumdar Ramakrishna Rao Pantulu* v. *Mazumdar Bal Krishna Rao Pantulu*, (1920) 56 Ind Cas 289 (289): 1920 Mad W N 261: 43 Mad 476: 27 Mad L Tim 279; *Abdul Latiff Saheb* v. *Bathula Bibi Ammal*, (1914) 23 Ind Cas 530 (530): 1914 Mad W N 346: 15 Mad L Tim 338; *Sethurama Sahib* v. *Ohhota Raja Sahib*, (1917) 40 Ind Cas 820 (823): 1917 Mad W N 327 [Adjustment in respect of possession also cannot be recognised unless certified].

Note 5.

(1) *Bidhoo Beebee* v. *Keshub Chunder Baboo*, (1868) 9 Suth W R 462 (462).

Note 6.

(1) *Lodd Govindoss* v. *Ramdoss Vishondoss*, (1915) 28 Ind Cas 376 (377): 17 Mad L Tim 222: (1915) Mad W N 225; *Kumara Venkata Perumal* v. *Thatha Ramaswami Chetty*, (1911) 9 Ind Cas 875 (885): 35 Mad 75: (1911) 2 Mad W N 290: 21 Mad L Jour 709: 9 Mad L Tim 487; *Fateh Muhammad* v. *Gopal Das*, (1885) 7 All 424 (431): 1885 All W N 76; *Sukha Nandan* v. *Lakhmichand*, (1911) 12 Ind Cas 364 (369): 7 Nag L R 136; *Hotchand Tolaram* v. *Premchand*, 1931 Sind 42 (43): 131 Ind Cas 710: 25 Sind L R 279; *Ahmad Mirza Beg* v. *Allahabad Bank Ltd, Lucknow*, 1926 Oudh 385 (387): 29 Oudh Cas 26: 94 Ind Cas 317. See also the undermentioned cases as to particular modes of adjusment; *Venkatasami* v. *Kotilingam*, 1926 Mad 184 (185): 49 Mad L Jour 730: 22 Mad L W 853: 1926 Mad W N 29: 91 Ind Cas 1051 [Composition with creditors]; *Ramasami Chetty* v. *Venkatesa Tawker*, (1892) 2 Mad L Jour 221 (224, 225), (Do.); *Lakshmi Narasimma* v. *Lakshmamma*, (1911) 12 Ind Cas 169 (169): 11 Mad L Tim 380 [Agree-

O. 21, R. 2, Note 6.

which the parties agree to vary the *mode* by which the reliefs granted by the decree are to be realised in execution in that suit, or the time when the decree becomes executable, is not an adjustment of the decree.[2] Thus, an agreement between the parties to a decree by which arrangements are made to enable the decree-holder to collect monies due to the judgment-debtor and credit them towards his decree, and which provides for a temporary suspension of execution proceedings is not such an adjustment of the decree as is contemplated by this rule.[3] It is not necessary that the judgment-debtor must have carried out all the terms of the arrangements made by him with the decree-holder: a *completed contract* by which he promises to do something at a future date, can be accepted by the decree-holder as a legal and immediate adjustment in satisfaction of his decree.[4] But an inchoate agreement, which if completed would bar the execution of the decree cannot be pleaded as an adjustment within the meaning of this rule.[5] The reason is that an inchoate agreement is an agreement not yet concluded by the parties and therefore the judgment-debtor cannot claim that the decree against him has been adjusted to the satisfaction of the decree-holder while the matter is still in the stage of negotiation.

Where there is a dispute as to whether a decree has or has not been adjusted by a compromise, the executing Court would have to determine whether there was a compromise, whether the compromise amounted to an adjustment and what the effect of the adjustment is on the decree.[6]

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ment to discharge debt by services rendered]; *M S S Chettiar Firm* v. *Ma Tin Tin*, 1925 Rang 349 (350): 4 Bur L Jour 179: 92 Ind Cas 677 [Agreement not to execute decree in consideration of discharge of another decree]; *Sethurama Sahib* v. *Chotta Raja Sahib*, (1917) 40 Ind Cas 820 (823): 1917 Mad W N 327 [Agreement to hold properties in common while decree is for division by metes and bounds]; *Hemchand* v. *Madhav*, 1889 Bom P J 33 [Adjustment by execution of mortgage]; *Ram Devi* v. *Ganeshi Lal*, 1926 All 501 (503): 24 All L J 480: 95 Ind Cas 416: 48 All 475 [Award of arbitration made out of Court]; *Raj Kumar Lal* v. *Bulaki Myan*, (1917) 42 Ind Cas 467 (468): 3 Pat L W 146, (Do.); *Harish Chandra Mondal* v. *Jagabandy Dutta*, (1908) 7 Cal L Jour 581 (584, 585): 12 Cal W N 282: 3 Mad L Tim 202; *Chunder Nath Misser* v. *Gouree Komul Bhuttacharjee*, (1873) 10 Beng L R App 28: 19 Suth W R 155; *Bharut Chander Roy* v. *Nazir Ali Khan*, (1868) 10 Suth W R 354 (355); *Thakoor Lall Miseree* v. *Kanye Lal Tewaree*, (1867) 7 Suth W R 510 (510); *Sham Lal* v. *Hazari Mal*, (1912) 13 Ind Cas 326 (327, 328): 15 Cal L Jour 451; *Ganeshi* v. *Hasan Din*, (1909) 4 Ind Cas 999 (1000): 93 Pun L R 1909: 140 Pun W R 1909 [Receipt in consideration of compounding a non-compoundable offence is illegal]; *Bhuban Mohan Bonnerjee* v. *Saducharan Sircar*, (1871) 6 Beng L R 339: 15 Suth W R O C 5 [Agreement without consideration is no adjustment].

(2) *Lodd Govindoss* v. *Ramdoss Vishondoss*, (1915) 28 Ind Cas 376 (377): 1915 Mad W N 225: 17 Mad L Tim 222; *Azizur Rahman* v. *Aliraja*, 1928 Cal 527 (529, 530): 32 Cal W N 434: 113 Ind Cas 9; *Suradhani Dutta* v. *Sitto Sheikh*, 1922 Cal 311 (313): 27 Cal W N 280: 71 Ind Cas 378: 38 Cal L Jour 17; *Bakshi Ram Varma* v. *Des Raj*, 1931 Lah 608 (609): 32 Pun L R 365: 132 Ind Cas 670; *Raja of Kalahasti* v. *Venkatadri Rao*, 1927 Mad 911 (913): 26 Mad L W 386: 1927 Mad W N 630: 50 Mad 897: 58 Mad L Jour 533: 105 Ind Cas 248. But see *Shamlal* v. *Hazarimal*, (1912) 13 Ind Cas 326 (327, 328): 15 Cal L Jour 451.

(3) *Fateh Mahomed* v. *Gopal Das*, (1885) 7 All 424 (431): 1885 All W N 76.

(4) *Sumer Chand* v. *Chiranji Lal*, 1927 Lah 544 (545): 102 Ind Cas 753 [Adjustment need not be embodied in writing]; *Baga Mal* v. *Shib Parshad*, 1930 Lah 334 (335): 120 Ind Cas 686; *Ramanarasu* v. *Venkata Reddi*, (1932) 63 Mad L Jour 598 (603, 609). But see *Gangadara Mudaliar* v. *Ekambara Mudaliar*, 1925 Mad 206 (207): 20 Mad L W 849: 85 Ind Cas 676; *Muthu Vaithilinga Mudaliar* v. *Subbaraya Chettiar*, 1930 Mad 410 (411): 1930 Mad W N 137: 123 Ind Cas 604: 32 Mad L W 702 [Dissented from in 63 Mad L Jour 598]; *Bakshi Ram* v. *Des Raj*, 1931 Lah 608 (609): 32 Pun L R 365: 132 Ind Cas 670.

(5) *Ramakrishna Kadiriveluswami* v. *Eastern Development Corporation, Ltd*, (1918) 43 Ind Cas 537 (538) Mad; *Ramanarasu* v. *Venkata Reddi*, (1932) 63 Mad L Jour 598 (602); *Lachmi Das* v. *Baba Kali Kamli Wala Ramanath*, 1922 All 13 (15): 44 All 258: 20 All L J 65: 64 Ind Cas 990; *Sumerchand* v. *Chiranji Lal*, 1927 Lah 544 (545): 102 Ind Cas 758; *Matadat Swami* v. *Ram Sarup*, 1930 Lah 231 (232): 118 Ind Cas 288; *Karam Chand Madan* v. *Dunlop Rubber Co, Ltd*, 1927 Lah 537 (538): 103 Ind Cas 86; *Jatindra Nath Roy* v. *Chandra Nath Banerjee*, (1912) 16 Ind Cas 972 (973): 16 Cal L Jour 101. But see *Gnanamma* v. *Raja Seetharama Chandra*, 1930 Mad 429 (429): 119 Ind Cas 480: 1931 Mad W N 103 [An agreement to adjust also requires certification]; *Raja of Kalahasti* v. *Muni Venkatadri Rao*, 1927 Mad 911 (915): 26 Mad L W 386: 1927 Mad W N 630: 50 Mad 897: 53 Mad L Jour 533: 105 Ind Cas 248, (Do.); *Venkatasami Naidu* v. *Rangappa Naidu*, (1915) 26 Ind Cas 944 (945): 2 Mad L W 109, (Do).

(6) *Baga Mal* v. *Shib Prasad*, 1930 Lah 334 (335): 120 Ind Cas 686.

The question whether an executing Court can entertain an objection to the execution of the decree based on an arrangement between the parties prior to the decree has already been discussed in S. 47, Note 31, *ante*.[7]

7. Adjustment in part.—A decree may be adjusted in part and the judgment-debtor is entitled to apply for a certificate of part satisfaction.[1] Where there is a money decree against two or more defendants, an agreement discharging one or some only of the judgment-debtors is an adjustment of the decree in part and should be certified.[2]

8. Oral adjustments.—It has been held by the High Courts of Allahabad, Calcutta and Lahore and by the Judicial Commissioner's Courts of Nagpur and Sind that evidence to prove an oral adjustment subsequent to the decree is not inadmissible by reason of S. 92 of the Indian Evidence Act.[1] They proceed on the view that the words "as between the parties to any such instrument" in that section suggests that the section applies to *dispositive documents* between contracting parties and that a decree is not an "instrument" between parties in the sense in which that expression is used in that section. But the High Court of Madras has, on the other hand, held that S. 92 of the Evidence Act is not confined in its operation to dispositive instruments but applies to decrees also and that therefore no evidence in proof of an oral agreement in adjustment of the decree is admissible.[2]

9. When and with whom payment or adjustment should be made.—The term "decree-holder" in this rule includes his assignee and the latter can certify a payment even before his transfer is recognised under O. 21, R. 16.[1] The judgment-debtor also can apply to record a payment made by him to the transferee.[2] The reason is that it is the *transfer* and not the Court's recognition that passes the title to the decree. Where an order recognising a transfer of a decree is cancelled and before the order of cancellation is set aside in appeal, the judgment-debtor pays the decretal amount to the original decree-holder, the payment is binding on the transferee decree-holder.[3]

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(7) *Panchananda Debnath* v. *Brojendra Kumar*, 1930 Cal 856 (356) [Pre-decree arrangement cannot be pleaded in execution]; *Hem Raj* v. *Dost Mohammad*, (1920) 57 Ind Cas 153 (156): 1921 Lah 248: 3 Lah L Jour 10, (Do.); *Ganeshlal* v. *Sardar Mal*, 1929 Nag 339 (340): 119 Ind Cas 704, (Do.); *Ramanathan Chettiar* v. *Venkatachalam Chettiar*, 1923 Mad 619 (620): 17 Mad L W 635: 44 Mad L Jour 599: 32 Mad L Tim 401: 1923 Mad W N 297: 72 Ind Cas 836, (Do.); *Gopala Krishna Ayyar* v. *Sankara Ayyar*, 1930 Mad 673 (674): 1930 Mad W N 240: 125 Ind Cas 543, (Do.); *Chidambaram Chettiar* v. *Krishna Vathiar*, (1917) 37 Ind Cas 836 (838, 840): 40 Mad 233: 21 Mad L Tim 24: 5 Mad L W 132: 1917 Mad W N 44: 32 Mad L Jour 13 F B [Pre-decree arrangement though not falling under this rule, may come under S 47]; *Narayanan Nambudri* v. *Damodaram Nambudri*, 1931 Mad 26 (27, 28): 130 Ind Cas 187, (Do.). See also *Bidurukota Pedda Veeranna* v. *Gondimalla Veeranna*, (1917) 38 Ind Cas 295 (296): 5 Mad L W 718: 1917 Mad W N 308.

Note 7.

(1) *Rajendranath* v. *Chunnomal*, (1880) 5 Cal 448 (450).

(2) *Mahomed Mahomed Khan Bahadur* v. *Mahomed Munawar Sahib*, (1908) 31 Mad 467 (468): 4 Mad L Tim 229: 18 Mad L Jour 542; *Lalji Singh* v. *Girja Prasad Singh*, (1917) 40 Ind Cas 1 (2), Pat.

Note 8.

(1) *Ganga Dihal Rai* v. *Ram Audh*, 1929 All 79 (80): 113 Ind Cas 760; *Anandapriya* v. *Bijoy*, 1926 Cal 643 (644): 91 Ind Cas 705; *Sumerchand* v. *Chiranji Lal*, 1927 Lah 544 (545): 102 Ind Cas 753; *Ranglal* v. *Chunni Lal*, (1921) 60 Ind Cas 316 (316): 16 Nag L R 204; *Hotchand Totalram* v. *Premchand*, 1931 Sind 42 (42, 43): 131 Ind Cas 710: 25 Sind L R 279. But see *Lachman Das* v. *Baba Ramnath Kalikam Liwala*, 1922 All 13 (15): 44 All 258: 20 All L J 65: 64 Ind Cas 990.

(2) *Raja of Kalahasti* v. *Venkatadri Rao*, 1927 Mad 911 (912, 913, 915): 26 Mad L W 386: 1927 Mad W N 630: 50 Mad 897: 53 Mad L Jour 533: 105 Ind Cas 248; *Gopalakrishna Ayyar* v. *Sankara Ayyar*, 1930 Mad 673 (673): 1930 Mad W N 240: 125 Ind Cas 543.

Note 9.

(1) *Dharani Mudali* v. *Meenamba Bai*, (1912) 17 Ind Cas 617 (618): 12 Mad L Tim 592.

(2) *Balakrishna* v. *Mini Reddi*, (1912) 14 Ind Cas 702 (703) Mad.

(3) *Bertola* v. *Jeewun Ram*, 1871 Pun Re No 29.

O. 21, R. 2, Notes 9—15.

A judgment-creditor has a right to absolve his judgment-debtor from liability at any time before other persons have acquired a right to realise the debt. Therefore, after a decree has been certified in Court as having been satisfied, it is not open to any creditor of the decree-holder to attach the decree on the ground that the satisfaction was certified collusively in order to defraud his creditors.[4] There is also nothing in this rule to prevent the holder of a decree which is attached, to enter satisfaction of his decree after the attachment, if the payment or adjustment had been made before the attachment.[5] As to the validity of payments or adjustment made after attachment of the decree, *see* Notes to O. 21, R. 53.

10. Payment to one of several decree-holders.—*See* Notes to O. 21, R. 15.

11. Adjustment by guardian of minor party.—The provisions of O. 32, R. 7 apply to a compromise entered into even after a decree has been passed, and an adjustment of a decree to which a minor is a party requires the sanction of the Court.[1] A payment or adjustment certified to the Court without the leave of the Court is not binding on a minor decree-holder and cannot be recognised by the Court executing the decree.[2]

12. "The decree-holder shall certify."—It is the *duty* of the decree-holder to report to the Court any payment or adjustment made out of Court.[1] As to the remedy of the judgment-debtor in case the decree-holder does not certify the payment or adjustment, *see* Notes 30 and 32, *infra*.

13. Effect of certifying without being paid.—Where a decree-holder admits and certifies to the Court satisfaction of the decree, he cannot afterwards apply to execute the decree on the ground he was induced to certify by means of fraud or coercion or that it was made under a mistake.[1]

14. Certification by one of several joint decree-holders.—*See* Notes to O. 21, R. 15.

15. "The judgment-debtor may also inform Court . . . . and apply."—Where a judgment-debtor pays the amount due under the decree out of Court,

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(4) *Subba Pillai* v. *Alliar Rowthar*, (1909) 2 Ind Cas 523 (523, 524): 5 Mad L Tim 72.

(5) *Ramasami Ayyar* v. *Rama Ayyar*, (1907) 2 Mad L Jour 288 (290); *Pathar* v. *Rangaswami Reddiar*, (1919) 51 Ind Cas 411 (412): 35 Mad L Jour 253.

Note 11.

(1) *Virupakshappa* v. *Shidappa and Basappa*, (1901) 26 Bom 109 (114): 3 Bom L R 565; *Arunachalam Chetty* v. *Ramanandan Chetty and Alamelu Achi*, (1906) 29 Mad 309 (310); *Shaik Davud Rowther* v. *Paramasami Pillai*, (1916) 35 Ind Cas 70 (72): 31 Mad L Jour 207; *Mt Perabai* v. *Bhawani Prasad*, 1924 Nag 185 (186): 78 Ind Cas 291.

(2) *Virupakshappa* v. *Shidappa and Basappa*, (1901) 26 Bom 109 (114): 3 Bom L R 565; *Chagan Lal* v. *Farasram*, 1921 Bom 142 (143): 45 Bom 1128: 28 Bom L R 473: 62 Ind Cas 219; *Pitchakkuttiya Pillai* v. *Doraiswami Mooppanar*, 1925 Mad 230 (232): 47 Mad L Jour 498: 1924 Mad W N 815: 82 Ind Cas 588; *Shivaram Sand* v. *Manu Lal Khimka*, 1928 Pat 40 (44): 104 Ind Cas 758.

Note 12.

(1) *Mookkan Muthiriyan* v. *Raja Gopala Ayyangar*, 1927 Mad 947 (948): 53 Mad L Jour 901: 105 Ind Cas 86: 1927 Mad W N 924; *Paupayya* v. *Narasannah*, (1880) 2 Mad 216 (218): 5 Ind Jur 196 [Party applying for execution must state payment or adjustment]; *Ragubar Prasad* v. *Sattoo*, 1926 Nag 164 (166): 89 Ind Cas 1009 [As per O 21, R 11]. See also *Gobind Sahai* v. *Mansa Ram*, (1885) 5 All W N 45 (46) [Certificate after death of judgment-debtor is not bad].

Note 13.

(1) *Ruttonjee Ourseljee* v. *Hormusjee Cowasjee*, 1870 Pun Re No 1 [Fraud—Remedy is by suit]; *Bhowani Dass* v. *Kishen Chund*, 1871 Pun Re No 32 [Duress]; *Gamen Shaha* v. *Jhangi Ram*, (1920) 54 Ind Cas 257 (257): 55 Pun L R 1919: 114 Pun W R 1919 [Mistake]; *Maung Po Mayaing* v. *Palaniappa*, (1916) 35 Ind Cas 369 (370): 10 Bur L Tim 30 [Mistake—Remedy is by review]. See also *Rup Chand* v. *Sant Ram*, 1876 Pun Re No 85.

he is not bound to wait till the decree-holder fails to certify the payment[1] or till the decree is actually drawn up[2] but may himself inform the Court of such payment and apply for its being recorded as certified. Where such application is resisted by the decree-holder on the ground that no such payment or adjustment was made, the Court cannot straight away dismiss the application.[3] It is bound to investigate and decide any question upon which the parties may not be agreed, upon such materials as they may legally place before it.[4] The reason is that the words "to show cause" do not mean merely to *allege* cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.[5]

O. 21, R. 2, Note 15.

The dismissal for default of an application under sub-R. 2 does not bar a fresh application by the judgment-debtor for the same purpose, and he is entitled to have an adjudication on the merits subject, of course, to any objection that may be open to the decree-holder.[6]

A certificate of payment or adjustment should be filed in the Court *which has to execute the decree*, that is, the Court which passed the decree.[7] It has been held by the High Court of Calcutta in the undermentioned cases[8] that, where an agreement of adjustment has been brought to the notice of the appellate Court by the judgment-debtor when an appeal from the decree is pending before it and the same is not objected to by the decree-holder, there is a sufficient compliance with the provisions of sub-R. 2. The High Court of Madras has dissented from this view and has held that the filing of a certificate of satisfaction in the wrong Court and obtaining an order recording it cannot be treated as legally valid.[9] Where a decree has been transferred to another Court for execution, the transferee Court is the only Court which has the power to enquire into an application under this rule by the judgment-debtor.[10]

Note 15.

(1) *Valambal* v. *Logambal Ammal*, (1902) 12 Mad L Jour 94 (95) [He may himself apply as soon as he has paid money].

(2) *Giribala Dasi* v. *Biswambhar*, 1924 Cal 1064 (1065): 40 Cal L Jour 87: 82 Ind Cas 746.

(3) *Rung Lal* v. *Hem Narain Gir*, (1885) 11 Cal 166 (168); *Davud Rowther* v. *Paramasami Pillai*, (1916) 35 Ind Cas 70 (72): 31 Mad L Jour 207.

(4) *Arjan Singh* v. *Harcharan Singh*, 1884 All W N 40 (40); *Ganga Dihal Rai* v. *Ram Oudh*, 1929 All 79 (80): 113 Ind Cas 760; *Muhammad Kazim* v. *Rukia Begum*, (1919) 50 Ind Cas 65 (67): 41 All 443: 17 All L J 677; *Tika Ram* v. *Ram Chand*, 1888 All W N 82 (83); *Sumer Chand* v. *Charanji Lal*, 1927 Lah 544 (545): 102 Ind Cas 753; *Jadunandan Singh* v. *Shonandan Prasad Singh*, 1922 Pat 276 (277, 278): 3 Pat L Tim 487: 1922 Pat H C C 200: 68 Ind Cas 645: 1 Pat 644 [Judgment-debtor's application cannot be thrown out under cl. 3. It is a matter under S 47]; *Maung Tin* v. *Ma Mi*, 1928 Rang 62 (63): 5 Rang 833: 110 Ind Cas 123. See also *Ganapaya* v. *Ramkrishna*, 1896 Bom P J 192.

(5) *Rung Lal* v. *Hem Narain Gir*, (1885) 11 Cal 166 (168) [Evidence may be given either orally or by affidavit]; *Davud Rowther* v. *Parameswami Pillai*, (1916) 35 Ind Cas 70 (72): 31 Mad L Jour 207. See also *Ganga Dihal Rai* v. *Ram Oudh*, 1929 All 79 (80): 113 Ind Cas 760.

(6) *Lakhpat Rai* v. *Bella Mal Jamal Rai*, 1931 Lah 505 (505): 132 Ind Cas 206.

(7) *Vakiyil Puthan Veetilkelu Nair* v. *Meenakshi*, (1913) 21 Ind Cas 639 (641): 25 Mad L Jour 586: 14 Mad L Tim 574; *Arunachala Chettiar* v. *Panchali Padayachi*, 1922 Mad 66 (67): 1922 Mad W N 189: 16 Mad L W 290: 65 Ind Cas 830 [Decree attached—Intimation by the decree-holder and judgment-debtor to the attaching Court that decree is satisfied is not sufficient]; *Jadunandan Singh* v. *Sheo Nandan Prasad*, 1922 Pat 276 (277): 3 Pat L Tim 487: 1922 Pat H C C 200: 68 Ind Cas 645: 1 Pat 644; *Mahomed Khan* v. *Nenumal*, (1919) 52 Ind Cas 901 (902): 13 Sind L R 130 [Casual reference in a plaint in another proceeding is not sufficient].

(8) *Azizur Rahman Choudhuri* v. *Ali Rajah Choudhuri*, 1928 Cal 527 (530): 32 Cal W N 434: 113 Ind Cas 9; *Biroogorain* v. *Jainurat Koer*, (1912) 13 Ind Cas 63 (67): 16 Cal W N 923: 16 Cal L Jour 174.

(9) *Vakiyil Puthan Veetilkelu Nair* v. *Meenakshi*, (1913) 21 Ind Cas 639 (641): 25 Mad L Jour 586: 14 Mad L Tim 574

(10) *Ramgopal Shriram* v. *Shivnarayan*, 1932 Bom 202 (203): 34 Bom L R 203: 137 Ind Cas 517; *Md Said Khan* v. *Payag Sahu*, (1894) 16 All 228 (231): 1894 All W N 55. See also *Rajendra Nath Roy* v. *Chunnoomul*, (1880) 5 Cal 448 (450).

O. 21, R. 2, Notes 16—17.

16. "Judgment-debtor"—Meaning of.—The word "judgment-debtor" in this rule includes persons claiming through him. Thus a transferee of the equity of redemption in the suit property from a judgment-debtor in a mortgage decree is a "judgment-debtor" for the purposes of this rule.[1] A surety for a judgment-debtor can plead an uncertified payment or adjustment made by him (*the surety*) with the decree-holder.[2] The reason is that when a Court proceeds against a surety under S. 145 it does not purport to execute the decree, but only enforces the bond in the manner provided for the execution of decrees and is not therefore a "Court executing the decree" within the meaning of sub-R. 3.

But the surety cannot plead an uncertified satisfaction or adjustment by *the judgment-debtor* inasmuch as the latter himself could not have pleaded it and the surety cannot be in any better position.[3]

17. Certification—Form of—Certification by decree-holder.—There is no particular form in which the decree-holder is required to certify a payment or adjustment.[1] It may be done orally[2] or by statement made in a subsequent execution application[3] or in a statement in answer to the objections of the judgment-debtor[4] or in a petition filed by him[5] or by way of admissions.[6] An intimation by him to the Court that the decree is satisfied is also a sufficient certification.[7] Where a decree for sale was passed in favour of a mortgagee in possession, but the decree failed to provide for the taking of accounts of the profits that might thereafter be received by the mortgagee, and the decree-holder intimated to the Court in his application for sale that the net profits should go in reduction of the decree amount it was held by the High Court of Madras that the application could be treated as an intention to certify adjustment of the decree and that an equiry may be directed as to the amounts collected by him.[8] The High Court of Bombay has, however, held that a certification

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Note 16.

(1) *Panduranga Mudaliar* v. *Vythilinga Reddi*, (1907) 30 Mad 537 (540): 17 Mad L Jour 417: 2 Mad L Tim 466; *Matharasappa Chettiar* v. *Muthu Chettiar*, (1919) 50 Ind Cas 931 (932): 9 Mad L W 596 [Purchaser in execution of another money decree can apply to certify satisfaction of mortgage decree against the same property].

(2) *Noor Mahomed Lallan* v. *Dhaniram*, 1926 Sind 105 (106, 107): 96 Ind Cas 234; *Thakar Datt* v. *Ram Singh*, 1928 Lah 61 (63): 108 Ind Cas 376.

(3) *Onkarmal Agarwala* v. *Nritya Gopal Chaki*, 1923 Cal 313 (313): 67 Ind Cas 885; *Rajani Kumar Seal* v. *Mahalaxmi Bank, Ltd*, (1932) 36 Cal W N 663 (664): 1932 Cal 729; *Tambi Reddi Viru Reddy* v. *Devi Reddy Pattabhirama Reddy and Company*, 1926 Mad 674 (675): 49 Mad 825; 50 Mad L Jour 584: 94 Ind Cas 522: 24 Mad L W 361.

Note 17.

(1) *Lodd Govinda Doss* v. *Rajah of Karvetnagar*, (1915) 30 Ind Cas 357 (361, 362): 29 Mad L Jour 219; *Fattu* v. *Nanak Chand*, 1924 Lah 676 (677): 75 Ind Cas 1029.

(2) *Mahabir Thakur* v. *Emperor*, (1916) 33 Ind Cas 316 (317): 20 Cal W N 520: 23 Cal L Jour 423; *Bhowani Das* v. *Kishen Chund*, 1871 Pun Re No 32; *Maung Po Mayaing* v. *Palaniappa*, (1916) 35 Ind Cas 369 (370): 16 Bur L Tim 30.

(3) *Fattu* v. *Nanak Chand*, 1924 Lah 676 (677): 75 Ind Cas 1029; *Thimma Reddi* v. *Subba Reddiar*, (1918) 49 Ind Cas 141 (143): 1918 Mad W N 507; *Nanku* v. *Jadu Nath*, (1920) 57 Ind Cas 591 (592) Oudh; *Bannumal* v. *Newandmal*, 1921 Sind 159 (160): 16 Sind L R 207: 83 Ind Cas 860 F B.

(4) *Gopal Das* v. *Ganga Ram*, 1888 All W N 115 (116).

(5) *Sadoollah Shaikh* v. *Kalee Churn*, (1869) 12 Suth W R 358 (358).

(6) *Gamen Shah* v. *Jhangi Ram*, (1920) 54 Ind Cas 257 (257): 55 Pun L R 1919: 114 Pun W R 1919; *Chinna Mummidi Royay* v. *Somasekara Chikka Royay*, 1929 Mad 783 (783): 30 Mad L W 526: 1929 Mad W N 713: 119 Ind Cas 594; *Vinayak* v. *Jagoji*, 1884 Bom P J 202 (202); *Babar Ali Biswas* v. *Shisir Kumar Basu*, (1912) 14 Ind Cas 574 (575, 576): 16 Cal W N 951 [Admission in another suit]; *Gopal Das* v. *Ganga Ram*, 1888 All W N 115 (116).

(7) *Khushal Chand* v. *Nandram*, (1911) 12 Ind Cas 572 (574): 35 Bom 516: 13 Bom L R 977.

(8) *Lodd Govinda Doss* v. *Rajah of Karvetnagar*, (1915) 30 Ind Cas 357 (361, 362): 29 Mad L Jour 219.

of payment or adjustment without *specifying the amount* of the payment or without mentioning the *terms of the adjustment* is not a sufficient compliance with the rule.[9] O. 21, R. 2, Notes 17—18.

Application by judgment-debtor.—An application by the judgment-debtor to certify a payment or adjustment, cannot be said to comply with the rule where there is no prayer for the issue of a *notice* to the decree-holder to show cause why the payment or adjustment should not be recorded as certified.[10]

According to the High Courts of Allahabad,[11] Patna[12] and Rangoon,[13] where a judgment-debtor contests an application for execution on the ground of payment or adjustment, the statement of objection can be treated as an application under sub-R. 2 provided it is made within 90 days of such payment or adjustment. The High Courts of Calcutta[14] and Madras[15] have, on the other hand taken a contrary view and have held that to so treat the objection would be to ignore the express language of the rule.

18. Limitation for certification.—The period of limitation for an application by the judgment-debtor under sub-R. 2 is 90 days from the time when the payment or adjustment was made (*see* Art. 174, Limitation Act). Where a judgment-debtor alleges that the decree-holder had fraudulently kept him from exercising his right to apply under sub-R. 2 by promising that he would himself certify the payment or adjustment, the judgment-debtor cannot claim an extension of time under S. 18 of the Limitation Act (IX of 1908).[1] The reason is that S. 18 does not deal with the *exercise*, of the right to apply, but only to cases where a person has been fraudulently kept from the *knowledge* of his right. An order granting a time-barred application to record satisfaction of a decree is, however, not a nullity, but is valid and binding unless set aside in appeal or other appropriate proceedings.[1-a]

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(9) *Tulsigiryappa* v. *Fakirayya*, (1900) 2 Bom L R 901 (905).

(10) *Ligraj* v. *Mahadeb*, (1919) 53 Ind Cas 882 (883): 30 Cal L Jour 118; *Frank Cooubs* v. *Mufassil Bank, Ltd, Gorakhpur*, 1929 All 674 (675): 115 Ind Cas 139 [Deposit of money by judgment-debtor mentioning prior payment is not an application for certification of that prior payment]; *Prasanna Kumar* v. *Lalmian*, (1920) 55 Ind Cas 669 (671) [Amin went to arrest—Judgment-debtor informed payment to decree-holder—Execution application dismissed on Amin's report—This is not certification under cl. 2]; *Khushal Singh* v. *Midailal*, (1881) 1 All W N 168 (168) [Decree-holder asked to show cause—But no formal notice—Held cl 2 sufficiently complied with]; *Kishen Prasad* v. *Beni Ram*, (1902) 24 All 85 (89, 90): 1901 All W N 168 [Though did not ask for notice, it was in fact served—Held application may be enquired into].

(11) *Ganga Dihal Rai* v. *Ram Oudh*, 1929 All 79 (80): 113 Ind Cas 760; *S Parshottam Saran* v. *Brahma Nand*, 1924 All 297 (298): 21 All L J 818: 4 L R All (Civ) 574: 83 Ind Cas 832. But see *Radha* v. *Bechu Ram*, 1891 All W N 11 (11) [Cannot be treated so].

(12) *Chandi Charan Chakravarti* v. *Panchanan Pandit*, 1930 Pat 526 (527, 528): 9 Pat 521: 126 Ind Cas 159: 11 Pat L Tim 763.

(13) *Maung Tin* v. *Ma Mi*, 1928 Rang 62 (63): 5 Rang 833: 110 Ind Cas 123; *U Po Thaing* v. *Maung Ba U*, (1911) 11 Ind Cas 780 (781): 4 Bur L Tim 162.

(14) *Bajrang Biharilal* v. *Lachmi Narain*, (1912) 13 Ind Cas 944 (945): 15 Cal L Jour 88.

(15) *Lodd Govind Doss* v. *Ramdoss Vishnudoss*, (1912) 17 Ind Cas 752 (753): 24 Mad L Jour 88: 1912 Mad W N 1245. But see *Alathoor Badruddin* v. *Gulam Mohideen*, (1911) 12 Ind Cas 562 (563): 36 Mad 357: 10 Mad L Tim 396: (1911) 2 Mad W N 473: 25 Mad L Jour 541 [Obiter and distinguished in 17 Ind Cas 752].

Note 18.

(1) *Golam Mujahar* v. *Goloke Charan*, (1914) 25 Ind Cas 884 (885) Cal; *Biroo Gorain* v. *Jainurat*, (1911) 13 Ind Cas 63 (66): 16 Cal W N 923: 16 Cal L Jour 174; *P R P L Chetty Firm* v. *Lon Pow*, 1923 Rang 103 (106): 11 L B R 363: 1 Bur L Jour 226: 68 Ind Cas 924; *Maung On Myit* v. *Maung Shwe Pi*, (1919) 52 Ind Cas 958 (958): (1919) 3 U B R 169.

(1-a) *Maung Po Myaing* v. *M M P L Palaniappa*, (1916) 35 Ind Cas 369 (370): 10 Bur L Tim 80.

O. 21, R. 2, Notes 18—19.

There is no express article of the Limitation Act applicable to certification by the decree-holder. Such certification is not an *application* within the meaning of Article 181 of the Limitation Act and therefore can be made at any time.[2] *See also* Note 27, *infra*. In *Shri Prakash Singh* v. *Allahabad Bank*[3] it was held by their Lordships of the Privy Council that even if the document by which the decree-holder certifies, is styled as an application, and is in the form of a petition, it cannot alter the real nature of the procedure, and convert what is really no more than a certificate, into an application within the meaning of Article 181.

It has been held by the High Courts of Calcutta and Rangoon and the Chief Court of Oudh, following the decision of the Privy Council in *Shri Prakash Sing's* case, that a certification by the decree-holder is not an *application* to the Court to take some step-in-aid of execution, even within the meaning of Article 182, Cl. 5 of the Limitation Act.[4] The High Court of Allahabad has on the other hand, held[5] that it is a step-in-aid of execution provided the payment or adjustment was actually made. The case was, however, decided before the decision of the Privy Council in *Shri Prakash Singh's* case.

19. "**Shall record the same**".—Where a decree-holder certifies a payment or adjustment the Court is *bound* to record it in accordance with his statement. It has no power to proceed to satisfy itself before recording the

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(2) *Raja Shri Prakash Singh* v. *The Allahabad Bank, Ltd*, 1929 P C 19 (22, 23): 29 Mad L W 161: 33 Cal W N 267: 56 Mad L Jour 233: 1929 All L J 33: 6 Oudh W N 29: 56 Ind App 30: 31 Bom L R 289: 114 Ind Cas 581: 3 Luck 684 P C; *Joti Prasad* v. *Sri Chand*, 1928 All 629 (631, 632): 26 All L J 966: 51 All 237: 112 Ind Cas 73; *Ram Sarup* v. *Mahomed Ubaidulla Khan*, 1930 All 123 (124): 124 Ind Cas 22; *Joti Prasad* v. *Sri Chand*, (1928) 26 All L J 991 (991): 1928 Notes 27 (*b*); *Pandurang Balkrishna* v. *Jagya Bhan*, 1921 Bom 411 (412): 45 Bom 91: 59 Ind Cas 399: 22 Bom L R 1120; *Thukaram* v. *Babaji*, (1897) 21 Bom 122 (124); *Hridoyamohan* v. *Khagendra Nath*, 1929 Cal 687 (689): 34 Cal W N 213; *Jalim Chand* v. *Yusufali Choudhuri*, 1925 Cal 1012 (1013, 1014): 86 Ind Cas 1051: 30 Cal W N 945; *Jalim Chand Patwari* v. *Yusuf Ali Chowduri*, (1927) 54 Cal 143 (150); *Bahu Balla Roy* v. *Jogesh Chandra*, (1919) 50 Ind Cas 242 (243): 23 Cal W N 320; *Lakhi Narain Ganguli* v. *Felamani Dasi*, (1915) 27 Ind Cas 11 (12): 20 Cal L Jour 131; *Fattu* v. *Nanak Chand*, 1924 Lah 676 (677): 75 Ind Cas 1029; *Rajam Ayyar* v. *Anantharatnam*, (1915) 31 Ind Cas 318 (319): 29 Mad L Jour 669: 18 Mad L Tim 475: (1916) 1 Mad W N 127; *Chinnasami Kavirayer* v. *Periathambi Butler*, 1929 Mad 811 (811): 117 Ind Cas 790: *Masilamani Mudaliar* v. *Sethusami Ayyar*, (1917) 41 Ind Cas 701 (702, 703): 41 Mad 251: 1917 Mad W N 502: 33 Mad L Jour 219: 22 Mad L Tim 115; *Dharani Mudali* v. *Meenamba Bai*, (1912) 17 Ind Cas 617 (618): 12 Mad L Tim 592; *Prakash Singh* v. *Allahabad Bank, Ltd*, 1927 Oudh 7 (11): 3 Oudh W N 829: 98 Ind Cas 353: 29 Oudh Cas 358: 1 Luck 428 [Affirmed in 1929 P C 19]; *Haider Mirza* v. *Kailash Narain Dar*, (1918) 47 Ind Cas 177 (178): 21 Oudh Cas 161: 5 Oudh L J 482; *Radha Kant Lal* v. *Parbati Kuer*, 1921 Pat 135 (136): 6 Pat L Jour 337: 2 Pat L Tim 755: 63 Ind Cas 535; *Sheikh Elahi Bux* v. *Nawab Lall*, (1919) 50 Ind Cas 364 (365): 4 Pat L Jour 159: 1919 Pat H C C 260; *Daw Ywet* v. *U Tin*, 1930 Rang 329 (331): 8 Rang 310: 127 Ind Cas 600; *Chotirmal* v. *Rupchand*, 1931 Sind 28 (30): 129 Ind Cas 909: 25 Sind L R 360; *Kazi Shafi Mahomed* v. *Choithram*, (1919) 52 Ind Cas 804 (810, 811, 813): 13 Sind L R 37. But see *Baley Mahomed* v. *Aijanmai*, 1922 Cal 30 (31, 32): 35 Cal L Jour 71: 68 Ind Cas 780: 26 Cal W N 529 [No longer law in view of 1929 P C 19].

(3) 1929 P C 19 (22, 23): 29 Mad L W 161: 33 Cal W N 267: 56 Mad L Jour 233: 1929 All L J 33: 6 Oudh W N 29: 56 Ind App 30: 31 Bom L R 289: 114 Ind Cas 581: 3 Luck 684. P C.

(4) *Amar Krishna Chowdhury* v. *Jagat Bandhu*, 1931 Cal 719 (724): 35 Cal W N 1192: 54 Cal L Jour 201: 134 Ind Cas 922 F B [Overruling 46 Cal 22, 45 Ind Cas 930, 34 Ind Cas 625, 6 Ind Cas 43, 3 Ind Cas 391, 20 Cal 696 and 12 Cal 608]; *Maung Tun Blaing* v. *U Aung Gyaw*, 1930 Rang 64 (65): 126 Ind Cas 540: *Ram Bharose* v. *Rammon Lal*, 1932 Oudh 148 (151): 9 Oudh W N 209: 137 Ind Cas 768 F B [Recording of a payment is not also a final order within the meaning of Art 182, cl 5, Limitation Act]. But see *Maung Law San* v. *Maung Po Thein*, 1925 Rang 26 (27): 2 Rang 393: 3 Bur L Jour 235: 84 Ind Cas 473: 84 Ind Cas 369; *Adimuthu* v. *Adiappa*, (1919) 52 Ind Cas 656 (656): 10 L B R 94: 12 Bur L Tim 113.

(5) *Lecky* v. *Bank of Upper India, Ltd*, (1911) 9 Ind Cas 1023 (1024): 33 All 529: 8 All L J 487; *Choley Singh* v. *Ishwari*, (1910) 5 Ind Cas 295 (296): 32 All 257: 7 All L J 251; *Kasumri* v. *Beni Prasad*, (1904) 26 All 19 (21): 1903 All W N 172; *Surjan Singh* v. *Hira Singh*, (1890) 12 All 399 (402, 403): 1890 All W N 125 F B; *Muhammad Husain* v. *Ram Sarup*, (1887) 9 All 9 (10): 1886 All W N 292. See also *Kanhia Lal* v. *Rudar Sahai*, (1888) All W N 23 (24) [Untrue certificate is not a step-in-aid]; *Qadam Singh* v. *Nathu Singh*, (1919) 52 Ind Cas 362 (363): 17 All L J 953; *Bannumal* v. *Newandmal*, 1921 Sind 159 (160): 16 Sind L R 207: 83 Ind Cas 360 F B.

satisfaction that such statement is true.[1] But the judgment-debtor will be entitled to show when an application for execution is made that no such payment or adjustment was made and cannot therefore extend the period of limitation for execution.[2] O. 21, R. 2, Notes 19–20.

Where the payment or adjustment is pleaded by the *judgment-debtor* under sub-R. (2), the Court is *not bound* to record the same as certified without requiring proof of it merely because the decree-holder does not appear to show cause why it should not be recorded as certified.[3] After a payment or adjustment is recorded, it is not necessary that a fresh or amended decree should be drawn up.[4]

Sub-R. (3), which provides that an uncertified payment or adjustment shall not be recognised by any Court executing the decree, does not require that the payment or adjustment must be both certified *and* recorded. Thus, where a certificate by the decree-holder was not recorded by the Court as provided in this rule, the judgment-debtor does not lose his protection merely because the Court fails to perform the duty cast upon it to make the record.[5]

An order recording the adjustment of a decree, brought about by the fraud, practised by one party upon another can be vacated under the inherent powers of the Court.[6] But the Court ought not to exercise such powers to vacate the order, unless it is prejudicial to one of the parties.[7]

20. Notice.—Sub-R. (1), does not contemplate the issue of a notice to the *judgment-debtor*.[1] But when the judgment-debtor applies under sub-R. (2), the Court is bound to issue a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified.[2] An order allowing a certification without notice to the decree-holder is bad in law[3] and an application will lie to set aside such an *ex parte* order.[4]

Note 19.

(1) *Maung Kyaw Min* v. *Ma Hpaw*, 1931 Rang 332 (333): 134 Ind Cas 213; *Ganeu Shah* v. *Jhangi Ram*, (1920) 54 Ind Cas 257 (257): 55 Pun L R 1919: 114 Pun W R 1919; *Haidar Mirza* v. *Kailash Narain Dar*, (1918) 47 Ind Cas 177 (178, 179): 21 Oudh Cas 161: 5 Oudh L J 482. See also *Lodd Govinddoss* v. *Ramdoss*, (1912) 17 Ind Cas 752 (753): 24 Mad L Jour 88: 1912 Mad W N 1245 [Inquiry into the terms of a compromise cannot be made on the application of the judgment-creditor]; *Sadho Saran Pande* v. *Mt Subhadra*, 1925 Pat 822 (822): 7 Pat L Tim 95: 1926 Pat H C C 100: 89 Ind Cas 195 [Dismissal of application by judgment-debtor under sub-Rule (2) does not bar an application by decree-holder for the same purpose].

(2) *Haidar Mirza* v. *Kailash Narain Dar*, (1918) 47 Ind Cas 177 (178, 179): 21 Oudh Cas 161: 5 Oudh L J 482.

(3) *Maung Chit Pe* v. *Narayan Chettiar*, 1928 Rang 185 (186): 6 Rang 218: 111 Ind Cas 371 [Court should be satisfied that it is true].

(4) *Haider Mirza* v. *Kailash Narain Dar*, 1925 Oudh 136 (137): 80 Ind Cas 454 [The Court has no jurisdiction to make such an amendment of the decree]; *Dulichand* v. *Goreylal*, 1925 Nag 49 (49): 20 Nag L R 122: 83 Ind Cas 162.

(5) *Tarak Nath Sarkar* v. *Natabar Mandal*, (1915) 30 Ind Cas 45 (46): 21 Cal L Jour 632; *Neduri Rajanna* v. *Dontukunti Seshamma*, 1927 Mad 155 (155, 156): 98 Ind Cas 698 [The decree-holder cannot withdraw an application made by him to have an adjustment recorded nor can the Court dismiss it]; *Pitchakkuttia Pillai* v. *Doraisami Mooppanar*, 1925 Mad 230 (231): 47 Mad L Jour 498: 1924 Mad W N 875: 82 Ind Cas 588; *Thimma Reddi* v. *Subba Reddiar*, (1919) 49 Ind Cas 141 (144): 1918 Mad W N 507; *Ram Prosad Roy* v. *Kirit Roy*, (1919) 52 Ind Cas 764 (765) (Pat) [Court can take evidence to decide whether decree-holder has certified].

(6) *Vilakuthala Raman* v. *Vapalil Pachu*, (1914) 25 Ind Cas 213 (213): 27 Mad L Jour 172.

(7) *Ram Gulam* v. *Sham Sahai Das*, (1921) 62 Ind Cas 234 (235): 5 Pat L Jour 379: 1 Pat L Tim 663: 1920 Pat H C C 358.

Note 20.

(1) *Haidar Mirza* v. *Kailash Narain Dar*, (1918) 47 Ind Cas 177 (178): 21 Oudh Cas 161: 5 Oudh L J 482; *Ilahi Bux* v. *Nawab Lall*, (1919) 50 Ind Cas 364 (365): 4 Pat L Jour 159: 1919 Pat H C C 260.

(2) *Lachman Singh* v. *Mardan Singh*, 1923 Nag 20 (20): 68 Ind Cas 443.

(3) *Ghulam Qazam Khan* v. *Qutb-ud-din*, 1930 Lah 113 (114): 125 Ind Cas 467: 30 Pun L R 512.

(4) *Ghulam Qazam Khan* v. *Qutb-ud-din*, 1930 Lah 113 (114): 125 Ind Cas 467: 30 Pun L R 512; *Ma Shwe I* v. *Sitamparam Chetty*, (1897-1901) U B R Vol II, 254.

O. 21, R. 2, Notes 21—22.

21. **Uncertified payment or adjustment not to be recognised by Court executing the decree.**—The prohibition in sub-R. (3) against the recognition of an uncertified payment or adjustment is limited to a "Court executing the decree" and will not extend to a Court, which is not executing the decree, when dealing with such a matter.[1] The object of the prohibition is to compel the judgment-debtor to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree, if he desires that it should be recognised by the executing Court as against the decree-holder executing the decree.[2]

Where the liability of the judgment-debtor under a decree is only a *conditional* one, as for instance, where a decree provides that the decree-holder is to execute the decree only in the event of the judgment-debtor failing to comply with a particular condition, it will be open to the latter to prove, where execution is taken out, that the condition has been complied with: sub-R. (3) has no application to such a case.[3]

22. **"Court executing the decree."**—The third clause of S. 258 of the Code of 1877 as well as S. 259 of the Code of 1859 provided that a payment or adjustment made out of Court shall not be recognised by "any Court executing the decree" unless it had been certified or recorded as certified.[1] S. 258 was amended in 1879 by S. 36 of Act XII of 1879 by omitting the words "executing the decree" after "any Court" and the section as amended was re-enacted in the Code of 1882. This gave rise to a conflict of opinion as to the effect of the amendment. The High Courts of Allahabad,[2] Calcutta[3] and Madras[4] and the Chief Court of Punjab[5] held that the amendment had not the effect of altering the law as it stood before the amendment and that an uncertified payment or adjustment could be recognised by a Court other than a Court executing the decree. A contrary view was taken by the High Court of Bombay.[6] Owing to this conflict of opinion the section was again amended by S. 27 of the Amending Act VII of 1888 which again restricted the prohibition to the Court executing the decree, thus restoring the law to the state in which it was prior to the amendment of 1879.[7] The rule is now in the same form.

Note 21.

(1) *Mu Mu Gyi* v. *May Nyo Po*, 1923 Rang 11 (41), 79 Ind Cas 278: 1 Bur L Jour 171; For other cases *see* Notes 22, 24, 25 and 30.

(2) *Kishan Singh* v. *Aman Singh*, (1895) 17 All 42 (45): 1894 All W N 198.

(3) *Wali Shah* v. *Bihari Lal*, 1926 Lah 641 (642): 8 Lah L Jour 43: 27 Pun L R 100: 93 Ind Cas 369; *Bihari Lal* v. *Wali Shah*, 1928 Lah 816 (816): 109 Ind Cas 886. See also *Ligraj Patjosi* v. *Mahadeb Ram*, (1919) 53 Ind Cas 882 (883): 30 Cal L Jour 118.

Note 22.

(1) *Davlata* v. *Ganesh*, (1879-80) 4 Bom 295 (297): 5 Ind Jur 150; *Viraraghava* v. *Subbakka*, (1882) 5 Mad 397 (400): 6 Ind Jur 633 F B; *O Musutti* v. *T P Shekharan Nayar*, (1883) 6 Mad 41 (43). See also *Bharut Chander* v. *Nawab Nazir Ali*, (1868) 10 Suth W R 354 (355) [Under S 206 of the Code of 1859]; *Obhoy Churn Mookerjee* v. *Mt Pearee Dossia*, (1874) 22 Suth W R 270 (271), (Do.).

(2) *Seetaram* v. *Mahipal*, (1881) 3 All 533 (535): 1881 All W N 21; *Shadi* v. *Ganga Sahai*, (1881) 3 All 538 (540): 1881 All W N 25.

(3) *Promanand* v. *Khepoo*, (1884) 10 Cal 354 (356, 357); *Pat Dasi* v. *Sharup Chand*, (1887) 14 Cal 376 (379); *Ishan Chunder* v. *Indra Narain*, (1883) 9 Cal 788 (790): 12 Cal L Rep 390.

(4) *Mallama* v. *Venkappa*, (1885) 8 Mad 277 (283) F B; *Sellamayyan* v. *Muthan*, (1889) 12 Mad 61 (63). But see *Thirumalai* v. *Sundara*, (1888) 11 Mad 469 (472) [Not followed in 12 Mad 61].

(5) *Mula Mai* v. *Rahman*, 1884 Pun Re No. 83 F B [Overruling 1881 P R 47 and 1883 P R 11].

(6) *Haji Abdul Rahiman* v. *Khoja Khaki Aruth*, (1887) 11 Bom 6 (12, 34, 35) F B ["Such payment or adjustment" means payment or adjustment of the decree as such]; *Harmasji Dorabji* v. *Burjorji Jamsetji*, (1886) 10 Bom 155 (165). But see *Patankar* v. *Devji*, (1881-82) 6 Bom 146 (147): 6 Ind Jur 317 [Overruled in 11 Bom 6].

(7) *Kalyan Singh* v. *Kamta Prasad*, (1891) 13 All 339 (342): 1891 All W N 100; *Balkrishna*

23. Court acting under O. 21, R. 16.—Can a judgment-debtor, who is debarred under this rule from pleading an adjustment of the decree with the decree-holder for failure to have it certified, nevertheless, plead the same when opposing an application by the assignee of the decree under O. 21, R. 16? The High Court of Bombay[1] has held following the undermentioned decisions of the High Court of Madras[2] that he can. These cases proceed on the view that when an application is made under O. 21, R. 16 by a transferee decree-holder, it is heard by the Court as a Court which passed the decree and not as a Court which is *executing the decree.*

The said Madras decisions, have, however, now been overruled by a recent Full Bench decision of the same High Court[3] according to which the judgment-debtor cannot plead such an uncertified adjustment and evade the operation of this rule. This view is based on the ground that an application under O. 21, R. 16 is an application for execution and, therefore, the Court which passed the decree when dealing with such an application does not cease to be an executing Court as well. The Judicial Commissioner's Court of Nagpur has taken the same view.[4]

23-A. Court dealing with application under O. 21, Rr. 90, 95, 97 and 98.—It has been held by the High Courts of Lahore and Patna that an application to set aside a sale under O. 21, R. 90 is not a proceeding in execution of a decree, and an adjustment or compromise of the matter in dispute cannot be certified under the provisions of O. 21, R. 2 but must be recorded only under the provisions of O. 23, R. 3.[1] On the same principle it has been held by the High Court of Bombay that a proceeding under O. 21, Rr. 95, 97 and 98 is not one in execution and the Court dealing with such an application is not an executing Court and is therefore not barred from recognising an uncertified adjustment of the decree.[2]

24. Suit by judgment-debtor based upon an uncertified payment or adjustment.—It is only a Court *executing the decree* that is barred from recognising an uncertified payment or adjustment. A *suit* based upon such payment or adjustment is not barred.

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v. *Bapu Yesaji*, (1895) 19 Bom 204 (206); *Ghanasham* v. *Kashiram*, (1892) 16 Bom 589 (592); *S Narayan Deshpande* v. *K K Mutalik*, (1891) 15 Bom 419 (421); *Ram Dayal* v. *Ram Hari*, (1893) 20 Cal 32 (36); *Kalu Ram* v. *Khuda Bakhsh Khan*, 1894 Pun Re No 54; *Subramania Chetty* v. *Sattaya Pathan*, (1900) 10 Mad L Jour 213 (214); *Sethu Ram Sahib* v. *Chhota Raja Sahib*, (1917) 40 Ind Cas 820 (824): 1917 Mad W N 327; *Ma Ma Gyi* v. *Ma Nyo Po*, 1923 Rang 44 (44): 79 Ind Cas 278: 1 Bur L Jour 171.

Note 23.

(1) *Ganpaya* v. *Krishnappa*, 1924 Bom 394 (394): 26 Bom L R 491: 80 Ind Cas 422; *Raghunath* v. *Gangaram*, 1923 Bom 404 (405): 25 Bom L R 474: 75 Ind Cas 893: 47 Bom 643.

(2) *Ramayya* v. *Krishnamurthi*, (1916) 32 Ind Cas 952 (952, 953): 40 Mad 296: 3 Mad L W 186: 19 Mad L Tim 124: (1916) 1 Mad W N 133; *Srirama Row* v. *Bapayya*, 1924 Mad 189 (192): 18 Mad L W 453: 76 Ind Cas 845; *Sadagopa Ayyangar* v. *Sellammal*, 1922 Mad 510 (510): 16 Mad L W 758: 43 Mad L Jour 761: 31 Mad L Tim 463: 72 Ind Cas 861; *Muhammad Rowthar* v. *Pichai Rowthar*, (1916) 35 Ind Cas 624 (624): 4 Mad L W 534; *Ponnusami Nadar* v. *Letchmanan Chettiar*, (1911) 12 Ind Cas 657 (662): 35 Mad 659: 10 Mad L Tim 442: (1911) 2 Mad W N 568: 22 Mad L Jour 170 [Per Sundara Ayyar, J, Rahim, J Contra]. See also *Monmohun Karmakar* v. *Dwarka Nath Karmakar*, (1910) 7 Ind Cas 55, (57, 58): 12 Cal L Jour 312.

(3) *Subramaniam* v. *Ramaswami*, 1932 Mad 372 (374): 1932 Mad W N 190: 62 Mad L Jour 362: 137 Ind Cas 28: 35 Mad L W 538 F B [Following 1930 Mad 429 and 54 Ind Cas 922].

(4) *Deoji and Brij Lall* v. *Ranchordass*, (1891) 4 C P L R 132 (133).

Note 23-A.

(1) *Gobind Sahai* v. *Nar Singh Das*, 1929 Lah 886 (887): 118 Ind Cas 908; *Jagdish Missir* v. *O Sureshwar Misir*, 1921 Pat 107 (109): 6 Pat L Jour 253: 2 Pat L Tim 273: 62 Ind Cas 608; *Bhawani Dai* v. *Jitendra Nath Chatterji*, 1929 Pat 400 (400).

(2) *Hiralal Mohanlal* v. *Ramachandra Kundanmal*, 1930 Bom 375 (377): 32 Bom L R 619: 125 Ind Cas 703: 54 Bom 479.

O. 21, R. 2, Notes 24—26.

Illustrations

1. *B* was a surety for *D* on a bond for Rs. 50 passed by *D* to *G*. *G* obtained a decree against *B* on this bond and *B* fully satisfied the decree by paying *G* Rs. 38. The payment was made out of Court and was not certified to the Court. *B* now sued *D* to recover the money so paid by him to *G*. Held that sub-R. (3) did not bar the suit and that the payment might be proved.[1]

2. *M* obtained a decree against *C* for possession of a *Jote* and mesne profits. Subsequently *C* adjusted the decree by paying the amount of mesne profits to *M* and purchasing the *Jote* from him by a registered conveyance. After *M's* death his heirs executed the decree and obtained possession. *C's* plea of uncertified adjustment having been overruled, *C* now sued *M's* heirs for possession of the *Jote*. Held that though the adjustment was not certified, the suit based upon it was maintainable.[2]

25. Suit by decree-holder based on uncertified payment or adjustment. —Where a judgment-debtor executed a bond in favour of the decree-holder in adjustment of the decree against him, it was held that, in a suit by the decree-holder upon the bond, the uncertified adjustment can be proved.[1] The reason is that the adjustment of a decree out of Court, if not certified to the Court under this rule, is ineffectual only so far as the *execution of the decree* is concerned. Similarly where the plaintiff brought a suit under O. 21, R. 63 to establish his right to certain attached property on the allegation, that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor, it was held that it was unnecessary that such transfer should be certified under the provisions of this rule.[2]

26. Effect of fraud.—*A* obtains a decree against *B*. *B* satisfies the decree by a payment or adjustment made out of Court: but such payment or adjustment is not certified to the Court in time. *A* then applies for execution of the decree, fraudulently omitting to state in his application the payment or adjustment as required by O. 21, R. 11 (*e*). Is *B* entitled to claim an investigation of the question under S. 47? The answer is, no. Although the question is one relating to the *satisfaction* of the decree within the meaning of S. 47, it is taken out of the purview of that section by virtue of the *particular provision* contained in this rule specifically dealing with such questions.[1]

Note 24.

(1) *Balaji Lakshman* v. *Dada Joti*, (1888) 12 Bom 235 (237); *Mathura* v. *Ohotu*, (1920) 58 Ind Cas 123 (124) (Nag).

(2) *Iswar Chandra Dutt* v. *Haris Chandra Dutt*, (1898) 25 Cal 718 (722, 724): 2 Cal W N 247.

Note 25.

(1) *Ramghulam* v. *Janki Rai*, (1885) 7 All 124 (129, 130): 1884 All W N 277; *Ghanasham Lakshmandas* v. *Kashiram Naroba*, (1892) 16 Bom 589 (592); *Swamirao* v. *Kashinath*, (1891) 15 Bom 419 (421); *Tukaram* v. *Anantbhat*, (1901) 25 Bom 252 (262): 2 Bom L R 1012; *Mt Kishen Devi* v. *Umar Din*, 1882 Pun Re No 182; *Subrahmania Chetty* v. *Sattaya Pathan*, (1900) 10 Mad L Jour 213 (214) [Bond assigned by judgment-debtor to decree-holder in adjustment—Suit on bond maintainable though adjustment was not certified]. See also *Lalji* v. *Gaya*, (1903) 25 All 317 (327-329): 1903 All W N 45 F B; *Juji* v. *Annai*, (1894) 17 Mad 382 (388) [As explained in 26 Mad 19].

(2) *Kalyan Singh* v. *Kamta Prasad*, (1891) 13 All 339 (342): 1891 All W N 100.

Note 26.

(1) *Parma Ram* v. *Lehna Singh*, (1919) 53 Ind Cas 443 (444): 135 Pun Re 1919: 57 Pun L R 1920; *Kedar Nath* v. *Chandika Prasad*, 1926 Oudh 620 (620): 91 Ind Cas 979; *P R P L Chetty Firm* v. *G Lon Pow*, 1923 Rang 103 (105): 11 L B R 363: 1 Bur L Jour 226: 68 Ind Cas 924; *Mehbunissa Begum* v. *Mehmedunissa Begum*, 1925 Bom 309 (309, 310): 27 Bom L R 403: 49 Bom 548: 95 Ind Cas 687 F B; *Mukundalal* v. *Bansidhar*, 1923 Cal 342 (343): 50 Cal 468: 76 Ind Cas 311; *Azizur Rahman* v. *Alliraja*, 1928 Cal 527 (529, 530): 32 Cal W N 434: 113 Ind Cas 9; *Jogendra* v. *Asutosh*, (1916) 37 Ind Cas 738 (741): 24 Cal L Jour 462; *Kutubullah Sarkar* v. *Durga Charan*, (1912) 13 Ind Cas 424 (425): 16 Cal W N 396; *Biroo Gorain* v. *Jainurat Koer*, (1912) 13 Ind Cas 63 (65): 16 Cal W N 923: 16 Cal L Jour 174; *Sham*

O. 21, R. 2, Note 27.

27. Effect on limitation.—It has been already mentioned in Note 1 *ante* that S. 258 of the old Code provided that an uncertified payment or adjustment shall not be recognised by any Court executing the decree *as a payment or adjustment* of the decree. Consequently it was held that such a payment could however be relied upon by a decree-holder for the purpose of extending the period of limitation for execution under S. 20 of the Limitation Act.[1] The words "as a payment or adjustment of the decree" have now been omitted in the present rule with the result that the executing Court cannot recognise an uncertified payment or adjustment for *any purpose* whatever.[1-a]

Now suppose a decree-holder makes an application for execution of his decree more than three years after the date of the decree or after the last starting point of limitation, and mentions in the application a part payment made by the judgment-debtor. Can the Court executing the decree recognise the payment, and hold that by virtue of such payment the decree is not time-barred? The High Courts of Madras,[2] Calcutta,[3] Bombay,[4] Lahore,[5] Patna[6]

Lal v. *Hazari*, (1912) 13 Ind Cas 326 (327, 328): 15 Cal L Jour 451; *Ram Doyal Bannerjee* v. *Ram Hari Pal*, (1892) 20 Cal 32 (36): *Bajrang Biharilal* v. *Lachmi Narain*, (1912) 13 Ind Cas 944 (945): 15 Cal L Jour 88; *Mon Mohan Karmakar* v. *Dwarka Nath Karmakar*, (1910) 7 Ind Cas 55 (57, 58): 12 Cal L Jour 312; *Kamini* v. *Aghore*, (1909) 4 Ind Cas 402 (404): 14 Cal W N 357: 11 Cal L Jour 91; *Tambi Reddi* v. *Devi Reddi*, 1926 Mad 674 (675): 49 Mad 325: 50 Mad L Jour 584: 94 Ind Cas 522: 24 Mad L W 361; *Mathar Dravia Sahaya Ela Nidhi Co* v. *Subramania Pillai*, (1917) 40 Ind Cas 889 (890): 5 Mad L W 644; *Ganapathy* v. *Ghenga*, (1906) 29 Mad 312 (313): 16 Mad L Jour 33; *Periatambi* v. *Vellaya*, (1898) 21 Mad 409 (410): 8 Mad L Jour 51; *Alathoor Badrudeen* v. *Gulam Mohideen*, (1911) 12 Ind Cas 562 (563): 36 Mad 357: 10 Mad L Tim 396: (1911) 2 Mad W N 473: 25 Mad L Jour 541; *Veerappa Chettiar* v. *Arumugam Poosari*, (1907) 17 Mad L Jour 527 (528); *Jhalri* v. *Rama Bharose Pandey*, 1926 Oudh 482 (483): 3 Oudh W N 198: 93 Ind Cas 53: 13 Oudh L J 493; *Fatimunnissa* v. *Asghar Husain*, 1928 Oudh 195 (198): 5 Oudh W N 68: 108 Ind Cas 105: 3 Luck 170 F B; *Imamuddin Khan* v. *Bindubasini Prasad*, (1920) 55 Ind Cas 890 (892, 893): 5 Pat L Jour 70: 1 Pat L Tim 149: 1921 Pat H C C 360; *Radha Kant* v. *Mussamamat Parbati*, 1921 Pat 135 (137, 138): 6 Pat L Jour 337: 2 Pat L Tim 765: 63 Ind Cas 535; *Munshi Ram* v. *Dera Mul*, (1897-1901) U B R Vol II, 256; *Motoomal* v. *Teoomal*, 1925 Sind 140 (141, 142): 79 Ind Cas 89: 18 Sind L R 51; *Sojhro* v. *Changomal*, 1921 Sind 10 (11): 15 Sind L R 77: 63 Ind Cas 238; *Allahrakhio Abdulla* v. *Ladik Sachoo*, (1919) 51 Ind Cas 567 (568): 13 Sind L R 71.

The following cases, it is submitted are not good law.—*Gadahar Panda* v. *Shyam Churn Naik*, (1908) 12 Cal W N 485 (487); *Kamini Kumar* v. *Abdul Rahim*, (1919) 53 Ind Cas 67 (68): 30 Cal L Jour 248; *Ramanyar* v. *Ramayyar*, (1898) 21 Mad 356 (358) [Dissented from in 29 Mad 312]: *Munisami Chetty* v. *Vaigapuri Udayan*, 1926 Mad 945 (945): 24 Mad L W 404: 1926 Mad W N 622: 97 Ind Cas 608; *Surji Narain Misra* v. *Chand Singh*, 1925 Oudh 225 (226): 78 Ind Cas 776: 27 Oudh Cas 277: 1 Oudh W N 218 [Dissented from in 1926 Oudh 482]; *P R P L Chetty Firm* v. *G Lon Pow*, 1922 L B R 31 (32): 1 Bur L Jour 43: 70 Ind Cas 859; *Hansa Godhaji Marwadi* v. *Bhava Jogaji Marwadi*, (1916) 33 Ind Cas 232 (233): 40 Bom 333: 18 Bom L R 22 [Overruled in 1925 Bom 309]; *Trimbak Ramakrishna Ranade* v. *Hari Lakman Ranade*, (1910) 7 Ind Cas 940 (943): 34 Bom 575: 12 Bom L R 686, (Do.).

Note 27.

(1) *Roshan Singh* v. *Maladin*, (1904) 26 All 36 (38): 1903 All W N 179 [Overruling 12 All 569]; *Kishan Singh* v. *Aman, Singh*, (1895) 17 All 42 (45): 1894 All W N 198; *Badri Narayan* v. *Kunj Behari Lal*, (1913) 18 Ind Cas 731 (732): 35 All 178: 11 All L Jour 224; *Oudh Bihari Pande* v. *Mahabir Sahi*, (1909) 2 Ind Cas 524 (524): 31 All 590: 6 All L J 836; *Zahur Khan* v. *Bakhtawar*, (1885) 7 All 327 (330): 1885 All W N 26; *Sham Lal* v. *Kanhia Lal*, (1882) 4 All 316 (317): 1882 All W N 47; *Kanchan Singh* v. *Sheo Prasad*, (1878-80) 2 All 291 (293); *Tukaram* v. *Babaji*, (1897) 21 Bom 122 (125); *Purmanand Das Jivandas* v. *Vallabdas Wallji*, (1887) 11 Bom 506 (513, 514); *Hurri Pershad Chowdhry* v. *Nasib Singh*, (1894) 21 Cal 542 (549); *Juggut Mohinee Dossee* v. *Madhub Chunder Kur*, (1871) 15 Suth W R 66 (67); *Fakir Chand Bose* v. *Madan Mohan Ghose*, (1870) 4 Beng L R F B 130: 13 Suth W R F B 40; *Bhubaneswari Debi* v. *Dinanath Sandyal*, (1869) 11 Suth W R 232 (233): 2 Beng L R A C 320; *Rajeswara* v. *Hari*, (1896) 19 Mad 162 (164).

(1-a) *Kutubullah Sarkar* v. *Durga Charan*, (1912) 13 Ind Cas 424 (425): 16 Cal W N 396.

(2) *Masilamani Mudaliar* v. *Sethusami Ayyar*, (1917) 41 Ind Cas 701 (702, 703): 1917 Mad W N 502: 33 Mad L Jour 219: 22 Mad L Tim 115: 41 Mad 251; *Rajam Ayyar* v. *Anantharatnam Ayyar*, (1915) 31 Ind Cas 318 (319): 29 Mad L Jour 669: 18 Mad L Tim 475: (1916) 1 Mad W N 127.

(3) *Lakhi Narain Ganguli* v. *Felamani Dasi*, (1915) 27 Ind Cas 11 (12): 20 Cal L Jour 131; *Enamjzeman Sarkar* v. *Sanchia Lal Nahata*, (1916) 34 Ind Cas 606 (607): 43 Cal 207: 20 Cal W N 272: 23 Cal L Jour 390; *Jalim Chand* v. *Yusufali Chowdhry*, 1925 Cal 1012 (1013, 1014): 86 Ind Cas 1051: 30 Cal W N 945; *Madan Mohan Bantkya* v. *Haru Lal Kundu*, 1921 Cal 643 (643, 644): 35 Cal L Jour 566: 26 Cal W N 534: 64 Ind Cas 72; *Jotindra* v. *Gangan*, (1918) 45 Ind Cas 903 (904): 46 Cal 22; *Baley Muhammad Sahi* v. *Afjanmai*, 1922 Cal 30 (31, 32): 35 Cal L Jour 71: 68 Ind Cas 780: 26 Cal W N 529; *Bahuballav Roy* v. *Jogesh Chandra*, (1919) 50 Ind Cas 242 (243): 23 Cal W N 320 [As explained in 1925 Cal 1012]. But see *Dwarika Nath Paul* v. *Bipin Rishi*, 1922 Cal 200 (200): 64 Ind Cas 32; *Bireswar* v.

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and Rangoon[7] and the Judicial Commissioner's Court of Sind[8] have held that it will amount to a sufficient certificate and the payment can therefore be recognised provided the payment is as a *matter of fact made* and provided also the application for execution is within three years of such payment, (as otherwise S. 20 of the Limitation Act will not apply). The said decisions proceed on the view that nothing is prescribed in this rule as to the time within which or the manner in which the decree-holder must certify a payment or adjustment. *See also* Notes 17 and 18, *supra*. The High Court of Allahabad on the other hand, held the contrary view in a series of cases. In one class of cases[9] it was held that this rule contemplates a formal proceeding consisting of two steps:—

First, an application by the decree-holder informing the Court of the payment and

Secondly, a formal order of the Court recording the payment,

and therefore a statement as to payment in an execution application is not such a certificate as is contemplated by this rule and would not save limitation. It was held in another class of cases[9-a] that where the decree will be time-barred if the payment sought to be certified by the decree-holder is ignored, such a payment cannot be certified. In a recent Full Bench ruling however[10] the same High Court has impliedly overruled these cases and fallen in line with the other Courts. The Judicial Commissioner's Court of Oudh[11] has followed the earlier view of the High Court of Allahabad. It is submitted that in view of the general trend of opinion the said decision cannot be accepted as correct.

28. Operation as estoppel.—It is not open to the executing Court to enquire into the fact of payment or adjustment of a decree which has not been certified or recorded within the period allowed by law, on the ground that the decree-holder is estopped from denying such payment or adjustment.[1] The

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Ambika Charan, (1917) 42 Ind Cas 472 (472): 45 Cal 630.

(4) *Pandurang Balkrishna* v. *Jagya Bhau Bhagat*, 1921 Bom 411 (412): 45 Bom 91: 59 Ind Cas 399: 22 Bom L R 1120.

(5) *Fattu* v. *Nanak Chand*, 1924 Lah 676 (677): 75 Ind Cas 1029.

(6) *Elahi Bux* v. *Nawab Lall*, (1919) 50 Ind Cas 364 (365): 4 Pat L Jour 159: 1919 Pat H C C 260.

(7) *Daw Ywet* v. *U Tin*, 1930 Rang 329 (331): 8 Rang 310: 127 Ind Cas 600; *Maung Law San* v. *Maung Po Thein*, 1925 Rang 26 (27): 2 Rang 393: 3 Bur L Jour 235: 84 Ind Cas 369: 84 Ind Cas 473.

(8) *Cholirmal* v. *Rupchand*, 1931 Sind 28 (30): 129 Ind Cas 909: 25 Sind L R 360; *Pahlumal Sewanmal* v. *Sedik*, (1921) 60 Ind Cas 935 (936): 14 Sind L R 198; *Kazi Shafi Mahomed* v. *Cholthram*, (1919) 52 Ind Cas 804 (810, 811, 812, 813): 13 Sind L R 37. But see *Narsoomal* v. *Tirathmal*, (1915) 30 Ind Cas 51 (52): 9 Sind L R 27 [Held to be not good law in 60 Ind Cas 935 in view of 52 Ind Cas 804 F B].

(9) *Baij Nath* v. *Panna Lal*, 1924 All 706: 46 All 635: 22 All L J 581: 5 L R All Civ 348: 83 Ind Cas 737; *Chatter Singh* v. *Amir Singh*, (1916) 32 Ind Cas 590 (592): 38 All 204: 14 All L J 132; *Amir Singh* v. *Chatter Singh*, (1915) 29 Ind Cas 274 (275): 13 All L J 666; *Bhajan Lall* v. *Cheda Lal*, (1914) 24 Ind Cas 215 (215, 216): 12 All L J 825; *Gokul Chand* v. *Bhika*, (1914) 23 Ind Cas 753 (755): 12 All L J 387.

(9-a) *Piare Mohan Prasad* v. *Raghnath Lal*, 1928 All 55 (57): 25 All L J 933: 50 All 259: 107 Ind Cas 40; *Amar Singh* v. *Mt Ram Dei*, 1925 All 802 (804): 23 All L J 836: 6 L R All Civ 409: 89 Ind Cas 415: 47 All 873.

(10) *Joti Prasad* v. *Sri Chand*, 1928 All 629 (631, 632): 26 All L J 966: 112 Ind Cas 73: 51 All 237; *Joti Prasad* v. *Baru Singh*, 1931 All 219 (221): 132 Ind Cas 426 [Following 1928 All 629 F B].

(11) *Mt Jamwanti* v. *Mt Mohan Dei*, 1924 Oudh 392 (392): 11 Oudh L J 379: 79 Ind Cas 799.

Note 28.

(1) *Trimback Ramakrishna* v. *Hari Laxman*, (1910) 7 Ind Cas 940 (941, 942): 34 Bom 575: 12 Bom L R 686 [Per Chandavarkar, J]; *Jogendra Nath Sircar* v. *Probhat Nath Chatterjee*, (1918) 21 Ind Cas 926 (928): 19 Cal L Jour

reason is that sub-R. (3) enacts a special law for a special purpose and the general law of estoppel cannot be allowed to override the special law.

29. Remedies of the judgment-debtor.—Where a judgment-debtor satisfies the decree by a payment or adjustment made out of Court, which is not certified to the Court in time and the decree-holder applies for execution of the decree in spite of the satisfaction, what is the remedy of the judgment-debtor in such a case? It is clear that the judgment-debtor cannot maintain a suit for a declaration that the decree has been satisfied and is consequently incapable of execution.[1] The reason is that such questions relate to the *satisfaction* of the decree, a separate suit in respect of which is barred by S. 47. If the properties of the judgment-debtor are sold in execution in such circumstances, no separate suit will, for the same reason lie to set aside the sale.[2] As to whether a suit *for damages* will lie against the decree-holder, *see* Note 30 *infra*.

30. Suit for damages.—Where a decree-holder whose decree has been satisfied by payment out of Court fails to certify satisfaction to the Court and executes the decree and *realises the money* a second time, the judgment-debtor may sue him for the recovery of the money paid out of Court.[1] Such a

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126: 19 Cal W N 650; *Cham Lal Chatterjee* v. *Hazarimal Babu*, (1912) 13 Ind Cas 326 (327, 328): 15 Cal L Jour 451; *Motumal* v. *Teomal*, 1925 Sind 140 (142): 79 Ind Cas 89: 18 Sind L R 51.

Note 29.

(1) *Azizan* v. *Maluk Lal*, (1894) 21 Cal 437 (445, 449, 460) F B; *Deno Bandhu* v. *Hari*, (1904) 31 Cal 480 (485); *Karuppa Pillai* v. *Athamsa Rowthan*, (1895) 5 Mad L Jour 140 (142); *Bairagulu* v. *Venkayya*, (1892) 15 Mad 302 (302, 303): 2 Mad L Jour 112; *Bam Labhya* v. *Mukandamal*, 1922 Lah 428 (431): 3 Lah 319: 67 Ind Cas 593 F B [Overruling 5 Ind Cas 814]; *Palaniappa Chetty* v. *M S S Somasundaram Chetty*, (1915) 28 Ind Cas 468 (469): 7 Bur L Jour 367. But see *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry*, (1874) 22 Suth W R 194 (194) [No longer law]; *Bishen Singh* v. *Mahindar Singh*, 1925 Lah 54 (55): 79 Ind Cas 125 [Following 5 Ind Cas 814 which is overruled by 1932 Lah 428 F B and does not refer to the Full Bench ruling—Submitted not good law] *Jaman Ram* v. *Kishen Ram*, (1914) 25 Ind Cas 642 (642): 1914 Pun Re No 42: 79 Pun W R 1914: 234 Pun L R 1914 [Not good law in view of 1922 Lah 428 F B]; *Mussammat Jamna and Shibba Mal* v. *Beli Ram*, (1913) 21 Ind Cas 557 (558): 1913 Pun L R No 330: 1913 Pun W R 190, (Do.); *Diwan Singh* v. *Amir Singh*, (1910) 5 Ind Cas 814 (815): 18 Pun W R 1910: 62 Pun L R 1910: 1910 Pun Re No 16, (Do.).

(2) *Prasanno Kumar* v. *Kalidas*, (1892) 19 Cal 683 (689): 19 Ind App 166: 6 Sar 209 P C; *Jaikaran Bharti* v. *Raghunath Singh*, (1898) 20 All 254 (256, 258): 1898 All W N 37; *Moru* v. *Hasan*, (1918) 48 Ind Cas 135 (136): 43 Bom 240: 20 Bom L R 929; *Avaram* v. *Yeshwant Rao*, (1919) 50 Ind Cas 956 (959): 15 Nag L R 158 See also *Mothura Mohan* v. *Akhoy Kumar*, (1888) 15 Cal 557 (563) [*Bona fide* purchaser—So not set aside—Bar under S 47 was not decided]; *Yellappa* v. *Ramchandra*, (1897) 21 Bom 463 (464), (Do.). The following cases are no longer in view of 19 Cal 683 P C:—*Pat Dasi* v. *Sharup Chand Mala*, (1887) 14 Cal 376 (379); *Poromanand Khasnabish* v. *Khepoo Paramanick*, (1884) 10 Cal 354 (357); *Ishan Chunder* v. *Indro Narain*, (1883) 9 Cal 788 (790): 12 Cal L Rep 390.

Note 30.

(1) *Gendo* v. *Nihal Kunwar*, (1903) 30 All 464 (466): 5 All L J 475: 1908 All W N 220; *Shadhi* v. *Ganga Sahai*, (1881) 3 All 538 (540): 1881 All W N 25; *Motee Lall Mookerjee* v. *Kandhai Lall*, (1869) 1 N W P 237; *Ganesh Mahadev* v. *Yeshwant*, 1923 Bom 253 (253): 25 Bom L R 247: 95 Ind Cas 410; *Hanmant* v. *Subbabhat*, (1899) 23 Bom 394 (396); *Davlatabin Kaloji Shinde* v. *Ganesh Shastri bin Bala Shastri*, (1879-80) 4 Bom 295 (297): 5 Ind Jur 150; *Gulawad Chandabhai* v. *Rahimtulla Jamalbhai*, (1866-67) 4 Bom H C R A C 76; *Biroo Gorain* v. *Jainurat Koer*, (1912) 13 Ind Cas 63 (66) Cal; *Shyama Charan Chowdhury* v. *Chaitanya Charan Chowdhury*, (1911) 11 Ind Cas 1 (1, 2) Cal; *Guni Khan* v. *Koonjo Behary Sein*, (1879) 3 Cal L Rep 414 (416); *Nujeem Mullick* v. *Erfan Mollah*, (1874) 22 Suth W R 298 (298); *Meer Mahomed Kazen Jowhurry* v. *Khetoo Bebee*, (1873) 20 Suth W R 150 (150): 11 Beng L R 405; *Gunamani Dasi* v. *Prankishori Dasi*, (1870) 13 Suth W R 69 (73): 5 Beng L R 223; *Bhugoban* v. *Gobind*, (1868) 9 Suth W R 210 (211); *Mohina Chunder Ghose* v. *Nobin Chunder Adhikaree*, (1867) 8 Suth W R 449 (449); *Amin Lal* v. *Ramji Lal*, (1917) 39 Ind Cas 15 (15): 12 Pun L R 1917; *Mamu* v. *Kalu Mall*, 1877 Pun Re No. 66; *Ganpat* v. *Kripa Ram*, 1892 Pun Re No 79; *Chalapuram Bank, Ltd* v. *Zamorin Raja Devagal*, (1917) 40 Ind Cas 549 (551): 1917 Mad W N 359; *Arji Marappa Chetty* v. *Arji Shanmugappa Chetty*, (1911) 10 Ind Cas 462 (462): 21 Mad L Jour 518 [Affirming 6 Ind Cas 267 on appeal]; *Shanmugappa* v. *Mariappa*, (1910) 6 Ind Cas 267 (268): 1910 Mad W N 121: 7 Mad L Tim 351; In the matter of *Medai Kaliani Anni*, (1907) 30 Mad 545 (546): 3 Mad L Tim 15; *Peratambi Udayan* v. *Vellaya Goundan*, (1878) 21 Mad 409 (410): 8 Mad L Jour 51; *Mallamma* v. *Venkappa*, (1885) 8 Mad 277 (283) F B; *Viraraghava* v. *Subbakka*, (1882) 5 Mad 397 (399): 6 Ind Jur 633 F B [Overruling 3 Mad H C R 188]; *Musutti* v. *Shekharam*, (1883) 6 Mad 41 (42); *Venkatagiri Ayyar* v. *Sadagopachariar*, (1904) 14 Mad L Jour 359 (369); *Kunhi Moidin Kutti* v. *Raman Unni*, (1876-78)

O. 21, R. 2, Notes 30—31.

suit will not be barred by S. 47, for the question in the suit as observed by Turner, C.J., in *Viraraghava* v. *Subbakka*, I.L.R. 5 Madras 397, "relates not to the execution of a decree, but to a contract which formed no subject of inquiry in the suit and could not form a subject of inquiry in execution of the decree."

The cause of action for the suit is *failure of consideration* or breach of an express or implied promise or of a statutory duty to certify the payment.

There is a difference of opinion as to when the cause of action for such a suit arises—whether it arises as soon as the application for execution is presented, or only after the amount is *actually recovered* in execution. The Judicial Commissioner's Court of Nagpur[2] and the undermentioned decisions[3] of the High Court of Madras have held that the cause of action arises only when damage is actually sustained, that is, when the money is recovered a second time. In the following cases[4] however, the High Court of Madras has held that the cause of action arises when the decree-holder fails to fulfil his duty and applies for execution, and that an execution need not actually be levied and money realised a second time before the suit can be maintained.

Where the decree-holder transfers the decree after it is satisfied by an uncertified payment or adjustment and the assignee executes the decree, he is not liable to re-pay the decretal amount realised in execution of the decree even though he has knowledge of the payment or adjustment.[5] The reason is that there is no privity *of contract* between the parties.

Where an application by the judgment-debtor under sub-R. (2) for recording a payment out of Court is dismissed by the executing Court on a consideration of the merits, the judgment-debtor cannot maintain a suit for recovery of the amount alleged to have been paid twice over, for, such a suit will be barred on general principles of *res judicata*.[6]

31. Restitution of uncertified payment on reversal of decree in appeal. —*V* obtained a decree against *G* for Rs 89. *G* appealed against the decree and pending appeal made a payment of Rs. 60 to the decree-holder which was not certified to the Court. The decree was reversed in appeal and *G* applied for refund of the amount he had paid. It was held that *G* was entitled to recover on the ground that "the decree having been reversed, the payment, whether

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1 Mad 203 (204): 1 Ind Jur 308; *Bairagulu* v. *Bapanna*, (1892) 15 Mad 302 (302, 303): 2 Mad L Jour 112; *Krishnasami Ayyangar* v. *Ranga Ayyangar*, (1897) 20 Mad 369 (370, 371): 7 Mad L Jour 71; *Alma Ram Patel* v. *Kisan Kirad*, (1904) 17 C P L R 60 (61); *Jhalri* v. *Rama Bharose Pandey*, 1926 Oudh 482 (483): 3 Oudh W N 198: 93 Ind Cas 53: 13 Oudh L J 493; *Maung Myo* v. *Maung Kha*, 1923 Rang 88 (92): 11 L B R 429: 1 Bur L Jour 207: 70 Ind Cas 115; *A K R M M C T Chetty Firm* v. *Maung Tha Din*, 1929 Rang 269 (270): 7 Rang 310: 119 Ind Cas 742; *Ma Shwe Pee* v. *Maung San Myo*, 1928 Rang 316 (317): 6 Rang 573; *Sayyid Muhammad Nur* v. *Ko Law Pan*, (1911) 22 Ind Cas 963 (964): 1 U B R 191; *Maung Myaing* v. *Maung Shwe Hmon*, (1893-1900) L B R 621. See also *Mookhan Muthriyan* v. *Rajagopala Ayyangar*, 1927 Mad 947 (948): 53 Mad L Jour 901: 105 Ind Cas 86: 1927 Mad W N 924 [Decree-holder's Vakil to whom payment was made did not certify—Judgment-debtor arrested—Suit for damages against Vakeel —Held liable]. But see *Taj* v. *Ganga Pershad*, (1867) 2 Agra H C R 45; *Alumja* v. *Goroo Churn*, (1865) 3 Suth W R S C C Ref 3 (5).

(2) *Mitsui Bussan* v. *Padamraj*, 1923 Nag 219 (222): 6 Nag L J 217: 72 Ind Cas 461.

(3) *Shanmugappa* v. *Marappa*, (1910) 6 Ind Cas 267 (268): 1910 Mad W N 121: 7 Mad L Tim 351; *Tirumalapalli Sriramulu* v. *Ryali Dalayya*, (1906) 16 Mad L Jour 54 (55, 56).

(4) In the matter of *Medai Kaliani Anni*, (1907) 30 Mad 545 (546): 3 Mad L Tim 15. See also *Gopalasami Naick* v. *Nammalwar Naick*, (1918) 48 Ind Cas 810 (812): 36 Mad L Jour 175: 1919 Mad W N 3 [Filing of execution petition gives a cause of action].

(5) *Krishna Ayyar* v. *Savarimuthu Pillai*, (1919) 50 Ind Cas 584 (588, 589): 42 Mad 338: 36 Mad L Jour 376: 9 Mad L W 448: 1919 Mad W N 248.

(6) *Hafiz Abdulla Khan* v. *Kanhaya*, (1912) 14 Ind Cas 751 (752): 91 Pun Re 1912: 141 Pun L R 1912: 92 Pun W R 1912; *Guruvayya* v. *Vudayappa*, (1895) 18 Mad 26 (27); *Manurath Singh* v. *Raj Kumari*, (1909) 4 Ind Cas 818 (819): (1907-09) U B Civ Pro C p 81.

certified or not, could only be regarded as made without consideration and entitling the defendant to have it restored.'"[1]

O. 21, R. 2, Notes 31—33.

32. Criminal proceedings.—Sub-R. (3) has no application to a case where a criminal Court is investigating a charge under S. 210 of the Penal Code of fraudulently executing a decree.[1] The prohibition in sub-R. (3) only means that the Court cannot consider the alleged adjustment in the *course of the execution of the decree in question*: The sub-rule does not prohibit the Court executing the decree from holding an enquiry under S. 476 of the Criminal Procedure Code into an alleged payment or adjustment with a view to file a complaint against the decree-holder for an offence under S. 210, Indian Penal Code.[2] Any other interpretation would make S. 210 of the Indian Penal Code a mere nullity and there could never be any prosecution for such an offence. Where on the objection of the judgment-debtor, the Court dismisses an application for execution on the ground that the decree has been satisfied by a payment out of Court, the decree-holder is not guilty of an offence under S. 210, Indian Penal Code because the decree has not been *caused to be executed*.[3]

33. Appeal and revision.—An order on an application by the judgment-debtor under sub-R. (2) recording or refusing to record, as certified, a payment or adjustment made out of Court, is the determination of a question between the parties and relating to the satisfaction of the decree within the meaning of S. 47 and hence is appealable as a decree.[1] No appeal lies against an order refusing to set aside a dismissal of an application for default[2] or an order refusing to review an order rejecting an application under this rule.[3]

Where a decree-holder certifies a payment made out of Court, but the Court in spite of it orders execution to proceed on the ground that the payment is not proved, the Court fails to exercise a jurisdiction vested in it by law and the order is therefore revisable by the High Court under S. 115.[4]

COURTS EXECUTING DECREES.

O. 21, R. 3.

R. **3.** [New.] *Where immoveable property forms one estate or tenure* situate *within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.*

Lands situate in more than one jurisdiction.

Note 31

(1) *Vasudev* v. *Vishnu*, (1887) 11 Bom 724 (726).

Note 32.

(1) *Queen-Empress* v. *Bapuji Dayaram*, (1886) 10 Bom 268 [Case under Amending Act XII of 1879, *see* Note 22 *supra*]; *Madhub Chunder Mozumdar* v. *Novodeepchunder Pandit*, (1889) 16 Cal 126 (127), (Do.); *Queen-Empress* v. *Pillala*, (1886) 9 Mad 101 (101): 1 Weir 183, (Do.).

(2) *Meyappa Chettiar* v. *U Tun Hla*, 1931 Rang 148 (150): 9 Rang 104: 132 Ind Cas 713; *Queen* v. *Moturaman*, (1882) 4 Mad 325 (327).

(3) *Shama Charan* v. *Kasi Naik*, (1896) 23 Cal 971 (975).

Note 33.

(1) *Jamna* v. *Mathura*, (1894) 16 All 129 (130): 1894 All W N 6; *Rangji* v. *Bhaiji*, (1887) 11 Bom 57 (58, 59); *Ram Kamlessuri Pershad* v. *Sukhan Singh*, (1903) 7 Cal W N 172 (174) [Even though there may be no pending application for execution, still Court may be said to be executing the decree]; *Lingaya* v. *Narasimha*, (1891) 14 Mad 99 (100); *Maung Po Myaing* v. *M M P L Palaniappa*, (1916) 35 Ind Cas 369 (370): 10 Bur L Tim 30.

(2) *Motee Lall* v. *Ram Doss*, 1864 Suth W R Gap Mis 38 (38); *Ma Shwe* v. *Sitamparam*, (1897-1901) 2 U B R 254.

(3) *Hanseswari Dasi* v. *Radhika Prosad*, (1921) 63 Ind Cas 855 (856, 857); *Lakhpat Rai* v. *Bella Mall Jamal Rai*, 1931 Lah 505 (505): 132 Ind Cas 206.

(4) *Qutab Din* v. *Hazuri Mal*, 1927 Lah 809 (810): 26 Pun L R 237: 105 Ind Cas 724 [See also notes to O 47, R 7]; *Maung Kyaw Min* v. *Ma Hpaw*, 1931 Rang 332 (333): 131 Ind Cas 218.

O. 21, R. 3, Notes 1—2.

Synopsis.

1. Sale of property situate in more than one jurisdiction.
2. Change of territorial jurisdiction.

1. Sale of property situate in more than one jurisdiction.—As has been seen in Note 8 to S. 17, *ante*, the general principle of law is that no Court can execute a decree in which the subject-matter of the suit or of the application for execution, is property, situate *entirely* outside the local limits of its jurisdiction. This rule is an exception to that general rule.[1] Even before this provision was enacted in this Code, it was held by the Calcutta High Court that where property attached in execution of a decree forms one estate and is situate within the territorial jurisdiction of two or more Courts, any one of such Courts has jurisdiction to sell the *entire* estate.[2] As to sales in execution of mortgage decrees where the mortgaged properties are situate within the jurisdiction of more than one Court, *see* Ss. 17 and 38.

2. Change of territorial jurisdiction.—*See* S. 37.

O. 21, R. 4, Note 1.

R. 4. [S. 223, Para. 5.] *Where a* decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in *Rule* 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

Transfer to Court of Small Causes.

[1877—S. 223, Para. 5.]

Synopsis.

1. Scope of the rule.
2. "As if it had been passed by itself."
3. Decrees of foreign Court.

1. Scope of the rule.—This rule is not restricted in its application to decrees of British Indian Courts; it applies equally to decrees of such foreign Courts as come within S. 44.[1]

And *see* O. 51, R. 1, *infra*.

Order 21, Rule 3—Note 1.

(1) *Kunja Mohan Chakravarthy* v. *Manindra Chandra Roy Chowdhury*, 1923 Cal 619 (621): 27 Cal W N 542: 77 Ind Cas 258.

(2) *Ram Lal* v. *Bama Sundari*, (1886) 12 Cal 307 (312); *Shurroop Chunder* v. *Ameerunnissa*, (1882) 8 Cal 703 (705); *Kalee Prosunno Bose* v. *Dinonath Bose*, (1873) 19 Suth W R 434 (436): 11 Rang L R 56; *Shib Narain* v. *Gobind Das*, (1875) 23 Suth W R 154 (155); *Gunga Narain* v. *Annunda Moyee*, (1869) 12 Cal L Rep 404 (406); *Unnocool Chunder* v. *Hurry Nath Koondoo*, (1865) 2 Cal L Rep 334 (336). But see *Syud Nowab Ali* v. *Shaikh Uzir Muhammad*, (1875) 23 Suth W R 233 (234).

Order 21, Rule 4—Note 1.

(1) *Srinivasa Ayyangar* v. *Narayana Ayyangar*, (1917) 40 Ind Cas 670 (671): 38 Mad L Jour 539: 1917 Mad W N 498: 6 Mad L W 361.

2. "As if it had been passed by itself."—The Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, in executing a decree of another Court transferred to it under this rule, has the same powers as it possesses in regard to execution of its own decrees.[1] *See* also S. 42. **O. 21, R. 4, Notes 2—3.**

3. Decrees of foreign Court.—*See* Note 1, *ante*.

R. **5.** [S. 223, Para. 6.] *Where* the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, *where* the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed. **O. 21, R. 5, Note 1.**

Mode of transfer.

[1877—S. 223.]

Local Amendments.

ALLAHABAD.

For the word "District," where it occurs *after* the words "same" and "different" *read* "province".

OUDH.

In Rule 5, *for* the word "District" where it occurs *after* the words "same" and "different" read "province".

RANGOON.

To Rule 5, the following proviso shall be added, namely:—

"Provided that where the Court to which the decree is sent for execution is presided over by the same Judge as the Court which passed the decree such transfer may be effected by recording a formal order of transfer in the diary of the execution proceedings."

Synopsis.

1. Scope of the rule.
2. Power of Court to which decree is sent for execution.
3. Transfer of local jurisdiction.

1. Scope of the rule.—Where two Courts are in the *same district*, one Court may transmit a decree for execution to the other Court direct *without the intervention of the District Court.*[1]

But where the Court to which the decree is to be sent is situate in a *different* district, it should be sent to the *District Court* of the district in which the decree is to be executed. Where this procedure is not followed and the decree is sent direct to the Court subordinate to the District Court in another district. that Court cannot execute the decree.[2] It should not, however, dismiss

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Note 2.

(1) *Gunputhy* v. *Thakurdye*, (1907) 34 Cal 823 (827) [Trying a question of title in respect of tiled huts in execution].

Order 21, Rule 5—Note 1.

(1) *Kelu* v. *Vikrisha*, (1892) 15 Mad 345 (347): 1 Mad L Jour 595.

(2) *Debi Dial Sahu* v. *Moharaj Singh*, (1895) 22 Cal 764 (766); *Prakash Chandra Sarkar*, v. *Pandey Baldeo Ram*, (1914) 22 Ind Cas 682 (682) Cal; *Kunja Behari Singh* v. *Tarapada Mitra*, (1919) 49 Ind Cas 374 (374): 4 Pat L Jour 49 [It is open to the parties at any stage to question the jurisdiction of the Subordinate Judge to execute it].

O. 21, R 5, Notes 1–3.

the application, but should send the papers back to the judge that sent them for adopting the correct procedure.[3]

The High Court of Madras has framed a rule—R. 161-A of the Civil Rules of Practice—under which the transferee Court is to return the papers to the transmitting Court, if no steps are taken by the decree-holder within six months from the date of transfer. This rule is one of convenience made with the object of inducing decree-holders to take early steps to execute the decree; and a violation thereof does not render the proceedings taken after six months *void ab initio*.[4]

2. **Power of Court to which decree is sent for execution.**—*See* Ss. 41 and 42.

3. **Transfer of local jurisdiction.**—*See* S. 38.

O. 21, R. 6. **Procedure *where* Court desires that its own decree shall be executed by another Court.**

R. 6. [S. 224.] The Court sending a decree for execution shall send—

(*a*) a copy of the decree ;

(*b*) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and

(*c*) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

[1877—S. 224; 1859—S. 286.]

Local Amendments.

ALLAHABAD.

Rule 6 shall be renumbered 6 (1) and the following sub-R. (6) (2) shall be added:—

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."

N.-W. F. P.

Read R. 6 as R. 6 (1) and *add* the following sub-R. 6 (2):—

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints in a sealed cover to be taken to the Court to which they are to be sent."

OUDH.

To Rule 6, *add* the following as sub-R. (2) and re-number 6 as 6 (1):—

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."

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(3) *Prakash Chandra Sarkar* v. *Pandey Baldeo Ram*, (1914) 22 Ind Cas 682 (682) Cal.

(4) *P M A Velliappa Chettiar* v. *S N Subramaniam Chetty*, (1915) 29 Ind Cas 119 (120): 29 Mad L Jour 172: 89 Mad 485.

RANGOON.

O. 21, R. 6, Notes 1—3.

To R. 6, the following proviso shall be added, namely:—

"Provided that where a transfer is effected under the proviso to R. 5 it shall not be necessary to send the above documents."

Synopsis.

1. Scope of the rule.
2. Certificate, effect of not sending.
3. Presumption as to compliance with the rule.
4. Copy of any order.
5. Small Cause Courts.
6. Appeal.

"Shall send." See Note 2, Pt. (1).

1. Scope of the rule.—The documents required to be transmitted by the Court sending the decree for execution to another Court are:—

(1) A copy of the decree.

(2) A certificate as required by clause (*b*), and

(3) A copy of any order for execution that may have been passed.[1]

As to the form of certificate of non-satisfaction *see* Appendix E, No. 4.

Where a Court, upon an application for transfer of the decree for execution to another Court, places a wrong construction on the decree and mentions in the certificate that a particular amount is due, the statement is *ultra vires* and the judgment-debtor need not have it amended by the transferor Court.[2] In sending the certificate of non-satisfaction, the Court which passed the decree is not called upon to consider whether the decree is still capable of execution; that is a question for determination by the transferee Court when a proper application for execution is presented to it.[3]

When once an order is made sending a decree to another Court for execution, that by itself, is sufficient to entitle the decree-holder to apply to the Court to which the decree is sent for execution.[4]

2. Certificate, effect of not sending.—The omission to send the certificate as required by clause (*b*) of this rule is a mere irregularity and does not affect the jurisdiction of the Court to which the decree is transferred for execution, to entertain the application for execution.[1] Nor is it a ground for an application under O. 21, R. 90 to set aside a sale.[2]

3. Presumption as to compliance with the rule.—Where the validity of an attachment effected by the transferee Court is attacked on the ground that no copy of the decree was sent by the Court which passed the decree, it

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Order 21, Rule 6—Note 1.

(1) *Venkata Subia* v. *Sivaramappa*, (1882) 4 Mad H C R 331 (333).

(2) *Gajadhar Prasad* v. *Firm, Manulal Jagarnath*, 1925 Pat 807 (809, 810): 4 Pat 440: 7 Pat L Tim 456: 93 Ind Cas 257.

(3) *Sripati Charan* v. *Belchambers*, (1910) 8 Ind Cas 22 (25): 15 Cal W N 661: 15 Cal L Jour 123.

(4) *Arimuthu* v. *Vyapuri*, (1910) 8 Ind Cas 852 (853): 35 Mad 588: 21 Mad L Jour 505: 9 Mad L Tim 121: (1911) 1 Mad W N 47 [For rateable distribution]. But see *Nanjunda Chettiar* v. *Nallakaruppan Chettiar*, 1928 Mad 496 (497): 27 Mad W N 473: 55 Mad L Jour 120: 109 Ind Cas 404 [Obiter].

Note 2.

(1) *Loke Nath Roy* v. *Mahim Chandra De*, 1931 Cal 649 (649): 35 Cal W N 308: 134 Ind Cas 944.

(2) *Abbubaker Saheb* v. *Mohidin Saheb*, (1897) 20 Mad 10 (12).

O. 21, R. 6, Notes 3—6

lies upon the judgment-debtor to prove that it was not transmitted, the maxim applicable being "*Omnia praesumuntur rite esse acta*"—all things are presumed to have been rightly and duly performed.[1] Where a decree was passed by a Judge in the capacity of a Small Cause Judge and an application for execution of the decree was filed before the same Judge acting on the original side, it was held that, even though there was no formal order of transfer, the provisions of this rule were sufficiently complied with.[2]

4. Copy of any order.—The words "copy of any order for the execution of the decree" in clause (*c*) mean a copy of any *subsisting* order and not a copy of an order for execution in the previous execution application.[1]

5. Small Cause Courts.—This rule applies to proceedings in the Small Cause Courts in the mofussil and if there is no sufficient property within the jurisdiction of the Small Cause Court to satisfy the decree, it may be sent to another Court.[1]

6. Appeal.—An order directing or refusing the issue of a certificate is appealable.[1]

O. 21, R. 7, Note 1.

R. **7**. [S. 225.] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

Court receiving copies of decree, etc., to file same without proof.

[1877—S. 225; 1859—S. 286.]

Synopsis.

1. Legislative changes.
2. Without any further proof.
3. Jurisdiction of the Court which passed the decree.
4. Executing Court, whether can question the jurisdiction of the Court which passed the decree.
5. Whether a transferee Court can execute a decree in excess of its pecuniary jurisdiction.

Executing Court—Whether can question jurisdiction of foreign Court which passed the decree. See Note 4, Pt. (3).

1. Legislative changes:—

The words "or of the jurisdiction of the Court which passed it" which occurred in the old section have now been omitted. *See* Note 4, *infra*.

Note 3.

(1) *Saroda Prasad Mullick* v. *Luchmeeput*, (1872) 17 Suth W R 289 (291): 14 Moo Ind App 529: 10 Beng L R 214: 2 Suth 560: 3 Sar 77.

(2) *Dasarathy Ghose* v. *Kartick Ch Ghose*, 1927 Cal 782 (783): 31 Cal W N 1052: 106 Ind Cas 146 [Appeal would lie from an order in execution]; *Ko Sit Kaung* v. *Periakaruppan*, 1928 Rang 15 (16): 5 Rang 613: 105 Ind Cas 654 [Transfer is not invalid].

Note 4.

(1) *Hathib Hai* v. *Patel Bechar*, (1889) 13 Bom 371 (373): 13 Ind Jur 426.

Note 5.

(1) *Anonymous*, (1868) 9 Suth W R 175 (177): 1 Beng L R Sup Vol 886.

Note 6.

(1) *Gopal Lal* v. *Mahomed Hadee*, (1874) 6 N W P H C R 73.

O. 21. R. 7, Notes 2--5.

2. Without any further proof.—As soon as a copy of the decree which is sent for execution to another Court is filed in the Court to which it is transmitted, it has the same effect as a decree of that Court.[1]

3. Jurisdiction of the Court which passed the decree.—*See* S. 42, Note 1.

4. Executing Court, whether can question the jurisdiction of the Court which passed the decree.—S. 225 of the old Code contained the words "or of the jurisdiction of the Court which passed it". There was a conflict of decisions as to whether the transferee Court can go into the question of the jurisdiction of the Court which passed the decree, if it sees any reason to do so.[1] The said words have now been omitted and it is now clear that the transferee Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution.[2]

This rule dispensing with the further proof of jurisdiction than the certificate of the transmitting Court applies only to the decrees of *British Indian Courts* and not to foreign decrees transmitted to British Indian Courts for execution under S. 44; the reason is that S. 44 "does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely allows the procedure by which such a judgment can have effect given to it in British India. Notwithstanding the section, such a decree still remains a foreign judgment, and its effect is removed by showing want of jurisdiction in the Court which passed it. The Court, is therefore, not precluded from ascertaining whether a foreign Court had jurisdiction merely because that Court has itself decided an issue upon that point in its own favour".[3]

5. Whether a transferee Court can execute a decree in excess of its pecuniary jurisdiction.—*See* S. 38, Note 7.

Order 21, Rule 7—Note 2.

(1) *Bagram* v. *Wise*, (1868) 10 Suth W R 46 (50): 1 Beng L R 91 F B.

Note 4.

(1) *Muhammad Sulaiman* v. *Fatima*, (1889) 11 All 314 (318): 1887 All W N 107; *Imdad Ali* v. *Jagan Lal*, (1895) 17 All 478 (482): 1895 All W N 109; *Bhagvantappa* v. *Viswanath*, (1904) 28 Bom 378 (382): 6 Bom L R 342; *Haji Musa* v. *Purmanand Nursey*, (1891) 15 Bom 216 (219) [A case of foreign judgment]. But see *Kasturshet* v. *Rama Kanhoji*, (1886) 10 Bom 65 (68); *Chogalal* v. *Trueman*, (1882) 7 Bom 481 (483): 8 Ind Jur 99.

(2) *Hari Govind Kulkarni* v. *Narsing Rao Nouherrao*, (1914) 23 Ind Cas 123 (124): 16 Bom L R 30: 38 Bom 194: *Zamindar of Ettiyapuram* v. *Chidambaram*, (1920) 58 Ind Cas 871 (877): 43 Mad 675: 39 Mad L Jour 203: 1920 Mad W N 460: 12 Mad L W 217: 28 Mad L Tim 75; *Ghulam Mahomed* v. *Fazal Nishan*, (1931) 133 Ind Cas 276 (276): 13 Lah 25: 33 Pun L R 309: 1932 Lah 289; *Ahmad Mirza* v. *Allahabad Bank*, 1926 Oudh 385 (388): 29 Oudh Cas 26: 94 Ind Cas 317; *Ekram Hussain* v. *Unatil Rasul*, 1931 Pat 27 (29, 30): 9 Pat 829: 129 Ind Cas 138; *Balaji Vithoba* v. *Balkrishna*, (1896) 9 C P L R 136 (137); *Sami Mudaliar* v. *Muthian Chetty*, 1923 Mad 212 (214): 16 Mad L W 314: 43 Mad L Jour 293: 1922 Mad W N 597: 69 Ind Cas 465; *Sheopat Rai* v. *Warakchand*, (1919) 46 Ind Cas 419 (420): 22 Pun Re 1919: 42 Pun L R 1918: 93 Pun W R 1918; *S A Nathan* v. *S R Samson*, 1931 Rang 252 (259): 9 Rang 480: 135 Ind Cas 65 F B [Overruling 1930 Rang 337]; *Ma Me* v. *Maung Aung Min*, (1916) 36 Ind Cas 10 (11): (1916) 2 U B R 119: 10 Bur L Tim 159; *Pran Nath* v. *Maha Dayal Prem Chandar*, 1932 Lah 601 (602): 138 Ind Cas 376: 33 Pun L R 725.

(3) *Jivappa* v. *Jeerji*, (1916) 86 Ind Cas 363 (364): 18 Bom L R 486: 40 Bom 551; *Haji Musa* v. *Purmanand Nursey*, (1891) 15 Bom 216 (219); *Veeraraghava Ayyar* v. *Muga Sait*, (1915) 26 Ind Cas 287 (290): 16 Mad L Tim 479: 27 Mad L Jour 535: 1 Mad L W 887: 1915 Mad W N 162: 39 Mad 24 F B [Reversing 20 Ind Cas 704]; *Sheo Tahal Ram* v. *Binaek Shukul*, 1931 All 689 (691): 1931 All L J 653: 53 All 747 [S 44 cannot override S 13].

O. 21, R. 8, Notes 1—2.

R. 8. [S. 226.] *Where* such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or *be transferred for execution to* any subordinate Court *of competent jurisdiction.*

Execution of decree or order by Court to which it is sent.

[1877—S. 226; 1859—S. 287.]

Synopsis.

1. Scope of the rule.
2. "Competent jurisdiction."

1. Scope of the rule.—The District Court to which a decree is sent for execution under this rule, has a right to entrust the execution of the decree to a Court subordinate to it.[1] An order of a District Court transferring a decree for execution, signed by the Sheristadar "by order" of the District Judge, is a valid endorsement complying with the provisions of this rule and is not vitiated by the absence of the signature of the Judge.[2]

Where an Assistant Judge is invested with all the powers of a District Judge within any part of the District of such Judge, he is the "District Court" in such part for the purposes of this rule.[3]

2. "Competent jurisdiction".—The expression "Court of competent jurisdiction" refers to *territorial* competence and therefore if the attached property is transferred from the jurisdiction of the transferee Court to some other Court, the sale by the transferee Court after the transfer of the property from its jurisdiction, is not valid even though the Court had jurisdiction over such property at the time of the transfer.[1]

O. 21, R. 9.

R. 9. [S. 227.] *Where* the Court to which the decree is sent for execution *is* a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

Execution by High Court of decree transferred by other Court.

[1877—S. 227.]

Synopsis.

1. Scope.
2. Ordinary original civil jurisdiction—Meaning of.
3. Limitation.

Order 21, Rule 8—Note 1.

(1) *Pulukdhri Roy* v. *Radha Pershad Singh*, (1881) 8 Ind App 165 (171): 8 Cal 28 (P C).

(2) *Jogendra Chandra* v. *Mahesh Chandra*, (1896) 23 Cal 480 (482); *Ghulam Ghouse* v. *Sunni Lal*, (1910) 5 Ind Cas 155 (155): 7 Mad L Tim 132.

(3) *Govind Hari Waleker* v. *Shidram Bin Shidmurti*, (1870) 7 Bom H C A C 87.

Note 2.

(1) *Visvanadhan Chetty* v. *Murugappa Chetty*, (1918) 43 Ind Cas 79 (80): 33 Mad L Jour 750: 23 Mad L Tim 24: 1918 Mad W N 182.

1. Scope.—It has been held in a very early case of the Calcutta High Court[1] that the functions of the High Court, in respect of the execution of a decree of another Court, are limited to effecting execution and to the matters arising out of the proceedings in execution, and that the question whether or not the applicant had a right to obtain execution, must be judged by the Court in which the record was. **O. 21, R. 9, Notes 1—3.**

2. Ordinary Original Civil Jurisdiction—Meaning of.—*See* Notes to Cl. 12 of the Letters Patent of Calcutta, Bombay and Madras High Courts.

3. Limitation.—The period of limitation applicable to the execution of a decree transmitted by one Court to another for execution, depends upon the character of the Court *which passed the decree* and not on the character of the Court *executing it*.[1] The *manner* of execution mentioned in this rule refers to the procedure under which the execution is to be had, and has no reference to the law of limitation; it simply applies the High Court machinery to the execution of the decree.[2] Thus, where a decree passed by the Calcutta Small Cause Court was transferred to the High Court at Calcutta for execution, it was held that the period of limitation applicable to the decree was Art. 182 of the Limitation Act and that it was not governed by the law of limitation relating to decrees of the High Court.[3]

APPLICATION FOR EXECUTION.

R. **10.** [S. 230, Para. 1.] *Where* the holder of a decree desires to *execute* it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof. **O. 21, R. 10.**

Application for execution.

[1877—Ss. 230, 231; 1859—S. 207.]

Local Amendments.

LAHORE.

Add the following proviso to Rule 10:—

"Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the Court to which the decree has been sent, the holder of the decree may apply to the Court within whose jurisdiction the judgment-debtor is, or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non-satisfaction by the holder of the decree pending the receipt of an order of transfer under S. 39."

Order 21, Rule 9—Note 1.

(1) *Jadu Roy* v. *Farrel*, (1871) 6 Beng L R App 66: 15 Suth W R Cr 14.

Note 3.

(1) *Tincowri* v. *Debendra Nath*, (1890) 17 Cal 491 (496); *Sree Krishna Das* v. *Alumbu Ammal*, (1911) 11 Ind Cas 635 (637): 10 Mad L Tim 75: 21 Mad L Jour 777: (1911) 2 Mad W N 565: 36 Mad 108; *Sambasiva* v. *Panchanada*, (1908) 31 Mad 24 (26): 17 Mad L Jour 441: 3 Mad L Tim 19; *Chatterput* v. *Daya Chand*, (1911) 11 Ind Cas 216 (216): 23 Cal L Jour 641 [So assumed].

(2) *Joyemaya Dassi* v. *Thackomani Dassi*, (1897) 24 Cal 473 (491).

(3) *Tincowri* v. *Debendra Nath*, (1890) 17 Cal 491 (496).

RANGOON.

O. 21, R. 10, Notes 1—2.

To Rule 10, the following shall be added, namely:—

"at the time of presenting the application for execution or at the time of admission thereof the holder of a decree may, if he wishes, deposit in Court the fees requisite for all necessary proceedings in the execution."

The following shall be *inserted* as Rule 10-A:—

"10-A. If no application is made by the decree-holder within six months of the date of the receipt of the papers, the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by S. 41."

Synopsis.

1. Successive applications for execution.
2. Who may apply for execution.
3. What decrees may be executed.
4. Court by which decree may be executed.
5. "Court which passed the decree."
6. Court to which the decree is sent for execution.
7. Executing Court cannot go behind the decree.
8. Application for execution.
9. Dismissal of application for default.

Application by representatives of deceased decree-holder—Succession certificate, if necessary. See Note 2, Pt. (6).

Maintenance decree—Execution of. See Note 3, F.-N. (1).

1. Successive applications for execution.—The Code does not bar a succession of applications for execution.[1-a] Thus, where an application for execution is withdrawn by the decree-holder without leave to apply again having been granted by the Court, a second application is not barred; S. 141 cannot be invoked so as to apply O. 23, R. 1, since that section does not apply to execution proceedings.[1] Similarly O. 2, R. 2 does not apply to proceedings in execution and when a decree gives reliefs of a different character, such as a decree for possession and a decree for costs, there is nothing which prevents separate and successive applications for executions as regards each of them.[2]

2. Who may apply for execution.—It is only the decree-holder whose name is on the record that is entitled to apply for execution of the decree.[1] A defendant in a partition suit in which a decree has been passed is in the position of a decree-holder, and will be entitled to apply for execution.[2] In the case of decrees in *representative suits*, a person not on the record, but who was represented in the suit by the decree-holder on record, can apply to be brought on the record and to execute the decree.[3] Similarly the representatives of a

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Order 21, Rule 10—Note 1.

(1-a) *Asin Mandal* v. *Raj Mohan Das*, (1911) 11 Ind Cas 385 (386): 13 Cal L Jour 532.

(1) *Thakur Prasad* v. *Fakir Ullah*, (1894) 17 All 106 (111, 112): 22 Ind App 44: 5 Mad L Jour 3: 6 Sar 526 P C [Overruling 10 All 71]; *Bunko Behary Gangopadhya* v. *Nil Madhub Chattopadhya*, (1891) 18 Cal 635 (637).

(2) *Radha Kishen Lall* v. *Radha Prasad Singh*, (1891) 18 Cal 515 (517); *Sadho Saran* v. *Hawal Pande*, (1893) 19 All 98 (100): 1893 All W N 57; *Ram Baksh* v. *Madat Ali*, (1875) 7 N W P H C R 95; *Fulchand* v. *Bai Iccha*, (1888) 12 Bom 98 (100); *Nepal Chandra* v. *Amrita Lall*, (1899) 26 Cal 888 (890); *Barada* v. *Nabin*, (1909) 4 Ind Cas 408 (409): 14 Cal W N 465: 11 Cal L Jour 83. But see *Dalichand* v. *Shivkor*, (1891) 15 Bom 242 (244) [Though not in accordance with law, yet it is a step-in-aid].

Note 2.

(1) *Dil Afza Begam* v. *Deputy Commissioner, Baharich*, (1917) 37 Ind Cas 133 (135): 3 Oudh L J 570 [Stranger not a party to the suit, cannot apply]; *Durioo Roy* v. *Doolla Roy*, (1875) 24 Suth W R 10 (11), (Do.); *Jasoda Deya* v. *Kritibash Das*, (1891) 18 Cal 639 (641); *Khettar Mohan* v. *Issur Chunder*, (1869) 11 Suth W R 271 (272). See also S 2, sub-S (3), Note 2.

(2) *Chunilal Jumna Das* v. *Mulchand Harjibandas*, 1923 Bom 23 (28): 46 Bom 937: 67 Ind Cas 417: 24 Bom L R 440.

(3) *Swaminatha Mudaliar* v. *Kumaraswamy Chettiar*, 1928 Mad 472 (473): 44 Mad L Jour

deceased decree-holder can apply to be brought on the record and to execute the decree.[4]

Where an application was made by the guardian *ad litem* of a minor after the latter had attained majority, but the latter ratified the application subsequently, it was held that the ratification rendered the application valid from the date of the ratification.[5]

As to the necessity for the production of succession certificate, along with the application for execution where the decree-holder is dead, *see* the undermentioned cases.[6]

Fresh Vakalathnama if necessary for execution proceedings.—Proceedings in execution are proceedings in continuation of the suit and therefore a fresh authority is not required for a pleader to appear, act and plead on behalf of the decree-holder in execution proceedings, if he was authorised by a *Vakalathnama* in the suit itself.[7]

3. **What decrees may be executed.**—*See* S. 38, Note 5 and S. 47, Note 33 and the undermentioned cases.[1]

4. **Court by which decree may be executed.**—*See* S. 37.

5. **"Court which passed the decree."**—*See* S. 37.

6. **Court to which the decree is sent for execution.**—Where a decree is transferred to another Court for execution under S. 39 and the records are not sent back to the transferor Court, an application made to the Court which passed the decree is not an application made to the *proper* Court within the meaning of Art. 182, Cl. 5 of the Limitation Act.[1] A transfer made in an

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282: 17 Mad L W 422: 32 Mad L Tim 212: 1923 Mad W N 239: 72 Ind Cas 284. See also *Lachman* v. *Patni Ram*, (1876) 1 All 510 (511): 2 Ind Jur 499 [Decree in favour of a firm in the name of agent—Another agent applying—Proceedings though irregular, not invalid].

(4) See also *Hulodhur Roy* v. *Judoonath*, (1870) 14 Suth W R 162 (162); *Baluswami Iyer* v. *Venkataswamy Naicken*, 1924 Mad 95 (96): 32 Mad L Tim 249: 75 Ind Cas 219.

(5) *Ghanayalal* v. *Madho Parshad*, 1931 Lah 600 (601): 32 Pun L R 290: 135 Ind Cas 207.

(6) *Kalian Singh* v. *Ram Charan*, (1898) 18 All 34 (35): 1895 All W N 148 [Succession certificate necessary—But may be produced during pendency of proceedings—It is not a condition precedent]; *Behari Lal* v. *Majid Ali*, (1902) 24 All 138 (142): 1897 All W N 29, (Do.); *Brojo Nath* v. *Iswar Chundra*, (1892) 19 Cal 482 (485), (Do.); *Mangal Khan* v. *Salimullah*, (1894) 16 All 26 (28): 1893 All W N 197 [Application without certificate will save limitation]; *Payne & Co* v. *Brahmdeo*, (1911) 9 Ind Cas 800 (802) All, (Do.); *Balkishen* v. *Wagar Singh*, (1896) 20 Bom 76 (78), (Do.); *Hafizuddin* v. *Abdool Aziz*, (1893) 20 Cal 755 (757), (Do.); *Raghavendra* v. *Bhima*, (1892) 16 Bom 349 (350) [Where claim is by survivorship, certificate is not necessary]; *Pallamraju* v. *Bapanna*, (1899) 22 Mad 380 (381), (Do.); *Jogendra Nath Bharati* v. *Ram Chunder Bharati*, (1893) 20 Cal 103 (105) [Decree in favour of Mohunt—Application by his successor—Certificate not necessary].

(7) *Raghubar Dayal* v. *Jadu Nandan*, (1912) 13 Ind Cas 365 (369): 15 Cal L Jour 89: 16 Cal W N 736; *Gobind Pershad* v. *Hriday Thakur*, 1925 Pat 692 (693): 1925 Pat H C C 234: 91 Ind Cas 211: 7 Pat L Tim 220; *Gobind Prasad* v. *Jugdip Sahay*, 1925 Pat 369 (372): 4 Pat 378: 1925 Pat H C C 57: 3 Pat L R 43: 86 Ind Cas 358: 6 Pat L Tim 547; *Kallu* v. *Muhammad Abdul*, (1885) 7 All 564 (565): 1885 All W N 131 [An application by pleader after client's death is invalid].

Note 3.

(1) *Jeora* v. *Thakoore*, (1870) 2 N-W P 303 [Declaratory decrees cannot be executed]; *Ramnal Sangji* v. *Kundan Kunvar* (1902) 26 Bom 707 (710): 4 Bom L R 531 [But future maintenance awarded by decree must be enforced in execution]; *Ashutosh* v. *Lukhimoni*, (1892) 19 Cal 139 (146), (Do.); *Parvati Ammal* v. *Venkatarama Iyer*, 1925 Mad 80 (84): 47 Mad L Jour 316: 20 Mad L W 278: 1924 Mad W N 510: 81 Ind Cas 771 [Satisfied decree cannot be executed]; *Hari Raghunath Joshi* v. *Krishnaji Anant*, (1894) 19 Bom 546 (549), (Do.).

Note 6

(1) *Maharajah of Bobbili* v. *Sri Raja Narasaraju*, 1916 P C 16 (18): 39 Mad 640: 43 Ind App 238: 14 All L J 1129: 18 Bom L R 909: 24 Cal L Jour 478: 21 Cal W N 162: 31 Mad L Jour 300: 20 Mad L Tim 472: 4 Mad L W 558: (1916) 2 Mad W N 541: 1 Pat L W 26: 36 Ind Cas 682 P C [Affirming 37 Mad 231 on appeal]; *Diwan Chand* v. *Rallia Ram*, 1931 Lah 14 (14): 130 Ind Cas 521; *Firm Sheru Mal* v. *Firm Hiral Lal*, 1925 Lah 233 (235): 78 Ind Cas 241; *Jnanendra Nath Ghosh* v. *Kumar Jogendra Narain Sinha*, 1923 Pat 384 (384): 2 Pat 247: 74 Ind Cas 608; *Rangasamy Chetty* v. *Seshappa Manjappa*, 1922 Bom 359

O.21, R.10, Notes 6—9.

irregular manner is not null and void and if the irregularity is not objected to, an application made to the transferee Court is in order.[2]

7. **Executing Court cannot go behind the decree.**—*See* Note 8 to S. 38.

8. **Application for execution.**—It has been already seen in Note 5 to S. 38 that where a decree is reversed, modified or affirmed in appeal, the only decree capable of execution is the appellate decree. Therefore, if a decree of a lower Court is confirmed on appeal while execution proceedings are pending, a fresh application for execution is necessary.[1]

When a decree follows an attachment before judgment, O. 38, R. 11 does not exempt the plaintiff from making an application as required by this rule.[2]

An application under S. 39 for transfer of a decree is not an application for execution[3]; but is only an application to take some step-in-aid of execution.[4] It is necessary however even for this purpose that the application for transfer should have been made to Court *having jurisdiction* in the matter.[4-a]

Where a decree-holder makes an application praying for a relief *not granted by the decree*, it is not an application which will save limitation under Art. 182 of the Limitation Act.[5] But an application which is merely incorrect in some respects would be one furthering execution.[6]

9. **Dismissal of application for default.**—A Court has inherent power to dismiss an application for execution when the applicant fails through his own laches, to put the Court in a position to proceed with the application.[1] But such dismissal does not bar a fresh application for execution.[2]

As to whether a Court has power to restore to the file an application dismissed for default, *see* Notes to O. 9, R. 9.

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(360): 24 Bom L R 798: 68 Ind Cas 506: 47 Bom 56. See also *Gangadhar* v. *Hanuman*, 1886 All W N 31 (31).

(2) *Dhondbhat Bin* v. *Apana Bin Balapa*, (1887) Bom P J 328 (328).

Note 8.

(1) *Harilal Dalsukhram* v. *Mulchand Asharam*, 1930 Bom 225 (227): 32 Bom L R 300: 127 Ind Cas 199 [A prayer for continuation of application is a defect curable by S 99].

(2) *Pallonji* v. *Edward Vaughan*, (1888) 12 Bom 400 (406); *Sewdut Roy* v. *Sreecanto Maity*, (1906) 33 Cal 639 (643): 10 Cal W N 634; *A L A R Arunachallam Chettiar* v. *P S K Haji Shaikh Meera Rowther*, (1910) 7 Ind Cas 856 (857): 34 Mad 25: 8 Mad L Tim 226: 1910 Mad W N 688.

(3) *Mt Sahodra* v. *Bhagwandas*, 1926 All 473 (474): 94 Ind Cas 482; *Hazari Lal* v. *Baidyanath Saha*, 1912 Cal 3 (4): 26 Cal W N 292: 63 Ind Cas 116.

(4) *Mt Sahodra* v. *Bhagwandas*, 1926 All 473 (474): 94 Ind Cas 482.

(4-a) *Sital Prasad Sukul* v. *Babu Lal Shukul*, 1932 Pat 309 (310): 13 Pat L Tim 498.

(5) *Pandari Nath* v. *Lilachund*, (1889) 13 Bom 237 (240); *Shri Ram* v. *Majid-ud-din*, 1901 Pun Re No 98.

(6) *Hari* v. *Narayan*, (1888) 12 Bom 427 (430); *Ramanadan Chetty* v. *Periathambi Shervai*, (1883) 6 Mad 250 (251).

Note 9.

(1) *Dhonkal Singh* v. *Phakkar Singh*, (1893) 15 All 84 (95): 1893 All W N 36 F B.

(2) *Thirthaswamy* v. *Annappayya*, (1895) 18 Mad 131 (133). But see *Kirat* v. *Pahlad*, 1882 All W N 97 (97) [Under Code of 1877 when decree-holder did use due diligence, subsequent application could not be granted. Not law under this Code]; *Sadik Ali Khan* v. *Muhammad Husain Khan*, (1878-80) 2 All 384 (386), (Do.).

O.21, R.11.

R. 11. [Ss. 256, 235.] (1) *Where* a decree is for *the payment* of money the Court may, on the oral application of the decree-holder *at the time of the* passing of the decree, order immediate execution[3] thereof by the *arrest* of the judgment-debtor, *prior to the preparation of a warrant* if he is within the *precincts* of the Court.

Oral application.

(2) *Save as otherwise provided by sub-rule* (1), *every* application for *the* execution of a decree shall be in writing, *signed and* verified[4] by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—

Written application.

(*a*) the number of the suit;

(*b*) the names of the parties;

(*c*) the date of the decree;[6]

(*d*) whether any appeal has been preferred from the decree;[7]

(*e*) whether any, and (*if any*) what, *payment or other* adjustment[8] of the matter in *controversy* has been made between the parties subsequently to the decree;

(*f*) whether any, and (*if any*) what, previous applications have been made for *the* execution of the decree, *the dates of such applications* and *their* results;[9]

(*g*) the amount with interest (*if any*) due upon the decree,[10] or other relief granted thereby, *together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed*;

(*h*) the amount of *the* costs (if any) awarded;

(*i*) the name of the person against whom *execution*[11] of the decree is sought; and

(*j*) the mode in which the assistance of the Court is required,[12] whether—

(*i*) by the delivery of *any* property specifically decreed;

(*ii*) by the attachment *and sale, or by the sale without attachment*, of any property;

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(*iii*) by the arrest and *detention in prison* of any person;

(*iv*) *by the appointment of a receiver*;

(*v*) otherwise, as the nature of the relief *granted* may require.

(3) *The Court to which an application is made under sub-rule* (2) *may require the applicant to produce a certified copy of the decree.*[13]

[1877—Ss. 235, 256; 1861—S. 13; 1859—S. 212.]

[*See* Ss. 38 and 51 and 135 and O. 40, R. 1.]

Local Amendments.

ALLAHABAD.

For Clause (*f*) of sub-R. (2), *substitute* the following:—

"(*f*) The date of the last application, if any," and *add* the following proviso to sub-R. (2):—

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in Cls. (*b*), (*c*) and (*h*) need not be given in the application."

MADRÁS.

In sub-R. (2) of R. 11 *between* Cls. (*f*) and (*g*), *insert* the following new clause:—

"(*ff*) whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transfer."

NAGPUR.

After sub-Cl. (*v*) of Cl. (*j*) of sub-R. (2) of R. 11, *insert* the following proviso:—

"Provided that, when the applicant files with his application a certified copy of the decree the particulars specified in Cls. (*b*), (*c*) and (*h*) need not be given in the application."

OUDH.

In R. 11, *for* Cl. (*f*) of sub-R. (2), *substitute* the following:—

"(*f*) the date of the last application, if any."

Synopsis.

1. Legislative changes.
2. Scope of the rule.
2-A. Applicability of rule to execution of decrees under other Acts.
3. Immediate execution—Sub-R. (1)—Privilege from arrest.
4. Verification of application.
5. Who may apply for execution.
6. Date of the decree to be given—Cl. (c).
7. Whether any appeal has been preferred from the decree—Sub-Cl. (d).
8. Payment or other adjustment—Sub-Cl. (e).
9. Previous applications and their results.
10. Amount due upon the decree—Cl. (g).
11. Against whom execution is to issue Cl. (i).
12. Mode in which the assistance of the Court is required—Cl. (j).
13. Certified copy of decree to be filed —Sub-R. (3).
14. Concurrent applications for execution.
15. Amendment of application.

Application "in accordance with law" or not. See Notes 2, 8, 9, 11 and 13.
Breach of sub-R. (2) and defects in applications. See Note 2.
Date of decree to be taken as that of judgment. See Note 6, Pt. (1).
Death of judgment-debtor. See Note 11, Pt. (2).
Decree burnt or destroyed. See Note 13, F.-N. (2).
Form. See Appendix E, Form No. 6.
Limitation. See Note 9, F.-N. (1).
Mistake in date of decree. See Note 6, Pt. (4).
Omission to specify costs—Cl. (h). See Note 10, Pt. (3).
Wrong name of the judgment-debtor. See Note 2, Pt. (5).
Wrong number of the suit—Cl. (a). See Note 2, Pt. (4).

1. Legislative changes.—

Sub-Rule (1) corresponds with S. 256 of the old Code and sub-Rule (2) with S. 235. Sub-Rule (3) is new and empowers the Court executing the decree to call upon the decree-holder to produce a certified copy of the decree.[1]

The following are the points of difference between sub-Rule (1) and S. 256:—

(1) Section 256 provided for immediate execution only where the amount decreed did not exceed the sum of one thousand rupees. This rule fixes no such limit.

(2) Under S. 256 the Court could order immediate execution only by the *issue of a warrant*. Under this rule the order may be made even prior to the preparation of a warrant.

(3) Under this rule execution cannot issue against the *movable property* of the judgment-debtor as was possible under the old Code.

(4) Under the old Code execution could be ordered if the judgment-debtor was "within the local limits of the jurisdiction of the Court". Under this rule it could be ordered only if he is within the *precincts of the Court*.

The following are the important alterations in sub-Rule (2):—

(1) The words "together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed in Cl. (*g*) are new.

(2) The words "and sale, or by the sale without attachment" in Cl. (*j*), sub-Cl. (*ii*) are new.

(3) Sub-Cl. (*iv*), Cl. (*j*) is new.

2. Scope of the rule.—An application for execution should be in *writing* except in the case dealt with under sub-Rule 1, when, it may be *oral*. Sub-Rule (2) says what particulars a written application for execution shall contain. But every omission to comply with the said requirements is not necessarily such a defect as will vitiate the execution proceedings.[1] Informalities of an immaterial character will not vitiate it.[2] Thus the omission

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Order 21, Rule 11—Note 1.

(1) *Mirza Qaiser Beg* v. *B Sheo Shankar Das*, 1932 All 85 (88): 1931 All L J 108: 129 Ind Cas 708: 53 All 391.

Note 2.

(1) *Saudamini Ghose* v. *Jessore Registered Loan Co. Ltd.* 1926 Cal 1146 (1148): 96 Ind Cas 554: *Prosanna Kumar* v. *Jotindra Nath*, 1924 Cal 398 (398): 71 Ind Cas 1054. See also *K Abdul Salam Saheb* v. *B Virabhadra Raju*, 1929 Mad 703 (704): 57 Mad L Jour 97: 30 Mad L W 110: 1929 Mad W N 611: 52 Mad 760: 118 Ind Cas 72; *Abdul Salam Sahib* v. *Veerabhadra Raju*, 1928 Mad 129 (131): 107 Ind Cas 298 [Per Devadoss, J—Jackson, J reversed in 1929 Mad 703]; *Ramanathan Chetti* v. *Periathambi Sherrai*, (1883) 6 Mad 250 (251): *Srinivasa* v. *Tirumalai*, (1914) 23 Ind Cas 99 (100): 1914 Mad W N 372: 15 Mad L Tim 337; *Vithal* v. *Gopal Rao*, (1911) 1 Ind Cas 240 (242): 5 Nag L R 8.

(2) *Sahijram Tahüram* v. *Tower son of Gul*, 1922 Sind 29 (30): 15 Sind L R 156: 65 Ind Cas 14.

O.21, R.11, Notes 2—4.

to mention the amount of costs,[3] or giving a wrong suit number,[4] or making a mistake in the name of the judgment-debtor,[5] or wrongly calculating the pleader's fee,[6] or the failure to draw up the petition in a tabular form,[7] is only an irregularity of an immaterial character which will not vitiate the proceeding. Where, however, the omissions relate to *material* particulars the application cannot be considered to be one in accordance with the law and cannot save limitation.[8] Whether an omission is material or not will depend upon the particular facts of each case.[9] *See also* the notes under the various headings below.

2-A. Applicability of rule to execution of decrees under other Acts.—Under the Oudh Rent Act, XXII of 1886 (S. 146), The Orissa Tenancy Act, II of 1913 [S. 198 (*j*)]; and The Madras Estates Land Act, I of 1908 [S. 192 (*g*)], the Court may order immediate execution, on the oral application of the decree-holder, as enacted in sub-R. (*i*) of this rule.

In applications for execution of decree relating to immoveable property under The Chota Nagpur Tenancy Act, VI of 1908, S. 210 (3) (*b*), as amended by Act, VI of 1920, [S. 50 (1)], the application shall be accompanied by a certified copy of the decree, as provided in sub-R. (*iii*) of this rule.

As to what particulars are necessary, when an application is made under sub-R. (2) of this rule, to execute a decree against the immoveable properties of the judgment-debtor, under the Bengal Tenancy Act, VIII of 1885, and The Orissa Tenancy Act, II of 1913, *see* Ss. 162 and 216, of those Acts respectively.

3. Immediate execution—Sub-R. (1)—Privilege from arrest.—S. 135 *ante* deals with exemptions from arrest. But sub-S. 3 thereof provides that "nothing in sub-S. 2 shall enable a judgment-debtor to claim exemption from arrest under an order for *immediate execution*....."[1]

4. Verification of application.—The application for execution should be signed and verified by (*a*) the applicant, or (*b*) some other person acquainted with the facts of the case. Where there are *several* applicants it is not necessary that *all* of them should verify the application even though some of

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(3) *Sahijram Tahilram* v. *Tower son of Gul*, 1922 Sind 29 (30): 15 Sind L R 156: 65 Ind Cas 14.

(4) *Gopal Chunder* v. *Gosain Das*, (1898) 25 Cal 594 (597): 2 Cal W N 556 F B; *Fuzloor Rahman* v. *Altaf Hossein*, (1884) 10 Cal 541 (544).

(5) *Gudu Balambhotlu* v. *Mandela Bapanamma*, 1930 Mad 172 (173): 119 Ind Cas 596.

(6) *Natesa Pillai* v. *Ganapathia Pillai*, (1917) 38 Ind Cas 136 (138): 40 Mad 949: 21 Mad L Tim 257: 5 Mad L W 648: 32 Mad L Jour 621.

(7) *S C Das Gupta* v. *The Burma Railways Co, Ltd*, 1921 L B R 37 (39): 11 L B R 168.

(8) *Sudeshwari Persad* v. *Paljhan Dube*, 1931 All 722 (723): 131 Ind Cas 33 [Incorrect entries in columns 2, 6 and 8]; *Arunachellam Chettiar* v. *Haji Sheik Meera*, (1910) 7 Ind Cas 856 (857): 34 Mad 25: 8 Mad L Tim 226: 1910 Mad W N 688 [Application praying only for rateable distribution is not a valid application]; *Balaji* v. *Gopal*, 1929 Nag 148 (150): 25 Nag L R 94: 116 Ind Cas 655: 12 Nag L J 64, (Do.); *Bhupendra Narain Mander* v. *Janeswar Mander*, 1926 Pat 533 (534): 7 Pat L Tim 350: 90 Ind Cas 761 [Flagrantly defective application]; *Gouree Sunker* v. *Arman Ali*, (1874) 21 Suth W R 309 (310); *Oodoy Chand* v. *Nobo Coomar*, (1868) 10 Suth W R 428 (428).

(9) *Saudamini Ghose* v. *Jessore Registered Loan Co, Ltd*, 1926 Cal 1146 (1148): 96 Ind Cas 554; *Prosanna Kumar* v. *Jotindra Nath Bose*, 1924 Cal 398 (398): 71 Ind Cas 1054.

Note 3.

(1) *De Penning* v. *Debendro Nath*, (1868) 9 Suth W R 549 (551) [Case under Small Cause Courts Act, S 19 of Act XI of 1865].

them are not acquainted with the facts of the case.[1] Where an application for execution is verified by a person other than the decree-holder, all that is necessary is that the Court should be satisfied that he is acquainted with the facts of the case.[2] O.21, R.11, Notes 4—7.

An application not verified is a defective application which ought to be rejected. Where the period of 12 years from the date of a decree expired when the Court was closed and the decree-holder presented an unverified petition for execution on the re-opening day it was held by the High Court of Madras that the petition ought to be rejected and not be allowed to be amended.[3]

5. **Who may apply for execution.**—*See* Note to O. 21, R. 10.

6. **Date of the decree to be given—Cl. (c).**—The date of the decree is the date on which the judgment was pronounced.[1] *See also* Notes to O. 20, R. 7. An error in the date of the decree or the omission to give it in an application for execution is not a material irregularity and will not affect the validity of the application.[2] It can be amended even after the period of limitation for execution has expired and the amendment so made would relate back to the date of the application.[3]

Where a decree was, by mistake, dated 16th February, 1929 instead of 11th February and the decree-holder was misled thereby and applied for execution on the 15th February, 1932 it was held that the decree ought to be regarded as having been passed on the 16th February, 1929 on the principle *actus curiae neminem gravabit*. An act of the Court shall prejudice no man.[4]

7. **Whether any appeal has been preferred from the decree—Sub-Cl. (d).**—It has been already mentioned in Note 5 to S. 38 that where an appeal is preferred against a decree and the decree is modified, reversed, or confirmed, it is the decree of the appellate Court that is capable of execution. This sub-clause requires that the application should state any modifications or reversals,

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Note 4.

(1) *Bhagwat Prasad* v. *Dwarka Prasad*, 1924 Pat 23 (25): 2 Pat 809: 4 Pat L Tim 513: 1923 Pat H C C 229: 74 Ind Cas 174: 1 Pat L R (Civ) 453.

(2) *Khararia Mijazilla Zamindari Syndicate, Ltd* v. *Omed Sheikh*, 1924 Cal 811 (811): 28 Cal W N 687: 80 Ind Cas 313; *Hasan Hassan Sahib* v. *Ramchandra*, 1929 Bom 196 (196): 31 Bom L R 355: 117 Ind Cas 526 [Verification by pleader]; *Ganesh Das* v. *Fatteh Chand*, (1920) 55 Ind Cas 16 (17): 2 Lah L Jour 104: 2 U P L R (Lah) 46: 31 Pun W R 1920 [Verification by decree-holder's son is sufficient]; *Gobind Prasad* v. *Hriday Thakur*, 1925 Pat 692 (693): Pat 378: 86 Ind Cas 358: 1925 Pat H C C 57: 3 Pat L R 43: 6 Pat L Tim 547, (Do.); *Gobind Prasad* v. *Hriday Thakur*, 1925 Pat 692 (693): 91 Ind Cas 211: 1925 Pat H C C 234: 7 Pat L Tim 220, (Do.); *Bakar Sajjad* v. *Udit Narain Singh*, (1904) 26 All 154 (155): 1903 All W N 209 [Verification by attorney]; *Madho Parshad* v. *Ghanaya Lal*, 1930 Lah 603 (604) [Application of next friend of decree-holder after his attaining majority—If *bona fide*, will not be dismissed]. But see *Saramma* v. *Seshayya*, (1905) 28 Mad 396 (398): 1 Mad L Tim 113 [Application by next friend after majority held to be not in accordance with law].

(3) *Raghunath* v. *Venkatesa*, (1903) 26 Mad 101 (103): 12 Mad L Jour 435.

Note 6.

(1) *Golam* v. *Goljan*, (1898) 25 Cal 109 (110, 111); *Ohhoto Rakhal* v. *Jagendra Narain*, (1909) 3 Ind Cas 391 (392): 10 Cal L Jour 467; *Afzal* v. *Umda*, (1897) 1 Cal W N 93 (94).

(2) *Jiwat* v. *Kali Charan*, (1898) 20 All 478 (480): 1898 All W N 128; *Ajudhia Ram* v. *Muhammad Munir*, 1893 All W N 112 (113); *Ghazi* v. *Kadir Baksh*, (1875-78) 1 All 212 (215); *Volkart Bros* v. *Achrajram*, 1931 Sind 160 (160): 134 Ind Cas 1182: 25 Sind L R 528.

(3) *Madho Singh* v. *Ram Bharose*, 1892 All W N 114 (115).

(4) *Nalini Kanta Ray* v. *Kamaraddin*, (1932) 56 Cal L Jour 185 (186): 141 Ind Cas 114.

O.21, R.11, Notes 7—11.

etc., which the decree of the appellate Court may have introduced in the decree of the lower Court.[1]

8. Payment or other adjustment—Sub-Cl. (e).—The applicant for execution is bound to mention in the application any payment or adjustment made between the parties after decree.[1] The non-mention of an *uncertified* payment out of Court in an application for execution does not, according to the High Court of Madras, render it an application not "in accordance with law" within the meaning of Art. 182 of the Limitation Act, 1908.[2] The Judicial Commissioner's Court of Nagpur has held that where the decree-holder deliberately omits to mention a certified adjustment, the application is not one "in accordance with law".[3]

9. Previous applications and their results.—An omission to specify all the previous applications with their dates and their results is not a material defect such as would vitiate the application and render it one not "in accordance with law" within Art. 182 of the Limitation Act.[1]

10. Amount due upon the decree—Cl. (g).—A Court will be justified in declining to act on an execution petition when the decree-holder does not state the amount due upon the decree.[1] Where a decree awards interest and the application for execution specifies the interest from the date of the decree to the date of the application, execution may be ordered for *future* interest also up to the date of sale, even though it is not specifically included in the application.[2]

The omission to mention the amount of *costs* is not a material omission and will not vitiate the application for execution.[3]

11. Against whom execution is to issue—Cl. (i).—An application for execution must state the name of the person against whom execution is sought[1]

Note 7.

(1) *Paupayya* v. *Narasannah*, (1878-80) 2 Mad (392): 1888 All W N 51. See aso *Toondun Singh* v. *Pokh Narain*, (1870) 14 Suth W R 205 (206).

Note 8.

(1) *Paupayya* v. *Narasannah*, (1878-80) 2 Mad 216 (218): 5 Ind Jur 196; *Queen-Empress* v. *Bapuji*, (1886) 10 Bom 288 (298) [Intentional omission to make such statement amounts to an offence under S 193, I P Code]; *Radha Kant* v. *Parbati*, 1921 Pat 135 (136): 6 Pat L Jour 337: 2 Pat L Tim 765: 68 Ind Cas 535; *Raghubar Prasad* v. *Sattu*, 1926 Nag 164 (166): 89 Ind Cas 1009.

(2) *Marimuthu Naicken* v. *Ramaswamy Padayachi*, (1919) 51 Ind Cas 114 (114): 10 Mad L W 66.

(3) *Mt Perabai* v. *Bhagwani Prashad*, 1924 Nag 185 (187): 78 Ind Cas 291.

Note 9.

(1) *Saudamani Ghose* v. *Jessore Registered Loan Co. Ltd*, 1926 Cal 1146 (1148): 96 Ind Cas 554: *Prosanna Kumar Chakraburti* v. *Jotindra Nath Bose*, 1924 Cal 398 (398): 71 Ind Cas 1054; *Kalka Dube* v. *Bisheshar*, (1901) 23 All 162 (163): 1901 All W N 31; *Ashraf Begam* v. *Safdar Ali*, 1891 All W N 154 (158); *Abdul Kharim* v. *Pulavarti Lakshmanaswamy*, 1928 Mad 440 (442): 27 Mad L W 475: 112 Ind Cas 36; *Rama* v. *Varada*, (1893) 16 Mad 142 (143). But see *Sahijram* v. *Tower son of Gul*, 1922 Sind 29 (30): 15 Sind L R 156: 65 Ind Cas 14 [Would be not in accordance with law where it is necessary to determine whether application is barred or not]. As to the period of limitation for an application for execution, *see* Arts. 182 and 183 of the Limitation Act.

Note 10.

(1) *Ramasa* v. *Rana Sheonath Singh*, 1921 Nag 90 (91): 4 Nag L J 207; *Guru Mahadeva Ashram Prasad Sahi* v. *Mahabir Sukul*, (1922) 65 Ind Cas 120 (120) Pat [Such an application is not a step-in-aid]. See also *Damodar* v. *Vyanku*, (1907) 31 Bom 244 (249): 9 Bom L R 199. See also *Nathu Ram* v. *Tufail Ahmed*, 1890 All W N 93 (93) [Decree-holder deliberately omitted to correct error in calculation of interest—Petition struck off for non-prosecution—Is not an application in accordance with law.].

(2) *Basanta Kumar Choudhury* v. *Rai Baikunthanath Chakravarthy*, (1932) 36 Cal W N 404 (406, 407): 1932 Cal 55: 138 Ind Cas 718.

(3) *Abdul Kharim Sahib* v. *Lakshmanaswamy*, 1928 Mad 440 (441): 27 Mad L W 475: 112 Ind Cas 36; *Sahijram* v. *Tower son of Gul*, 1922 Sind 29 (30): 15 Sind L R 156: 65 Ind Cas 14.

Note 11.

(1) *Shaikh Abdool* v. *Syud Jan Ali*, (1872) 18 Suth W R 55 (56); *Bipin Behari* v. *Zohra*, (1908) 35 Cal 1047 (1049).

Where an application is made against a dead person it cannot be acted upon, but it will be a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act if it had been made *bona fide* in ignorance of the death.[2] Similarly, where, in an application for execution the guardian *ad litem* of a minor defendant is described by mistake, as the judgment-debtor, the application will give a fresh starting point for limitation.[3] But where a minor judgment-debtor is not represented at all by a guardian, the application is not one in accordance with law and is of no effect.[4]

12. Mode in which the assistance of the Court is required—Cl. (j). —An execution application which does not specify the manner in which the assistance of the Court is required is not an application in accordance with law.[1] So also is an application asking for a relief which the Court cannot grant inasmuch as the Court is asked to do something which it is not competent to do.[2]

The words "otherwise, as the nature of the relief granted may require" in Cl. (*j*), show that the modes of execution mentioned above are not *exhaustive*.[3] But where the decree-holder prays for a particular mode of execution, he cannot ask the Court to give a different mode of execution upon that application.[4]

This rule should be read with S. 51 *ante* and O. 40, R. 1. *infra* and an order for the appointment of a receiver by way of execution of a decree must

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(2) *Samia* v. *Chokkalinga*, (1894) 17 Mad 76 (77): 4 Mad L Jour 8; *Madho Prosad* v. *Kesho Prosad*, (1897) 19 All 337 (339): 1897 All W N 75 [Such application made with knowledge of death will not save limitation]. For execution against legal representatives of a deceased judgment-debtor, *see* S 50, N 12 and N 13, Pts (6) to (8) and N 14. See also S 52, Nts 4 to 6 and 8 and *see* the following case also:—*Gopal* v. *Har Prasad*, 1892 All W N 241 (242) [Application against wrong legal representative—Step-in-aid of execution.]

(3) *Ram Lakhan* v. *Shankar*, (1918) 43 Ind Cas 519 (520) All; *Hari* v. *Narain*, (1888) 12 Bom 427 (430).

(4) *Muhammad Ismail* v. *Rashidunnissa*, (1911) 12 Ind Cas 628 (629): 8 All L J 1277; *Keshwa* v. *Malukrani*, (1918) 48 Ind Cas 415 (415): 4 Pat L Jour 35 [But where a guardian is proposed though without an application, it is a step-in-aid].

Note 12.

(1) *Shakaramchand* v. *Ghelabhai*, (1895) 19 Bom 34 (35); *Satish Chandra Mukerjee* v. *Purna Chandra Dutt*, (1911) 11 Ind Cas 696 (696) Cal [Unless the defect is remedied the application must be dismissed]; *Khajah Ramdhun Ray* v. *Abdul Gunee*, (1868) 9 Suth W R 390 (391); *Franks* v. *Nuneh Mal*, (1875) 7 All H C Rep 79 (79); *Balaji* v. *Gopal*, 1929 Nag 148 (150): 25 Nag L R 94: 116 Ind Cas 655: 12 Nag L J 64; *Ghanaya Lall* v. *Punjab National Bank, Ltd*, 1932 Lah 534 (534): 138 Ind Cas 249 [It was held on the facts that the mode of execution was sufficiently described, and that therefore it was a step-in-aid of the execution]; *Wajihan* alias *Atijan* v. *Bishwanatha*, (1891) 18 Cal 462 (465) [But where it refers to previous application, in which mode of execution is mentioned, it is in accordance with law]. But see *Mrs M Baness* v. *Col J P Turton*, 1883 Pun Re No 23 [Such an application received by Court without objection is in accordance with law].

(2) *Munawar Hussain* v. *Bijai Shankar*, (1905) 27 All 619 (621): 1905 All W N 132: 2 All L J 576; *Chatter* v. *Newal Singh*, (1890) 12 All 64 (65): 1889 All W N 200; *Muhammad Umar* v. *Kamili Bibi*, (1882) 4 All 34 (35): 1881 All W N 123; *Janardhan* v. *Narain*, (1918) 46 Ind Cas 56 (57): 42 Bom 420: 20 Bom L R 421; *Nathubhai Kusandas* v. *Pranjivan Lal Chand*, (1910) 5 Ind Cas 601 (602): 34 Bom 189: 12 Bom L R 13; *Pandarinatha* v. *Lila Chand*, (1889) 13 Bom 237 (239); *Stevens* v. *Kamta Prasad*, (1909) 2 Ind Cas 941 (942): 10 Cal L Jour 19; *Protap* v. *Peary*, (1882) 8 Cal 174 (177): 9 Cal L Rep 453: 6 Ind Jur 308; *Sukha Sindhu Sanyal* v. *Jogeswar Battacharjee*, (1910) 5 Ind Cas 480 (482) Cal; *Khet Singh* v. *Onkar Sethi*, (1905) 1 Nag L R 61 (63); *Volkart Bros* v. *Achrajram*, 1931 Sind 160 (161): 134 Ind Cas 1182: 25 Sind L R 524 [May be in accordance with law if there is a *bona fide* belief about competency]; *Varadiah* v. *Kumara Venkataperumal*, (1913) 21 Ind Cas 782 (783): 26 Mad L Jour 83: 1914 Mad W N 157: 11 Mad L Tim 530, (Do.) [Can be allowed to amend]; *Prabh Singh* v. *Bal Kishen*, 1895 Pun Re No 6, (Do.). But see *Sakar Lal* v. *Bai Parvati Bai*, (1905) 26 Bom 283 (288): 4 Bom L R 14; *Bando Krishna* v. *Narasimha*, (1912) 17 Ind Cas 210 (212): 37 Bom 42: 14 Bom L R 861.

(3) *Kuvucha Gangu Naidu* v. *Kovvuri Basava Reddy*, (1913) 18 Ind Cas 691 (695): 1913 Mad W N 821: 13 Mad L Tim 145; *Sirdarani Datar Kaur* v. *Ram Ratan*, (1920) 56 Ind Cas 173 174): 115 Pun L R 1920: 2 Lah L Jour 398: 2 U P L R (Lah) 96 [Temporary alienation].

(4) *Bhana Mal* v. *Ganpat Rai*, 1899 Pun Re No 21; *Muhammad Sadik* v. *Tikaram*, (1911) 9

O.21, R.11, Notes 12—15.

be deemed to be made under O. 40, R. 1 and must satisfy the requirements thereof.[5]

13. Certified copy of decree to be filed—Sub-R. 3.—It is not imperative that an application for execution should, in all cases, be accompanied by a copy of the decree.[1] The Court can order the execution to proceed without a copy of the decree being filed.[2] An application not accompanied by a copy of the decree cannot be said to be one not in accordance with law for the purposes of limitation.[3] It will be in accordance with law even if it is dismissed for non-compliance with an order of the Court requiring a copy of the decree to be produced.[4]

14. Concurrent applications for execution.—*See* Note 10 to S. 38, *ante*.

15. Amendment of application.—*See* Notes to R. 17 below.

O.21, R.12, Note 1.

Application for attachment of moveable property *not in judgment-debtor's possession.*

R. **12.** [S. 236.] *Where* an application is made for the attachment of any moveable property belonging to *a* judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

[1877—S. 236; 1859—S. 214. *See* Ss. 2 (13) and 60.]

Synopsis.

1. Scope of the rule.
2. Failure to annex inventory—Effect of.

Description inaccurate—Effect of. See Moveable property. See Ss. 2 (13) and 60. Note 1, F.-N. (1).

1. Scope of the rule.—This rule applies to moveables in the possession of third parties. When a third party has some moveables belonging to himself

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Ind Cas 240 (241) Oudh. But see *Durga Das Nandi* v. *Devaraj Agarwala*, (1906) 33 Cal 306 (308): 3 Cal L Jour 112: 10 Cal W N 297.

(5) *Hamendra Nath Roy Choudhry* v. *Prokash Chandra Ghosh*, 1932 Cal 189 (192): 35 Cal W N 1066: 59 Cal 205: 137 Ind Cas 98.

Note 13.

(1) *Ram Chandra* v. *Laxman*, (1907) 31 Bom 162 (164): 8 Bom L R 892; *Mathuranath Roy Chaudhuri* v. *Janaki Nath Chaudhuri*, 1930 Cal 804 (805, 806): 57 Cal 996: 129 Ind Cas 780 [Especially when it is the Court which passed the decree or when the decree is voluminous]; *Madhoo Dossia* v. *Nobin Chunder*, (1871) 16 Suth W R 25 (25) [Court which passed the decree being the executing Court]; *Dhanpat Singh* v. *Leelanund Singh*, (1869) 11 Suth W R 28 (29): 2 Beng L R App 18, (Do.); *Ramdhun Rukhit* v. *Punchanun Chakrabutty*, (1868) 10 Suth W R 144 (145): 1 Beng L R (S N) 9 (*b*), (Do.); *Gunga Gobind* v. *Makhun Lall*, (1868) 9 Suth W R 362 (362); *Sufur Ali* v. *Mohesh Chunder Kaug*, (1865) 4 Suth W R Mis 15 (16); *Raj Gir Sahay* v. *Ishwardhari Singh*, (1910) 5 Ind Cas 660 (662): 11 Cal L Jour 243; *Khettur Mohan* v. *Ishur Chunder*, (1869) 11 Suth W R 271 (272).

(2) *Raj Gir Sahay* v. *Ishwardhari Singh*, (1910) 11 Cal L Jour 243 (247): 5 Ind Cas 660 (661, 662) [Decree burnt or destroyed].

(3) *Pachayappa Achari* v. *Poojali Seenan*, (1908) 28 Mad 557 (559); *Abdul Karim Sahib* v. *Lashmanaswami*, 1928 Mad 440 (441): 27 Mad L W 475: 112 Ind Cas 36; *Dhunpat Singh* v. *Leelanund*, (1869) 11 Suth W R 28 (29): 2 Beng L R App 18; *Raghunandan Lal* v. *Badan Singh*, (1918) 43 Ind Cas 914 (915): 40 All 209: 16 All L J 87.

(4) *Raghunandan Lal* v. *Badan Singh*, (1918) 43 Ind Cas 914 (915): 40 All 209: 16 All L J 87; *Arjun Naick* v. *Lakhan*, (1918) 47 Ind Cas 993 (995): 5 Pat L W 205.

and others belonging to the judgment-debtor, an inventory is obviously necessary before an attachment could be made.[1] But where a decree is passed under S. 52 of the Code against the legal representatives of a deceased debtor and the moveable property attached is in their possession, the rule has no application.[2] The reason is that the legal representatives themselves are the judgment-debtors and therefore the property sought to be attached could not be said to be property belonging to, but not in the possession of the judgment-debtor. **O.21, R.12, Notes 1--2.**

2. Failure to annex inventory, effect of.—Where a decree-holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same as required by this rule, the application is not one in accordance with law within the meaning of Art. 182 of the Limitation Act and cannot save limitation.[1]

Application for attachment of immoveable property *to contain certain* particulars

R. **13.** [S. 237.] *Where* an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot— **O.21, R.13.**

(*a*) a description of *such* property sufficient to identify *the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers* ; and

(*b*) a specification of the judgment-debtor's share or interest *in such property* to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

[1877—Ss. 237, 238; 1859—S. 213.]

Local Amendment.

RANGOON.

The following shall be *substituted* for Order 21, Rule 13:—

(1) When application is made for execution of a decree relating to immoveable property included within the cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *kwin* or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding

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Order 21, Rule 12—Note 1.

(1) *Gopal Rao* v. *Hari Lakshman*, 1930 Bom 65 (66): 31 Bom L R 1291: 122 Ind Cas 856 [Execution against legal representatives under S 50, C P Code—Inventory not necessary]; *Dhonkal Singh* v. *Phakkar Singh*, (1893) 15 All 84 (86): 1893 All W N 36; *Sreenath Gooha* v. *Yusoof Khan*, (1881) 7 Cal 556 (559): 9 Cal L Rep 334; *Palaniappa Thevan* v. *Sadagopa Mudaliar*, (1911) 9 Ind Cas 729 (729): (1911) 1 Mad W N 133: 9 Mad L Tim 319 [Inaccurate description—Wrong date—No prejudice—Sale valid]; *Nga Tha Yah* v. *FN Burn*, (1869) 11 Suth W R 8 (16): 2 Beng L R 91 F B.

(2) *Birdichand* v. *Badesaheb*, 1927 Bom 52 (52): 50 Bom 730: 28 Bom L R 1322: 98 Ind Cas 941; *Jaffer Hussain* v. *Mashuq Ali*, 1892 All W N 55 (56): 14 All 193.

Note 2.

(1) *Abdul Rafi* v. *Maula Bakhsh*, (1915) 29 Ind Cas 479 (480): 13 All L J 706: 37 All 527; *Mahabir* v. *Saira*, 1894 All W N 54 (54); *Lachmi Kaur* v. *Dal Chand*, 1892 All W N 47 (47); *Mangal San* v. *Baldeo Prasad*, 1892 All W N 70 [Though the execution application expressly stated that it was filed to save limitation].

O.21, R.13, Notes 1—2.

the filling up of forms of process concerning immoveable property, must also be furnished so far as they are not given in the plan. In the case of other immoveable property, a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied:—

1. If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area, *kwin* number, latest holding number (if different kinds of holding, *e.g.*, rice land and garden holdings are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding), year of *kwin* map from which the holding number is taken, and revenue last assessed upon the land, must be given.

2. In the case of other agricultural land, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified.

3. In the case of land in large towns the area, block or quarter, name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot, particulars regarding that part), the holding number in the latest town survey map, if any, and year of the map, the rent or revenue last assessed on the land, must be given.

4. In the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number, the quarter or block name or number, the number of the building in the street or if it has no number, the lot number must be given.

5. In the case of immoveable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given.

6. The purpose to which land or buildings are put, the material and age of buildings, all incumbrances and Municipal taxes should be stated.

7. The judgment-debtor's share or interest in the property should be specified.

(2) The cost of the certified extract should be reckoned in the costs of the application.

Synopsis.

1. Legislative changes. 2. Specification of property.

Sufficient to identify. See Note 2, Pt. (2).

1. Legislative changes.—

This rule corresponds to the first paragraph of S. 237 of the old Code, except that the words "and in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers" have been newly added in Cl. (*a*).

The second paragraph of S. 237 requiring the list of properties to be verified has been omitted from this rule and reproduced in sub-Rule (3) of R. 66 of this order.[1]

2. Specification of property.—The rule applies only to execution of money decrees, and not to decrees made upon a charge or a mortgage.[1]

Order 21, Rule 13—Note 1.

(1) For cases under the old Code which required verification, see *Nasir-un-nissa* v. *Gafur-ud-din*, (1906) 28 All 244 (245): 1905 All W N 263; *Basdeo* v. *John Smidt*, (1899) 22 All 55 (64): 1899 All W N 172.

Note 2.

(1) *Raghunath Tewari* v. *Radhessor Kuar*, (1916) 35 Ind Cas 368 (369) Pat.

The object of requiring the boundaries and numbers to be specified is to easily *identify* the property.[2] Clause (*b*) imposes a duty on the decree-holder to specify the judgment-debtor's share or interest, to the best of his belief.[3] Thus where the share is undivided it should be so specified.[4] **O.21, R.13, Note 2.**

An application which does not contain the particulars required by this rule cannot be treated as an application in accordance with law within the meaning of Art. 182 of the Limitation Act unless the defects are remedied by amendment under R. 17.[5] (*See also* Notes to R. 17, *infra.*)

This rule applies to proceedings under the Chota Nagpur Tenancy Act, 1908, S. 210, as amended by Act VI of 1920, S. 50.

R. **14**. [S. 238.] *Where an* application *is made* for *the* attachment *of any* land *which is* registered in the office *of the* Collector, *the Court may require the applicant to produce a certified* extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for *the* land, and the shares of the registered proprietors. **O.21, R.14, Notes 1—2.**

Power to require certified **extract from Collector's register** *in certain cases.*

[1877—Ss. 237, 238; 1859—S. 213.]

Synopsis.

1. Legislative changes.
2. Applicability of the rule.
3. Application for time to produce certified extracts is a step in aid of execution.

1. Legislative changes.—

S. 238 of the old Code corresponding to this section provided that "the application *shall* be accompanied by an authenticated extract from the register of such office".[1] The present rule leaves it to the *option of the Court* to require the applicant to produce a certified extract.

2. Applicability of the rule.—Where an application for sale is made in pursuance of a mortgage decree a preliminary attachment of the mortgaged

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(2) *Ajoodhiya Dass* v. *Sheo Pershun Singh*, (1869) 11 Suth W R 175 (176); *Lack Ram* v. *Mahesh*, (1869) 12 Suth W R 488 (488); *Mahatabchand* v. *Burodanatha*, (1872) 18 Suth W R 411 (411); *Zerkalee Koer* v. *Lalla Doorga Pershad*, (1871) 16 Suth W R 149 (149); *Hurry Charan* v. *Subadar*, (1886) 12 Cal 161 (164); *Ganga Pershad* v. *Subhag Chand*, (1914) 25 Ind Cas 704 (706): 17 Oudh Cas 256: 1 Oudh L J 564 [Description conflicting—Court should ascertain by evidence]; *Ramanujachariar* v. *Pranatharthi Haracharlar*, (1912) 14 Ind Cas 588 (589) Mad. (Do.).

(3) *Agarchand Guman Chand* v. *Rakhma Hanmant*, (1888) 12 Bom 678 (682); *Ardeshir Nusserwanjee* v. *Muse Natha Amiji*, (1876) 1 Bom 601 (605); *Dayal Das* v. *Shankar*, 1931 Nag 116 (117): 27 Nag L R 318: 14 Nag L J 20: 134 Ind Cas 269; *Kali Dass* v. *Prasanna Kumar*, 1920) 55 Ind Cas 189 (191): 47 Cal 446: 24 Cal W N 269: 30 Cal L Jour 496; *Giriya Shetti* v. *Ananthamma Shettithi*, 1927 Mad 1142 (1142): 52 Mad L Jour 222: 38 Mad L Tim 49: 100 Ind Cas 493; *Tinnappa* v. *Murugappa*, (1884) 7 Mad 107 (110).

(4) *Muhammad Hussain* v. *Dip Chand*, (1892) 14 All 190 (192): 1892 All W N 53.

(5) *Sakkargauda* v. *Bhimappa*, 1931 Bom 128 (128): 32 Bom L R 1368: 129 Ind Cas 159: *Jafar Hussain* v. *Mashuq Ali*, 1892 All W N 55 (56): 14 All 193; *Ishri* v. *Serhmal*, 1890 All W N 22 (22); *Hira Lal* v. *Dulari Kaur*, 1892 All W N 3 (3); *Dhonkul Singh* v. *Phokkar Singh*, (1893) 15 All 84 (86): 1893 All W N 36; *Baldeo Sahai* v. *Kanhaya Lal*, (1916) 34 Ind Cas 955 (955): 65 Pun L R 1916: 202 Pun W R 1915.

Order 21, Rule 14—Note 1.

(1) *Ajoodhia* v. *Sheo Pershun*, (1869) 11 Suth W R 175 (176); *Lack Ram* v. *Mahesh*, (1869) 12 Suth W R 488 (489).

O.21, R.14, Notes 2—3.

properties is not necessary and therefore this rule does not apply to such a case and a Court cannot dismiss the application for failure to produce the certified extract.[1] This rule applies to proceedings under the Chota Nagpur Tenancy Act, 1908, S. 210, as amended by Act VI of 1920, S. 50.

3. **Application for time to produce certified extracts is a step-in-aid of execution.**—An application by a decree-holder for time to produce the certified copies or extracts required by this rule is a step-in-aid of execution.[2]

O.21, R.15.

R. **15.** [S. 231.] (1) *Where* a decree has been passed jointly[3] in favour of more persons than one, any one or more of such persons may, *unless the decree imposes any condition to the contrary*[5], apply for the execution of the whole decree[4] *for the benefit of them all*, or, *where any of them has died*, for the benefit of the survivors and the *legal* representatives of the deceased.

Application for execution by joint decree-holder.

(2) *Where the Court sees sufficient cause* for allowing the decree to be executed on an application made *under this rule*, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

[1877—Ss. 230, 231; 1859—S. 207.]

1. Legislative changes.
2. Scope of the rule.
3. "Where a decree has been passed jointly."
4. "Any one or more of such persons may apply for the execution of the whole decree."
5. Application by one of several decree-holders for execution in respect of his share of the decree.
6. Unless the decree imposes a condition to the contrary.
7. Execution against one of the joint judgment-debtors—Limitation.
8. Payment by judgment-debtor out of Court to one of several decree-holders.
9. Defective application under the rule—If could be amended.
10. Appeal.
11. Limitation.

Court can make such order for protecting interests of other decree-holders. See Note 2, Pt. (1).

"For the benefit of them all." See Note 4, Pts. (7) and (8) and Note 9, Pt. (1).

Issue of notice before execution—Whether necessary. See Note 4, Pt. (5).

Objection to execution—Whether can be taken in second appeal. See Note 2, F.-N. (1-a).

"Where any of them has died." See Note 4, F.-N. (1).

"Where the Court sees sufficient cause." See Note 4, Pt. (3).

Note 2.

(1) *Iqbal Narain* v. *Jaskaran*, (1918) 47 Ind Cas 639 (639): 5 Oudh L J 414.

Note 3.

(1) *Sheshadasa* v. *Bhimacharya*, (1912) 17 Ind Cas 969 (969): 37 Bom 317: 14 Bom L R 1204; *Mathura Prasad* v. *Anurago Koer*, (1910) 5 Ind Cas 579 (581): 14 Cal W N 481 [Application returned for amendment is a step-in-aid]; *Mootha* v. *Kandam*, (1915) 27 Ind Cas 811 (811) (Mad) [Even application not represented is a step-in-aid].

1. Legislative changes.— **O.21, R.15, Notes 1—2.**

1. The words "or his or their representatives" in S. 231 of the old Code, after the words "one or more of such persons" have been omitted as unnecessary in view of the provisions of S. 146, *ante*.
2. The words "unless the decree imposes any condition to the contrary" are new. *See* Note 5.

2. Scope of the rule.—There are two rules of general application governing the execution of joint decrees in favour of several persons:—

(1) One of the decree-holders alone cannot apply for execution of *his share* only of the decree, leaving the other decree-holders to take out execution for their shares.[1-a]

(2) One of the decree-holders alone cannot execute the *whole* decree so as to bind the other decree-holders by the result of such execution.

The first rule is based on the principle that the *judgment-debtor* should not be harassed by a number of applications for execution. As observed by Sir Barnes Peacock, C. J. in *Haro Sankar Sandyal* v. *Tarak Chandra Buttacharjee*, 11 Suth. W. R. 488 at p. 490:

"Suppose there was a decree for a *lac* of rupees, it could not be contended that the decree-holder could assign it to a *lac* of assignees, so as to give to each of them power to take out execution for one rupee, his portion of it. Otherwise, there might be a *lac* of executions under the decree, a *lac* of seizures and a *lac* of sales under each one of which there can be no doubt that the judgment-debtor would suffer loss. If this were allowed, the judgment-debtor must necessarily be ruined."

The second rule is based on the principle that the interests of the other decree-holders should not be jeopardised, and also on the principle that all persons representing a *single and indivisible* right must be parties before the right can be adjudicated upon. (*See* Note 7 to O. 1, R. 1.)

This rule is an exception to the second of the two rules abovementioned, in that it provides that one of several joint decree-holders can execute, under certain circumstances, the *whole* decree. In order, however, to prevent the interest of the other decree-holders from being jeopardised, the Court is given power, and is indeed bound, to make such order as is necessary to safeguard such interests.[1]

Order 21, Rule 15—Note 2.

(1a) *Banarsi Das* v. *Maharani Kuar*, (1883) 5 All 27 (31): 1882 All W N 140: 7 Ind Jur 374; *Collector of Shahjahanpur* v. *Surjan*, (1882) 4 All 72 (74): 1881 All W N 120; *Ram Autar* v. *Ajudhia Singh*, (1879) 1 All 231; *Balkishoon* v. *Md Tuzum Allee*, (1872) 4 N W P H C R 90; *Rae Damodar Das* v. *Bhola Nath*, (1870) 2 N W P H C R 413; *Doli Chand* v. *Bai Shivkar*, (1891) 15 Bom 242 (244); *Haro Shankar* v. *Tarak Chandra*, (1869) 11 Suth W R 488 (490): 3 Beng L R 114; *Purna Chandra* v. *Sarda Churn*, (1869) 3 Beng L R App 21: 11 Suth W R 241; *Nund Coomar Foutehdar* v. *Bunso Gopal Sahoy*, (1875) 23 Suth W R 342 (343); *Nubo Kishore Moojoomdar* v. *Anund Mohun Mojoomdar*, (1872) 17 Suth W R 19 (20); *Thakoordas* v. *Luchmeput*, (1867) 7 Suth W R 10 (11); *Prannath Mitter* v. *Mothooranath Chuckerbutty*, (1866) 6 Suth W R Mis 64 (65); *Muthuswami* v. *Natesa*, (1895) 18 Mad 464 (465); *Meik* v. *The Midnapur Zamindary Co. Ltd.* (1919) 53 Ind Cas 803 (804): 4 Pat L Jour 575: 1919 Pat H C C 349; *Gauri Shankar* v. *Kunwar Jang Bahadur*, 1926 Oudh 605 (605): 3 Oudh W N Supp 160: 97 Ind Cas 896 [Such application is not one in accordance with law so as to save limitation]; *Maung Sun* v. *Maung Chit*, (1897-1901) 2 U B R 247. See also *Roy Goodur* v. *Dhunneshur*, (1880) 7 Cal L Rep 117 (118) [Objection cannot be taken for the first time in second appeal]. But see *Azeezoonissa Khatoon* v. *Shushee Bhoosun Bose*, (1869) 11 Suth W R 343 (344): 3 Beng L R App 47 [S 207 of the Code of 1859 did not contain the words "the whole decree"].

(1) *Sambhusa* v. *Gopal*, (1905) 1 Nag L R 24 (30): *Mirza Abid Ali* v. *Munna Byas*, (1867) 2 Agra 183; *Ram Lal Mandal* v. *Ashtosh Mandal*, (1918) 44 Ind Cas 445 (447) Cal; *Faiz Bukhsh* v. *Sadut Ali Khan*, (1875) 23 Suth W R 282 (282); *Auzeemonnissa Khatoon* v. *Ameeroon-*

O.21, R.15, Notes 3—4.

3. **"Where a decree has been passed jointly".**—A decree directing the defendant to pay a certain sum of money to several persons *specifying their shares* therein is not a joint decree, even though the amount is made payable as an entire sum.[1] The High Court of Patna has, on the other hand, in a recent case[2] expressed an *obiter dictum* that a decree does not cease to be a joint decree merely because the shares of the decree-holders in the decretal amount has been determined by the decree. According to the High Court of Lahore, where a suit is filed in the name of a firm, the decree passed in the suit in favour of the firm must be held to be a decree passed jointly in favour of all the partners, since a firm name is only a compendious method of writing the names of all the partners.[3] But the Judicial Commissioner's Court of Sind has held that unless a declaration of the names of all the partners has been made under O. 30, R. 2, the decree in favour of the firm cannot be said to be a joint decree.[4]

This rule can apply only where a decree has been *passed jointly* in favour of more persons than one. Where a portion of a decree is transferred to another, either by assignment in writing or by operation of law, the transferee is in the position of a joint decree-holder and the Court has got the *inherent* power to grant him relief in execution by applying general principles of law analogous to this rule.[5]

4. **"Any one or more of such persons may apply for the execution of the whole decree."**—As has been seen in Note 2 above, this rule makes an exception to the general rule that all decree-holders must join in an application to execute the joint decree, and permits one or more of several joint decree-holders to apply for execution of the whole decree,[1] unless the

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nissa Khatoon, (1874) 22 Suth W R 204 (204); *Mt Amatool Russool* v. *Mt Luteefun*, (1873) 19 Suth W R 302 (302); *Indro Coomar Doss* v. *Mohinee Mohan*, (1871) 15 Suth W R 159 (159); *Tarasundari Burmoni* v. *Beharilal Roy*, (1868) 1 Beng L R A C 28; *Prakash Chandra* v. *Brindaban*, 1922 Pat 611 (612): 3 Pat L Tim 781: 1922 Pat H C C 296: 67 Ind Cas 991: 4 U P L R (Pat) 93; *A J Meik* v. *Midnapur Zamindary Co*, (1919) 53 Ind Cas 803 (805): 4 Pat L Jour 575: 1919 Pat H C C 349; *Chaudhry M Nazirul Hasan* v. *Abdul Wahab Khan*, 1925 Pat 591 (592): 1925 Pat H C C 228: 89 Ind Cas 811: 7 Pat L Tim 27.

Note 3.

(1) *Chocha Shahoo* v. *Tripora*, (1870) 13 Suth W R 244 (245); *Kuttianna Goundan* v. *Muthia Goundan*, (1892) 2 Mad L Jour 14 (15) [Suit on a mortgage-decree for a moiety in favour of plaintiff and for another moiety in favour of a defendant]. See also *Wasudev Mutha Shastri* v. *Vithal Shastri*, 1922 Mad 456 (457): 16 Mad L W 292: 1922 Mad W N 518: 70 Ind Cas 296: 31 Mad L Tim 311: 43 Mad L Jour 379 [Partition decree]; *Ayisa Bivi Ammal* v. *Jokara Bivi*, 1925 Mad 1265 (1266): 49 Mad L Jour 375: 22 Mad L W 740: 90 Ind Cas 869, (Do.).

(2) *Chandra Chur* v. *Mt Shyam Kumari*, 1932 Pat 261 (265): 11 Pat 445: 139 Ind Cas 397.

(3) *Abdul Hamid* v. *Dhanpat Mal Diwan Chand*, 1931 Lah 507 (508): 131 Ind Cas 376.

(4) *Yusuf Mahbur & Co* v. *Sadik Mahomed Umar Dossal*, 1928 Sind 37 (38): 105 Ind Cas 892.

(5) *Muthiah Chettiar* v. *Lodd Govinda Doss*, 1921 Mad 599 (601, 605): 44 Mad 919: 41 Mad L Jour 316: 14 Mad L W 287: 1921 Mad W N 649: 69 Ind Cas 337 F B. See also *Rawat Gayan Singh* v. *Banwari Lal*, (1911) 11 Ind Cas 700 (701): 34 All 72: 8 All L Jour 1229; *Madhav Prabhakar* v. *Balaji Govind Joshi*, 1927 Bom 123 (124): 29 Bom L R 75: 51 Bom 143: 100 Ind Cas 619; *Byjnath Sahoo* v. *Doolarchand Sahoo*, (1875) 24 Suth W R 245 (246); *Vasha Kuthiyakath* v. *Ashi Kalakath*, (1910) 5 Ind Cas 120 (120): 7 Mad L Tim 247; *Ramasami* v. *Anda Pillai*, (1891) 14 Mad 252 (254): 1 Mad L Jour 240 [Overruling 13 Mad 347 on review]; *Kailash* v. *Dasrath Singh*, 1929 Pat 232 (232): 119 Ind Cas 883. But see *Mohkamchand* v. *Ganga Ram*, (1917) 39 Ind Cas 654 (656): 15 Pun Re 1917.

Note 4.

(1) *Ponnampilath* v. *Ponnampilath*, (1880) 3 Mad 79 (81): 5 Ind Jur 74; *Inderjeet* v. *Sevaram*, (1873) 5 All H C 16; *Maharajah Satish Chunder Roy* v. *Saroda Pershad Mookerjee*, (1866) 5 Suth W R Mis 58 (58); *Kailash* v. *Dasrath Singh*, 1929 Pat 232 (232): 119 Ind Cas 883; *Baijnath Goenka* v. *Ravaneswar Prasad Singh*, (1920) 58 Ind Cas 212 (213): 1 Pat L Tim 426; *Maung Sun* v. *Maung Shet*, (1897-1901) 2 U B R 247; *Rai Jagatpal Singh* v. *Thakurain Bilas Kunwar*, (1907) 10 Oudh Cas 378 (382): *Anrup Misir* v. *Ramharakh Misir*, 1929 All 953 (957): 1929 All L J 1049: 51 All 998 [Per Boys, J]; *Ambaram* v. *Rimalsing Kalianji*, (1864) 2 Bom H C 103; *Bottamma* v. *Audinarayana*, (1918) 43 Ind Cas 1008 (1008) Mad [One decree-holder dying—Surviving decree-holders may execute for benefit of all including that of legal representatives of deceased]; *Teja Singh* v. *Pokhur*, (1868) 10

O.21, R.15, Note 4.

decree imposes a condition to the contrary.[2] But it does not confer an unconditional right on one of the decree-holders to execute the decree. It is within the discretion of the Court to allow such execution and the Court will act only if it sees sufficient cause for allowing such a course to be taken.[3] It may allow other decree-holders to intervene in a pending execution, if it is not being properly conducted.[4] It is also in the discretion of the Court whether or not notice should be given to the other decree-holders or to the judgment-debtor before making an order for execution under this rule.[5] Where one of several decree-holders applies for execution and the others do not object to execution being granted to him, it is not for the judgment-debtor to say that sufficient steps have not been taken to safeguard the interests of the other decree-holders.[6]

When one of several joint decree-holders executes a decree, he executes the decree *prima facie* for the benefit of all, unless there is a direction by the Court or in the decree itself which permits execution for the benefit of the executing creditor alone.[7] Therefore, where one decree-holder executes a joint decree and realises the amount due under it, the realisation is made on behalf of, and for the benefit of, all the joint decree-holders and they are entitled to recover their respective shares from him by a separate suit.[8]

The High Court of Lahore has held in the undermentioned case[9] that it need not be stated in the body of the application that it is being made for the benefit of all the decree-holders and that when the application is for

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Suth W R 95 (96): 1 Beng L R A C 62, (Do.); *Jogendra Chandra* v. *Sham Das*, (1909) 1 Ind Cas 168 (174): 36 Cal 543: 9 Cal L Jour 271, (Do.). See also *Krishna Kishore Chakaravarti* v. *Sukh Sindhu Sanyal*, (1906) 10 Cal W N 1000 (1002).

(2) *Gajadhar Pershad Sahu* v. *Bindubashini Pershad*, (1915) 29 Ind Cas 181 (183) Cal.

(3) *Sheikh Ahmed* v. *Shahzada*, (1880) 7 Cal L Rep 537 (538); *Ranee Nyna Koer* v. *Doolee Chund*, (1874) 22 Suth W R 77 (78); *Umrith Nauth Chowdhry* v. *Chunder Kishore*, (1874) 21 Suth W R 31 (32); *Mahomed Kazam* v. *Nadir Ali Shah*, 1931 Lah 5 (6): 130 Ind Cas 403: *Alathoor Badruddin* v. *Gulam Mohideen*, (1911) 12 Ind Cas 562 (564): 36 Mad 357: 10 Mad L Tim 396: (1911) 2 Mad W N 473: 25 Mad L Jour 541; *Gobardhan Das Dwarka Prasad* v. *Satish Chandra Rai*, 1922 Pat 597 (597): 1 Pat 609: 4 Pat L Tim 263: 69 Ind Cas 668 [But the fact that application is not allowed will not make it one not in accordance with law]; *Maung Sun* v. *Maung Chet*, (1897-1901) U B R Vol II 247.

(4) *Muthiah Chettiar* v. *Lodd Govinda Doss*, 1921 Mad 599 (601): 44 Mad 919: 41 Mad L Jour 316: 14 Mad L W 287: 1921 Mad W N 649: 69 Ind Cas 337 F B [Similarly in the case of part-transferee of a decree].

(5) *Durga Das Nandi* v. *Deoraj Agarwalla*, (1906) 33 Cal 306 (310): 3 Cal L Jour 112: 10 Cal W N 297 [Notice is not necessary where the decree grants injunction]; *Nawab Nushat-ud-dowla* v. *Beni Madhab*, 1926 Cal 811 (812): 30 Cal W N 562: 96 Ind Cas 692; *Ghanaya Lal* v. *Madho Parshad*, 1931 Lah 600 (601): 32 Pun L R 290: 135 Ind Cas 207. See also *Sheikh Ahmed Chowdhry* v. *Shahzada Khatoon*, (1880) 7 Cal L Rep 537 (538) [But ordinarily it should hear the other decree-holders]. But see *Umrith Nauth* v. *Chunder Kishore*, (1874) 21 Suth W R 31 (32).

(6) *Krishnappa Holla* v. *Savitri*, (1898) 8 Mad L Jour 91 (91); *Amir Ali* v. *Gopal Das*, (1920) 54 Ind Cas 924 (925) Lah; *Ghanaya Lal* v. *Madho Parshad*, 1931 Lah 600 (601): 32 Pun L R 290: 135 Ind Cas 207; *Nasiruddin* v. *Dost Mahomed*, (1932) 33 Pun L R 549 (550): 139 Ind Cas 151; *Yaramath Khan Bahadur* v. *Amir-ul-uma Bahadur*, 1926 Mad 1198 (1199): 24 Mad L W 711: 97 Ind Cas 375 [Objection taken only in appeal].

(7) *Arunachala Chettiar* v. *Virappa Chettiar*, 1928 Mad 800 (801): 112 Ind Cas 410; *Jugjeebun Goopto* v. *Goluck Monee Debia*, (1874) 22 Suth W R 354 (354); *Shib Chunder* v. *Ram Chunder*, (1871) 16 Suth W R 29 (30); *Roy Preonath* v. *Prananath*, (1867) 8 Suth W R 100 (101) [Saves limitation for all decree-holders]; *Mussamut Dhunnessuree* v. *Goodhun Sahoy*, (1869) 11 Suth W R 421 (421), (Do.); *Huruck Roy* v. *Zuhooree Mull*, (1874) 22 Suth W R 468 (468), (Do.); *Johiroonissa Khatoon* v. *Ameeroonissa Khatoon*, (1866) 6 Suth W R Mis 59 (59), (Do.).

(8) *Ganga Sahai* v. *Kesri*, 1915 P C 81 (82): 37 All 545: 42 Ind App 177: 30 Ind Cas 265: 13 All L J 999: 17 Bom L R 998: 22 Cal L J 508: 19 Cal W N 1175: 29 Mad L Jour 329: 18 Mad L Tim 203: 2 Mad L W 837: 1915 Mad W N 713 P C; *Kesri* v. *Ganga Sahai*, (1911) 11 Ind Cas 517 (518): 33 All 563: 8 All L J 616 [Affirmed on appeal by P C in 1915 P C 81]; *Khub Chand* v. *Todar Mal*, 1924 All 813 (814): 78 Ind Cas 814; *Arunachala Chettiar* v. *Virappa Chettiar*, 1928 Mad 800 (803): 112 Ind Cas 410.

(9) *Madho Parshad* v. *Ghanaya Lal*, 1930 Lah 603 (604).

O.21, R.15, Notes 4—7.

execution of the entire decree, it should be assumed that the person applying is attempting to execute it on behalf of all the decree-holders. But the High Court of Patna has held that such an application is invalid and must be disallowed.[10]

The omission on the part of the decree-holder to state in his application the names of all the persons who are interested in the decree is not such a defect as would invalidate the execution proceedings.[11]

5. **Application by one of several decree-holders for execution in respect of his share of the decree.**—It has been seen in Note 2 above that it is not open to one of several joint decree-holders to apply for execution in respect of *his share* only of the decree, and that the rule is based on the principle that the judgment-debtor should not be harassed by a multiplicity of applications by different decree-holders. Where, therefore, there is no possibility of the judgment-debtor being harassed by different applications, the bar against one of the decree-holders applying for execution will not apply. Thus where some of the joint decree-holders apply for execution with regard to a certain portion only of the decree giving up the rest and the other decree-holders, being made parties, do not object to such a giving up by the applicants, the execution asked for may be allowed and the other decree-holders cannot subsequently apply for execution of the balance of the decree.[1] Similarly, where one of the joint decree-holders intimates to the Court satisfaction of his share in the decree, this rule does not bar an application by the others for execution for the balance remaining due under the decree.[2] So also, where *A* and *B* jointly obtain a decree for money or for possession of immoveable property against *C*, and *C* as judgment-debtor either purchases his share in the decree or inherits such share from *A*, the result would be the extinguishment of the decree *pro tanto* and *B* could, therefore, execute the decree in respect of his share.[3]

6. **Unless the decree imposes a condition to the contrary.**—This rule is not applicable to the case of joint decree-holders where the execution of a joint decree is made dependent upon all the decree-holders joining in the application.[1]

7. **Execution against one of the joint judgment-debtors—Limitation.**—*See* Art. 182 of the Limitation Act.

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(10) *A J Meik* v. *Midnapur Zamindary Co. Ltd*, (1919) 53 Ind Cas 803 (804): 4 Pat L Jour 575: 1919 Pat H C C 349.

(11) *Nawab Nushat-ud-dowlah* v. *Beni Madhab*, 1926 Cal 811 (812): 96 Ind Cas 692: 30 Cal W N 562; *Ghanaya Lal* v. *Madho Parshad*, 1931 Lah 600 (601): 32 Pun L R 290: 135 Ind Cas 207; *Nasiruddin* v. *Dost Mahomed*, (1932) 33 Pun L R 549 (550): 139 Ind Cas 151; *Rameshwar Prasad* v. *Ram Ratan Ram*, 1932 Pat 359: 13 Pat L Tim 579 (581) [Omission to mention the death of co-decree-holder will not entail a rejection of the petition].

Note 5.

(1) *Tarak Nath Saha* v. *Moti Lal Agarwalla*, 1928 Cal 559 (560): 56 Cal 12: 117 Ind Cas 677 [Subsequent application for balance cannot be filed].

(2) *Tej Narain* v. *Ram Tunoo*, (1869) 12 Suth W R 370 (371).

(3) *Kudhai* v. *Sheo Dayal*, (1888) 10 All 570 (574): 1888 All W N 231: 18 Ind Jur 275; *Banarsi Das* v. *Maharani Kuar*, (1883) 5 All 27 (34): 1882 All W N 140: 7 Ind Jur 874; *Hurrish Chunder* v. *Kali Sundari*, (1883) 9 Cal 482 (494): 10 Ind App 4: 12 Cal L Rep 511: 4 Sar 406: 7 Ind Jur 161 P C [Affirming on appeal 6 Cal 594]; *Sirtaj Kuar* v. *Narendra Bahadur Pal*, 1894 All W N 15 (16); *Fazal Ilahi* v. *Habib Bakhsh*, (1910) 7 Ind Cas 474 (474): 61 Pun Re 1910: 110 Pun L R 1910: 90 Pun W R 1910. See aso *Kudhai* v. *Sheo Dayal*, 1886 All W N 125 (126).

Note 6.

(1) *Farzand* v. *Abdullah*, (1884) 6 All 69 (70): 1883 All W N 211: 8 Ind Jur 820.

O.21, R.15, Note 8.

8. Payment by judgment-debtor out of Court to one of several decree-holders.—One of several joint decree-holders cannot, as a general rule, give a valid discharge of the entire decree without the concurrence of others. A payment, therefore, to one of several decree-holders out of Court is valid only to the extent of the *share* of that decree-holder, unless it can be proved that the decree-holder who granted the discharge was an agent of the other decree-holders, or otherwise had legal authority to bind them by his acts.[1] On the same principle one of two or more joint decree-holders, is not competent, without being authorised by the other or others, to certify a payment made to him under O. 21, R. 2 so as to operate as a satisfaction of the entire decree, and the others are not debarred from executing the decree as to their shares.[2] The reason is that "when one of two or more joint decree-holders takes it upon himself to certify satisfaction of the whole decree, it is clear that no provision can be made by the Court for safeguarding the interests of the other decree-holder or decree-holders; and that if a Court was bound to recognise such an adjustment out of Court, the remaining decree-holders might be driven to another suit to recover money for which a decree had already been passed in their favour."[3]

Where the joint decree-holders are *partners* or members of a *Hindu co-parcenary*, a payment to one of them or a certificate by him under O. 21, R. 2 cannot according to the High Court of Madras,[4] be treated as satisfaction of the decree *even in part*. This view is based on the ground that a decree debt in favour of a firm or of a co-parcenary is only one asset out of the numerous other assets and that one of the decree-holders cannot legally claim any definite share in the particular decree debt. The same High Court has also held that the fact that the decree-holder receiving payment is a partner or is the managing member of the joint family is not enough to clothe him with authority to act as the agent of the other decree-

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Note 8.

(1) *Brojeswari Chowdhranee* v. *Tripoora Soonudari Debi*, (1865) 3 Cal L Rep 513 (514); *Mohima Chunder* v. *Pearee Mohun*, (1869) 11 Suth W R 262 (263): 2 Beng L R App 43; *Kaka Ram* v. *Hardi Ram*, 1930 Lah 814 (815): 126 Ind Cas 513 [Shares can be ascertained in execution], *Karam Singh* v. *D S Tailor*, 1929 Lah 462 (463): 119 Ind Cas 426; *Ram Singh* v. *Nanak Chand*, (1915) 27 Ind Cas 603 (603): 60 Pun L R 1915: 10 Pun W R 1915; *Sultan Moideen* v. *Savalayammal*, (1892) 15 Mad 343 (345): 2 Mad L Jour 50; *Sambhusa* v. *Gopal*, (1905) 1 Nag L R 24 (30). See *Lachman Das* v. *Chaturbhuj Das*, (1906) 28 All 252 (255): 1906 All W N 16: 3 All L J 49 [But payment to one of several executors who have jointly obtained a decree is not valid at all]. The Calcutta High Court has held that a judgment-debtor could not pay to a joint decree-holder as *his share* any amount, see *Bharateswari Das* v. *Bhagaban Chandra Chakraburthy*, 1928 Cal 759 (760): 33 Cal W N 193: 115 Ind Cas 513.

(2) *Moti Ram* v. *Hannu Prasad*, (1904) 26 All 334 (336): 1 All L J 40: 1904 All W N 34; *Umrao Beg* v. *Mukhtar Beg*, 1923 All 491 (495): 21 All L J 308: 45 All 401: 4 L R All (Civ) 516: 74 Ind Cas 687; *Tamman Singh* v. *Lachmin Kunwari*, (1904) 26 All 318 (320): 1904 All W N 22; *Balgobind* v. *Bhawani Deen*, (1866) 1 Agra Mis App 16; *Inderjet* v. *Newaram*, (1873) 5 N W P H C R 16; *Ram Chandra* v. *Pundlik*, 1898 Bom P J 47; *Surendra Kumar* v. *Abhay Kumar Das*, 1930 Cal 78 (79): 126 Ind Cas 124 [Extent of shares can be ascertained in execution]; *Tarruck* v. *Divendro*, (1883) 9 Cal 831 (837): 12 Cal L Rep 566: 5 Shome L R 25, (Do.); *Bibee Budhan* v. *Hafezah*, (1879) 4 Cal L Rep 70 (72); *Dhan Raj* v. *Ujain Singh*, 1906 Pun Re No 34: 93 Pun L R 1906: 52 Pun W R 1906; *Sadho Saran* v. *Mt Subhadra*, 1925 Pat 822 (823): 7 Pat L Tim 95: 1926 Pat H C C 100: 89 Ind Cas 195 [But may certify as to his share]. See also *Thima Reddi* v. *Subba Reddiar*, (1919) 49 Ind Cas 141 (147): 1918 Mad W N 507 [Where payment is in fact made to all, certificate by one only will bind all]. But see *Nyna Kaeer* v. *Doole Chund*, (1874) 22 Suth W R 77 (78).

(3) *Moti Ram* v. *Hannu Prasad*, (1904) 26 All 334 (336): 1 All L J 40: 1904 All W N 34.

(4) *Mahomed Sitar* v. *Nabikhan*, (1916) 35 Ind Cas 157 (157, 158): 31 Mad L Jour 93: (1916) 1 Mad W N 471: 3 Mad L W 579: 20 Mad L Tim 381; *Pichchakkuttiya Pillai* v. *Dorai swami Moopanar*, 1925 Mad 230 (232, 233), 17 Mad L Jour 498: 1924 Mad W N 875: 82 Ind Cas 588. But see *Krishna Hande* v. *Padmanabha Hande*, (1913) 21 Ind Cas 177 (178): 25 Mad L Jour 442: 1913 Mad W N 802: 14 Mad L Tim 233.

O.21, R.15, Notes 8—10.

holders in receiving such payment.[5] The High Courts of Allahabad[6] and Patna[7] and the Judicial Commissioner's Court of Oudh[8] have, on the other hand, held that a *karta* of a joint Hindu family has legal authority to act on behalf of the family and that a payment to, or a certificate by him will bind the other decree-holders. It has been held by the High Court of Lahore[9] and the Court of the Judicial Commissioner of Sind[10] that one partner is the *agent* of the others and that where a decree is obtained in the name of a firm, one of the partners can receive the entire money due under the decree and certify the payment.

Although a payment to one of two joint decree-holders of the whole decree amount does not, even when certified, absolve the judgment-debtor from liability to the other decree-holder, such decree-holder is not bound to proceed against the judgment-debtor in execution, but may sue to recover his share from the other decree-holder.[11]

9. **Defective application under the rule—If could be amended.**—It has been held by the High Court of Patna in the undermentioned case[1] that where in an application for execution of a decree by one of several joint decree-holders, it is not stated that the application is for the benefit of all the decree-holders, the application is invalid and cannot be allowed to be amended. It proceeds upon the view that the requirements of this rule go to the root of the execution of the decree and that while R. 17 of this Order empowers the Court to allow a defect in the requirements of Rr. 11 to 14 to be amended, it does not include this rule. But the High Court of Allahabad[2] has taken a contrary view that there is nothing in R. 17 which deprives the Court of its powers to allow amendments in relation to matters required to be mentioned by this rule.

10. **Appeal.**—The question whether an appeal lies from an order passed under this rule depends upon the consideration whether the question decided is one within S. 47 of the Code. Thus, an order allowing or refusing execution in favour of one of the decree-holders when an objection is raised by the judgment-debtor is one falling under S. 47 and, therefore, appealable as a decree.[1] But no appeal will lie against an order refusing to allow

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(5) *Mahomed Sitar Sahib & Co* v. *Nabi Khan*, (1916) 35 Ind Cas 157 (158): 31 Mad L Jour 93: (1916) 1 Mad W N 471: 3 Mad L W 579: 20 Mad L Tim 381.

(6) *Achhaibar Singh* v. *Ram Sarup Sahu*, (1913) 19 Ind Cas 645 (646): 35 All 380: 11 All L J 463.

(7) *Jhakhri Gope* v. *Phagu Mahto*, 1927 Pat 329 (330): 103 Ind Cas 75: 8 Pat L Tim 708.

(8) *Ajudhia Prasad* v. *Yasin Ali Khan*, (1913) 20 Ind Cas 457 (458): 16 Oudh Cas 146. See also *Manohar Lal* v. *Sheo Singh*, (1908) 11 Oudh Cas 246 (247).

(9) *Ghulam Muhammad* v. *Sohna Mal*, 1927 Lah 385 (387): 9 Lah L Jour 238: 28 Pun L R 307: 101 Ind Cas 742.

(10) *Yusif Mahbub & Co* v. *Salloh Mahomed Umor*, 1926 Sind 167 (169): 92 Ind Cas 387.

(11) *Somasundaram* v. *Krishnasamy*, (1906) 29 Mad 183 (183); *Arunachala Chettiar* v. *Virappa Chettiar*, 1928 Mad 800 (803): 112 Ind Cas 410 [Plaintiff is entitled to interest from date of plaint and not from the date of receipt of such amount by defendant].

Note 9.

(1) *Meik* v. *The Midnapur Zemindary Co, Ltd*, (1919) 53 Ind Cas 803 (805): 4 Pat L Jour 575: 1919 Pat H C C 349.

(2) *Dharamdeo Rai* v. *Jwala Prasad*, 1930 All 188 (191): 1930 All L J 474: 122 Ind Cas 179. See also *Judoonath Roy* v. *Ram Buksh Chuttangee*, (1867) 7 Suth W R 535 (536).

Note 10.

(1) *Lakshmi* v. *Ponnassa*, (1894) 17 Mad 394 (394); *Srimat Bhayankaran Rangacharlu* v. *Srimat Bhayankaran Ranganathacharlu*, (1907) 2 Mad L Tim 307; *Mir Khan* v. *Jive Khan*, 1898 Pun Re No 28.

execution in favour of one on the objection of another joint decree-holder[2] or against an order protecting the interests of the non-applying decree-holder.[3] O.21, R.15, Notes 10—11.

11. Limitation.—An application for execution by one of several joint decree-holders is an application in accordance with law and will afford a fresh starting point of limitation under Art. 182 of the Limitation Act.[1] It has been held by the High Courts of Calcutta, Bombay and Madras that although this rule does not allow one of such decree-holders to apply for partial execution of a joint decree, yet such an application may keep alive the right to execute the decree.[2] But the High Court of Allahabad and the Judicial Commissioner's Court of Oudh have taken the contrary view that such an application is not one in accordance with law and, therefore, will not save limitation.[3]

Where there is a decree in favour of two or more joint decree-holders and one of them is a minor, can the minor decree-holder apply to execute the decree on behalf of *all*, more than three years after the last starting point of limitation but within three years of his attaining majority? There is a conflict of opinion on this question. It has been held by the High Courts of Allahabad,[4] Bombay,[5] Calcutta[6] and Lahore[7] that the ex-minor decree-holder can apply to execute the *whole* decree, even though the other decree-holders would be barred by limitation. But the High Court of Madras[8] has, on the other hand, held that the decree cannot be executed as a joint decree. *See* S. 7 of the Indian Limitation Act.

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(2) *Ratanlal* v. *Bai Gulab*, (1899) 23 Bom 623 (625): 1 Bom L R 87; *Gooroo Das* v. *Ram Rungince*, (1872) 17 Suth W R 136 (136); *Odhoya Pershad* v. *Mahadeo Dutt*, (1872) 17 Suth W R 415 (415); *Buda Raju Hanumantha Rao* v. *Allameneni Krishnamma*, 1924 Mad 518 (519): 32 Mad L Tim 118: 70 Ind Cas 329.

(3) *Gyamonee* v. *Radha Romon*, (1880) 5 Cal 592 (593).

Note 11.

(1) *Jogendra Prasad* v. *Mangal Prasad*, 1926 Pat 160 (161): 1925 Pat H C C 315: 90 Ind Cas 847: 7 Pat L Tim 330; *Gobardhan Das* v. *Satischandra*, 1922 Pat 597 (597): 1 Pat 609: 4 Pat L Tim 263: 69 Ind Cas 668 [Application though defective saves limitation]; *Raj Behari* v. *Kali Har Gupta*, (1909) 3 Ind Cas 336 (337): 10 Cal L Jour 479; *Autoo Misree* v. *Bidhoomookhee Dabee*, (1879) 4 Cal 605 (606). See also *Amirunnissa* v. *Ahsanullah*, (1883) 13 Cal L Rep 18 (22); *Brojo Coomar Mullick* v. *Ram Buksh*, (1864) 1 Suth W R Mis 1 (2).

(2) *Kanak Prova Debi* v. *Dhirendra Nath Roy*, 1928 Cal 861 (862): 32 Cal W N 1107; *Dali Chand* v. *Bai Shivkor*, (1891) 15 Bom 242 (244): *Nepal* v. *Amrita*, (1899) 26 Cal 888 (890); *Doya Moyee* v. *Nilmonee*, (1876) 25 Suth W R 70 (70); *Pran Kishore* v. *Kishen Chunder*, (1871) 16 Suth W R 267 (268); *Shib Chunder Dass* v. *Ram Chunder Poddar*, (1871) 16 Suth W R 29 (30); *Koylas Nath Ghose* v. *Nitya Shama Dossee*, (1871) 15 Suth W R 449 (450); *Ponnampilath Parapravan* v. *Ponnampilath Parapravan*, (1877-78) 3 Mad 79 (81): 5 Ind Jur 74. See also *Indurjeet* v. *Mazum*, (1866) 6 Suth W R Mis 76 (77); *Seetaput Roy* v. *Syed Ali Hossein*, (1875) 24 Suth W R 11 (12).

(3) *Ram Autar* v. *Ajudhia*, (1875-78) 1 All 231 (234): 1 Mad L R 309; *The Collector of Shahjahanpur* v. *Surjan Singh*, (1881) 4 All 72 (74): 1881 All W N 120; *Gauri Shankar* v. *Kunwar Jang Bahadur*, 1926 Oudh 605 (605): 3 Oudh W N Sup 60: 97 Ind Cas 896; *Nanda Rai* v. *Raghunandan*, (1885) 7 All 282 (283): 1885 All W N 41 [But if not objected to by judgment-debtor, subsequent application will not be barred].

(4) *Zamir Hassan* v. *Sundar*, (1900) 22 All 199 (204): 1900 All W N 8 [Overruling 1888 All W N 58].

(5) *Govindram* v. *Tatia*, (1896) 20 Bom 383 (385); *Ganpat Shantaya* v. *Sheshgiri Shrinivas*, (1904) 6 Bom L R 647 (648).

(6) *Surja Kumar* v. *Arunchunder*, (1901) 28 Cal 465 (468): 5 Cal W N 767; *Sheikh Jamir* v. *Srimati Lal Bibi*, (1908) 7 Cal L Jour 308 (309): *Anando Kishore Das* v. *Anando Kishore Bose*, (1887) 14 Cal 50 (54): 11 Ind Jur 143.

(7) *Mahomed Kazam* v. *Nadir Ali Shah*, 1931 Lah 5 (6): 130 Ind Cas 403.

(8) *Periasami* v. *Krishna Ayyan*, (1902) 25 Mad 431 (435): 12 Mad L Jour 166 F B; *Seshan* v. *Rajagopalan*, (1890) 13 Mad 236 (241). See also *Johnson* v. *Madras Ry Co.* (1905) 28 Mad 479 (485): 15 Mad L Jour 363.

O.21, R.16.

R. 16. [S. 232.] *Where* a decree *or, if a decree has been passed jointly*[7] *in favour of two or more persons,* [8]*the interest of any decree-holder in the decree is* transferred[3] by assignment in writing[4] or by operation of law[5], *the transferee may apply for execution of the decree* to the Court which passed it; and the decree *may be executed*[11] in the same manner and *subject to the same conditions*[21] as if the application were made by such decree-holder:

Application *for execution* by transferee of decree.

Provided *that*, where the decree, *or such interest as aforesaid*, has been transferred by assignment, notice[14] of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections[15] (if any) to its execution:

Provided also that, where a decree for *the payment of* money[17] against *two or more* persons has been transferred to one of them[16], it shall not be executed against the others.

[1877—S. 232; 1859—S. 208.]

Local Amendments.

LAHORE.

In the first proviso *omit* the words "and the judgment-debtor".

NAGPUR

In Rule 16 *after* the words, "which passed it", *insert* the words "or to any Court to which it has been sent for execution".

N.-W. F. P.

For the first proviso to Rule 16, *substitute* the following proviso:—

"Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor; and unless an affidavit by the transferor admitting the transfer is presented with the application, the decree shall not be executed, until the Court has heard his objections (if any) to its execution."

RANGOON.

For the first proviso to Rule 16, the following shall be *substituted*, namely:—

"Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor; and, unless an affidavit by the transferor admitting the transfer is filed with the application, the decree shall not be executed until the Court has heard his objections (if any) to its execution."

Synopsis.

1. Legislative changes.
2. Decree.
3. "Where a decree has been transferred."
4. Transfer by assignment in writing.
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6. Benamidar.
7. Part transfer of a decree.
8. Pledge of decree.
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10. Transfer when takes effect.

11. Rights of the transferee.
12. Application for execution must be made to the Court which passed the decree.
13. Award.
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17. "Decree for the payment of money."
18. Attachment of decree by co-judgment-debtor.
19. Application for substitution by transferee.
20. Transfer of decree against company in liquidation.
21. Equities enforceable against the original decree-holder.
22. Appeal.
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Application by a transferee from the original transferee. See Note 12, F.-N. (1).
Assignment of decree pending execution. See Note 19, Pt. (4).
Death of decree-holder—Legal representative must apply for fresh execution. See Note 19, Pt. (6).
"Decree-holder"—Meaning. See Note 3, Pt. (6).
"May be executed"—Discretion of Court. See Note 11, Pts. (1) and (2).
Principle of rule. See Note 3, Pt. (1).
Person entitled to assignment of decree—Whether can apply before assignment. See Note 4, F.-N. (3).
Registration of assignment—Whether necessary. See Note 4, Pts. (5), (6), and (7).
"Subject to the same conditions." See Note 21.
"The interest of any decree-holder." See Note 3, Pt. (10).
"The transferee may apply for execution." See Note 11.
Transferee of maintenance decree—Whether can apply. See Note 3, Pt. (12).
Transfer of property only—Whether transfer of decree. See Note 3, Pt. (4).

1. Legislative changes.—

1. The words "or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree", are new. *See* Note 7, *infra*.

2. The words "if that Court thinks fit" which occurred in the old S. 232 before the words "the decree may be executed in the same manner . . . ." have been omitted. *See* Note 11, *infra*.

3. The words "decree for money" in the second proviso have been changed into "a decree for the payment of money . . . .". *See* Note 17, *infra*.

2. Decree.—The provisions of this rule in the first paragraph as well as in the first proviso are not restricted to *money* decrees, they apply to mortgage decrees also.[1] As to the applicability of the second proviso, *see* Note 17, *infra*.

3. "Where a decree has been transferred."—The principle of this rule is that no one can execute a decree except the decree-holder or a person to whom the decree has been *transferred* by assignment in writing or by operation of law.[1] A third person cannot, therefore, apply for execution of a decree unless there is a transfer to him of the decree by the original decree-holder.[2] Where on the

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Order 21, Rule 16—Note 2.

(1) *Sarju* v. *Thakur*, (1920) 58 Ind Cas 743 (745): 42 All 544: 18 All L J 690: 2 U P L R (All) 174.

Note 3.

(1) *Shib Charan Das* v. *Ram Chander*, 1922 All 98 (99): 66 Ind Cas 878.

(2) *Abidoonissa* v. *Ameeroonissa*, (1877) 2 Cal 327 (334): 4 Ind App 66: 3 Sar 677: 1 Ind Jur 172: 3 Suth 371 P C.

O.21, R.16, Note 3.

death of *A*, the plaintiff in a suit, his widow *B* continues the proceedings as his legal representative and obtains a decree, *C* claiming to be the real heir of *A* cannot apply to execute the decree inasmuch as there is no *transfer* of the decree by *B* in his favour.[3] The rule is, however, intended primarily for those cases where the applicant for execution does not *appear as decree-holder in the decree* and he applies for execution on the basis of a transfer of the decree; it does not, therefore, apply where the applicant is one whose name is already in the decree as one of two persons in whose favour the decree has been passed and who claims on the death of the other decree-holder to execute the decree as the surviving decree-holder.[3-a]

A transfer in writing of the *property* dealt with by the decree is not a transfer of the decree itself and the transferee cannot apply under this rule.[4] It has, however, been held by the High Court of Rangoon that it is a matter of construction of the deed of transfer whether the decree also was intended to be transferred by the transfer of the property,[5] and the words of the rule relating to the transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment. The assignee of decree to be subsequently passed cannot apply for execution under this rule.[6] Thus a person who obtains a transfer, pending suit, of the property forming the subject-matter of the suit is not entitled to execute the decree subsequently passed unless his name has been substituted in place of his vendor under O. 22, R. 10.[7] Similarly, the assignee of a preliminary decree who has not taken steps to be impleaded in the suit cannot apply to execute the final decree in the suit.[7-a]

The High Court of Bombay has, however, held in the undermentioned case[8] that the effect of the transfer was, in equity, to vest, in the transferee, the interest in the decree which was afterwards obtained and that the decree

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(3) *Abidoonissa* v. *Ameeroonissa*, (1877) 2 Cal 327 (334): 4 Ind App 66: 3 Sar 677: 1 Ind Jur 172: 3 Suth 371 P C.

(3-a) *Rameshwar Prasad Bhagat* v. *Ram Ratan Ram*, (1932) 13 Pat L Tim 579 (580, 581): 1932 Pat 359.

(4) *Perumal Naidu* v. *Marukrithammal*, 1927 Mad 240 (241): 98 Ind Cas 856; *Hanerajpal* v. *Mukhraji*, (1908) 30 All 28 (30): 4 All L J 759: 1907 All W N 280; *Ram Sahay* v. *Gaya*, (1885) 7 All 107 (110): 1884 All W N 224; *Shib Charan Das* v. *Ram Chander*, 1922 All 98 (99): 66 Ind Cas 878 [Transfer after decree but pending appeal]; *Vithal Laxman Naik* v. *Mahadev Raghunath*, 1924 Bom 426 (427): 26 Bom L R 333: 80 Ind Cas 249; *Ahmad Shah* v. *Faujdar Khan*, (1920) 55 Ind Cas 983 (984): 2 Lah L Jour 1: 1920 Pun W R 11: 1920 Pun L R 28; *Jamsetji* v. *Hari Dayal*, (1908) 32 Bom 181 (184): 10 Bom L R 18.

(5) *Abdul Kader* v. *Daw Yin*, 1930 Rang 308 (311, 312): 128 Ind Cas 584.

(6) *Bhandari* v. *Ramachandra*, (1907) 17 Mad L Jour 391 (392): 2 Mad L Tim 197; *Peer Mahomed Rowthen* v. *Raruthanambalam*, (1915) 30 Ind Cas 831 (831) Mad [17 Mad L Jour 312 foll]; *Mathurapore Zemindary Co, Ltd* v. *Bhasaram*, 1924 Cal 661 (665): 51 Cal 703: 28 Cal W N 626: 39 Cal L Jour 373: 80 Ind Cas 881; *Genaram* v. *Hanmantaram*, 1926 Bom 406 (407): 28 Bom L R 761: 96 Ind Cas 833; *Lalchand Khushaldas* v. *Hussainio Mamo*, 1927 Sind 78 (83): 97 Ind Cas 257. See also *Jamsetji Manekji* v. *Hari Dayal*, (1908) 32 Bom 181 (184): 10 Bom L R 18 [When decree for injunction was not assigned but the land being the subject-matter of suit was sold, and vendee was obstructed].

(7) *Mathurapur Zamindary Co, Ltd* v. *Bhasaram*, 1924 Cal 661 (665): 51 Cal 703: 28 Cal W N 626: 39 Cal L Jour 373: 80 Ind Cas 881 [Dissenting from 57 Ind Cas 874 (877)]; *Prabashinee Debi* v. *Rasiklal Banerjee*, 1932 Cal 439 (439): 59 Cal 297: 137 Ind Cas 857; *Thakuri Gope* v. *Malik Mokhtar Ahmad*, 1922 Pat 563 (564): 1922 Pat H C C 256: 3 Pat L Tim 625: 69 Ind Cas 959 [S. 146 cannot be invoked as it is subject to this rule].

(7-a) *Ramanadhan Chettiar* v. *Ramachandra Sivaji*, 1926 Mad 1129 (1130): 29 Mad L W 392: 97 Ind Cas 754; *Kanniah Naidu* v. *Chengamma Naidu*, (1916) 32 Ind Cas 981 (981) (Mad) [The applicant may however be directed to amend the petition as one under O. 22, R. 10].

(8) *Purmanand Das Jiwandas* v. *Vallabdas Wallji*, (1887) 11 Bom 506 (512).

must be taken to have been transferred by *operation of law*. The High Court of Rangoon has dissented from the above reasoning of the High Court of Bombay and has held that the words "by operation of law" cannot be invoked so as to make an assignment in writing, an assignment by operation of law.[9] O.21, R.16, Notes 3—4.

When a decree is assigned, what is really transferred is not the decree alone, but the interest of the decree-holder in the decree as may be finally determined. Therefore an assignment of the decree of the trial Court carries with it the right to execute the decree passed in appeal.[10]

It has been held by the High Court of Calcutta in the undermentioned case[11] that the transferee of a decree for future maintenance is entitled to apply for execution in respect of the amounts that fall due from time to time and that S. 6 of the Transfer of Property Act will not apply when the cause of action has merged in the decree. But the High Court of Madras[12] has held that only that portion of the maintenance decree that related to the arrears of maintenance already accrued due could legally be transferred.

4. **Transfer by assignment in writing.**—An assignee of a decree under an *oral* transfer has no *locus standi* to apply for execution under this rule.[1] In order to enable a transferee to apply, the transfer must be effected by an instrument *in writing*.[2] A mere *contract* for sale of a decree without an assignment in writing in favour of the purchaser, is not enough.[3] Nor does a release of his rights by a decree-holder in favour of another operate as an assignment.[4]

It has been held by the High Courts of Allahabad, Calcutta and Lahore that a decree for sale of immovable property is itself not immovable property and, therefore, an assignment of such a decree does not require to be registered.[5]

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(9) *Abdul Kader* v. *Daw Yin*, 1930 Rang 308 (311): 128 Ind Cas 584.

(10) *Ponnuswami* v. *Chidambaram*, (1918) 44 Ind Cas 849 (849): 35 Mad L Jour 294: 1918 Mad W N 194: 23 Mad L Tim 213: 7 Mad L W 566. See also *Ramakrishna Ayyar* v. *Narayana Ayyar*, (1897) 7 Mad L Jour 227 (228, 229) [And a satisfaction entered on the decree, made subsequent to the assignment is binding on him].

(11) *Asad Ali* v. *Haidar Ali*, (1910) 6 Ind Cas 826 (829): 38 Cal 13: 12 Cal L Jour 130: 14 Cal W N 918.

(12) *Venkataramaniah* v. *Venkatacharlu*, (1909) 3 Ind Cas 444 (444): 33 Mad 80: 6 Mad L Tim 242: 6 Mad L Tim 294.

Note 4.

(1) *Parvata* v. *Digambar*, (1891) 15 Bom 307 (309); *Javermal Hirachand* v. *Umaji Hayabati*, (1886) 9 Bom 179 (181); *Mathurapur Zemindary Co, Ltd* v. *Bhasaram*, 1924 Cal 661 (665): 51 Cal 703: 28 Cal W N 626: 39 Cal L Jour 373: 80 Ind Cas 881; *Ramanathan* v. *Raghavendra*, (1912) 16 Ind Cas 807 (807) (Mad); *Ramanathan Chettiar* v. *Sokkanatha Goundan*, (1912) 13 Ind Cas 78 (79): (1911) 2 Mad W N 559: 10 Mad L Tim 532.

(2) *Jatindra Nath* v. *Peyer Deye Bibi*, (1916) 34 Ind Cas 69 (71): 1916 P C 147: 43 Cal 990: 43 Ind App 108: 14 All L J 527: 18 Bom L R 509: 24 Cal L Jour 67: 20 Cal W N 866: 31 Mad L Jour 248: 20 Mad L Tim 25: 3 Mad L W 553: (1916) 1 Mad W N 403 (P C). See *Kalimuddin* v. *Tata Industrial Bank, Ltd*, 1925 Oudh 417 (417): 2 Oudh W N 352: 12 Oudh L J 538: 88 Ind Cas 1016: 29 Oudh Cas 98 [Assets of Decree-holder Bank transferred to another]; *Miller* v. *Abinash Chunder Dutt*, (1900) 4 Cal W N 785 (787) [Decree in favour of insolvent transferred to surety on annulment of adjudication]; *Antaji* v. *Durga Prasad*, 1884 All W N 39 (39) [In lifetime of father son not competent to apply in the absence of assignment in writing].

(3) *Jatindra Nath Basu* v. *Peyer Deye Bibi*, 1916 P C 147 (148): 43 Cal 990: 43 Ind App 108: 14 All L J 527: 18 Bom L R 509: 24 Cal L Jour 67: 20 Cal W N 866: 31 Mad L Jour 248: 20 Mad L Tim 25: 3 Mad L W 553: (1916) 1 Mad W N 403: 34 Ind Cas 69 (P C); *Pandu* v. *Savla*, 1925 Bom 472 (472): 27 Bom L R 1109: 90 Ind Cas 561 [Similarly a person entitled to obtain an assignment of a decree under another decree cannot apply].

(4) *Ram Newak Lal* v. *Satruhan Deo Sahai*, 1927 Pat 170 (171): 8 Pat L Tim 168: 101 Ind Cas 616.

(5) *Mumtaz Ahmad* v. *Sri Ram*, (1913) 21 Ind Cas 462 (463): 35 All 524: 11 All L J 815; *Abdul Majid* v. *Muhammad*, (1891) 13 All 89 (91, 92): 1890 All W N 186; *Gous Mahomed* v. *Khawas Ali*, (1896) 28 Cal 450 (454); *Ram Ratan Chuckerbutty* v. *Jogesh Chandra Bhattacharya*, (1908) 12 Cal W N 625 (627); *Jaswant*

O.21,R.16, Notes 4—5.

But the High Court of Bombay has taken a contrary view.[6] In any view a *personal* decree against a defendant is transferable without registration even though the decree may be a mortgage decree as against the other defendants.[7]

5. **Transfer by operation of law.**—Ordinarily transferees by operation of law would include the following persons[1]:—

(1) In the case of a deceased decree-holder, his legal representatives.

(2) In the case of an insolvent debtor the Official Assignee or Official Receiver.

(3) The purchaser of a decree at a Court sale.

The following are also some of the instances of transfer by operation of law:—

(1) *A* obtains a decree against *X*. *B*, his son, sues *A* for partition and obtains a decree for 1/5th share of the decree obtained by *A*. *B* is entitled to apply for execution as transferee by operation of law.[2]

(2) *A*, a trustee obtained a decree for rent against certain tenants. *A* filed another suit and obtained therein a declaration that the trust was incapable of being executed. It was held that thereafter the original owner of the properties could apply to execute the decree for rent without actual assignment.[3]

(3) Where, on the revocation of a probate of a will, the minor son of the testator succeeds to the estate, he is entitled to execute the decree obtained by the executrix.[4]

(4) A mortgagee who has obtained a final decree for foreclosure against the mortgagor who in turn has obtained a decree for possession of the immovable properties comprised in the mortgage, is an assignee by operation of law.[5]

(5) Where a mortgage is foreclosed and a pre-emptor obtains a decree for pre-emption of the same properties, he is a transferee of the foreclosure decree.[6]

Rai Datta Chowdhry v. *Mt Lajwanti*, 1928 Lah 70 (71): 107 Ind Cas 603. But see *Koob Lal* v. *Nittyanand*, (1883) 9 Cal 839 (842): 12 Cal L Rep 393: 8 Ind Jur 38 [Entitled to execute it only as a money decree].

(6) *Gopal Narayan* v. *Trimbak*, (1875-77) 1 Bom 267 (268).

(7) *Krishnayya* v. *Sriramulu*, 1928 Mad 142 (142): 106 Ind Cas 485.

Note 5.

(1) *Mathurapur Zemindary Co. Ltd* v. *Bhasaram Mondal*, 1924 Cal 661 (665): 51 Cal 703: 28 Cal W N 626: 39 Cal L Jour 373: 80 Ind Cas 881. See *Sailendra Nath Ghose* v. *Surendra Nath De*, 1930 Cal 614 (615): 34 Cal W N 437: 57 Cal 1137: 129 Ind Cas 572 [Legal representative]; *Alagirisami Naidu* v. *Venkatachalapathy Ayyar*, (1908) 31 Mad 77 (79): 17 Mad L Jour 566, (Do.); *Kuppusami Ayyangar* v. *Subbarayya Rowtha*, (1912) 13 Ind Cas 324 (326): 22 Mad L Jour 161: 11 Mad L Tim 15: 1912 Mad W N 1 [Purchaser of decree in Court sale].

(2) *Ramasami* v. *Anda Pillai*, (1891) 14 Mad 252 (254): 1 Mad L Jour 240 [Reversing 13 Mad 347]. See also *Doorga Pershad* v. *Lalla Juggannath Pershad*, (1869) 1 N W P 81; *Sreepada Brahmayya Pantulu* v. *Parasurammayya*, (1902) 12 Mad L Jour 348 (349) [Person becoming entitled under a decree to execute another decree].

(3) *Gobind Singh* v. *Maharaja Kumar Gopal Saran Singh*, 1924 Pat 343 (345): 4 Pat L Tim 731: 2 Pat L R 27: 80 Ind Cas 652.

(4) *Umasoondary Dassy* v. *Projonath Bhuttacharjee*, (1889) 16 Cal 347 (349). See also *Manorath Das* v. *Ambhica Kanta Bose*, (1909) 1 Ind Cas 57 (58): 13 Cal W N 533: 9 Cal L Jour 443 [Minor beneficiary attaining majortiy—Authority of executor terminated—Is a transferee].

(5) *Rai Bahadur Lala Onkar Das* v. *Shahbaz Khan*, (1905) 1 Nag L R 49 (51).

(6) *Durga Prasad Singh* v. *Bishunnath Baksh Singh*, 1927 Oudh 358 (359): 4 Oudh W N 810: 104 Ind Cas 831.

(6) A holder of a certificate of administration granted under S. 3 of the Bombay Regulation VIII of 1827 is a transferee by operation of law.[7] O.21, R.16, Notes 5—6.

But if a decree obtained by a member of a joint Hindu family is allotted to another member at a family partition, the latter is not a transferee by operation of law and, therefore, must get an assignment in writing from the decree-holder to enable him to apply under this rule.[8] A person does not become a transferee by operation of law from a decree-holder by merely obtaining another decree against him.[9]

6. Benamidar.—*A* obtains a decree against *B* and transfers it to *C benami* for *D*. It has been held by the High Court of Calcutta that *D* is the person entitled to execute the decree, that *C*, not being the *real* transferee cannot apply under this rule, and that a mere application by him for execution cannot be held to be one in "accordance with law" for the purposes of limitation[1] but that it will be one in "accordance with law" if, with the permission of the Court *he is allowed to execute the decree*.[2] On the other hand, the High Courts of Madras[3] and Lahore[4] and the Judicial Commissioner's Court of Sind[5] have held that the "transferee" referred to in the rule is the transferee *named as such* in the transfer, and that the real owner is not entitled to apply. The High Courts of Allahabad[6] and the Chief Court of Lower Burma[7] have also held that the *benamidar* is entitled to apply without deciding whether the *real* owner can or cannot do so.

Where the transferee of a decree dies and thereupon, his heirs and a person alleging that the transferee was only a *benamidar* for him apply separately to execute the decree, the Court has got power under S. 47, sub-S. 3 to enquire who is the representative of the deceased and the question of *benami* can be gone into in execution proceedings.[8]

Where the decree itself is obtained by a *benamidar*, the Chief Court of Oudh has held that the *benamidar* has the right to execute the decree.[9] The

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(7) *Khanderav Rayajiram* v. *Ganesh Shastri*, (1887) 11 Bom 368 (370).

(8) *Ramanathan Chettiar* v. *Raghavendra Rao*, (1912) 16 Ind Cas 807 (807) (Mad); *Salekhan* v. *Vishvanath*, (1911) 9 Ind Cas 349 (349): 13 Bom L R 22; *Govind* v. *Pandu*, 1885 Bom P J 195 (195).

(9) *Fazlur Rahman Ahmad* v. *Mt. Kokila*, 1926 Pat 320 (320): 5 Pat 511: 96 Ind Cas 446: 7 Pat L Tim 793.

Note 6.

(1) *Gour Sundar* v. *Hem Chunder*, (1889) 16 Cal 355 (363): 13 Ind Jur 381; *Deno Nath* v. *Lallit Coomar*, (1883) 9 Cal 633 (634): 12 Cal L Rep 146; *Abdul Kareem* v. *Chukkhun*, (1879) 5 Cal L Rep 253 (256).

(2) *Balkrishen Das* v. *Bedmati Koer*, (1893) 20 Cal 386 (395, 396); *Nadir Hossein* v. *Peeroo*, (1875) 19 Suth W R 255 (260): 14 Beng L R 425 Note.

(3) *Palaniappa Chetty* v. *Subramanian Chettiar*, 1925 Mad 701 (702): 48 Mad L Jour 419: 21 Mad L W 545: 88 Ind Cas 409: 48 Mad 553 [Dissenting from 21 Mad 388]; *Challam Chetty* v. *Seeni Chetti*, (1918) 43 Ind Cas 801 (804): 7 Mad L W 201: 1918 Mad W N 226. See also *Arasappan* v. *Pulugasary*, (1907) 6 Mad L Jour 31 (32).

(4) *Gurdial Singh* v. *Gurbaksh Singh*, 1927 Lah 110 (110): 8 Lah 35: 9 Lah L Jour 133: 100 Ind Cas 545: 28 Pun L R 239.

(5) *Official Receiver* v. *Lalchand Hiranand*, 1930 Sind 1 (2): 119 Ind Cas 542.

(6) *Kamta Prasad* v. *Indomati*, (1915) 29 Ind Cas 593 (594): 37 All 414: 13 All L J 557.

(7) *Lall Dwarkadas* v. *Burma Railways Co.*, (1921) 62 Ind Cas 299 (301): 10 L B R 280: 13 Bur L Tim 173.

(8) *Bada Kristam Naidu* v. *Durrada Patrudu*, 1927 Mad 903 (905, 907): 26 Mad L W 308: 39 Mad L Tim 176: 1927 Mad W N 639: 53 Mad L Jour 568: 105 Ind Cas 405.

(9) *Mt Raghubansa* v. *Deputy Commissioner*, 1931 Oudh 69 (69): 7 Oudh W N 1203: 130 Ind Cas 343. See also *Rukmaniammal* v. *Ramachandra Thondaman Sahib*, 1923 Mad 317 (317): 17 Mad L W 67: 44 Mad L Jour 122: 72 Ind Cas 874 [While benamidar's application was pending, real owner impleaded as a party].

O.21, R.16, Notes 6—9.

High Court of Calcutta is, on the other hand, of opinion that he cannot so apply and that his application will, therefore, not be one in accordance with law.[10]

7. Part transfer of a decree.—Under S. 232 of the old Code it was held that the transferee of the interest of any one of several joint decree-holders in the decree could apply to execute the decree.[1] This principle has been given effect to in the present Code by adding in this rule the words "or if a decree has been passed jointly . . . in the decree" (*see* Note 1 *supra*). Similarly there is nothing in this rule or elsewhere which prohibits the transferee of a *portion* of the decree from applying under this rule.[2] The only qualification in such a case is that the transferee is in the position of a *joint decree-holder* and can execute the decree only subject to general provisions of law analagous to R. 15 *supra*.[3] *See also* notes to O. 21, R. 15.

8. Pledge of decree.—The transfer of a decree by way of a mortgage is an "assignment in writing" of a fractional interest in the decree and the mortgagee is, therefore, entitled to apply under this rule.[1]

9. Assignment of rent decree under the Tenancy Acts.—S. 148, clause (*o*) of the Bengal Tenancy Act (VIII of 1885) provides that, notwithstanding anything contained in S. 232, Civil Procedure Code (of 1882), an application for the execution of a decree for arrears of rent shall not be made by an assignee of the decree, unless the landlord's interest in the land has become vested in him.[1] The word "assignee" in that section refers only to pur-

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(10) *Ramlal Pahari* v. *Babulal Barik*, (1914) 25 Ind Cas 555 (556) Cal; *Nil Kanta Ghosal* v. *Ram Chand Roy*, 1928 Cal 835 (836) [Real owner can apply].

Note 7.

(1) *Muthunarayana* v. *Balakrishna*, (1896) 19 Mad 306 (307): 6 Mad L Jour 172; *Salcharam Nagarkar* v. *Krishna Rao Malhar*, (1887) 11 Bom 153 (158): 11 Ind Jur 258; *Narayan* v. *Vithal*, 1886 Bom P J 287 (287). But see *Seetaput Roy* v. *Sajud Ali Hossein*, (1875) 24 Suth W R 11 (12) [Dissented from in 17 Cal 341].

(2) *Kishore Chand Bhakat* v. *Gisborne & Co*, (1890) 17 Cal 341 (343); *Ram Shahai* v. *Madanlal Kanhaiyalal*, 1926 All 346 (348): 24 All L J 430: 48 All 432: 98 Ind Cas 876; *Gyamonee* v. *Radha Romon*, (1880) 5 Cal 592; *Jaswant Rai Datta Chowdhry* v. *Mt Lajwanti*, 1928 Lah 70 (71): 107 Ind Cas 603 [39 Ind Cas 654 dissented from]; *Rajah of Kalahasti* v. *Venkatappa Nayanim Bahadur*, 1928 Mad 713 (716): 27 Mad L W 544: 109 Ind Cas 872 F B; *Muthiah* v. *Lodd Govind Doss*, 1921 Mad 599 (601): 44 Mad 919: 41 Mad L Jour 316: 14 Mad L W 287: 1921 Mad W N 649: 69 Ind Cas 337; *Venkataramaniah* v. *Venkatacharlu*, (1909) 3 Ind Cas 444 (444): 33 Mad 80: 6 Mad L Tim 242: 6 Mad L Tim 294. But see *Mokamchand* v. *Ganga Ram*, (1917) 39 Ind Cas 654 (655): 1917 Pun Re No 15 [Dissented from in 1928 Lah 70]. But see *Mazhar Hussain* v. *Mt Amtul Bibi*, 1922 All 101 (102): 66 Ind Cas 679 [Dissented from in 1926 All 346].

(3) *Muthiah Chettiar* v. *Govindoss Krishnadoss*, 1921 Mad 599 (601): 44 Mad 919: 41 Mad L Jour 316: 14 Mad L W 287: 1921 Mad W N 649: 69 Ind Cas 337; *Thimma Reddi* v. *Subba*, (1919) 49 Ind Cas 141 (145): 1918 Mad W N 507; *Ramchander Naik Kalia* v. *Abdul Hakim*, (1913) 19 Ind Cas 304 (304): 35 All 204: 11 All L J 249 [Transferee cannot apply for execution of the portion transferred only]; *Rup Singh* v. *Deokinandan*, 1883 All W N 262 (262) [Must execute the whole decree); *Byjnath Sahoo* v. *Doolar Chand Sahoo*, (1874) 24 Suth W R 245 (246), (Do.); *Kazee Syud Abdullah* v. *Syud Reasut Hossein*, (1878) 20 Suth W R 51 (51) [Court should protect the interests of the others].

Note 8.

(1) *Ram Sahai* v. *Madanlal Kanaya Lal*, 1926 All 346 (348): 48 All 432: 24 All L J 430: 98 Ind Cas 876 [1922 All 101 dissented from]; *Nagendra Nath Banerjee* v. *Ambica Charan Chakrabarty*, 1929 Cal 676 (679): 50 Cal L Jour 12: 33 Cal W N 958; *Subbaraya Rowthu Minda Nainar* v. *Kuppusami Ayyangar*, (1909) 1 Ind Cas 535 (538): 34 Mad 442: 5 Mad L Tim 278.

Note 9.

(1) *Rahimuddi Lupti* v. *Jogendra Kumar Singha*, (1931) 54 Cal L Jour 596 (597, 600): 1931 Notes 19 (*d*) [Cannot be executed even as a simple money decree]; *Sambhunath* v. *Sheo Prasad*, (1913) 18 Ind Cas 689 (690): 40 Cal 462: 17 Cal L Jour 227: 17 Cal W N 276 [Landlord's interest defined]; *Arthur Henry Forbes* v. *Maharaj Bahadur Singh and others*, 1914 P C 111 (114): 41 Cal 926: 41 Ind App 91: 12 All L J 653: 25 Cal L Jur 434: 18 Cal W N 747: 15 Mad L Tim 380: 27 Mad L Jour 4: 1 Mad L W 1059: 1914 Mad W N 397: 23 Ind Cas 682 P C [The relationship of landlord and tenant must exist]; *Karunamayi* v. *Surendra*, (1899) 26 Cal 176 (178); *Dinanath* v. *Golap Mohini*, (1897) 1 Cal W N 183 (184); *Dwarka Nath* v. *Peari Mohun*, (1897) 1 Cal W N 694 (694); *Nagendra* v. *Bhuban*, (1902) 6 Cal W N 91 (91). See *Monmotho Nath* v. *Rakhal Chandra*, (1909) 3 Ind Cas 324 (329): 14 Cal W N 752: 10 Cal L Jour 396 [A case where landlord's interest vested by operation of law].

chasers for consideration and does not include a person in whom the legal estate is vested by an act of the owner, as for instance, a trustee, who has no independent interest in the property.[2] It has been held in the undermentioned case[3] that a Court executing a rent decree cannot refuse execution when the assignment had been recognised by the Court before the Tenancy Act came into force. O.21, R.16, Notes 9—11.

A provision similar to that in S. 148 of the Bengal Tenancy Act has been made also by S. 198 (*k*) of the Orissa Tenancy Act (II of 1913). By Sch. II, List II of the Agra Tenancy Act (III of 1926) it is provided that no application for the execution of a decree shall be made by an assignee of the decree unless the assignor's interest in the land to which it relates has become and is vested in such assignee.

10. Transfer when takes effect.—The transfer of a decree made by an instrument in writing takes effect from the date of such instrument, irrespective of its recognition by the Court on an application made to it under this rule.[1]

Illustrations.

1. *A* brought certain properties to sale in execution of a decree obtained by him against *F*. Pending execution proceedings *A* assigned his decree to D. Subsequently two days before sale, *A* reported that the decree had been satisfied by payment. *D* intervened and objected to the record of satisfaction being made. It was held that if his transfer was true he was a representative of *A* and the matter must be enquired into. *Dwar Buksh* v. *Fatik*, I. L. R. 26 Cal. 250.

2. *M* had obtained a money decree against *H. R* in execution of a decree obtained by him against *M* applied under O. 21, R. 53 and recovered the amount due under *M's* decree. Thereupon *C*, claiming under an assignment of the decree in writing from *M* prior to *R's* attachment, sued *R* for the recovery of the money drawn by him. It was held that *C's* title to the decree was complete on the date of the assignment and therefore prevailed as against *R's* attachment. *Co-operative Town Bank of Padigar* v. *Raman Chettiar*, I. L. R. 5 Rang. 595: 1928 Rang 25 (26).

11. Rights of the transferee.—S. 232 of the old Code contained the words "and if that Court thinks fit, the decree may be executed." It was, therefore, held that the executing Court had a discretion to allow or to refuse an application made by the transferee.[1] Under this Code, those words have

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(2) *Chatrapat* v. *Gopi Chand*, (1899) 26 Cal 750 (757): 4 Cal W N 446.

(3) *Kollash Chunder Roy* v. *Jodo Nath Roy*, (1887) 14 Cal 380 (381, 382).

Note 10.

(1) *Gulzari Lal* v. *Daya Ram*, (1887) 9 All 46 (51): 1886 All W N 287; *Badri Narain* v. *Jai Kishen Das*, (1894) 16 All 483 (492): 1894 All W N 184; *Dwar Buksh Sirkar* v. *Fatik Jalil*, (1899) 26 Cal 250 (254): 3 Cal W N 97; *Sadagopa* v. *Raghunatha*, (1909) 3 Ind Cas 938 (939): 33 Mad 62: 9 Mad L Tim 273; *Subba Naicker* v. *Saminatha Ayyar*, (1909) 1 Ind Cas 353 (353): 5 Mad L Tim 260 [An attachment after date of assignment does not prevent recognition of the transferee as such]; *Abhoy Naidu* v. *Muthukrishna Naidu*, (1907) 2 Mad L Tim 93; *Mian Sahib Levvai* v. *Gopalier*, (1916) 33 Ind Cas 558 (558) Mad; *Co-operative Town Bank of Padigon* v. *Raman Chettiar*, 1928 Rang 25 (26): 5 Rang 595: 6 Bur L Jour 221: 106 Ind Cas 853 [Reversing 1927 Rang 55: 4 Rang 426 on L P Appeal]; *Firm of Nihal Singh Mahtabsing* v. *Firm of Vishinji Gurdhan*, 1928 Sind 71 (73): 106 Ind Cas 54 [Assignee can prefer a claim against attachment after transfer]; *Lakshmichand Ghandamal* v. *Vazir Chand Deviditamal*, (1932) 26 Sind L R 158 (161): 1932 Sind 164. See also *Krishnasami Naidu* v. *Karuppan Chettiar*, 1928 Mad 478 (478): 27 Mad L W 538: 54 Mad L Jour 663: 51 Mad 681: 109 Ind Cas 563 [Auction sale of decree in favour of company by liquidator—Deed of transfer after dissolution —Held valid].

Note 11.

(1) *Parvata* v. *Digambar*, (1891) 15 Bom 307 (309); *Javermal Hirachand* v. *Umaji Hayabati*, (1885) 9 Bom 179 (181); *Balkishen* v. *Bedmati*, (1893) 20 Cal 888 (395); *Krishna Mohini Dossee* v. *Kedarnath Chuckerbutty*, (1888) 15 Cal 446 (448, 449); *Shama Poodoo Dutt* v. *Nobin Chunder Bose*, (1871) 15 Suth W R 283 (283); *Megh Narain* v. *Radha Pershad*, (1870) 13 Suth W R 224 (225): 4 Beng L R A C 200; *Bishto Churn* v. *Kishen Gopal*, (1870) 13 Suth W R

O.21,R.16, Notes 11--12.

been omitted and the transferee's right to apply does not depend upon the discretion of the Court.[2]

Where a transfer is recognised by the Court on an application under this rule, the transferee is entitled to execute the decree as if the application were made by the original decree-holder.[3] The absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his rights to execute the decree, provided the assignment is not a sham transaction.[4]

It has already been mentioned in Notes to O. 21, R. 10 *ante* that the person appearing on the face of the decree as the decree-holder is the person entitled to execution. Therefore, where the transferee of a decree does not apply under this rule for execution, the executing Court is bound to allow execution at the instance of the transferor, even after the date of the transfer till the transfer is recognised by the Court.[5]

As to the right of the transferee to apply for execution, where the decree has been attached by the holder of a decree against the transferor, *see* notes to O. 21, R. 53 *infra*.

Where an *ex parte* decree was assigned and the assignee did not take any step under this rule and thereafter on an application made by the defendant as against the original decree-holder alone, the *ex parte* decree was set aside, it was held that the transferee could not proceed with the execution until he got an order cancelling the order setting aside the *ex parte* decree.[6]

12. Application for execution must be made to the Court which passed the decree.—An application by the transferee of a decree under this rule can be entertained only by the Court which passed the decree; the Court to which the decree has been transferred has no jurisdiction to entertain the same.[1]

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207 (207); *Bharat Chunder Roy* v. *Nazir Ali Khan*, (1868) 10 Suth W R 354 (355); *Jodoonath Roy* v. *Ram Bukhsh Chukungee*, (1867) 8 Suth W R 202 (202); *Muthu Narayana Reddi* v. *Balakrishna Reddi*, (1896) 19 Mad 306 (307): 6 Mad L Jour 172; *Agra Bank* v. *Cripps*, (1885) 8 Mad 455 (463); *Waman Rao* v. *Tek Chand*, (1889) 2 C P L R 45 (46) [And the Appellate Court will not interfere unless it is shown that the discretion is improperly exercised]

(2) *Asad* v. *Haidar*, (1910) 6 Ind Cas 826 (828): 38 Cal 13: 12 Cal L Jour 130: 14 Cal W N 918.

(3) *Shama Nund Surmah* v. *Shumboo Chunder Doss*, (1867) 7 Suth W R 205 (205); *Vishnu Sakhram* v. *Krishna Rao*, (1887) 11 Bom 153 (158): 11 Ind Jur 258; *Hafiz Suleman* v. *Sheikh Abdullah*, (1894) 16 All 133 (135) [Entitled to the benefit of attachment effected before transfer]; *Kurucha Gangu Naidu* v. *Kovvuri Basava Reddi*, (1913) 18 Ind Cas 691 (694): 1913 Mad W N 821: 13 Mad L Tim 145, (Do.); *Gonesh Lal Tewari* v. *Sham Narain*, (1880) 6 Cal 213 (217): 6 Cal L Rep 533: 4 Ind Jur 419: 3 Shome L R 215: 3 Suth 773: 4 Sar 161 P C. See also *Balkishore* v. *Mahomed Tazam Allee*, (1872) 4 N W P H C R 90 [Assignee's name should be brought on record as a party].

(4) *Rami Reddi* v. *Venkatanarasimmalu Chetty*, 1928 Mad 458 (459): 109 Ind Cas 617; *Thimma Reddi* v. *Subba Reddiar*, (1919) 49 Ind Cas 141 (143): 1918 Mad W N 507.

(5) *Arichetty* v. *Thertha Malai Chetty*, (1916) 34 Ind Cas 791 (792): 3 Mad L W 521; *Situ Pedayelligadu* v. *Surya Rao Bahadur Zamindar Garu*, (1915) 31 Ind Cas 542 (542): 29 Mad L Jour 693: 2 Mad L W 1122: 18 Mad L Tim 494: (1916) 1 Mad W N 119; *Jasoda* v. *Kirtibash*, (1891) 18 Cal 639 (641); *Khettur Mohun Chuttopadhya* v. *Ishur Chunder Surma*, (1869) 11 Suth W R 271 (271); *Gopi Chand* v. *Mehr Chand*, 1931 Lah 116 (117): 31 Pun L R 961: 134 Ind Cas 194; *Faquir Mahammad Khan* v. *Pirdad Khan*, 1924 Lah 615 (616): 75 Ind Cas 844; *Ejaz Hussain* v. *Shah Zaman Mirza*, (1913) 18 Ind Cas 97 (98): 16 Oudh Cas 70; *S C Das Gupta* v. *The Burma Railways Co, Ltd*, 1921 Low Bur 37 (39): 11 L B R 163.

(6) *Bonomalai Banikya* v. *Joy Kumar Baidya*, (1915) 29 Ind Cas 673 (674) Cal.

Note 12.

(1) *Amar Chandra* v. *Guru Prosunno*, (1900) 27 Cal 488 (491) [If entertained by transferee Court, the order is without jurisdiction and can be set aside in appeal. It is not cured by S 99. Application is by transferee from the original transferee]; *Tameshar Prasad* v. *Thakur Prasad*, (1903) 25 All 443 (445): 1903 All W N 99 [Application for ratenble distribution to the transferee Court is bad]; *Kadir Bakhsh* v. *Illahi Bakhsh*, (1879) 2 All 283 (283): 4 Ind Jur 358; *Nakoda Ismail Valad A. Barucha* v. *Kassam Valad Azam Dupli*,

The reason is, as stated in *Sheo Narain Singh* v. *Hurbans Lall,* (1870) 14 W. R. 65 (66), that "it would lead to the greatest difficulties, if in one Court one party was recognised as being the holder of, and having the control over, a decree, and at the same time in another Court another party was recognised as being in that position."

As to whether a transferee can *continue* the execution proceedings initiated by the original decree-holder without a fresh application, *see* Note 19 *infra.*

13. Award.—*A* having obtained an award against *B* and filed it in Court, assigned the same to *C*. *C* applied to execute it under S. 15 of the Indian Arbitration Act (IX of 1899) which provides that the *award* on being filed in Court, shall be enforceable as a decree. It was held that *C* could execute it and that the Court in which the award was filed must be deemed to be the Court which passed the decree for the purposes of this rule.[1]

14. Notice to transferor and judgment-debtor.—The provisions of this rule as to notice are imperative; the giving of notice of the application, to the assignor and to the judgment-debtor is an indispensable condition of jurisdiction and the failure to give it renders all the proceedings in execution void as against them.[1] Where the assignee applied under this rule for notices to the assignor and the judgment-debtor and also for *attachment* of a certain property and the notice as well as the warrant of attachment were issued together, it was held that the attachment was illegal inasmuch as the objections of the judgment-debtor were not heard at that time.[2] Where in an application under this rule, by the assignee of a mortgage decree, notice is given only to the mortgagor and not to the subsequent mortgagee, who was also a judgment-debtor under the decree, the latter will not be bound by such execution and the auction-purchaser will acquire only the rights of the mortgagor, but not those of the subsequent mortgagee.[3]

The notice that is to be given under this rule is of the *application* for execution and not of the *assignment.*[4] But a written notice is not always

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(1872) 9 Bom H C R 46; *Nando Lal* v. *Chatturput,* (1902) 29 Cal 235 (236) [Notice under this rule must also be issued by the executing Court]; *Sheo Narayan Singh* v. *Harbana Lal,* (1870) 14 Suth W R 65 (66): 5 Beng L R 497; *Intzamia Committee Gurdwara Rori Sahib* v. *Saran Das,* 1931 Lah 499 (500): 132 Ind Cas 183; *Allah Baksh Fazal Din* v. *Karam Chand,* 1931 Lah 690 (691): 133 Ind Cas 643 [Transferee Court can entertain the objection that R 16 has not been complied with before transfer]; *Tharya Ram* v. *Popat Ram,* (1918) 47 Ind Cas 997 (999): 92 Pun Re 1918: 168 Pun W R 1918; *Thamboo Pillai* v. *Sriramulu,* (1907) 17 Mad L Jour 300 (301) [But it may be waived]; *Chathoth Kunki Pakki* v. *Saidindavide Kunhammad,* (1903) 26 Mad 258 (259); *Shriram* v. *Durga Prasad,* (1920) 55 Ind Cas 156 (157) Nag; *Prithvi Chand Lal Chowdhry* v. *Satya Kinkar Das,* 1932 Pat 168 (169): 11 Pat 94: 137 Ind Cas 472: 13 Pat L Tim 402.

Note 13.

(1) *Gladstone Wallis & Co* v. *Joosub Peer Mahomed & Co,* 1924 Cal 117 (118): 27 Cal W N 666: 77 Ind Cas 868.

Note 14.

(1) *Gulzari Lal* v. *Daya Ram,* (1887) 9 All 46 (49): 1886 All W N 287; *Umamoyee Dasya* v. *Jatan Bewa,* 1927 Cal 781 (782): 54 Cal 624: 105 Ind Cas 193; *Sreenath Das* v. *Achutananda Mahanti,* (1910) 6 Ind Cas 262 (263): 11 Cal L Jour 354; *Notam Das* v. *Thakar Lachman Singh,* 1921 Lah 143 (144): 2 Lah 230: 3 Lah L Jour 434: 91 Pun L R 1921: 63 Ind Cas 884; *Gul Muhammad* v. *Bandu,* (1920) 56 Ind Cas 461 (462) Lah; *Abdul Samad Sahib* v. *Sowcar Kamuruddin Sahib,* 1931 Mad 192 (193): 1930 Mad W N 1187: 131 Ind Cas 171; *Maharaja Sir Rameshwar Singh* v. *Harihar Jha,* (1920) 57 Ind Cas 250 (251): 1921 Pat 76: 1921 Pat H C C 1: 1 Pat L Tim 666: 5 Pat L Jour 390 [The fact that a notice purporting to be under S 158-B (2), B T Act (1885) has been shown to the assignor will not dispense with the necessity of complying with the rule].

(2) *Kassum Goolam Hussain* v. *Dayabhai Amarsi,* (1911) 12 Ind Cas 547 (547): 36 Bom 58: 13 Bom L R 973; *Partap Singh* v. *Guruditta Mal,* (1917) 39 Ind Cas 952 (953): 75 Pun W R 1917: 118 Pun L R 1917.

(3) *Ram Deo Ram* v. *Frank Coombs,* 1930 All 627 (627): 1930 All L J 1265: 129 Ind Cas 445: 52 All 898 [Reversing 1929 All 437].

(4) *Mussamat Bhagwanta* v. *Dewan Zamir,* 1924 Pat 576 (578): 3 Pat 596: 5 Pat L Tim

O.21,R.16, Notes 14--15.

necessary; if the judgment-debtor is present in Court at the time the order on the application is made, and has thus notice of the application, the fact that no written notice was given will not vitiate the proceedings.[5]

The object of issuing notice under this rule is to determine once for all and in the presence of all the parties the validity of the instrument of transfer. It is therefore not necessary that notice must be issued on *every* subsequent application by the transferee under this rule.[5-a]

If the judgment-debtor is dead when the assignee applies for execution, the notice required by this rule may be served on his legal representatives.[6] If the original decree-holder becomes insolvent, the Official Receiver would be entitled to notice.[7]

15. Objections to be heard.—After the service of the notice mentioned in the first proviso to this rule, the Court is bound to hear the objections, if any, of the transferor and of the judgment-debtor.[1] As has been already mentioned in Note 11 *ante*, it is not a valid objection that the assignment is not supported by consideration.[2] Nor can the judgment-debtor raise the plea that the *decree* is not valid.[3] As to the right of the judgment-debtor to plead an uncertified payment or adjustment, *see* Note 23 to O. 21, R. 2.

An assignment of a decree is not valid as against the judgment-debtor until the debtor has had notice of the assignment and, therefore, any payment made to the original decree-holder before notice is valid as against the transferee.[4]

The failure of the judgment-debtor to object to the validity of the assignment when an application under this rule is made will preclude him, under general principles of *res judicata*, from raising such objection at a subsequent stage of the proceedings.[5]

451: 1924 Pat H C C 221: 2 Pat L R Civ 249: 78 Ind Cas 766; *Mussamat Gulab* v. *Syed*, 1921 Pat 180 (182): 6 Pat L Jour 358: 2 Pat L Tim 619: 62 Ind Cas 30.

(5) *Mt Bhagwanta Kuer* v. *Dewan Zamir Ahmad*, 1924 Pat 576 (580): 3 Pat 596: 5 Pat L Tim 451: 1924 Pat H C C 221: 2 Pat L R Civ 249: 78 Ind Cas 766.

(5-a) *Brajabashi Modak* v. *Manik Chandra Modak*, 1927 Cal 694 (695): 31 Cal W N 921: 104 Ind Cas 4. See also *Mammad* v. *Muga Seth*, 1930 Mad W N 166 (168).

(6) *Khushrobhai Nasarwanji* v. *Hormazsha Phiorzsha*, (1887) 11 Bom 727 (730): 12 Ind Jur 109; *Mahalinga* v. *Kuppanna Chariar*, (1907) 30 Mad 541 (543): 17 Mad L Jour 485: 3 Mad L Tim 21.

(7) *Periathambi Nayinar* v. *Ghundhunada Nayanar*, 1928 Mad 360 (361): 109 Ind Cas 832. See also *Ussam Kassim Sait* v. *Palat Mammad Koya*, (1917) 38 Ind Cas 231 (231) Mad.

Note 15.

(1) *Harditta* v. *Nighahi*, 1922 Lah 396 (397): 4 Lah L Jour 259: 79 Ind Cas 546; *Surjan Chaudhuri* v. *Tegh Bahadur Singh*, 1931 Lah 545 (546): 131 Ind Cas 229; *Kothandapani Naidu* v. *Kuppuswami Naicker*, (1914) 23 Ind Cas 951 (951): 1 Mad L W 206.

(2) *Prasanna Kumar Punja* v. *Ashotosh Roy*, (1913) 20 Ind Cas 685 (689): 18 Cal W N 450; *Venkataramanujamma* v. *Chinna Venkata Reddi*, 1932 Mad 827 (827, 828): 1932 Mad W N 326: 137 Ind Cas 715; *Venkataswami Nhidu* v. *Rangappa Naidu*, (1915) 26 Ind Cas 944 (946): 2 Mad L W 109 [In the absence of fraud]; *Dharani Mudali* v. *Meenamba Bai Ammani*, (1912) 17 Ind Cas 617 (618): 12 Mad L Tim 592. See also *Sheo Prasad Singh* v. *P E Lall*, 1925 Pat 449 (449): 4 Pat 120: 86 Ind Cas 564 [Question when title passes, where part consideration is unpaid, depends upon the intention of the parties].

(3) *Parvata* v. *Digambar*, (1891) 15 Bom 307 (308); *Mahomed Hady* v. *Joakim*, (1916) 32 Ind Cas 492 (493): 8 Bur L Tim 216.

(4) *Tata Iron and Steel Co, Ltd* v. *Baidyanath Laik*, 1924 Pat 116 (119): 2 Pat 754: 76 Ind Cas 55.

(5) *Dwarka Das* v. *Muhammad Ashfagullah*, 1925 All 117 (118): 22 All L J 928: 5 L R A (Civ) 744: 80 Ind Cas 722: 47 All 86; *Taj Singh* v. *Jagan Lal*, (1916) 35 Ind Cas 234 (234): 38 All 289: 14 All L J 370; *Oman Prasad* v. *J Durlab Shankar*, (1914) 23 Ind Cas 286 (287): 12 All L J 206; *Mumtaz Ahmad* v. *Sri Ram*, (1913) 21 Ind Cas 462 (463): 35 All 524: 11 All L J 815; *Mulchand Ranchod Das* v. *Chagan Naran*, (1887) 10 Bom 74 (76); *Ram Ratan Chuckerbutty* v. *Jogesh Chandra Bhattacharya*,

As to objections to the executability of the decree under similar circumstances, *see* Note 23 to S. 11 *ante*, and also the undermentioned cases.[6]

16. Transfer of decree for payment of money against two or more persons to one of them.—It is a general principle of law that when one of the persons jointly liable under a decree unites in himself the two opposite characters of creditor and joint-debtor in respect of the whole decretal debt, the effect is to extinguish the liability of all the co-judgment-debtors under the decree.[1] The second proviso to this rule is based on this general principle and provides that, in such a case, the transferee cannot enforce the decree by execution against his co-debtors.[2] On the same principle where a decree has been passed jointly in favour of two or more persons and the interest of one of such decree-holders devolves upon a judgment-debtor the decree is extinguished *pro tanto*.[3] When the alleged transferee of a decree for money is found to be the *benamidar* of one of the judgment-debtors, the Court is bound, under the second proviso to this rule, to refuse to allow the assignee to execute the decree against the other judgment-debtors.[4] But an agreement between the decree-holder and some of the judgment-debtors that the decree-holder should execute the decree against the other judgment-debtors and pay the amount realised to them in consideration of the fact that they have paid the amount in advance, does not fall under the prohibition in this rule.[5]

This proviso does not make the assignment of a decree in favour of one of several judgment-debtors invalid in law; it only provides that the transferee is not entitled to enforce his rights by execution.[6] His remedy

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(1908) 12 Cal W N 625 (627); *Briji Lal Marwari* v. *Atkinson*, (1920) 57 Ind Cas 707 (708): 5 Pat L Jour 639: 1 Pat L Tim 504 [In his application to set aside the sale under O 21, R 90]. See also *Ram Baran Singh* v. *The Mufassil Bank, Ltd.*, 1925 All 206 (208): 6 L R A (Civ) 29: 83 Ind Cas 142.

(6) *Ram Charan Sahu* v. *Salik Ram Sahu*, 1925 All 662 (663): 6 L R A (Civ) 295: 87 Ind Cas 436 [Objection that decree is nullity is barred by *res judicata*]; *Prithvi Chand Lal Chaudhry* v. *Satya Kinkar Das*, 1932 Pat 168 (169): 11 Pat 94: 137 Ind Cas 472: 13 Pat L Tim 402 [Right to execution—Question barred by *res judicata*].

Note 16.

(1) *Banarsi Das* v. *Maharani Kuar*, (1883) 5 All 27 (33): 1882 All W N 140: 7 Ind Jur 374. See *Asia Bibi* v. *Malik Azir Ahmed*, (1932) 137 Ind Cas 50 (52): 1932 All L J 230 [This principle will not apply to a converse case where decree-holder acquires a share in the estate of one of the judgment-debtors].

(2) *Degumburee Dabee* v. *Eshan Chunder Sein*, (1866) 9 Suth W R 230 (234): Beng L R Sup Vol 938; *Mahomed Abdul Kadir Sahib* v. *Syed Abdul Kadir Marakkayar*, 1926 Mad 1141 (1142): 51 Mad L Jour 443: 98 Ind Cas 26 [Transfer of personal decrees brought about by death is not excluded from the operation of proviso 2]; *Annabatulla Venkataratnam* v. *Annabattulla Naidu*, (1915) 28 Ind Cas 906 (907) (Mad).

(3) *Banarsi Das* v. *Maharani Kuar*, (1883) 5 All 27 (34): 1882 All W N 140: 7 Ind Jur 374; *Sirtaj Kuar* v. *Narendra Bahadur*, (1894) 14 All W N 15 (16); *J P Wise* v. *Abdool Ali*, (1867) 7 Suth W R 136 (136); *Pogose* v. *Fukurooddeen*, (1876) 25 Suth W R 343 (343).

(4) *Sadagopa Ayyangar* v. *Sellammal*, 1922 Mad 510 (510): 16 Mad L W 758: 43 Mad L Jour 761: 31 Mad L Tim 463: 72 Ind Cas 861; *Bayyana Ramayya* v. *Nidamarthi Krishnamurthi*, (1916) 32 Ind Cas 952 (953): 40 Mad 296: 3 Mad L W 186: 19 Mad L Tim 124: (1916) 1 Mad W N 133; *Mohamad Rowther* v. *Pichai Rowther*, (1916) 35 Ind Cas 624 (624): 4 Mad L W 534; *Ponnusami* v. *Lechumanan*, (1912) 12 Ind Cas 657 (660): 35 Mad 659: 10 Mad L Tim 442: (1911) 2 Mad W N 568: 22 Mad L Jour 170 [Per Sundara Ayyar, J]; *Surjan* v. *Tegh Bahadur Singh*, 1931 Lah 545 (546): 131 Ind Cas 229; *Gian Chand* v. *Sunder Das*, 1926 Lah 666 (667): 95 Ind Cas 706; *Gurditta Mal* v. *Pratap Singh*, (1920) 54 Ind Cas 944 (945): 2 U P L R (L) 42; *Nanhelal* v. *Mangilal*, 1924 Nag 41 (42): 19 Nag L R 151: 78 Ind Cas 372; *Waman Rao* v. *Teck Chand*, (1889) 2 C P L R 45. See *Darbari Lal* v. *Damodar Das*, 1929 All 792 (792) [Transfer of decree to relative of judgment-debtor does not amount to transfer to judgment-debtor].

(5) *Ramanathan Chetty* v. *Muthu Vallaiappa Chetty*, 1927 Mad 322 (326): 52 Mad L Jour 59: 99 Ind Cas 902. See also *Lachmana Kuer* v. *Sampat Rai*, (1909) 2 Ind Cas 88 (88) All.

(6) *Arumuga Mudaliar* v. *Yogamba Bai Ammani*, (1912) 17 Ind Cas 323 (327): 13 Mad L Tim 227.

O. 21, R. 16, Notes 16–17.

is, therefore, to sue his co-judgment-debtors for contribution having regard to the proportion in which they were bound *inter se* to satisfy the decree.[7]

The words "decree for the payment of money against two or more persons" mean a decree against two or more persons *jointly*.

Illustration.

A decree directed that *N* should pay Rs. 90 and Rs. 11-5-3 as costs, and *A* should pay Rs. 30 with Rs. 3-12-4 as costs. *A* afterwards took an assignment of the decree in writing and applied to execute it against *N* to the extent of Rs. 90 and costs. It was held that the decree for money so far as it related to Rs. 90 and costs was not a decree against several persons, but against one person *N*, and therefore *A* could execute it.[8]

17. "Decree for the payment of money."—The second proviso to this rule does not apply to decrees other than *money* decrees.[1] Thus it does not apply to mortgage decrees for sale, and, therefore, an assignment of a mortgage decree in favour of one of the judgment-debtors does not extinguish the decree.[2]

The expression "decree for money" in S. 232 of the old Code (corresponding to this rule) was interpreted by the High Courts of Bombay and Calcutta to mean a personal decree for the payment of money. Thus, a decree against a legal representative for payment of money out of the assets of the deceased,[3] or a decree against a purchaser of the equity of redemption in a mortgage suit[4] was held not to come within that section. The High Court of Allahabad[5] has in a recent case held that the substitution of the expression "for the *payment* of money" for the words "for money" in the proviso is intended to emphasise the fact that the proviso is confined to cases of personal decrees. On the other hand, the High Court of Madras[6] and the Judicial Commissioner's Court of Nagpur[7] have held that this is an unduly narrow interpretation of the rule and that it is immaterial whether the assignee decree-holder is one against whom a personal money decree has been passed or one who has been directed to pay the decretal debt out of the assets in his hands.

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(7) *Anant Vinayak Gokarn* v. *Nagappa Subraya*, (1908) 32 Bom 195 (197): 10 Bom L R 89; *Khoshalee* v. *Nund Lal*, (1874) 6 N W P H C R 1 F B; *Narayan* v. *Bhau*, 1889 Bom P J 262 (263); *Ramlal Mandlal* v. *Khiroda Mohini Dasi*, (1913) 20 Ind Cas 569 (570): 18 Cal W N 113.

(8) *Anant Vinayak* v. *Nagappa Subraya*, (1908) 32 Bom 195 (197): 10 Bom L R 89.

Note 17.

(1) *Yakoob Ali* v. *Ram Doolal*, (1883) 13 Cal L Rep 272 (274); *Arumuga Mudaliar* v. *Yogamba Bai Ammani*, (1912) 17 Ind Cas 323 (327): 13 Mad L Tim 227.

(2) *Laldhari* v. *Manager, Court of Wards*, (1911) 12 Ind Cas 70 (72): 16 Cal W N 132: 14 Cal L Jour 639; *Jagabandhu Pal* v. *Haladhar Pal*, (1917) 41 Ind Cas 269 (270): 27 Cal L Jour 110; *Chidambara Thevar* v. *Subrayar*, 1926 Mad 623 (628): 23 Mad L W 515: 1926 Mad W N 224: 93 Ind Cas 58: 49 Mad 508: 51 Mad L Jour 139 [Until a personal decree is given it cannot be called a money decree]; *Rajaratna Naidu* v. *Ramachandra Naidu*, 1924 Mad 901 (901): 47 Mad 948: 47 Mad L Jour 434: 20 Mad L W 465: 1924 Mad W N 747: 35 Mad L Tim 81: 82 Ind Cas 948.

(3) *Panachand* v. *Sundrabai*, (1907) 31 Bom 308 (312, 313): 9 Bom L R 409.

(4) *Lalla Begum Pershad* v. *Holloway*, (1885) 11 Cal 393 (396).

(5) *Asia Bibi* v. *Azir Ahmed*, (1932) 137 Ind Cas 50 (53): 1932 All L J 230.

(6) *Sheopratap Dubey* v. *Sheogulam Lal*, 1924 Pat 193: 72 Ind Cas 781.

(7) *Nanhelal* v. *Mangilal*, 1924 Nag 41 (41): 19 Nag L R 151: 78 Ind Cas 372.

O. 21. R. 16, Notes 18—19.

18. Attachment of decree by co-judgment-debtor.—One *S* obtained a decree against *A*, *B*, *C* and *D*. *A* obtained decree against *S* and attached the decree of *S* and applied under O. 21, R. 53 for execution of *S's* decree against his co-judgment-debtors *B*, *C*, and *D*. It was held that *A*, by attaching *S's* decree, did not become an assignee thereof, that the prohibition in this rule did not therefore apply to such a case and that *A* was entitled to execute the decree.[1]

19. Application for substitution by transferee.—A transferee from a decree-holder can only apply under this rule to *execute* the decree; an application *merely for recognising* him as transferee is legally incompetent and must be rejected.[1] It is not also necessary for the validity of the proceedings that the substitution of the name of the transferee is actually made.[2] All that is necessary is that the transferee should merely file his application for execution of the decree setting out either in it or in an affidavit filed in support thereof that he is such a transferee; thereupon the Court orders the application for execution to proceed or rejects it.[3]

Where during the pendency of execution proceedings, the decree-holder dies or transfers the decree by an assignment in writing, can the transferee apply under this rule to continue the execution proceedings? It has been held by the High Courts of Bombay, Calcutta, Madras and Patna and the Judicial Commissioner's Court of Sind that it is open to the transferee either to apply for continuing the proceedings in execution or to make a fresh application.[4] The reason is that a pending execution application does not abate by reason of the death or devolution of any interest of the decree-holder and, therefore, the transferee can apply by virtue of S. 146 and this rule. Similarly where the decree-holder dies while his application is pending in a Court to which the decree has been transferred for execution, his legal representatives may either apply to the Court which passed the decree for fresh execution after bringing their names on the record, or may

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Note 18.

(1) *Kalyan Singh* v. *Dambar Singh*, (1909) 2 Ind Cas 626 (626): 6 All L J 564.

Note 19.

(1) *Alagappa Chetty* v. *Ramaswami Chetty*, (1913) 21 Ind Cas 609 (609): 1913 Mad W N 1003: 14 Mad L Tim 513 [An amendment of such application by adding a prayer for execution will not be allowed in appeal]; *Somamma* v. *Basamma*, (1912) 14 Ind Cas 704 (705) Mad; *Ramachandra Ayyar* v. *Subramania Chettiar*, (1904) 14 Mad L Jour 393 (393); *Baijnath* v. *Ram Bharos*, 1927 All 165 (167): 25 All L J 249: 49 All 509: 104 Ind Cas 116 F B; *Akhoy Kumar* v. *Surendra Lal*, 1926 Cal 957 (958): 30 Cal W N 735: 96 Ind Cas 378; *Mirza Mohammad Sadiq Ali Khan* v. *Sajjad Mirza*, 1928 Oudh 30 (31): 105 Ind Cas 611: 4 Oudh W N 1025: 3 Luck 126. See also *Harditta* v. *Nigahia Mal*, 1922 Lah 396 (398): 4 Lah L Jour 259: 79 Ind Cas 546 [Assignee wanted to execute—Absence of formal application is a mere irregularity]; *Nundo Lal* v. *Chutterput Singh*, (1902) 29 Cal 235 (236) [Application to transmit to another Court treated as an application under this rule].

(2) *Jagat Tarini Dasi* v. *Pandit Rakhal Chandra Tewary*, (1909) 3 Ind Cas 324 (326): 14 Cal W N 752: 10 Cal L Jour 396; *Jogendra Chandra Roy* v. *Syam Das*, (1909) 1 Ind Cas 168 (174): 9 Cal L Jour 271: 36 Cal 543; *Nadir Hossein* v. *Peeroo Thovildarinee*, (1873) 19 Suth W R 255 (260): 14 Beng L R 425 Note.

(3) *Palaniappa* v. *Subramania*, 1925 Mad 701 (702): 48 Mad L Jour 419: 21 Mad L W 545: 88 Ind Cas 409: 48 Mad 553.

(4) *Kacharabhai* v. *Kacharabhai*, 1931 Bom 423 (423): 33 Bom L R 818: 134 Ind Cas 720; *Sailendra Nath Ghose* v. *Surendra Nath De*, 1930 Cal 614 (616): 34 Cal W N 437: 57 Cal 1137: 129 Ind Cas 572; *Akhoy Kumar* v. *Surendra Lal*, 1926 Cal 957 (958): 30 Cal W N 735: 96 Ind Cas 378 [An order for substitution only cannot be said to continue the execution application]; *Manmatha* v. *Rakhal*, (1909) 3 Ind Cas 324 (326): 10 Cal L Jour 396: 14 Cal W N 752; *Dwar Bukhsh Sirkar* v. *Fatik Jali*, (1899) 26 Cal 250 (253): 3 Cal W N 222; *Venkatachalam Chetty* v. *Ramaswami Servai*, 1932 Mad 73 (82): 135 Ind Cas 561: 1931 Mad W N 1209: 62 Mad L Jour 1: 34 Mad L W 866: 55 Mad 352 F B; [Overruling 1927 Mad 184: 50 Mad 1 and approving 1931 Mad 303]; *Mussammat Golab Koer* v. *Syed Mohammad Zafar Hussan*, 1921 Pat 180 (181): 2 Pat L Tim 619: 62 Ind Cas 30: 6 Pat L Jour 358; *Mussammat Bhagwanta* v. *Dewan Zamir*, 1924 Pat 576: 3 Pat 596: 78 Ind Cas 766: 5 Pat L Tim 451: 1924 Pat H C C 221: 2 Pat L R Civ 249; *Showkomal* v. *Nichumal*, 1930 Sind 283 (284): 123 Ind Cas 303: 24 Sind L R 195.

O.21,R.16, Notes 19—21.

apply to the executing Court for continuing the proceedings, subsequently producing from the Court which passed the decree the necessary order under this rule.[5] According to the High Court of Allahabad, however, the transferee must apply, whenever he does apply, for *fresh execution*, even when the application by his predecessor is pending.[6]

Though an application by the transferee *merely* for substitution of his name is not competent, still it is a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act so as to give a fresh starting point of time.[7] But in cases governed by Art. 183 of the Limitation Act, the order of the Court allowing the transferee to execute the decree after recognition of his transfer will operate as a revivor and be a fresh starting point of limitation.[8] The mere issue of a notice under this rule without a decision of the Court that the decree is executable will not, however, operate as a revivor.[9]

See also the undermentioned cases holding that an application under this rule is an application in accordance with law within the meaning of Art. 182 of the Limitation Act.[10]

20. Transfer of decree against company in liquidation.—An application by a transferee of a decree, obtained against a limited company which has since gone into liquidation, for substitution of his name as decree-holder must, in spite of the provisions of S. 171 of the Indian Companies Act, be made to the execution Court and not to the Court in which the winding up proceedings are pending.[1]

21. Equities enforceable against the original decree-holder.—*See* Notes to S. 49. As to whether the prohibition under O. 34, R. 14 applies

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(5) *Sailendra Nath* v. *Surendra Nath*, 1930 Cal 614 (615, 616): 57 Cal 1137: 34 Cal W N 437: 129 Ind Cas 572. See also *Nuzhat-ud-dowla Abbas Hassan Khan* v. *Prince Wala Kadar Husain Ali Mirza*, (1908) 11 Oudh Cas 112 (113).

(6) *Baijnath* v. *Ram Bharos*, 1927 All 165 (167): 25 All L J 249: 49 All 509: 104 Ind Cas 116 F B; *Dulari* v. *Mohan Singh*, (1881) 3 All 759 (765): 1881 All W N 57. But see *Mohan Singh* v. *Jagat Singh*, 1928 All 299 (300): 26 All L J 417: 109 Ind Cas 412: 50 All 621 [Decided without referring to the Full Bench ruling in 1927 All 165].

(7) *Pitam Singh* v. *Tota Singh*, (1907) 29 All 301 (302): 4 All L Jour 184: 1907 All W N 74; *Mohan Singh* v. *Jagat Singh*, 1928 All 299 (300): 26 All L J 417: 50 All 621: 109 Ind Cas 412; *Annamalai Mudaliar* v. *Ramier*, (1908) 31 Mad 231 (235): 4 Mad L Tim 72: 18 Mad L Jour 24; *Appaniangar* v. *Dharni Mudali*, (1907) 17 Mad L Jour 475 (475); *Mahalinga Moopanar* v. *Kuppanachariar*, (1907) 30 Mad 541 (543): 17 Mad L Jour 485: 3 Mad L Tim 21; *Govind* v. *Appaya*, (1880-81) 5 Bom 246 (248): 5 Ind Jur 534. See also *Abdul Kureem* v. *Chukhun*, (1880) 5 Cal L Rep 253 (256).

(8) *Palaniappa Chettiar* v. *Valliammal Achi*, 1929 Mad 252 (256): 29 Mad L W 203: 1929 Mad W N 78: 56 Mad L Jour 555: 52 Mad 590: 118 Ind Cas 775.

(9) *Monohar Das* v. *Fulteh Chand*, (1903) 30 Cal 979 (981): 7 Cal W N 793; *Khajah Salauddin* v. *Afzal Begam*, 1925 Cal 23 (25): 39 Cal L Jour 590: 28 Cal W N 963: 84 Ind Cas 68 [As to the meaning of the term 'revivor' *see* 43 Cal 903].

(10) *Hayat Ali* v. *Rup Chand*, 1890 All W N 245 (246) [Petition containing an unnecessary prayer for attachment of properties covered by a mortgage decree but not followed by an inventory]; *Subbaya Chetty* v. *Rangaswami Chetty*, (1907) 2 Mad L Tim 339; *Manorath Das* v. *Ambika Kanta*, (1909) 1 Ind Cas 57 (59, 60): 13 Cal W N 533: 9 Cal L Jour 443; *Salekhan* v. *Vishvanath*, (1911) 9 Ind Cas 349 (350): 13 Bom L R 22 [Even though the instrument of transfer is not obtained]; *Balkishan* v. *Wagar Singh*, (1896) 20 Bom 76 (78) [Even though succession certificate is not obtained]; *Keshurlal* v. *Pitambardas*, (1895) 19 Bom 261 (268), (Do.); *Hafizuddin* v. *Abdool Aziz*, (1893) 20 Cal 755 (757), (Do.); *Alagirisami* v. *Venkatachala*, (1908) 31 Mad 77 (79): 17 Mad L Jour 566, (Do.); *Kundan Lal* v. *Makhni*, 1894 Pun Re No 27 (Do.); *Ahmed Ali* v. *Maung Ton*, (1910) 8 Ind Cas 986 (987): 3 Bur L Tim 142; *Imdad Husen* v. *Lalta Prasad*, 1899 All W N 16 (16).

Note 20.

(1) *Kashi* v. *The Union Bank of India*, (1919) 50 Ind Cas 115 (115): 41 All 432: 17 All L J 464.

to the assignee of a decree, *see* Note 4 to S. 49 and O. 34, R. 14 and also the undermentioned case.[1]

22. Appeal.—An order allowing or dismissing an application by a transferee from a decree-holder made under this Rule is appealable as a decree.[1] The reason is that, as mentioned already in Note 24 to S. 47, the transferee is a representative of the decree-holder and, therefore, a decision on a question whether any person is a representative or not of a party is one within the scope of S. 47, sub-S. 3. Sub-section 3 to S. 47 was first introduced in S. 244 of the old Code by the Amending Act VII of 1888 and the undermentioned decisions[2] prior to that Act holding that no appeal lay in such a case are no longer good law.

23. Suit by assignee for declaration of right or for refund of price.—Section 47, sub-S. 3 provides that a question as to whether any person is, or is not the representative of a party *shall*, for the purposes of S. 47, be determined by the Court (*i.e.*, the Court executing the decree). The provision in S. 244 of the old Code corresponding to this sub-section was introduced in that section by the Amending Act VII of 1888 and ran as follows:—

> "If a question arises as to who is the representative of a party for the purposes of this section, the Court may either stay execution of decree until the question has been determined by a *separate suit*, or itself determine the question by an order under this section."

It was held in cases arising before the date of the amendment that a question as to the validity of the transfer of a decree entitling him to execute the decree was not one within S. 244 and that a suit raising such question was not barred.[1] In one class of cases arising *after* the date of the said amendment

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Note 21.

(1) *Sambhuram* v. *Mt Khulsambi*, (1901) 14 C P L R 35 (36) [Assignee cannot bring to sale the equity of redemption].

Note 22.

(1) *Tameshar* v. *Thakur*, (1903) 25 All 443 (445): 1903 All W N 99; *Badri Narain* v. *Jai Kishen Das*, (1894) 16 All 483 (492): 1894 All W N 184; *Budhan Singh* v. *Salig Ram*, (1904) 1 All L J 61 (63) [He cannot in a separate suit brought by him in appeal ask the High Court for the first time to treat it as an execution application]; *Peache* v. *Aulad Fatima*, 1891 All W N 87 (88); *Gulzari Mal* v. *Daya Ram*, (1887) 9 All 46 (48): 1886 All W N 287; *Murli Dhar* v. *Parsotam Das*, (1879) 2 All 91 (92); *Purmanandas Jiwandas* v. *Vallabdas Wallji*, (1887) 11 Bom 506 (512); *Framji Rustomji* v. *Rutansu Pestonji*, (1872) 9 Bom H C R 49; *Nil Kanta Ghosal* v. *Ramchand Roy*, 1928 Cal 835 (836); *Mohini Mohan* v. *Surendra Chandra*, (1916) 32 Ind Cas 524 (525): 20 Cal W N 679 [Genuineness of purchase between assignee and attaching creditor of the decree]; *Ganga Das Seal* v. *Yakub Ali Dobashi*, (1900) 27 Cal 670 (672, 673); *Dwar Buksh* v. *Fatik Jali*, (1899) 26 Cal 250 (252): 3 Cal W N 222; *Hridoy Kant Battacharjee* v. *Behari Lal Mookerjee*, (1907) 11 Cal W N 239 (241) [Question between executor of decree-holder and judgment-debtor is one under S 244 about his right to execute]; *Afzal* v. *Ram Kumar*, (1886) 12 Cal 610 (611); *Bhagun Pershad* v. *Holloway*, (1885) 11 Cal 393 (395); *Mohabir* v. *Ram Bhughawan*, (1885) 11 Cal 150 (152); *Harditta* v. *Nigahia Mal*, 1922 Lah 396 (397): 4 Lah L Jour 259: 79 Ind Cas 546; *Bolla Brahmadu* v. *Ruddaraju Venkataraju*, (1916) 33 Ind Cas 71 (72) Mad [The subsequent dismissal does not take away the right of the judgment-debtor to appeal]; *S Venkataswami Naidu* v. *Gunturu Rangappa*, (1915) 26 Ind Cas 944 (945): 2 Mad L W 109; *Subbuthayammal* v. *Chidambaram*, (1902) 25 Mad 383 (385); *Krishnama Chariar* v. *Appasami Mudaliar*, (1901) 25 Mad 545 (546): 12 Mad L Jour 280; *Kunhammad* v. *Ahmad*, (1906) 16 Mad L Jour 27 (28); *Manikkam* v. *Tatayya*, (1898) 21 Mad 388 (390): 8 Mad L Jour 48; *Chogmal Sepani* v. *Govind Prasad Mahajan*, (1902) 15 C P L R 69; *Deoji* v. *Ranchordas*, (1891) 4 C P L R 132 (133). But see *Sheoraj Singh* v. *Amiruddin Khan*, (1898) 20 All 539 (542): 1898 All W N 145; *Jowala Sahai* v. *Ram Rakha*, 1896 Pun Re No 78.

(2) *Ram Baksh* v. *Panna Lal*, (1885) 7 All 457 (459): 1885 All W N 72; *Sambasiva* v. *Srinivasa*, (1889) 12 Mad 511; *Sobha Bibee* v. *Sukhamut*, (1877-78) 3 Cal 371 (373): 1 Cal L Rep 331: 2 Ind Jur 826 [Cases under the Code of 1859]; *Shama Puddoo Dutt* v. *Nobin Chunder Bose*, (1871) 15 Suth W R 283, (Do.). See also *Megh Narayan Singh* v. *Radha Prasad Singh*, (1870) 13 Suth W R 224 (226): 4 Beng L R (A C) 200, (Do.); *Abedoonissa Khatoon* v. *Ameeroonnissa Khatoon*, (1873) 20 Suth W R 305 (307), (Do.).

Note 23.

(1) *Raman* v. *Muppil*, (1891) 14 Mad 478 (479); *Halodhar* v. *Haro Gobind*, (1886) 12 Cal 105 (107). See also *Ram Bakhsh* v. *Panna Lal*,

O.21,R.16, Note 23.

it was held that where an application by the transferee under S. 232 of the old Code (O. 21, R. 16) was rejected, the transferee could not be considered to be the representative of the decree-holder and that the question of the validity of the transfer not being thus "*between the parties or their representatives*" is not one within S. 244 and can be agitated in a separate suit by the transferee.[2] In a second class of cases it was held that the above amendment left two courses open to the Court, namely, of either determining the question in execution itself or of referring the parties to a separate suit, and that a mere dismissal of application under S. 232 did not bar a suit by the transferee for declaration of his right.[3] In a third class of cases it was held that the bar of suit in respect of questions falling within the first sentence of S. 244 could not be reasonably extended to cases falling under the amendment, and a suit was, therefore, not barred.[4]

In view of the present sub-R. 3 it is now clear that a suit raising such a question for the purposes of execution is barred.[5] The High Court of Lahore has, however, taken a contrary view relying on *Bommanapatti Veerappa* v. *Chintakunta Srinivasa Rao,* I. L. R. 26 Mad. 264, a decision under the old Code. It is submitted that the decision cannot be accepted as correct.[6]

Where a transfer of a decree is not recognised by the executing Court, the transferee is entitled to sue the assignor for refund of the money received by him for the assignment.[7] But the assignee is not entitled to treat the assignment in his favour as ineffectual and to maintain a suit unless he has taken steps to have his transfer recognised. Thus, where, after a transfer was effected, the decree was attached at the instance of a third person, and the assignee's application for execution was dismissed wrongly, on the ground that the decree had been attached, and thereupon the assignee filed a suit for refund of the purchase money, it was held that it was his duty to have the attachment removed by presenting a claim to the attaching Court on the strength of his assignment and that unless such a claim was presented and rejected he could not succeed in the suit.[8]

O.21, R 17.

Procedure on receiving application for execution of decrees

R. 17. [S. 245.] (1) On receiving an application for the execution of a decree *as provided by rule* 11, *sub-rule* (2), the Court shall ascertain whether such of the requirements of *rules* 11 *to* 14 as

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(1885) 7 All 457 (459): 1885 All W N 72 [Proceeds on the view that as transferee was not recognised he was not a party and therefore a suit lies. Though reasoning is not correct, the conclusion is correct].

(2) *Sheo Raj* v. *Aminuddin,* (1898) 20 All 539 (543): 1898 All W N 145 [Foll 7 All 457]. See also *Gour Mohun* v. *Denonath Karmakar,* (1898) 25 Cal 49 (52): 2 Cal W N 76; *Md Mehdi Ali Khan* v. *Mst Sharfunnissa,* (1900) 3 Oudh Cas 32 (37); *Pasupathy Ayyar* v. *Kothanda Rama Ayyar,* (1905) 28 Mad 64 (65, 66).

(3) See *Imdad Husain* v. *Lalta Prasad,* 1896 All W N 201 (202).

(4) *Bommanapatti Veerappa* v. *Chintakunta Srinivasa Rao,* (1903) 26 Mad 264 (265). See also *Sethurayar* v. *Shanmugam Pillai,* (1898) 21 Mad 353 (356): 7 Mad L Jour 279.

(5) *A Venkataratnam* v. *A Nayudu,* (1915) 28 Ind Cas 906 (906, 907) Mad. See also *Amanatullah* v. *Sardha Prasad,* (1906) 28 All 613 (613): 1906 All W N 133: 3 All L J 428.

(6) *Ishar Das* v. *Salig Ram,* 1929 Lah 51 (52): 117 Ind Cas 893.

(7) *Ramasami* v. *Basavappa,* (1893) 16 Mad 325 (326); *Pulhiandi* v. *Avalu Moidin,* (1897) 20 Mad 157 (158).

(8) *Sadagopachariar* v. *Ragunad Achariar,* (1909) 3 Ind Cas 938 (939): 33 Mad 62: 9 Mad L Tim 273.

may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow *the defect to be remedied* then and there or within a time *to be* fixed by *it*. O.21,R.17.

(2) *Where an application is amended under the provisions of sub-rule* (1), *it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.*

(3) Every amendment made under this *rule* shall be *signed or initialled* by the Judge.

(4) When the application is admitted, the Court shall enter in the *proper* register a note of the application and the date on which it was made, and shall, *subject to the provisions hereinafter contained*, order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for *the payment of* money, the value of the property attached shall, as nearly as may be, correspond with the amount *due under* the decree.

Local Amendments.

ALLAHABAD.

Between the words "been complied with" and "the Court may" *insert* the words "and if the decree-holder fails to remedy the defect within a time to be fixed by the Court".

LAHORE.

For the words "and, if they have not been . . . . to be fixed by it" in sub-R. (1) of R. 17, *substitute* the following words:—

"and, if they have not been complied with, the Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time, may reject the application."

NAGPUR.

In sub-R. (1) of R. 17, for the words "and, if they have not been complied with . . . . within a time to be fixed by it", *substitute* the words "and, if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application".

OUDH.

In R. 17, sub-R. (1), *delete* the last sentence beginning with the words "and, if they . . . ." and ending with the words "to be fixed by it", and *substitute* the following sentence in lieu thereof:—

"and if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be

O.21, R.17, Notes 1—3.

remedied; and, in case the decree-holder fails to remedy the defect within such time the Court may reject the application."

RANGOON.

In R. 17, sub-R. (1) for the words, "the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it" the following shall be *substituted*, namely:—

"the Court may reject the application if the defect is not remedied within a time to be fixed by it."

Synopsis.

1. Legislative changes.
2. Procedure on receiving an application for execution.
3. Amendment and limitation.
4. Non-compliance with the order of amendment within the time fixed.
5. Procedure on admission of application.
6. Execution of declaratory decree.
7. Execution of rent decree under the Tenancy Acts.
8. Execution of maintenance decree.
9. Value of property attached.
10. Appeal.

Amendment not made—How far application in accordance with law. See Note 4, Pts. (4) and (6).
Sale of more properties than sufficient—Court whether can set aside sale. See Note 9, Pt. (2).
Scope of the rule. See Note 2, Pt. (1) and Note 3, Pt. (8).
Sub-R. (2). See Note 3, Pt. (10).

1. Legislative changes.—

1. The words "may allow it to be amended" have been replaced by the words "may allow the defect to be remedied". The object is to make the rule clear and comprehensive so as to include cases of *defects* such as omission to file a copy of the decree.

2. Sub-R. (2) is new. *See* Note 3, *infra*.

2. Procedure on receiving an application for execution.—Sub-R. 1 prescribes the procedure to be followed on receiving an application for execution of a decree. It casts a duty upon the Court to ascertain whether such of the requirements of Rr. 11 to 14 as are applicable have been complied with or not. If they are not complied with the Court can either reject the application at once or allow the defect to be remedied then and there or within a time fixed.[1] If it does neither, it cannot, after the period of limitation for execution has expired, reject the application without giving the decree-holder an opportunity to amend the application.[2]

3. Amendment and limitation.—This rule contemplates the amendment of defects in the execution application before *admission and registration*. But supposing the Court overlooks the defects and registers the application,

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Order 21, Rule 17—Note 2.

(1) *Ganesh Das* v. *Fatteh Chand*, (1920) 55 Ind Cas 16 (17): 2 Lah L Jour 104: 2 U P L R (L) 46: 31 Pun W R 1920; *Pichayya* v. *Ankineedu*, 1924 Mad 367 (367): 45 Mad L Jour 651: 18 Mad L W 739: 33 Mad L Tim 125: 76 Ind Cas 750; *Sankaran Nair* v. *Uruppoyil Ambu*, 1926 Mad 260 (260): 49 Mad L Jour 699: 1925 Mad W N 917: 92 Ind Cas 109; *Bhagwat Prashad Singh* v. *Dwarka Prasad Singh*, 1924 Pat 23 (24): 2 Pat 809: 4 Pat L Tim 513: 1923 Pat H C C 229: 74 Ind Cas 174: 1 Pat L R 458; *Chintamoni* v. *Monmohini Debi*, 1922 Pat 409 (411): 1 Pat 149: 69 Ind Cas 200; *Ganga Dial* v. *Kharsaran*, 1885 All W N 304 (304); *Nourangilal Marwari* v. *Sm Charubala Dasi*, 1932 Cal 766 (767): 56 Cal W N 618: 55 Cal L Jour 538: 59 Cal 1266; *Chowdhry Purladh Mohapattur* v. *Chowdhry Jonardon Mohapattur*, (1866) 6 Suth W R Mis 15 (16); *Ramji Mal* v. *Kidarnath*, (1919) 49 Ind Cas 982 (984): 32 Pun W R 1919.

(2) *Fuzloor Ruhman* v. *Altaf Hossein*, (1884) 10 Cal 541 (544); *Chowdhry Purladh Mohapattur* v. *Chowdhry Jonardon Mohapattur*, (1866) 6 Suth W R Mis 15 (16).

O.21, R.17, Note 3.

can they be subsequently amended during the pendency of the application? The answer to this depends upon the question whether the decree is or is not barred by limitation on the date of the amendment. If there is no bar of limitation, the amendment can according to the Patna High Court be allowed.[1] The reason is that a substantive fresh application can be entertained on that date, and that there is nothing which prevents the Court from treating the amended application as a fresh application for execution.[2] A Full Bench of the Calcutta High Court has, on the other hand, held in *Asgar Ali* v. *Troilokyanath*, I. L. R. 17 Cal. 631 (F. B.) that "section 245 by implication excludes the power of the Court to amend after admission and registration". It was held by the Patna High Court in *Ram Sumran* v. *Ram Bahadur*, I. L. R. 2 Pat. 328, that the said observations should be understood only as referring to the particular case before the Full Bench where the decree was *barred* on the date when the defect (*viz.*, omission to file a list of property) was sought to be amended.

Where, however, on the date when the defect is sought to be amended the decree would be barred by limitation, there is a conflict of opinion as to whether or not an amendment can be allowed. On the one hand, the High Court of Calcutta[3] holds that no amendment is permissible on the ground that the Court is not empowered under the Rule to allow such an amendment. On the other hand, the High Court of Madras[4] holds that the Court can allow such an amendment under sub-R. 1 and that such amendment relates back to the date of the application. The reasoning of the Madras High Court is that the law casts a duty upon the Court to notice the defects in the application before admission and if the Court had done its duty properly, the defects could have been remedied within time, and that the decree-holder should not be made to suffer for the failure of the Court to do its duty. The High Courts of Allahabad,[5] Lahore[6] and Patna[7] have also

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Note 3.

(1) *Ram Sumran Prasad* v. *Ram Bahadur*, 1923 Pat 224 (225): 2 Pat 328: 4 Pat L Tim 99: 1923 Pat H C C 61: 71 Ind Cas 741; *Ganga Ram* v. *Dina Nath*, (1913) 18 Ind Cas 526 (527): 118 Pun Re 1912: 51 Pun W R 1913: 86 Pun L Re 1913.

(2) *Ram Sumran Prasad* v. *Ram Bahadur*, 1923 Pat 224 (225): 2 Pat 328: 4 Pat L Tim 99: 1923 Pat H C C 61: 71 Ind Cas 741; *Jagannath Das* v. *Chamu Raghunath*, 1929 Pat 407 (409): 8 Pat 462: 11 Pat L Tim 215: 119 Ind Cas 411; *Braja Sundar Das* v. *Radha Prasad Bhagat*, (1932) 11 Pat 508 (513): 1932 Pat 306; *Haridas Banik* v. *Raj Kumar Dey*, (1919) 53 Ind Cas 111 (113) Cal.

(3) *Asgar Ali* v. *Troilokya Nath Ghose*, (1890) 17 Cal 631 (636) F B [Overruling 14 Cal 124]; *Sali Mulla Bahadur* v. *Sainaddi Sarkar*, (1914) 22 Ind Cas 337 (337): 18 Cal L Jour 538; *Abdul Hasmat Ahamad* v. *Hrishikesh Das*, 1925 Cal 1048 (1050): 85 Ind Cas 742 [Following 17 Cal 631 F B]. But see *Gnanendra Kumar Rai Chowdhury* v. *Shayama Sunder Jen*, (1918) 44 Ind Cas 553 (554): 22 Cal W N 540: 27 Cal L Jour 398 [Where the original application was one in accordance with law, and a *supplementary* list of properties was allowed to be filed. Distinguishing 17 Cal 631]; *Hurry Charan Bose* v. *Subaydar Sheikh*, (1886) 12 Cal 161 (165).

(4) *Pitchayya* v. *Ankineedu*, 1924 Mad 367 (368): 45 Mad L Jour 651: 18 Mad L W 739: 33 Mad L Tim 125: 76 Ind Cas 750 [Following 17 Mad 67]; *Maheswaran Nambudripad* v. *Valappa Menon*, 1928 Mad 24 (25): 39 Mad L Tim 371: 54 Mad L Jour 154: 107 Ind Cas 303: 27 Mad L W 796 [Following 1924 Mad 367]. See however *Sankaran Nair* v. *Ambu*, 1926 Mad 260 (260): 49 Mad L Jour 699: 1925 Mad W N 917: 92 Ind Cas 109 [The petitioner is not entitled to insist for amendment *as of right*]; *Pattah Veeran Kutty* v. *Kunhi Kandi Shazhath Veetil Appu*, (1911) 9 Ind Cas 760 (760): (1911) 1 Mad W N 181: 9 Mad L Tim 347 [Amendment cannot be allowed to the prejudice of the judgment-debtor by inserting a prayer for attachment after the decree is barred]; *T Varadarajan* v. *Rajakumara*, (1913) 21 Ind Cas 782 (783): 26 Mad L Jour 83: 1914 Mad W N 157: 14 Mad L Tim 530.

(5) *Ajudhia Ram* v. *Muhammad Munir*, 1893 All W N 112 (113); *Jiwat Dube* v. *Kali Charan*, (1898) 20 All 478 (480): 1898 All W N 128.

(6) *Ganesh Das* v. *Fatteh Chand*, (1920) 55 Ind Cas 16 (17): 2 Lah L Jour 104: 2 U P L R (Lah) 46: 31 Pun W R 1920; *Bishen Singh* v. *Ganga Ram*, 1905 Pun Re No 27: 79 Pun L R 1905: 2 Pun W R 1905.

(7) *Sheo Gobind Ram* v. *Mt Kishunbansi Kuer*, 1932 Pat 222 (223): 13 Pat L Tim 318: 138 Ind Cas 91: 11 Pat 546.

O.21, R 17, Notes 3—4.

in the undermentioned cases allowed the defects to be amended though the decree became barred on the date of the amendment.

Sub-R. 1 refers only to the requirements of *Rr.* 11 *to* 14. Consequently the rule does not apply where the defect in the execution application is one which has no reference to Rr. 11 to 14. The Court can, however, amend such defects under its general powers.[8] As to whether a defect by reason of non-compliance with O. 21, R. 15 can be amended under this rule *see* R. 15, *ante*.

Effect of amendment.—In the absence of any provision under the old Code corresponding to sub-R. 2, there was a conflict of opinion as to whether an amendment took effect only from the date of the *amendment* or from the date of the *application,* and whether the original application which was defective could be considered as being in accordance with law within the meaning of Art. 179, Cl. 4 of the Limitation Act of 1877 (Art. 182, Cl. 5 of the present Limitation Act of 1908) so as to operate as a fresh starting point for limitation.[9] Under sub-R. 2 of this rule it is now clear that the application. though defective, when presented should be deemed to be in accordance with law when the defect is subsequently amended and the amendment dates back to the original date of the application.[10] The effect of the sub-rule is to preclude the judgment-debtor from raising any objection at a later stage on the ground that the application was not in accordance with law at the time it was presented.[11] If, however, the Court without giving an opportunity to amend *rejects* the application, the rejected application cannot be considered to be in accordance with law.[12]

As to whether an application returned for amendment and not represented is one in accordance with law, *see* Note 4 below.

4. Non-compliance with the order of amendment within the time fixed.—Sub-R. 1 empowers the Court to fix a time for the amendment of the execution application. If the party fails to amend within the time fixed or such further time as the Court may extend, the proper course is to reject the application.[1] If notwithstanding the decree-holder's failure to amend the defect within the time fixed the Court does not reject the application,

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(8) *Nouranjal Marwari* v. *Charubala Dasi,* 1932 Cal 766 (768): 36 Cal W N 618: 55 Cal L Jour 538: 59 Cal 1266.

(9) *Thathachariar* v. *Venkatesa Tawker,* (1903) 26 Mad 101 (103): 12 Mad L Jour 435 [No]; *Gopal Sah* v. *Janki Koer,* (1896) 23 Cal 217 (222), (Do.); *Fazloor* v. *Altaf,* (1884) 10 Cal 541 (543, 544) [Yes]; *Kewal Ram* v. *Khadim Hussain,* 5 All 576 (577): 1883 All W N 112.

(10) *Kalanand Singh* v. *Chandra Kishore,* (1910) 7 Ind Cas 19 (21): 14 Cal W N 971: 12 Cal L Jour 192; *A T S Valaoubramania Pillai* v. *T A B Chit Company Yela Nidhi,* (1919) 52 Ind Cas 765 (766): 10 Mad L W 222; *Drigbijai Singh* v. *Bhagwan Dass,* 1930 Oudh 65 (66): 6 Oudh W N 1064: 5 Luck 458: 124 Ind Cas 445.

(11) *Abdul Kharim* v. *Lakshmanaswami,* 1928 Mad 440 (443): 27 Mad L W 475: 112 Ind Cas 36; *Sm Rani Basanta Kumari* v. *Tulsi Charan Ghosh,* 1930 Cal 353 (355): 34 Cal W N 139: 127 Ind Cas 54.

(12) *Joyanuddin Khan* v. *Jamiruddin Sarkar,* (1917) 37 Ind Cas 916 (917): 21 Cal W N 835: *Behari Lal* v. *Jagannath,* 1923 Nag 236 (237): 8 Nag L J 91: 72 Ind Cas 473; *Meghraj* v. *Abdul Majid,* 1921 Nag 28 (28): 4 Nag L J 71: 17 Nag L R 179: 63 Ind Cas 971; *Mt Janul* v. *Harumal Walad Ayaram,* (1911) 11 Ind Cas 77 (78): 5 Sind L R 68; *Bances* v. *Turton,* 1883 Pun Re No 28.

Note 4.

(1) *Asgar Ali* v. *Troilokya Nath Ghose,* (1890) 17 Cal 631 (635) F B; *Fazloor Rahman* v. *Altaf Hossein,* (1884) 10 Cal 541 (544); *Gopal Sah* v. *Janki Koer,* (1896) 23 Cal 217 (224); *Gopal* v. *Rajendra,* (1916) 34 Ind Cas 625 (626): 20 Cal W N 615 [Court can extend time under S 148]; *Meghraj* v. *Abdul Majid,* 1921 Nag 28 (29): 4 Nag L J 71: 17 Nag L R 179: 63 Ind Cas 971.

it is not precluded from allowing a fresh application for amendment at a subsequent stage.[2] O.21, R.17, Notes 4—5.

If the Court returns an application for amendment of the defects, and the decree-holder does not represent it within the time fixed, the question arises whether such an application can be treated as one in accordance with law within the meaning of Art. 182, Cl. 5 of the Limitation Act so as to operate as a fresh starting point for execution. The answer to this question depends upon another question namely whether the defect for the amendment of which the application was returned was a *material* defect, without the amendment of which, further proceedings could not be taken, or was only a *formal* defect.[3] In the latter case the application will be one in accordance with law[4] while in the former case it will not.[5]

Where the application is returned not for any defect in Rr. 11 to 14 but for some other defect it has been held by the Allahabad and the Patna High Courts that the application would be one in accordance with law.[6]

5. **Procedure on admission of application.**—Sub-R. 4 prescribes the procedure to be followed after admission of the application. If it is not in any way defective the Court is bound to order execution according to the nature of the application. Thus if the decree-holder prays for the arrest of the judgment-debtor, the Court cannot refuse the same and direct him to proceed against the property in the first instance.[1] No enquiry as to whether the

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(2) *Fazloor Rahman* v. *Altaf Hossein*, (1884) 10 Cal 541 (544); *Syud Mahomed* v. *Syud Abdullah*, (1883) 12 Cal L Rep 279 (280) *Kaminy Mohun* v. *Gopal*, (1882) 8 Cal 479 (481): 10 Cal L Rep 519: 4 Shome L R 274.

(3) *Rama* v. *Varada*, (1893) 16 Mad 142 (143); *Somu* v. *Chockalinga*, (1894) 17 Mad 76 (77): 4 Mad L Jour 8; *Ramanadan* v. *Peria Thambi*, (1883) 6 Mad 250 (251). See also *Vadivelu* v. *Maruda Pillai*, (1915) 26 Ind Cas 413 (414) Mad [Decisions under the present Code]; *K R Srinivasa Ayyangar* v. *Tirumalai Chetty*, (1914) 23 Ind Cas 99 (100): 15 Mad L Tim 337: 1914 Mad W N 372; *T Narayanaswami Naidu Garu* v. *Krovidi Guntayya*, (1916) 32 Ind Cas 691 (691): 1915 Mad W N 865; *Gopal Chunder Manna* v. *Gosain Das Kalay*, (1898) 25 Cal 594 (597): 2 Cal W N 556 F B [Explaining 23 Cal 217]. See also *Mathura Prosad* v. *Anurago Koer*, (1910) 5 Ind Cas 579 (580): 14 Cal W N 481; *Gopal Sah* v. *Janki Koer*, (1896) 23 Cal 217 (218); *Musaraf Ali* v. *Amir Jan*, (1910) 8 Ind Cas 833 (834): 15 Cal W N 71.

(4) *Raghunandan Lal* v. *Badan Singh*, (1918) 43 Ind Cas 914 (915): 40 All 209: 16 All L J 87 [Omission to file a copy of decree]; *Gurpen Chetty* v. *Ana Mahalingam*, (1917) 42 Ind Cas 100 (101): 11 Bur L Tim 116, (Do.); *Ramayyan* v. *Kadir Bacha*, (1908) 31 Mad 68 (70): 17 Mad L Jour 596: 3 Mad L Tim 254 [Omission to mention if an appeal has been filed against decree]; *Vithal* v. *Gopal Rao*, (1909) 1 Ind Cas 240 (242): 5 Nag L R 8 [Giving wrong number of suit]; *Pitambar Jana* v. *Damodara Guchait*, 1926 Cal 1077 (1080): 53 Cal 664: 30 Cal W N 918: 45 Cal L Jour 86: 98 Ind Cas 166 [Incorrect calculation of interest amount and costs]; *Chowdhuri Chintamoni Mahapatra* v. *Srimati Manmohini Debi*, 1922 Pat 409 (411): 1 Pat 149: 69 Ind Cas 200, (Do.); *Zabardast Khan* v. *Kanta Prasad*, 1895 All W N 18 (19), (Do.); *Wajihan* v. *Biswanath*, (1901) 18 Cal 462 (465) [Property not specified but reference given to document and prior application]; *Keshawesarindra Sahi* v. *Rani Debendra Bala Dassi*, (1918) 48 Ind Cas 245 (253): 4 Pat L Jour 213: 1919 Pat H C C 121; *Mrs M Baness* v. *Col J P Turton*, 1883 Pun Re No 23 [Relief not specified and judgment-debtor not objecting]; *Kamachi Ammal* v. *Pichu Ayyar*, (1914) 35 Ind Cas 876 (876): 31 Mad L Jour 561: 4 Mad L W 103: (1916) 2 Mad W N 152 [O 21, R 17, C P Code was not intended to affect the construction put upon the words "applying in accordance with law" occurring in Art. 182 of the Limitation Act by judicial decisions in dealing with formal defects in execution applications]; *Tadinada Abdul Kharim Sahib* v. *Pulavarti Lakshmanaswami*, 1928 Mad 440 (441, 443): 27 Mad L W 475: 112 Ind Cas 36, (Do.).

(5) *Asghar Ali* v. *Troilokya Nath*, (1890) 17 Cal 631 (638) F B [List of property not filed]; *Sangiliya Pillai* v. *Muthu Chettiar*, (1931) 135 Ind Cas 15 (15) [Party not signing and verifying application]; *Sobran* v. *Sibilas*, (1920) 54 Ind Cas 933 (934) Pat [Decree-holder failing to comply with a conditional order of Court]; *Guru Mahadeva Ashram Prasad Sahi Bahadur* v. *Mahabir Sahai*, (1922) 65 Ind Cas 120 (120) Pat [Amount of the decree and costs not shown—Held material defect]. See also *Behari Lal* v. *Raghunandan*, (1911) 12 Ind Cas 734 (734): 8 All L J 1151.

(6) *Dumbar Lal* v. *Chand Mal*, 1932 All 484 (484): 1932 All L J 578: 139 Ind Cas 201; *Bhagwat Prasad Singh* v. *Duarka Prasad Singh*, 1924 Pat 23 (24): 2 Pat 809: 4 Pat L Tim 513: 1923 Pat H C C 229: 74 Ind Cas 174: 1 Pat L R 453.

Note 5.

(1) *Hargobind Kishan Chand* v. *Hakim Singh*, 1926 Lah 110 (110): 6 Lah 518: 93 Ind Cas 54; *Davis* v. *Middleton*, (1867) 8 Suth W R 282 (284): *Dewan Ali* v. *Soroshibala Dabee*, (1882) 8 Cal 297 (299): 10 Cal L Rep 111 [The word granted is equivalent to admitted]; *Rahim Alli* v. *Phul Chand*, (1896) 18 All 482 (485): 1896 All W N 142, (Do.).

O.21, R.17, Notes 5—9.

property sought to be proceeded against belongs to the judgment-debtor is contemplated under the rule before execution can be ordered.[2]

6. Execution of declaratory decree.—*See* Note 33 to S. 47 and Note 5 to S. 38 and the following cases.[1]

7. Execution of rent decree under the Tenancy Act.—A landlord who obtains a decree for arrears of rent of an undertenure is not restricted by the provisions of the Bengal Tenancy Act to execute the decree in the first instance by sale of the undertenure. He is at liberty to execute it in the ordinary manner against the person or property of his judgment-debtor.[1] S. 163 of the Bengal Tenancy Act VIII of 1885 and S. 217 of the Bihar and Orissa Tenancy Act II of 1913 prescribe that the Court shall, on admission of the application for execution, order the issue simultaneously of the order of attachment as well as of the proclamation for sale.

8. Execution of maintenance decree.—A decree declaring a person's right to maintenance at a certain rate and also directing the payment of such maintenance by future instalments is not a mere declaratory decree and can be executed as each instalment falls due.[1]

Where a decree awarding future maintenance also charges certain property for the due payment thereof the decree-holder can, if there is default, apply for an order for the sale of the property or file a fresh suit to enforce the charge.[2] The High Court of Calcutta[3] has held that to avoid the difficulty of a further suit the Court can provide in the decree for maintenance for the appointment of a receiver with directions to take possession of the property in case of default and sell the same and pay the maintenance from out of the sale proceeds.

9. Value of property attached.—Under the proviso to the rule the Court should call upon the decree-holder to specify the approximate value of the property to be attached, to see that the value of the property to be attached corresponded as nearly as may be with the amount due under the decree.[1] But if more property than is necessary is attached and sold and a purchaser buys the same without notice of the fact that the amount realised

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(2) *Soobjan Beebee* v. *Shaikh Shureentoollah*, (1869) 12 Suth W R 329 (330): 3 Beng L R A C 413.

Note 6.

(1) *Vishnu Shambhog* v. *Manjamma*, (1885) 9 Bom 108 (110): 9 Ind Jur 271 [Declaratory decree cannot be executed]; *Kishore Bun* v. *Dwarka*, (1894) 21 Cal 784 (789): 21 Ind App 89: 6 Sar 429 P C (Do.).

Note 7.

(1) *Fotick* v. *Foley*, (1888) 15 Cal 492 (495); *Tarinin* v. *Narayan*, (1890) 17 Cal 301 (303); *Sourendra* v. *Surnomayi*, (1899) 26 Cal 103 (108): 3 Cal W N 38; *Bhabani* v. *Pratap*, (1904) 8 Cal W N 575 (578).

Note 8.

(1) *Ashutosh Bannerjee* v. *Lukhimoni Debya*, (1892) 19 Cal 139 (146) F B; *Lakshmibhai Bapuji Oka* v. *Madar Rav Bapuji Oka*, (1888) 12 Bom 65 (67); *Mansa Debi* v. *Jiwan Lal*, (1887) 9 All 33 (34): 1886 All W N 248; *Ram Dial* v. *Indar Kuar*, (1894) 16 All 179 (181): 1894 All W N 17; *Muttia* v. *Virammal*, (1887) 10 Mad 283 (288) F B [The decree can be executed against the legal representative of the judgment-debtor]; *Subbanna Bhatta* v. *Suharana*, (1907) 30 Mad 324 (326): 17 Mad L Jour 180: 2 Mad L Tim 83, (Do.).

(2) *S M Chunder Moni Dassee* v. *Mutty Lal Mullick*, (1898) 2 Cal W N 33 (33); *Matangini Dassee* v. *Chooneymoney Dassee*, (1895) 22 Cal 903 (908).

(3) *Hemanginee* v. *Khumode*, (1899) 26 Cal 441 (448): 3 Cal W N 139.

Note 9.

(1) *Sundera Bai* v. *Bapuna*, 1929 Nag 305 (308): 116 Ind Cas 65; *Sadatmand* v. *Phul Koer*, (1898) 20 All 412 (418): 25 Ind App 146: 7 Sar 380: 2 Cal W N 550 P C; *Sivasami* v. *Ratnasami*, (1900) 23 Mad 568 (570): 10 Mad L Jour 314; *Sorabji Edulji* v. *Gobind Ramji*, (1892) 16 Bom 91 (114).

by sale of the other plots was more than sufficient to satisfy the decree, the sale in his favour cannot be set aside.[2] O.21, R.17, Notes 9—10.

10. Appeal.—An appeal lies against an order returning an execution application on the ground that the decree-holder is not entitled to calculate the amount due to him on the basis adopted in the petition, and directing him to amend the same.[1] But an order allowing the decree-holder to withdraw the execution proceedings does not determine anything under S. 47 and is not appealable.[2]

O.21, R.18.

Execution in case of **Cross decrees.**

R. **18.** [S. 246.] (1) *Where applications are made*[8] *to a Court for the execution of* cross-decrees[3] *in separate suits*[4] for the payment of *two sums of* money[3] *passed* between the same parties[5] *and* capable of execution at the same time[7] by *such* Court, *then*—

(*a*) if the two sums *are* equal, satisfaction shall be entered upon both decrees ; *and*

(*b*) *if the two sums are unequal*, execution *may* be taken out only by the *holder of the* decree for the larger sum[9] and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This *rule shall be deemed to* apply where either party is an assignee of one of the decrees[10] and as well in respect of judgment debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This *rule shall* not *be deemed to* apply unless—

(*a*) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits ; and

(*b*) the sums due under the decrees are definite.

(4) *The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to*

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(2) *Surendra* v. *Bola Ram*, (1918) 45 Ind Cas 699 (701) Cal.

Note 10.

(1) *Vyapuri Goundan* v. *A O Chidambara Mudaliar*, (1913) 18 Ind Cas 607 (607): 24 Mad L Jour 26: 37 Mad 314.

(2) *Kenaram* v. *Kailash*, (1913) 19 Ind Cas 904 (905): 18 Cal L Jour 53.

O.21, R.18, Note 1.

a decree passed against him singly in favour of one or more of such persons.[11]

[1877—Ss. 233, 243, 246; 1859—S. 209. *See* S. 49 and O. 21, Rr. 19, 20 and 29.]

Illustrations.

(*a*) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule.

(*b*) *A* and *B*, co-plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*. *C* cannot treat his decree as a cross-decree under this rule.

(*c*) *A* obtains a decree against *B* for Rs. 1,000. *C* who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C's* decree as a cross-decree under this rule.

(*d*) A, B, C, D *and* E *are jointly and severally liable for Rs.* 1,000 *under a decree obtained by* F. A *obtains a decree for Rs.* 100 *against* F, *singly and applies for execution to the Court in which the joint-decree is being executed.* F *may treat his joint-decree as a cross-decree under this rule.*

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. Cross-decrees for the payment of two sums of money.
4. Cross-decrees in separate suits.
5. "Between the same parties."
6. Same character in both suits necessary.
7. Decrees must be capable of execution at the same time.
8. Decrees must be in the same Court for execution.
9. Execution can be had only of the decree for the larger sum.
10. Assignment of the decree.
11. Sub-R. (4).

Applicability only after application for execution. See Note 8, Pt. (1).
Applicability to an adjudication under S. 144. See Note 4, Pt. (1).
Barred decrees. See Note 7, Pt. (2).
Benami decree-holders. See Note 5, Pts. (2) and (3).
Claims of holder of decree for smaller sum. See Note 9, Pt. (3).
Claims pending in a suit. See Note 2, Pts. (5) and (6).
Claims under decrees pending, or liable to, appeal. See Note 7, Pt. (4) also Note 10, Pt. (6).
Counter-claims. See Note 4, Pt. (4).
Court to which application is made. See Note 8, Pt. (2).
Cross-claims. See Note 4, Pt. (3).
Cross-decrees in respect of mesne-profits. See Note 3, Pt. (5).
Decrees of different Courts. See Note 8, Pt. (2).
Essential conditions for set-off. See Note 2.
Execution for smaller sum not invalid. See Note 9, Pt. (4).
Inapplicability to private awards. See Note 4, Pt. (2).
Mortgage-decrees. See Note 3, Pts. (2) to (4) and also O. 21, R. 20.
Set-off by order of Court. See Note 8, Pt. (4).

1. Legislative changes.—

1 The words "where applications are made to a Court for the execution of cross-decrees in separate suits" in sub-R. (1) are new.

2 Sub-R. (4) is new.

3. Illustration (*d*) is new.

2. Scope and applicability of the rule.—This rule provides that cross-decrees for the payment of money shall be set-off against each other. In order that this rule may apply the following conditions must be satisfied:— O.21, R.18, Notes 2–3.

(1) The decrees must be for the payment of *definite sums of money* (*infra.*)

(2) They must have been passed in *separate suits.*[1] (*Vide also* Note 4 *infra.*)

(3) The decree-holder in one must be the judgment-debtor in the other.

(4) The parties must fill the *same character* in both suits (Note 6 *infra*).

(5) Both decrees must be capable of execution[2] and must be so *at the same time* and *by the same Court.* (Notes 7 and 8, *infra.*)

(6) Applications should have been made to the Court for execution of both decrees (Note 8 *infra*).

If the above conditions are satisfied the set-off should be worked out as follows:—

(1) If the amounts under the two decrees are equal, then the two decrees shall satisfy each other and full satisfaction shall be entered upon both.

(2) If the amounts under the two decrees are not equal, then full satisfaction shall be entered upon the decree for the smaller amount, and part-satisfaction upon the decree for the larger amount; and execution shall be allowed only under the latter decree and for so much only, as remains due after the set-off (*vide* Note 9 *infra*).

A right to set-off under this rule cannot be defeated by an assignment of either decree (*vide* Note 10 *infra*) or by its attachment by the other decree-holder,[3] or by a stranger.[4]

Where an application is made for the execution of a decree and a suit which is capable of resulting in a cross-decree of the kind contemplated by this rule is at that time pending in *the Court which passed that decree,* the execution may be stayed under R. 29. But if such suit is pending in any *other Court,* R. 29 will not apply.[5]

3. Cross-decrees for the payment of two sums of money.—The first condition for claiming a set-off under this rule is that the decrees should be for the *payment of money* and that the amounts under each decree should be *definite and ascertained.*[1] A decree directing recovery of money by sale of immoveable

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Order 21, Rule 18—Note 2.

(1) *Nubo Lal Khan* v. *Maharanee of Burdwan,* (1868) 9 Suth W R 590 (591).

(2) *Huro Pershad Roy Chowdhry* v. *Fool Kishore Dosse,* (1871) 16 Suth W R 308 (309).

(3) *Sobha Ram Gopal Rai* v. *Tara Chand,* 1929 All 502 (502): 117 Ind Cas 103.

(4) *Bughawan Lal* v. *Sukhraj,* (1878-80): 2 All 866 (868) [Case under S 209 of the Code of 1859].

(5) *Mittun Bibee* v. *Buzloor Khan,* (1867) 8 Suth W R 392 (393).

Note 3.

(1) *Moulvie Reazoodeen Hossein* v. *Fuzloonissa,* (1866) 5 Suth W R (Mis) 12 (12).

O.21, R.18, Notes 3—6.

property is a decree for the payment of money under this rule,[2] even though it may be in enforcement of a charge.[3] But a mortgage-decree in which there is no *personal* liability does not fall within this rule.[4] *See* Notes to R. 20, *infra*.

A decree for mesne profits of which the amount has not been ascertained cannot be set-off under this rule as the amount is not *definite*.[5]

4. Cross-decrees in separate suits.—The second condition is that there must be cross-*decrees* and they must have been passed in *separate suits*. An adjudication under S. 144 of the Code is a *decree* to which this rule will apply.[1] But a private *award* is not.[2]

Cross-claims in the *same suit* do not fall within this rule but come under R. 19.[3]

5. "Between the same parties".—It is necessary that the parties should be the same in both suits.[1] For this purpose it is the party *on the record* that has to be considered.

Illustrations.

1. *A* holds a decree against *B*. *B* holds a decree against *C*. The two cannot be set-off on the ground that, in respect of the first decree, *A* is *benamidar* for *C*.[2]
2. *A* holds a decree against *B*. *B* holds a decree against *A*. A set-off between the two cannot be objected to on the ground that in respect of the first decree *A* is a *benamidar* for *C*.[3]

6. Same character in both suits necessary.—

Illustrations.

1. *A*, as *executor* to the estate of *B*, obtains a decree against *C*. *C* holds a decree against *A personally*. The two decrees cannot be set-off.[1]
2. *A* holds a decree against *B personally*. *B* files a suit on a mortgage executed by *C*, impleading *A* as a purchaser of a portion of the equity of redemption and obtains a decree. The two decrees cannot be set-off.[2] In this illustration, *A* is no doubt acting in his own interest. But his *character* in the mortgage suit is *different* from that in the other suit inasmuch as the mortgage-decree

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(2) *Krishnan* v. *Venkatapathy Chetty*, (1906) 29 Mad 318 (319).

(3) *Nagar Mal* v. *Ram Chand*, (1910) 8 Ind Cas 835 (836): 33 All 240: 7 All L J 1179.

(4) *Burma Oil Co, Ltd* v. *Ma Tin*, 1930 Rang 68 (71): 7 Rang 505: 120 Ind Cas 699 [29 Mad 318 doubted].

(5) *Matadin* v. *Chand Din*, (1888) 10 All 188 (193): 1888 All W N 66: *Huro Sunkar Sondyal* v. *Taruck Chunder Bhuttacharjee*, (1869) 11 Suth W R 488 (489): 3 Beng L R (A C) 114 [But even in cases where amount is not ascertained, if the parties agree to a mode of execution involving a set-off—It should be allowed].

Note 4.

(1) *Adwaita Chandra Saha* v. *The Chittagong Co, Ltd*, 1925 Cal 102 (103, 104): 28 Cal W N 988: 84 Ind Cas 747.

(2) *Dheeraj Singh* v. *Deen Dayal Singh*, (1869) 11 Suth W R 144 (144).

(3) *Kalka Pershad* v. *Ramdin*, (1883) 5 All 272 (273): 1883 All W N 20: 7 Ind Jur 619. See also *Shankar Das* v. *Amrit Lal*, 1932 Lah 537 (537): 138 Ind Cas 285: 33 Pun L R 671 [Costs in I A and under the decree in same suit—Rule 18 inapplicable nor S 151].

Note 5.

(1) *Rezaooddeen* v. *Fazloonissa*, (1866) 5 Suth W R (Mis) 12 (12): *Shaikh Rozeeoodeen* v. *Shaikh Jehangeer*, (1866) 5 Suth W R Mis 22 (23): *Janki* v. *The Collector of Allahabad*, (1887) 9 All 64 (67): 1886 All W N 300.

(2) *Tara Chand Ghose* v. *Anund Chunder*, (1868) 10 Suth W R 450 (451): 2 Beng L R A C 110.

(3) *Veerabadra Razu* v. *Jagannadha Razu*, (1893) 3 Mad L Jour 220 (221).

Note 6.

(1) *Abdul Hasan* v. *Zoura Jan*, (1883) 5 All 299 (302): 1883 All W N 45.

(2) *Sheo Shankar Kualapuri* v. *Chuni Lal*, (1916) 36 Ind Cas 948 (951): 38 All 669: 14 All L J 776.

is as against him not a decree for payment of money *personally*. If he had himself been the mortgagor there would have been his personal liability and the two decrees could have been set-off. The expression "same character, etc.", does not mean that the liability to pay which resulted in the decree should have been incurred by the parties themselves in both suits. Thus a decree against a widow in respect of a debt contracted by her deceased husband can be set-off against a decree obtained by the widow on a debt due to herself.[3] A decree against a firm is binding on the partners personally. It can be set-off against a decree obtained by one of the partners against the holder of the former decree.[4]

7. Decrees must be capable of execution at the same time.—It is necessary that the decrees should be capable of execution at the *same time*. Thus there can be no set-off if one of the decrees is only a preliminary decree[1] or if its execution is time-barred[2] or if its execution is expressly postponed till the happening of a certain contingency and the contingency has not happened.[3] But the fact that the judgment-debtor under one decree intends appealing against the decree will not make it inexecutable so as to prevent a set-off being allowed.[4]

8. Decrees must be in the same Court for execution.—Finally, applications should have been made for execution of *both decrees*[1] and those applications should be pending in *one and the same Court* either as the Court which passed the decrees or as the Court to which the decree or decrees have been transferred for execution.[2]

However, if at the time execution of one decree is sought, no application for the execution of the other decree is pending, execution of the former decree may be stayed in order to enable an application for execution of the latter decree being filed and the set-off worked out.[3]

Further, if one of the decrees expressly stipulates that execution shall not issue till the amount under the other decree is ascertained, a set-off can be ordered even though no application for execution of the latter decree may have been filed.[4]

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(3) *Grish Chunder* v. *Koomaree*, (1864) 1 Suth W R Mis 23 (23); *Rukmani Ammal* v. *Seethammal*, (1914) 22 Ind Cas 73 (74): 1 Mad L W 3: 1914 Mad W N 85 [A decree obtained against husband can after his death be set-off against a decree obtained by the widow against holder of decree against the husband].

(4) *Administrator-General* v. *Sultanali Sushtary*, 1927 Bom 255 (256): 29 Bom L R 396: 104 Ind Cas 319.

Note 7.

(1) *J C Galstaun* v. *Radhakissen Chamaria*, 1931 Cal 23 (24): 57 Cal 855: 129 Ind Cas 420.

(2) *Prosunno Coomar* v. *Sham Lall*, (1866) 5 Suth W R Mis 8 (8): *Anund Mohun* v. *Huro Chunder*, (1866) 5 Suth W R Mis 16 (16): Wym 109; *Hem Raj* v. *Asoodun*, (1866) 5 Suth W R Mis 43 (43); *Huro Pershad Roy* v. *Fool Kishore Dossee*, (1871) 16 Suth W R 308 (309); *Munsur Ali* v. *Abhoy Charan Das*, (1917) 40 Ind Cas 816 (818): 21 Cal W N 1147.

(3) *Judoonath* v. *Ram Buksh*, (1867) 7 Suth W R 535 (536).

(4) *Sheo Prosanna Singh* v. *Shib Lal Jha*, (1864) Suth W R Mis 1; *Huro Pershad Roy* v. *Shama Pershad*, (1866) 5 Suth W R Mis 52 (52).

Note 8.

(1) *Chajmal Das* v. *Lal Dharam Singh*, (1902) 24 All 481 (483): 1902 All W N 126; *Janki* v. *The Collector of Allahabad*, (1887) 9 All 64 (68): 1886 All W N 300; *Afzalunissa* v. *Nurul Huda*, (1913) 21 Ind Cas 32 (32): 11 All L J 763: *Bharath Prosad* v. *Rameshwar Koer*, (1903) 8 Cal W N 118 (120): 30 Cal 1066; *Ponnusamy* v. *Doraisamy*, (1909) 1 Ind Cas 247 (248): 32 Mad 336: 5 Mad L Tim 144.

(2) *Greesh Chunder* v. *Fakeer Chand*, (1866) 6 Suth W R Mis 72 (73): Beng L R Sup Vol 503; *Ram Coomar* v. *Gobindnath*, (1867) 7 Suth W R 480 (481); *Ignatius Peter* v. *Ameer Shaha*, (1871) 16 Suth W R 303 (303); *Hadoo Sirdar* v. *Jadoo Monee*, (1872) 17 Suth W R 46 (46); *Reea Mahton* v. *Ram Kishen Singh*, (1886) 14 Cal 18 (24): 13 Ind App 106: 4 Sar 746: 10 Ind Jur 428 P C; *Salig Ram* v. *Ishar Das Dharam Chand*, 1930 Lah 508 (510): 126 Ind Cas 516; *East Indian Railway Co, Ltd* v. *Hall*, (1871) 3 N W P H C 104.

(3) *Rukmani* v. *Seethammal*, (1914) 22 Ind Cas 73 (74): 1 Mad L W 3: 1914 Mad W N 85; *Raghu Nundan* v. *Sumessar*, (1873) 22 Suth W R 335 (238): 13 Beng L R 489.

(4) *Hira Lal Singh* v. *Ramji Ram*, (1919) 52 Ind Cas 746 (746): 1919 Pat H C C 372.

O.21, R.18 Notes 9—10

9. **Execution can be had only of the decree for the larger sum.**—If the amounts due under two cross-decrees are equal, they satisfy each other. If the sums are not equal, execution of the decree for the smaller sum becomes incapable of being issued;[1] execution can only issue under the decree for the larger amount and only in respect of the *balance due* after the set-off.[2] This does not, however, deprive the holder of the decree for the smaller amount of any claim to priority or otherwise which he might possess.[3] Further if execution of the decree for the smaller sum does take place and properties are sold in auction, the same is not invalid.[4]

10. **Assignment of the decree.**—Under S. 49 of the Code, every transferee of a decree will hold the same subject to all equities which the judgment-debtor might have enforced against the decree-holder. A right to set-off is one such equity and sub-R. 2 expressly recognises its enforcement against the assignee.[1]

Illustrations.

1. *A* holds a decree against *B* for Rs. 5,000. *B* holds a decree against *A* for Rs. 3,000, *A* assigns his decree to *C*. *B* can claim a set-off to the extent of Rs. 3,000 even as against *C*; and *C* will be entitled to execute the decree only for Rs. 2,000.[2]
2. *A* holds a decree against *B* for Rs. 5,000. *B* holds a decree against *A* for Rs. 6,000, *A* assigns his decree to *C*. *B* can claim a set-off and *C* will not be entitled to execute his decree for any amount.[3]

The fact that the assignment took place before the one, or the other, decree had been passed, will not affect the right to set-off, provided that the assignee had notice thereof:—

Illustrations.

1. *A*, who held a decree against *B* assigns it to *C*. Before the assignment *B* had filed a suit against *A*, and the suit results in a decree. *B* can set-off the decree even as against *C*.[4]
2. *A* holds a decree against *B*. *B* who had filed a suit against *A* assigns his interest in the suit to *C*. The suit is decreed. *A* can set-off his decree as against the decree in favour of *C*.[5]

Note 9.

(1) *Sinnu Pandaram* v. *Santhoji Row*, (1903) 26 Mad 428 (429): 12 Mad L Jour 398; *Bepin Behari Sen* v. *Krishna Behari Sen*, (1918) 45 Ind Cas 246 (248) Cal [Partition suit decreed to plaintiff for Rs. 2,130-0-0. Plaintiff appealed. Appeal was dismissed with costs. He sought leave to appeal to Privy Council. Application was dismissed with costs. Total costs due to defendant Rs. 586-0-0. Defendant sought execution for costs. *Held*, execution should be refused and costs should be set-off against the Rs 2,130-0-0].

(2) *Girdhari Lal* v. *Mulla Mahomed*, (1911) 12 Ind Cas 205 (206): 4 Bur L Tim 254; *Galstaun* v. *Radhakissen Chamaria*, 1931 Cal 23 (24): 57 Cal 855: 129 Ind Cas 420; *Shib Chunder* v. *Jaggut Indur*, (1869) 12 Suth W R 212 (213).

(3) *Arumuga* v. *Yokamba*, (1912) 17 Ind Cas 323 (328): 13 Mad L Tim 227.

(4) *Rewa Mahton* v. *Ramkishen*, (1887) 14 Cal 18 (25): 13 Ind App 106: 4 Sar 746: 10 Ind Jur 428 P C; *Mothura Mohun Ghose* v. *Akhoy Kumar*, (1888) 15 Cal 557 (563).

Note 10.

(1) *Nunde Coomar* v. *Koonjo Kishore*, (1866) 6 Suth W R Mis 73 (73); *Syed Tabub Hossein* v. *R Walker*, (1867) 7 Suth W R 470 (471); *Doorga Churn Nundee* v. *Debnath Roy Chowdhry*, (1872) 18 Suth W R 442 (443); *Oopendro Mohun Mustafee* v. *Purno Chunder Buttacharjee*, (1873) 19 Suth W R 85 (87); *Ram Chunder* v. *Mohendra Nath Bose*, (1874) 21 Suth W R 141 (143); *Sheo Narain Singh* v. *Choonee Bhuggut*, (1875) 24 Suth W R 299 (300); *Girdharlall* v. *Mulla Muhammed*, (1911) 12 Ind Cas 205 (206): 4 Bur L Tim 254; *Raghu Nundan Rain* v. *Sumessar Panday*, (1874) 22 Suth W R 285 (287): 18 Beng L R 489.

(2) *Kaim Ali* v. *Lokhikant*, (1868) 10 Suth W R 32 (33): 1 Beng L R 23 (F B).

(3) *Sinnu Pandaram* v. *Santhoji Row*, (1903) 26 Mad 428 (429): 12 Mad L Jour 398.

(4) *Kristo Ramani* v. *Kader Nath*, (1889) 16 Cal 619 (622).

(5) *Peeloo Chaudhrani* v. *Court of Wards*, (1867) 7 Suth W R 219 (221); *Bhagwani Kun-*

This right to set-off will be available even though the judgment-debtor had filed an appeal against the assigned decree and the assignee had not been made a party to the appeal.[6] O.21, R.18, Notes 10—11.

An attaching decree-holder is an "assignee" within the meaning of this rule.[7]

11. Sub-R. 4.—This sub-rule is new. Where a person holds a decree against several persons *jointly and severally* and is *singly* liable under another decree in favour of one or more of such persons, he can claim a set-off between the two decrees.[1] He cannot, however, do so if his decree is not a *joint and several* decree as against this judgment-debtors[2] or if he is not the sole decree-holder in his decree.[3]

Execution in case of **cross claims under same decree.**

R. **19.** [S. 247.] *Where application is made to a Court for the execution of a decree under which* two parties are entitled to recover sums of *money* from each other, *then*,— O.21, R.19, Note 1.

(*a*) *if the two sums* are equal, satisfaction for *both* shall be entered *upon* the decree ; *and*,

(*b*) *if the two sums are unequal*, execution *may be taken out only by* the party entitled to the *larger sum and for so much only as remains after deducting the smaller sum*, *and* satisfaction for the smaller sum shall be entered *upon* the decree.

[1877—S. 247.]

Synopsis.

1. Scope and object of the rule.
2. "Two parties."
3. Two sums unequal—Procedure.
4. Set-off of costs.

"Are entitled to recover sums of money from each other." See Notes 1 and 4.
Costs more than the amount decreed—Court-fee whether recoverable from the amount decreed. See Note 4, F.-N. (2).
Execution by party entitled to the larger sum. See Note 3, Pts. (2) and (3).
Execution for difference only. See Note 3, Pts. (2) and (4).
"Of a decree." See Note 1, Pt. (2).

1. Scope and object of the rule.—This rule provides a set-off in the case of cross-claims contained in the *same* decree.[1] The object of the provision is

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war v. *Lala Baij Nath*, (1868) 10 Suth W R 380 (380).

(6) *Ramakrishna Iyer* v. *Narayana Iyer*, (1897) 7 Mad L Jour 227 (228).

(7) *Adwaita* v. *The Chittagong Co, Ltd*, 1925 Cal 102 (103): 28 Cal W N 988: 84 Ind Cas 747.

Note 11.

(1) *Ram Sukh Das* v. *Tota Ram*, (1892) 14 All 339 (340, 341): 1892 All W N 12; *Hury Doyal* v. *Din Doyal*, (1883) 9 Cal 479 (480, 481): 13 Cal L Rep 93.

(2) *Ramachandar Upadhya* v. *Mahabir Singh*, (1917) 39 Ind Cas 560 (560): 15 All L J 827 [A mortgage decree can never be termed a "joint" and "several" decree within O 21, R 18 (4) and therefore, there cannot be a set-off of two mortgage decrees not between the same parties; but if they are between the same parties it is doubtful whether they can be set-off against each other].

(3) *Murli Dhar* v. *Parsotam Das*, (1878-80) 2 All 91 (92); *Kusseemoonissa Bibee* v. *Archibald Hill*, (1871) 15 Suth W R 127 (128): 6 Beng L R App 125.

Order 21, Rule 19—Note 1.

(1) See *Bisheshwar Nath* v. *Narmadeshwar Pra-*

O.21, R.19, Notes 1—3.

to prevent each side taking out execution in respect of sums due under the same decree.[2] It is, however, not necessary that the remedy of each party against the other should be *identical*. In an old Allahabad case it was held that a set-off cannot be ordered unless the parties had identical rights of execution in respect of their claims.[3] This is no longer good law and it is now well settled that a set-off under this rule will be ordered even though the remedy of each party against the other is not precisely of the same nature.[4] Thus costs awarded can be set-off against—

(1) Money directed to be realised by sale of hypothecated property[5] or against redemption amount awarded by the decree.[6]

(2) Against mesne profits decreed.[7]

(3) Against pre-emption amount to be deposited under the decree.[8] But in pre-emption suits under Ss. 14 and 15 of the *Oudh Laws Act* the purchase money must be deposited; else, the right is lost. In such suits it has been held that the costs cannot be set-off against the pre-emption amount.[9]

"By S. 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908), this rule has been made applicable to execution of decrees under that Act, subject to the other provisions of the Act; and the rules that may be made under sub-S. (1).

2. "Two parties".—The expression "two parties" includes two sets of parties.[1] It also includes the legal representatives of a party but not *two different legal representatives* of the *same* party.[2]

3. Two sums unequal—Procedure.—If the amounts under the two claims are unequal, the claim for the smaller amount is automatically satisfied and no execution should be allowed in respect of it.[1] Execution under the

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sad Upadhia, 1930 All 726 (727): 127 Ind Cas 525.

(2) *Bhagwan* v. *Ratan*, (1894) 16 All 395 (397): 1894 All W N 133; *Rengayya Chetty* v. *Narasayya*, (1916) 34 Ind Cas 388 (388): 3 Mad L W 267.

(3) *Kalka Prasad* v. *Ram Din*, (1883) 5 All 272 (274): 1883 All W N 20: 7 Ind Jur 619.

(4) *Bhagwan Singh* v. *Ratan*, (1894) 16 All 395 (396): 1894 All W N 133.

(5) *Bhagwan Singh* v. *Ratan*, (1894) 16 All 395 (397): 1894 All W N 133; *Chhogmal* v. *Govind Prasad*, (1903) 16 C P L R 73 (75); *Sadik Hussain Khan* v. *Hashim Ali Khan*, (1914) 21 Ind Cas 876 (877) Cal.

(6) *Sidu* v. *Bali*, (1893) 17 Bom 32 (34); *Sankara Menon* v. *Gopala Pattar*, (1900) 23 Mad 121 (128).

(7) *Madappa Ganappa* v. *Jaki Ghosal*, (1915) 30 Ind Cas 893 (894): 40 Bom 60: 17 Bom L R 689.

(8) *Hemendranath* v. *Tulshi Singh*, 1930 All 413 (418): 126 Ind Cas 831; *Kapuria Mal* v. *Wali Muhammad*, 1922 Lah 142 (143): 23 Pun L R 1922: 65 Ind Cas 250: 4 Lah L Jour 354: 2 Lah 294: 111 Pun L R 1921; *Ram Nidh* v. *Thulsi Ram*, (1908) 6 Oudh Cas 23 (24). See also *Ishri* v. *Gopal Saran*, (1884) 6 All 351 (354): 1884 All W N 125: 8 Ind Jur 635.

(9) *Nilkanth* v. *Mahabir Singh*, 1924 Oudh 104 (105): 26 Oudh Cas 845: 74 Ind Cas 558.

Note 2.

(1) *Rengiah Chetty* v. *Narasiah*, (1916) 34 Ind Cas 388 (389): 3 Mad L W 267 [A plaintiff who holds a joint and several decree against two defendants (who under the same decree are individually entitled to different amounts for costs, which in the aggregate exceed the amount due to the plaintiff), can take out execution of the decree against one defendant alone for the balance due to him by both defendants until the other defendant makes an application in execution to recover the amount due to him by the plaintiff under the decree].

(2) *T S Venkatanarayana* v. *Puvvada Narasimha Row*, 1923 Mad 638 (640): 44 Mad L Jour 590: 32 Mad L Tim 341: 17 Mad L W 643: 72 Ind Cas 865: 1923 Mad W N 474.

Note 3.

(1) *Jugo Mohun* v. *Soorenderanath*, (1870) 13 Suth W R 106 (107); *Ram Lal* v. *Asutosh*, (1918) 44 Ind Cas 445 (447) Cal; *Bepin Behari Sen* v. *Krishna Behari Sen*, (1918) 45 Ind Cas 246 (248) Cal; *Venkatanarayana* v. *Puvvada Narasimha Row*, 1923 Mad 638 (640): 44 Mad L Jour 590: 32 Mad L Tim 341: 17 Mad L W 643: 72 Ind Cas 865: 1923 Mad W N 474.

claim for larger amount should be allowed only to the extent of the *difference*.[2] The Court should first ascertain the amounts due, enter satisfaction in respect of the claim for the smaller amount and enforce execution for the *balance of* the amount due under the larger claim.[3] Since the two claims form a single indivisible decree, and only enforceable for the difference, the fact that one of the claims is barred by limitation, does not alter the position.[4] O.21, R.19, Notes 3—4.

If in executing the decree for the larger claim, no deduction is made for the amount due under the smaller claim, and the claim is executed in full, the Court may order refund of the excess under S. 151.[5]

4. Set-off of costs.—From the illustrations given in Note 1, *supra* it is seen that an award of costs is a claim to "recover money" within the meaning of this rule. Thus costs awarded to one party in a suit may be set-off either against costs awarded to the other party in the suit[1] or against other sums awarded to the latter party.[2] Such costs, should, however, have been *actually* awarded.[3]

When costs have been awarded on interlocutory matters in the same suit between the same parties and against each other, they will be deemed to be incorporated in and to form part of, the final decree in the suit and will therefore be set-off against each other under this rule.[4]

Cross-decrees and cross claims in mortgage suits.

R. 20. [*New.*] *The provisions contained in rules* 18 *and* 19 *shall apply to decrees for sale in enforcement of a mortgage or charge.* O.21, R.20, Note 1.

Synopsis.

1. Scope and object of the rule.

1. Scope and object of the rule.—This rule makes the provisions of Rr. 18 and 19 applicable to cases where the decrees are, or one of the decrees is, a mortgage decree[1] thus:—

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(2) *Srimati Giribala Debia* v. *Srimati Rani Mina Kumari*, (1901) 5 Cal W N 497 (502): *Anand Mohan* v. *Atul Chandra*, (1920) 56 Ind Cas 753 (754): 24 Cal W N 465; *Haji Muhammad Taqi* v. *Haji Abdul Rahman*, 1923 Lah 151 (153): 79 Ind Cas 281.

(3) *Nubo Lal Khan* v. *The Maharanee of Burdwan*, (1868) 9 Suth W R 590 (592); *Issur Chunder* v. *Munmohan*, (1869) 12 Suth W R 308 (309); *Amjad Ali Khan* v. *Syed Fazul Hussain*, (1873) 19 Suth W R 187 (188); *Ram Lal Mandal* v. *Asutosh Mundal*, (1918) 44 Ind Cas 445 (447) Cal.

(4) *Madappa Ganappa* v. *Janki Ghosal*, (1915) 30 Ind Cas 893 (894): 40 Bom 60: 17 Bom L R 689.

(5) *Ananda Mohun* v. *Atul Chandra*, (1920) 56 Ind Cas 753 (755): 24 Cal W N 465.

Note 4.

(1) *Parmanand Raot* v. *Gobardhan Sahai*, (1906) 28 All 676 (677): 1906 All W N 198: 3 All L J 804.

(2) *Sadik Hussain Khan* v. *Hussain Ali Khan*, (1914) 24 Ind Cas 376 (377) (Oudh); *Bechai Singh* v. *Shami Nath*, (1911) 10 Ind Cas 454 (455) [On this principle where a pauper suit was decreed only partially and the amount decreed to the plaintiff was less than what plaintiff had to pay to the defendant as costs under the decree, it was held in *Chakrapani* v. *Government of India*, 1922 Mad 125 (126): 42 Mad L Jour 191: 31 Mad L Tim 38: 69 Ind Cas 743: 14 Mad L W 529: 1921 Mad W N 805 that the Government could recover nothing out of the amount decreed, towards the Court-fee due to it]. See, however, *Janki* v. *The Collector of Allahabad*, (1887) 9 All 64 (67, 68): 1886 All W N 300 where it was held that a claim to set-off under this rule must yield to the right of the Government for a first charge for Court fee on amount decreed in pauper suit.

(3) *Huro Pershad* v. *Fool Kishoree*, (1871) 16 Suth W R 308 (309).

(4) *Ramu Sahu* v. *Thakur Dayal*, (1917) 39 Ind Cas 888 (889): 2 Pat L W 62.

Order 21, Rule 20—Note 1.

(1) *See* the Report of the Select Committee: *Nagar Lal* v. *Ram Chand*, (1910) 8 Ind Cas 835 (836): 33 All 240: 7 All L J 1179; *Sadik Hussain* v. *Hashim Ali*, (1914) 24 Ind Cas 376 (377) (Oudh).

O.21, R.20, Note 1.

(1) A simple money-decree can be set-off against a mortgage decree if the other conditions laid down in R. 18 are satisfied,[2] and

(2) Costs awarded to a judgment-debtor may be set-off against a mortgage-decree obtained against him in the suit, if the other conditions laid down in R. 19 are satisfied.[3]

The Rangoon High Court has, however, held that a set-off cannot be allowed if there is no *personal liability* under the mortgage decree.[4]

O.21, R.21, Note 1.

R. **21**. [S. 230, para. (2)] The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Simultaneous execution.

[1877—Ss. 230, 231. *See* S. 51 and O. 21, R. 30.]

Synopsis.

1. Simultaneous execution.
2. Appeal.

Applicability to O. 38. See Note 1, F.-N. (1).

No power to direct mode of execution. See Note 1, Pts. (5) and (2).

1. Simultaneous execution.—Rule 30 entitles the decree-holder to execute his decree against the person, or the property, or both, of the judgment-debtor. But the power to order execution against the person and property *simultaneously* is within the discretion of the Court,[1] and this rule provides that such simultaneous execution may be refused.

In exercising the discretion under this Rule, regard must be had to the principle that the decree-holder has a right to realise the fruits of his decree in any manner allowed by law and therefore the refusal of simultaneous execution should be an exception rather than the rule.[2]

If the judgment-debtor is evading payment, his arrest can be ordered even though his properties might have been attached under the same decree.[3] But if there is no fraud or *mala fides* on his part, simultaneous execution may be refused.[4]

This rule, however, does not empower the Court to pin the decree-holder down to any particular mode of execution or refuse one mode of execution, on the ground that he had not sought the other in the first

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(2) *Nagar Mal* v. *Ram Chand*, (1910) 8 Ind Cas 835 (836): 33 All 240: 7 All L J 1179.

(3) *Sadik Husain Khan* v. *Hashim Ali Khan*, (1914) 24 Ind Cas 376 (377) (Oudh).

(4) *Burma Oil Co, Ltd* v. *Ma Tin*, 1930 Rang 68 (70, 71): 7 Rang 505: 120 Ind Cas 699.

Order 21, Rule 21—Note 1.

(1) *Syed Hoosein* v. *S R M M C T Chettiar Firm*, 1924 Rang 361 (361): 2 Rang 362: 3 Bur L Jour 159: 84 Ind Cas 270 [Applicable to O 38].

(2) *Hargobind Kishan Chand* v. *Hakim Singh*, 1926 Lah 110 (111): 6 Lah 548: 93 Ind Cas 54; *Maung Tha Dun* v. *Maung Thin*, (1904) U B R Execution of decree, p 1.

(3) *Chena Pemaji* v. *Ghelabhai*, (1883) 7 Bom 301 (302); *Beni Pershad* v. *Kashi Nath*, (1909) 2 Ind Cas 222 (223): 6 All L J 401.

(4) *Bhama Mal* v. *Ganpat Rai*, (1899) Pun Re No 21.

instance.[5] Nor does the rule prevent the decree being executed simultaneously in several districts.[6] O.21, R.21, Notes 1—2.

See also Note 10 to S. 38 *ante*.

2. Appeal.—An order refusing simultaneous execution under this rule amounts to a decree and is appealable as such.[1]

Notice to show cause *against execution in certain cases.*

R. **22.** [S. 248.] (1) *Where an application for execution is made*— O.21, R.22.

(*a*) more than one year *after* the date of the decree[11], or

(*b*) against the legal representative of a party to the decree,

the Court *executing the decree* shall issue a notice[3] to the *person* against whom execution is applied for requiring him to show cause, *on a date* to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application *is* made within one year from the date of the last order against the party against whom execution is applied for, *made* on any previous application for execution, or in consequence of the application being *made* against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him[12].

(2) *Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice*[16].

[1877—S. 248 ; 1859—S. 216. *See* Ss. 48 and 50.]

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(5) *Hira Lal* v. *Lal Chand*, 1929 Lah 86 (87): 110 Ind Cas 185; *Johari Mal* v. *Sant Lal*, (1887) 9 All 484 (485): 1887 All W N 101.

(6) *Krishto Kishore Dutt* v. *Rooplall Dass*, (1882) 8 Cal 687 (689): 10 Cal L Rep 609; *S R M M C T Chetty Firm* v. *Chimanbux*, 1921 L B 25 (26): 11 L B R 15: 63 Ind Cas 809 (2): 13 Bur L Tim 235.

Note 2.

(1) *China Pemaji* v. *Ghelabhai*, (1883) 7 Bom 301.

O. 21, R. 22.

Local Amendments.

ALLAHABAD.

For the words "one year", wherever they occur in this rule, *read* the words "three years".

To sub-R. (2) of this rule shall be added the following proviso:—

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."

BOMBAY.

In Rule 22, the words "two years" shall be substituted for the words "one year" wherever they occur.

LAHORE.

In Rule 22, the words "two years" shall be *substituted* for the words "one year" wherever they occur.

Add the following proviso at the end of the rule:—

"Failure to record such reasons shall be considered an irregularity not amounting to a defect in jurisdiction."

MADRAS.

In Rule 22, *between* sub-Rules (1) and (2), *insert* the following:—

"(1-*a*) Where from the particulars mentioned in the application in compliance with Rule 11 (2) (*ff*), *supra*, or otherwise the Court has information that the original decree-holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer."

In sub-Rule (1) of Rule 22, after Clause (*b*), *insert* the following:—

"or (*c*) where the party to the decree has been declared insolvent, against the Assignee or Receiver in insolvency."

NAGPUR.

In Rule 22, *for* the words "one year", wherever they occur, *substitute* the words "three years".

To sub-Rule (2) of Rule 22, *add* the following proviso:—

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."

N-W. F. P.

For the words "one year", wherever they occur in Rule 22, *read* "two years".

OUDH.

In Rule 22, *for* the words "one year", wherever they occur in this rule, *read* the words "three years".

To sub-Rule (2) of this rule *add* the following proviso:—

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment-debtor has sustained substantial injury by reason of such omission."

RANGOON.

In Clause (*a*) of sub-Rule (1) of Rule 22 *for* the words "one year" the words "three years" shall be substituted.

In the second line of the proviso to sub-Rule (1) of Rule 22, *for* the words "one year" the words "three years" shall be substituted.

Synopsis.

1. Legislative changes.
2. Scope and object of the rule.
3. "Shall issue notice."
4. Proof of notice.
5. Effect of omission to give notice.
6. Notice to wrong person.
7. Irregular service of notice.
8. Objection as to notice when may be taken.
9. More than one notice, if contemplated by the rule.
10. Remedy when property has been sold without notice under this rule.
11. Date of the decree.
12. Notice when not necessary.
13. Notice and limitation.
14. Court executing the decree.
15. Revivor of decree by notice to one judgment-debtor.
16. Sub-Rule (2).
17. Appeal.

Court which is to implead legal representative. See Note 14, Pts. (2) and (3).

Notice to some only of judgment-debtors—Effect. See Note 13, Pt. (15).

Notice—Who is entitled to. See Note 3, Pts. (5) and (6) and Note 12.

Writ of sciu Facias and this rule. See Note 13, Pt. (11).

1. Legislative changes.—

1. The words "of any decree passed on appeal from the decree sought to be executed or" which occurred in the proviso to the old S. 248 have been omitted as being unnecessary, as the decree to be executed in such cases will be the appellate decree.[1]

2. The explanation contained in the old section has also been omitted in view of the definition of "Court" given in S. 37.[2]

3. Sub-Rule (2) is new. *Vide* Note 16, *infra*.

2. Scope and object of the rule.—The object of the notice required to be given under this rule is not only to furnish an opportunity to the person concerned to urge any objection he may have to the maintainability of the execution application, but also to prevent his being taken by surprise and to enable him to satisfy the decree before execution is issued against him.[1] The rule is imperative and notice *shall* be issued—

(1) where the application is made *one year after* the date of the decree, and

(2) where it is made against the *legal representatives* of a party to the decree.[2]

An amendment, after one year, of an application for execution made within one year, does not render the application one made after one year

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Order 21, Rule 22—Note 1.

(1) *Kristo Kinkur Roy* v. *Raja Burroda Kant Roy*, (1870-72) 14 Moo Ind App 465 (484): 10 Beng L R 101: 17 Suth W R 292: 2 Suther 564: 3 Sar 62; *Muhammad Sulaiman Khan* v. *Muhammadyar Khan*, (1889) 11 All 267 (274): (1889) All W N 55: 13 Ind Jur 427 F B.

(2) The Report of the Special Committee.

Note 2.

(1) *Erava* v. *Sidramappa*, (1897) 21 Bom 424 (432) F B; *Jogendra Chandra* v. *Sham Das*, (1909) 1 Ind Cas 168 (171): 36 Cal 543: 9 Cal L Jour 271; *Levinia* v. *Madhabmoni*, (1910) 5 Ind Cas 390 (394): 11 Cal L Jour 489: 14 Cal W N 560; *Lakshmi Charan* v. *Srie Chandra*, (1911) 9 Ind Cas 584 (585): 13 Cal L Jour 162; *Arjun* v. *Gunendra*, (1914) 20 Cal L Jour 341: 18 Cal W N 1266: 37 Ind Cas 294; *Gurudas* v. *Thakamani Dasi*, 1921 Cal 609 (610): 25 Cal W N 972: 64 Ind Cas 476; *Tara Prasanna* v. *Jnanendra Narayan Bagchi*, 1926 Cal 86 (86): 88 Ind Cas 1039.

(2) *Adkia* v. *Shankar Rao*, 1921 Nag 126 (126, 127): 59 Ind Cas 757; *Raghunath Das* v. *Sundar Das Khetri*, 1914 P C 129 (131): 42 Cal 72: 41 Ind App 251: 18 All L J 154: 16 Bom L R 814: 20 Cal L Jour 555: 18 Cal W N 1058: 27 Mad L Jour 150: 16 Mad L Tim 353: 1 Mad L W 567: 1914 Mad W N 747: 24 Ind Cas 304 P C.

O.21, R.22, Notes 2—3.

for the purposes of this rule.[3] The necessity for notice in an application for execution against the legal representatives of the judgment-debtor is not confined to cases where execution is taken out against them in the *first instance;* it equally applies to cases where execution had been previously taken against the judgment-debtor himself and, on his death, the execution is sought to be taken out against the legal representatives.[4]

A notice under this rule may be issued by the Court *executing* a transferred decree, while a notice under O. 21, R. 16 should be given only by the Court which *passed* the decree.[5]

The issue of a notice under this rule to the guardian of a minor judgment-debtor raises no presumption that he has been appointed guardian by implication by the Court.[6]

The rule does not apply to summary proceedings like those contained in S. 111 of the Madras Estates Land Act.[7]

3. **"Shall issue notice."**—The provisions of this rule are mandatory[1] and the issue of the notice is a *condition precedent* to the validity of the execution proceedings.[2] It is the duty of the Court to issue the notice whether the decree-holder has asked for it or not[3] and the failure to do so will render the proceedings *null and void.*[4] *See* Note 5, *infra.*

The Rule is, however, sufficiently complied with if notice has been given to all persons interested and the fact that some of them were minors for whom guardians had not been appointed will not invalidate the execution proceedings if the others sufficiently represented them.[5]

A minor who attained majority pending execution proceedings is not entitled, on that ground, to a fresh notice under this rule.[6]

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(3) *See* Rule 17, sub-Rule 2 *ante.*

(4) *Smith* v. *Kailash Chandra Chakravarty,* 1932 Pat 199 (200, 201): 11 Pat 241: 13 Pat L Tim 323: 138 Ind Cas 99. See *Jagadish* v. *Bama Sundari,* (1919) 51 Ind Cas 972 (974, 975): 23 Cal W N 608: 29 Cal L Jour 411 [Death of judgment-debtor after attachment—Execution sale without legal representative under Code of 1882—Sale not invalid]. *See also* S 50, N 12 Pts (4) and (4-a).

(5) *Jung Bahadur* v. *Bank of Upper India, Ltd, Lucknow,* 1925 Oudh 448 (450): 12 Oudh L J 146: 2 Oudh W N 73: 87 Ind Cas 21: 28 Oudh Cas 330.

(6) *Khajeh Salaluddin* v. *Mt Afzal Begam,* 1925 Cal 23 (25): 28 Cal W N 963: 39 Cal L Jour 590: 84 Ind Cas 68. But see *Krishna Pershad Singh* v. *Gosta Behari Kundu,* (1907) 5 Cal L Jour 434 (438) [Person named guardian-*ad-litem* in execution petition and notice issued—Appointment as guardian by implication presumed].

(7) *Subba Reddi* v. *Marga Sastriar,* 1929 Mad 517 (519): 118 Ind Cas 818.

Note 3.

(1) *Syam Mandal* v. *Sati Nath Banerjee,* (1917) 38 Ind Cas 493 (496): 44 Cal 954: 24 Cal Jour 528: 21 Cal W N 776.

(2) *Sahdeo Panday* v. *Ghasiram Gyawal,* (1893) 21 Cal 19 (22); *Raj Bullub Shaha* v. *Gossain Doss Shaha,* (1870) 13 Suth W R 400 (401); *Imam-un-nissa* v. *Liakat Husain,* (1881) 3 All 424 (426): 1881 All W N 1; *Rameswri* v. *Doorga Das,* (1881) 6 Cal 103 (105): 7 Cal L Rep 85; *Raghunath* v. *Sundar,* 1914 P C 129 (131): 42 Cal 72: 41 Ind App 251: 18 All L J 154: 16 Bom L R 814: 20 Cal L Jour 555: 18 Cal W N 1058: 27 Mad L Jour 150: 16 Mad L Tim 353: 1 Mad L W 567: 1914 Mad W N 747: 24 Ind Cas 304 P C.

(3) *Stevens* v. *Kamta Pershad,* (1909) 2 Ind Cas 941 (942): 10 Cal L Jour 19; *Jagannath Khan* v. *Brojonath Pal,* (1902) 29 Cal 580 (582); *Shyam Mandal* v. *Satinath Banerjee,* (1917) 38 Ind Cas 493 (494): 44 Cal 954: 24 Cal L Jour 528: 21 Cal W N 776; *Rajagopala Ayyar* v. *Ramanuja Chariar,* (1924) 46 Mad L Jour 104.

(4) *Syam Mandal* v. *Sati Nath Banerjee,* (1917) 38 Ind Cas 493 (496): 44 Cal 954: 24 Cal L Jour 528: 21 Cal W N 776; *Maharaj Bahadur Singh* v. *Inderchand Bothra,* (1917) 41 Ind Cas 853 (856): 26 Cal L Jour 130: 22 Cal W N 390. See also *Fani Bhusan Bhuian* v. *Surendra Nath Das,* 1921 Cal 476 (478): 35 Cal L Jour 9: 64 Ind Cas 25; *Gopal Chunder* v. *Gunamoni Dasi* (1893) 20 Cal 370 (373); *Manindra Chandra Nandi* v. *Rahatannessa Bibi,* 1931 Cal 555 (556): 53 Cal L Jour 46: 58 Cal 825: 133 Ind Cas 670: 35 Cal W N 220.

(5) *Fani Bhusan* v. *Surendra Nath,* 1921 Cal 476 (478): 35 Cal L Jour 9: 64 Ind Cas 25.

(6) *Nagappa Chetty* v. *Muthuraman Chetty,* 1925 Mad 158 (159): 78 Ind Cas 12.

A notice under the rule should be to specifically show cause why the decree should not be executed.[7] O.21, R.22, Notes 3—5.

4. Proof of notice.—Where an execution is impeached on the ground of want of notice under the rule, the onus of proving the want of notice will be on the party setting it up.[1] The reason is that the issue of a notice under the rule being the duty of Court, it will be presumed that the Court has done all that it was legally bound to do. In this connection an entry on the order sheet[2] or a report of the Nazir[3] to the effect that notice has been served will be *prima facie* evidence of the service of notice.

5. Effect of omission to give notice.—Before the date of the Privy Council decision in *Malkarjun* v. *Narhari*,[1] it was held by the High Courts of Allahabad and Calcutta that a sale in execution without giving the notice required by this rule was absolutely void and without jurisdiction.[2] The High Court of Madras, on the other hand, held that the absence of notice was only a *material irregularity* and that the sale was only *voidable*, and not *void*.[3] In this state of conflict of authority the Privy Council decided the case of *Malkarjun* v. *Narhari*.[4] There, a judgment-debtor having died, the decree was executed against his estate. A notice under the rule was issued and served on a person as the legal representative of the judgment-debtor. He appeared and objected that he was not the legal representative. The Court, however, decided that he was the legal representative and proceeded with the execution. The properties of the judgment-debtor were sold in Court auction. It was ultimately found that the person to whom the notice was sent was not the proper legal representative. The question before the Privy Council was whether the sale was, under the circumstances, *void for want of jurisdiction* or *only voidable on the ground of material irregularity*. Their Lordships decided that the Court had jurisdiction to decide whether a person was a legal representative of a party or not, that having decided it in a particular manner, the decision cannot be said to be without *jurisdiction*, that the case was only one of material irregularity in the *exercise* of jurisdiction and that the sale was, therefore, not void.

Notwithstanding the above points of distinction the decision came to be regarded in India as one equally applying to a *total omission to issue notice*

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(7) *Smith* v. *Kailash Chandra Chakravarty*, 1932 Pat 199 (201): 11 Pat 241: 13 Pat L Tim 323: 138 Ind Cas 99 [A notice calling upon the legal representative to show cause why his name should not be substituted in the place of the judgment-debtor is not enough].

Note 4.

(1) *Jayannath Khan* v. *Brojonath Pal*, (1902) 29 Cal 580 (582); *Bimola Sundaree Dassee* v. *Kalee Kishen Mojoomdar*, (1874) 22 Suth W R 5 (6).

(2) *Bindu Bashini Dasya* v. *Keshab Lal Basu*, (1917) 37 Ind Cas 66 (68, 69): 21 Cal W N 945: 26 Cal L Jour 109; *John Galstaun* v. *Syed Mahomed Husain*, 1932 Cal 627 (628): 36 Cal W N 242.

(3) *Mahomed Monee* v. *Kadir Mera*, (1914) 22 Ind Cas 802 (803): 1914 Mad W N 63; *Meer Lootf Ali* v. *Aboo Bibee*, (1871) 15 Suth W R 203 (204); *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory*, (1873) 19 Suth W R 102 (103).

Note 5.

(1) (1901) 25 Bom 337 (348): 27 Ind App 216: 5 Cal W N 10: 2 Bom L R 927: 10 Mad L Jour 368: 7 Sar 739 P C.

(2) *Imam-un-nissa Bibi* v. *Liakat Husain*, (1881) 3 All 424 (426): 1881 All W N 1; *Gopal Chunder* v. *Ghunamoni Dassee*, (1893) 20 Cal 370 (373); *Rameswri Dassee* v. *Doorgadas*, (1880) 6 Cal 103 (105, 106): 7 Cal L Rep 85.

(3) *Krishnayya* v. *Unnissa Begam*, (1892) 15 Mad 399 (400). But see *Ramasami Ayyangar* v. *Bhagirathi Ammal*, (1883) 6 Mad 180 (181).

(4) (1901) 25 Bom 337 (347, 348): 27 Ind App 216: 5 Cal W N 10: 2 Bom L R 927: 10 Mad L Jour 368: 7 Sar 739 P C.

O.21, R.22, Note 5.

and as laying down the law that, even in the absence altogether of any notice there was only a *material irregularity* and *not a want of jurisdiction* and that the sale was *voidable* and *not void.* Accordingly, the Calcutta High Court changed its original view and held that an omission to give notice under the rule was only a *material irregularity* rendering the execution-sale *voidable.*[5] The Allahabad and Madras High Courts also began to hold the same view.[5-a] This view held the field till the Privy Council had occasion to clarify the whole position, in *Raghunath Das* v. *Sundar Das.*[6] In that case, the judgment-debtor having become insolvent, his properties had vested in the Official Assignee. When the decree-holder took out execution a notice was issued to the Official Assignee to show cause why he should not be substituted for the debtor but there was no notice to show cause *why the decree should not be executed.* It was, therefore, a case of omission to issue notice under the rule. The execution proceeded and the properties of the debtor were sold in Court auction. The question before the Privy Council was whether the sale was *void* or only *voidable.* Their Lordships of the Privy Council held that a *notice under the rule was necessary in order that the Court should obtain jurisdiction to sell the property,* that the notice to show cause against substitution was not enough and that the sale was, therefore, *void and the purchaser obtained no title.* Their Lordships pointed out—

(1) that in *Malkarjun's case* a notice having been issued and served, though on a wrong person, the Court had acquired jurisdiction to deal with the matter;

(2) that the Court in deciding upon a wrong person as the legal representative nevertheless acted with jurisdiction;

(3) that in so deciding erroneously, the Court acted only with *material irregularity* and not without jurisdiction.

Since the said decision in *Raghunath Das's case,* all the High Courts[7] except the Madras High Court veered round to their old view, *viz.*, that the sale was without jurisdiction and therefore void. The Madras High Court, however, still continued to hold that the sale was only voidable and not

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(5) *Levinia Ashton* v. *Madhabmoni Dasi,* (1910) 5 Ind Cas 390 (394): 11 Cal L Jour 489: 14 Cal W N 560; *Sreepati Charan Chowdhry* v. *Belchambers,* (1910) 8 Ind Cas 22 (24): 15 Cal W N 661: 15 Cal L Jour 123; *Lakshmi* v. *Srish,* (1911) 9 Ind Cas 584 (585): 13 Cal L Jour 162; *Sham Sunder Singh* v. *Jhumat Shah,* (1911) 11 Ind Cas 893 (895): 20 Cal L Jour 337; *Raeuraj Kumar* v. *Prasanna,* (1912) 15 Ind Cas 506 (507): 40 Cal 45; *Bepin Behari Bejali* v. *Kanti Chandra Mandal,* (1913) 18 Ind Cas 715 (716) (Cal); *Bepin Behary* v. *Sosi Bhusan,* (1913) 22 Ind Cas 95 (97): 18 Cal W N 766: 18 Cal L Jour 628.

(5-a) *Ramjas* v. *Sheo Prasad,* (1906) 28 All 193 (195): 2 All L J 640: 1905 All W N 241; *Mahomed Meera Rowther* v. *Kadir Meera Rowther,* (1914) 22 Ind Cas 302 (303): 1914 Mad W N 63.

(6) 1914 P C 129 (132): 42 Cal 72: 41 Ind App 251: 13 All L J 154: 16 Bom L R 814: 20 Cal L Jour 555: 18 Cal W N 1058: 27 Mad L Jour 130: 16 Mad L Tim 353: 1 Mad L W 567: 1914 Mad W N 747: 24 Ind Cas 304 P C.

(7) *Chandi Prasad* v. *Mt Jumna,* 1928 All 74 (76): 49 All 830: 25 All L J 507: 102 Ind Cas 289; *Arjun* v. *Gunendra,* (1915) 27 Ind Cas 294 (296): 20 Cal L Jour 341: 18 Cal W N 1266; *Maharaja Bahadur Singh* v. *Surendra Narayan Singh,* (1915) 28 Ind Cas 898 (901): 19 Cal W N 152; *Shyam Mandal* v. *Satinath,* (1917) 38 Ind Cas 493 (496): 44 Cal 954: 21 Cal W N 776: 24 Cal L Jour 523; *Maharaj Bahadur Singh* v. *Indar Chand Bothra,* (1917) 41 Ind Cas 853 (856, 857): 22 Cal W N 390: 26 Cal L Jour 130; *Surendra Nath Saha* v. *Boda Ram Poddar,* (1918) 45 Ind Cas 699 (700) (Cal): *Ram Kinker Tewari* v. *Sthithi Ram,* (1918) 46 Ind Cas 221 (223): 27 Cal L Jour 528; *Gurudas Biswas* v. *Thakamani,* 1921 Cal 609 (610, 611): 25 Cal W N 972: 64 Ind Cas 476; *Sarda Prosad Roy* v. *Krishna Dome,* 1926 Cal 539 (540): 91 Ind Cas 711; *Monmatha Nath Ghose* v. *Luchmi Debi,* 1928 Cal 60 (62): 46 Cal L Jour 579: 105 Ind Cas 65: 55 Cal 96; *Satish Chandra Bhaduri* v. *Pabna Dhana Bhandar Company, Ltd.,* 1930 Cal 348 (349): 51 Cal L Jour 197: 125 Ind Cas 655: *Manindra Chandra Nandi* v. *Rahatannessa Bibi,* 1931 Cal 555 (556): 35 Cal W N 220: 53 Cal L Jour 46: 58 Cal 825: 133 Ind Cas 670; *Adkia*

void[8] distinguishing *Raghunath Das's case* on the ground that it was a case under the old Code which contained no provision similar to that contained in the present sub-R. (2); and that in view of the recognition in the present sub-R. (2) of the Court's *discretion* in the matter of issuing notice there was no longer any question of want of jurisdiction.[9] The matter, however, came up before a Full Bench of the same Court which finally laid down that a sale held under the circumstances mentioned above was *void for want of jurisdiction* and *not merely voidable.*[10]

Thus it may now be taken as well settled that in cases of a *total omission to issue a notice* under the rule the sale is *absolutely void* and not *merely voidable.* It is immaterial whether the property sold is immoveable or movable.[11] Nor is it material whether the purchaser is the decree-holder himself[12] or a stranger.[13]

However, the only object of the rule is to give the person concerned an opportunity to show cause against execution. Consequently, if, though no notice is served, he appears and contests the application[14] or if he was served with a notice under R. 66 and was thus aware of the application pending against him[15] the object of the rule is achieved and the proceedings are valid. It has been held by the Judicial Commissioner's Court of Oudh that the omission to issue notice under this rule does not render the sale in execution of a *mortgage decree* void, inasmuch as the jurisdiction to sell the property is derived from the decree itself and not by reason of the notice.[16]

6. **Notice to wrong person.**—In *Malkarjun* v. *Narhari*[1] their Lordships of the Privy Council held that if a notice is, as a fact, issued but served

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v. *Shanker Rao*, 1921 Nag 126 (127): 59 Ind Cas 757; *Babu Das Narayan Singh* v. *Mir Muhammad Yusuf*, 1921 Pat 145 (147): 6 Pat L Jour 319: 1921 Pat H C C 181: 2 Pat L Tim 401: 61 Ind Cas 823: 3 U P L R (Pat) 33; *Smith* v. *Kailash Chandra Chakravarty*, 1932 Pat 199 (201): 11 Pat 241: 13 Pat L Tim 323: 138 Ind Cas 99; *Ramdass* v. *Kannammal*, 1929 Rang 161 (161): 7 Rang 110: 117 Ind Cas 245; *Kumar Gocool Chandra* v. *Matilal Ghose*, 1931 Cal 553: 35 Cal W N 336: 58 Cal 1013: 134 Ind Cas 889 [Where there are several legal representatives against whom execution is sought and only some of them are not served with notice under O 21, R 22 and the sale is held, it is without jurisdiction only with respect to the shares of the legal representatives not served and can be set aside only to that extent].

(8) *Krishnasami Ayyangar* v. *Soorikutty Ganapathi Ayyar*, 1921 Mad 523 (523): 14 Mad L W 638: 1921 Mad W N 394: 63 Ind Cas 903; *Doraiswami* v. *Chidambaram Pillai*, 1924 Mad 130 (132): 47 Mad 63: 45 Mad L Jour 413: 18 Mad L W 577: 1923 Mad W N 817: 83 Mad L Tim 25: 75 Ind Cas 46.

(9) *Kasiviswanathan Chetty* v. *Somasundaram Chetty*, 1922 Mad 93 (95): 1922 Mad W N 173: 42 Mad L Jour 422: 70 Ind Cas 611: 45 Mad Mad 875.

(10) *Rajagopala Ayyar* v. *Ramanuja Chariar*, 1924 Mad 431 (436): 47 Mad 288: 46 Mad L Jour 104: 19 Mad L W 179: 34 Mad L Tim 37: 1924 Mad W N 182: 80 Ind Cas 92 F B. See also *P K Nainar Rowthen* v. *Kuppai Pichai Rowthen*, 1929 Mad 609 (611): 1929 Mad W N 168: 120 Ind Cas 889.

(11) *Sahdeo* v. *Ghasiram*, (1894) 21 Cal 19 (22) [Where the property sold was an elephant].

(12) *Rameswurt Dassee* v. *Doorga Dass Chatterjee*, (1881) 6 Cal 103 (105, 106): 7 Cal L Rep 85; *Gurudas Biswas* v. *Thakamani Dasi*, 1921 Cal 609 (610, 611): 25 Cal W N 972: 64 Ind Cas 476.

(13) *Imam-un-nissa Bibi* v. *Liakat Husain*, (1881) 3 All 424 (426): 1881 All W N 1; *Sahdeo Pandey* v. *Gasiram Gyawal*, (1894) 21 Cal 19 (23); *Syam Mandal* v. *Satinath*, (1917) 38 Ind Cas 493 (496): 44 Cal 954: 24 Cal L Jour 523: 21 Cal W N 776.

(14) *Chandra Nath Bachi* v. *Nabadwip Chand Dutt*, 1931 Cal 476 (478): 35 Cal W N 9: 53 Cal L Jour 329: 131 Ind Cas 702; *Fakhrul Islam* v. *Bhubaneswari Kuer*, 1929 Pat 79 (80): 7 Pat 790: 117 Ind Cas 648; *Grish Chandra Bannerjee* v. *Bhanoo Motee*, (1869) 11 Suth W R 329 (329); *Madhu Sudan* v. *Kailash Chunder*, (1897) 2 Cal W N 254 (255). See also *Karu Mahto* v. *Emperor*, 1932 Pat 244 (245, 246): 13 Pat L Tim 395: 1932 Cr C 641: 139 Ind Cas 585 [Delivery of possession passes possession in spite of non-service of notice under this rule].

(15) *Kora Lal* v. *The Punjab National Bank*, (1920) 55 Ind Cas 816 (817): 1921 Lah 384: 118 Pun L R 1920: 5 Lah L Jour 67: 2 U P L R (L) 91. See also *Nagappa Chetty* v. *Muthuraman Chetty*, 1925 Mad 158 (159): 78 Ind Cas 12.

(16) *Kaniz Mehdi Begam* v. *Rasulbey*, (1918) 48 Ind Cas 39 (49): 5 Oudh L J 551.

Note 6.

(1) *Malkarjun* v. *Narhari*, (1901) 25 Bom 337 (347, 352): 27 Ind App 216: 5 Cal W N 10:

O.21,R.22, Notes 6—8.

on a wrong person and, on the objection of the latter, the Court decides that he is the right legal representative, it acts only in the exercise of jurisdiction and the sale is only *voidable*. In such cases the proper legal representatives are equally bound by the execution proceedings though they were not parties thereto.[2] But if the decree-holder was aware of the proper legal representatives and deliberately gets notice served on a wrong person and there is no *adjudication* by the Court as to who is the legal representative, the sale will be void.[3]

7. Irregular service of notice.—The notice issued under this rule must be in accordance with law and must satisfy the requirements laid down in sub-R. (1).[1] Thus a day must be specified for the appearance of the person to whom the notice is issued[2] allowing sufficient time to enable him to come and oppose the application[3] and the notice must be signed by the Judge or other officer.[4]

But an irregularity in the service of notice is quite different from an *omission* to issue notice. It will not make the subsequent proceedings void.[5] The judgment-debtor or the legal representative will not be precluded from setting up his defence of objections at a later stage.[6] The irregularity may also furnish a ground for avoiding a sale under R. 90.[7]

8. Objection as to notice when may be taken.—Since the question of the issue of notice is one affecting the jurisdiction of the Court, an objection that no notice was issued is entertainable at any time even in appeal[1] but not, if it is likely to take the other side by surprise.[2]

But an *irregular or insufficient service* of such notice is only an irregularity and an objection based on the ground of non-service or insufficient service should be taken at the earliest possible opportunity.[3]

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2 Bom L R 927: 10 Mad L Jour 368: 7 Sar 739 P C. See also *Gopal* v. *Har Prasad*, (1892) 12 All W N 241 (242). See also *Hari* v. *Narain*, (1888) 12 Bom 427 (430). See also *Khiarajmal* v. *Daim*, (1905) 32 Cal 296 (314, 315): 32 Ind App 23: 9 Cal W N 201: 2 All L J 71: 7 Bom L R 1: 1 Cal L Jour 584: 8 Sar 734 P C. See also *Jnanendranath Basu* v. *Rani Nihalo Bibi*, (1910) 6 Ind Cas 38 (40): 32 All 404: 7 All L J 512.

(2) *Babu Lal* v. *Sukhrani*, 1926 Oudh 613 (614): 3 Oudh W N 771: 99 Ind Cas 211: 13 Oudh L J 813. See also *Nanabhai Ganpat Rao* v. *Janardhan Vasudeoji*, (1892) 16 Bom 636 (638).

(3) *Shankar Daji Naik* v. *Dattatraya Vinayak Khandalekar*, 1921 Bom 385 (387): 45 Bom 1186: 23 Bom L R 514: 63 Ind Cas 248 [Per Macleod, J., contra, sale only voidable though purchaser was not entitled to possession].

Note 7.

(1) *Anand Ram* v. *Nitya Nanda Barham*, (1916) 32 Ind Cas 744 (747) Cal.

(2) *Sheikh Naseer* v. *Emperor*, (1909) 5 Ind Cas 409 (410): 37 Cal 122: 14 Cal W N 282.

(3) *Lakshmanan Chetty* v. *Palaniappa Chetty*, 1928 Mad 1052 (1054).

(4) *Ram Dayal* v. *Mahtab Chand*, (1885) 7 All 506 (508); *Queen-Empress* v. *Janki Prasad*, (1886) 8 All 293 (294): 1886 All W N 106.

(5) *Babu Das Narayan Singh* v. *Mir Muhamad Yusuf*, 1921 Pat 145 (147): 1921 Pat H C C 181: 6 Pat L Jour 819: 2 Pat L Tim 401: 61 Ind Cas 823: 3 U P L R (Pat) 33.

(6) *Shripati Charan* v. *Belchambers*, (1910) 8 Ind Cas 22 (25): 15 Cal L Jour 123: 15 Cal W N 661; *Mochai* v. *Meerruddin*, (1911) 9 Ind Cas 213 (214): 13 Cal L Jour 26; *Chatterput* v. *Daya Chand*, (1911) 11 Ind Cas 216 (217): 23 Cal L Jour 641.

(7) *Moinuddeen Mirza* v. *Mahomed Amin*, 1930 Pat 153 (154): 119 Ind Cas 891.

Note 8.

(1) *Lakshmi Charan Sen* v. *Srishchandra Roy*, (1911) 9 Ind Cas 584 (585): 13 Cal L Jour 162.

(2) *Bhadai Sahu* v. *Manowar Ali*, (1919) 52 Ind Cas 125 (128): 4 Pat L Jour 645: 1920 Pat H C C 91 [An execution sale which had become final was impeached in the appellate Court as a nullity on the ground that one of the two judgment-debtors had died and the sale was held without notice to his heirs. *Held*, that the point not having been taken at any stage of the suit and no opportunity having been given of showing that the surviving judgment-debtor was entitled to represent the heirs of the deceased, it was impossible to say that the sale was a nullity].

(3) *Rewut Koonwar* v. *Omrao Bahadoor*, (1874) 21 Suth W R 148 (148). See also *Newajuddin Mondal* v. *Sashi Kanta Acharjee*, (1920) 57 Ind Cas 883 (884) Cal.

9. More than one notice, if contemplated by the rule.—The provisions of the rule as to *notice* is not confined to the *first* execution application. It extends to every subsequent application also.[1] The only exception in the latter case is that contained in the proviso,[2] *viz.*:—

> (1) If on a prior execution application an order has been passed against the judgment-debtor, no notice will be necessary on a subsequent execution application presented within one year after that *order* though more than one year might have elapsed from the date of the decree.[3]
>
> (2) If on a prior execution application execution has been ordered to issue against the legal representatives of a deceased judgment-debtor, no notice will be necessary for an execution application presented within one year of that order though more than one year might have elapsed from the date of the decree.

Consequently, if the subsequent execution application is presented more than one year after such last order, notice is necessary.[4] It is, however, unnecessary that the order should be a *subsisting* one.[5]

But the rule will apply only to a *fresh application for execution*. Where the proceedings are but a *continuation* of a prior execution case, no notice of such proceedings is necessary.[6] Acting on this principle the High Court of Madras has held that where properties have been attached in a prior execution application and the application has been dismissed leaving the attachment substing, a *subsequent application for sale of the property* will not require a notice under this rule.[7]

10. Remedy when property has been sold without notice under this rule.—When a sale is held without the issue of a notice under this rule, the party aggrieved will be entitled to have the sale declared void and will be further entitled to claim damages.[1] This he may do by means of an application under S. 47.[2] *See* Note 61 to S. 47. As to the period of limitation for such applications, *see* Note 88 to S. 47 and the undermentioned cases.[3]

Note 9.

(1) See however *M L M Ramanathan Chettiar* v. *Ramanathan Chettiar*, 1929 Mad 275 (279): 117 Ind Cas 705: 30 Mad L W 995.

(2) *Adaya Prasad Singh* v. *Ram Narayan Das*, 1925 Pat 474 (476): 1925 Pat H C C 121: 6 Pat L Tim 290: 87 Ind Cas 531: 5 Pat 1 F B [Overruling 2 Pat 916].

(3) *Srinivasa* v. *Narayana*, (1917) 40 Ind Cas 670 (672): 1917 Mad W N 498: 33 Mad L Jour 539: 6 Mad L W 361; *Venkataraman* v. *Mahalingayyan*, (1886) 9 Mad 508 (509, 510) [An order for rateable distribution is an order within the meaning of this rule].

(4) *Adaya Prasad Singh* v. *Ram Narain Das*, 1925 Pat 474 (476): 1925 Pat H C C 121: 6 Pat L Tim 290: 87 Ind Cas 531: 5 Pat 1 F B [Dissenting from 2 Pat 916].

(5) *Bibi Wakilan* v. *Bibi Kasiman*, 1930 Pat 536 (538): 9 Pat 499: 125 Ind Cas 799: 11 Pat L Tim 859.

(6) *Sultan Hasan Mirza* v. *Srimati Nanki Bibi*, 1928 Cal 241 (242); *Shankar Balchand* v. *Hiralal Balchand*, 1931 Bom 425 (427): 33 Bom L R 858: 134 Ind Cas 730. See also *Kalanand Singh* v. *Chandra Kishore Jha*, (1910) 7 Ind Cas 19 (21): 14 Cal W N 971: 12 Cal L Jour 192.

(7) *Vuppu Seetharamayya* v. *Minchula Gopalakrishna Amma*, (1919) 53 Ind Cas 257 (260): 43 Mad 57: 37 Mad L Jour 216: 10 Mad L W 190: 1919 Mad W N 568.

Note 10.

(1) *Syed Ruznudeen Hossein* v. *Mt Fuzalin*, (1865) 3 Suth W R 120 (122); *Kasee Nath Roy Chowdhry* v. *Hullodhur Roy*, (1865) 2 Suth W R 60 (61).

(2) *Parashram* v. *Balmukund Lachiram*, (1908) 32 Bom 572 (574): 10 Bom L R 752; *Lakshmi* v. *Srishchandra*, (1911) 9 Ind Cas 584 (585): 13 Cal L Jour 162.

(3) *Ram Kinkar* v. *Sthiti Ram*, (1918) 46 Ind Cas 221 (224): 27 Cal L Jour 528; *Bihari*

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11. Date of the decree.—The period of one year is to be computed from the date of the decree capable of execution. Thus, if the decree of the first Court is affirmed or modified in appeal, the date of the decree is the date of the appellate decree. But if the appeal is dismissed for default, the date of the decree is that of the decree appealed against.[1]

Where a decree provides for the payment of money in instalments, the period of one year should be computed from the date of the decree and not from the date of *default* in payment of the instalment.[2]

12. Notice when not necessary.—The principle underlying the mandatory provision of the rule is that the interests which *would* be affected by the execution should be sufficiently represented and that an opportunity should be given for showing cause, if any, against the execution. A notice should, therefore, be insisted on only to the extent necessary for that purpose. Therefore, in cases falling under cl. (*a*) of sub-R. 1, no notice need be issued to a judgment-debtor who has no interest in the property against which execution is sought.[1] And in cases falling under clause (*b*) of sub-R. 1, it is enough if notice has gone to an adult legal representative capable of representing the estate, notice to the other legal representatives is not essential.[2] Nor is any notice essential where the legal representative is already a party on the record though in another capacity.[3]

13. Notice and Limitation.—By virtue of Cl. 5 of column 3 of Art. 182 of the Limitation Act of 1908, a notice issued under this rule will be a step-in-aid of execution in the case of decrees of Courts other than Chartered High Courts. For this purpose it is not necessary that the application on which the notice was issued should be a *bona fide* application.[1] Nor is it material that the application was defective or irregular.[2] Or that it was not actually

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Lal Mitter v. *Tanuk Lal Mandar*, 1926 Pat 397 (398): 97 Ind Cas 798: 8 Pat L Tim 28.

Note 11.

(1) *Syam Mandal* v. *Satinath*, (1917) 38 Ind Cas 493 (496): 44 Cal 954: 24 Cal L Jour 523: 21 Cal W N 776.

(2) *Koralal* v. *Punjab National Bank, Ltd.*, 1921 Lah 384 (385): 5 Lah L Jour 67 [The *terminus a quo* is *the date of the decree* and not the date of default in paying the instalment which gave the right to execute the decree].

Note 12.

(1) *Tara Prasanna Sinha* v. *Jnanendra Narayan Bagchi*, 1926 Cal 86 (86, 87): 88 Ind Cas 1039.

(2) *M L M Ramanathan Chettiar* v. *Ramanathan Chettiar*, 1929 Mad 275 (282): 117 Ind Cas 705: 30 Mad L W 995.

(3) *Azizannessa* v. *Dwarika Prosad*, 1925 Cal 1227 (1228): 86 Ind Cas 745; *Odayanaswami Tevar* v. *Alagappa Chetty*, (1904) 14 Mad L Jour 342 (343).

Note 13.

(1) *Rohinee Nundan Mitter* v. *Bhugwan Chunder Roy*, (1874) 22 Suth W R 154 (155): 14 Beng L R 144 Note; *Koonj Behari* v. *Girdharee*, (1874) 22 Suth W R 484 (484); *Eshanchunder Bose* v. *Prannath Nag*, (1874) 22 Suth W R 512 (517): 14 Beng L R 143 F B; *Shurut Chunder Sen* v. *Abdool Khyr Mahomed Mohuteeur*, (1875) 23 Suth W R 327 (328). The following cases cannot be considered to be good law:—*Tabbur Singh* v. *Motee Singh*, (1867) 8 Suth W R 306 (307); *Mazedoonissa Beebee* v. *Fuezun Beebee*, (1865) 4 Suth W R Mis 6 (6); *Bhugobutty* v. *Mohun Chunder Puteedundo*, (1866) 6 Suth W R Mis 97 (97); *Ram Sahai Singh* v. *Sheo Sahai Singh*, (1866) 6 Suth W R Mis 98 (101): 1 Ind Jur N S 421: Beng L R Sup Vol 492; *Kisto Kaut Bural* v. *Nistarinee Debia*, (1867) 8 Suth W R 268 (268); *Obhoy Churn* v. *Modhoo Soodun Chowdhry*, (1868) 9 Suth W R 330 (331); *Tabbur Singh* v. *Motee Singh*, (1868) 9 Suth W R 443 (444); *Rajeeb Lochan Saha* v. *Mr James Wilford Massey*, (1872) 18 Suth W R 193 (194); *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory*, (1873) 19 Suth W R 102 (103).

(2) *Dhonkal Singh* v. *Phakkar Singh*, (1893) 15 All 84 (89): 1893 All W N 36 F B; *Jamna Dat* v. *Bishnath Singh*, (1909) 3 Ind Cas 817 (818): 6 All L J 944; *Behari Lal* v. *Salikram*, (1875-78) 1 All 675 (680); *Ramanaja Sewak Singh* v. *Hinau Lal*, (1881) 3 All 517 (519): 1881 All W N 16; *Keshavlal* v. *Pitamberdas*, (1895) 19 Bom 261 (268); *Sadashiv* v. *Narasing Rao*, (1915) 28 Ind Cas 493 (494): 17 Bom L R 203; *Gopal Chunder Manna* v. *Gosain Das Kalay*, (1898) 25 Cal 594 (599): 2 Cal W N 556 F B; *Jogindranath Roy* v. *Rasik Chandra Banerji*,

O.21, R.22, Note 13.

served.[2-a] But it is necessary that the notice should have been *issued* on an application which was not time-barred.[3] On the question as to the date from which the period of three years is to be computed there was a conflict of views under the Limitation Act of 1877, the High Courts of Allahabad[4] and Bombay[5] holding that time should be computed from the date when the Court *ordered* the notice to issue, the Calcutta and Madras High Courts holding, that it should be computed only from the date when the notice was *actually issued*.[6] The word "issuing" which occurred in Cl. (6) of Art. 179 of the Limitation Act of 1877 corresponding to Art. 182, cl. (6) was changed into the word "issue" in the Act of 1908 and it was held by the High Court of Bombay that the effect of the change was to give effect to the Calcutta and Madras view.[7] Under the Act of 1908 it was held by all the High Courts except the High Court of Allahabad and by the Chief Court of Oudh that it is the date of the *issue* of the notice, that is the starting point of limitation.[8] The Allahabad High Court, and, following it, the Oudh Chief Court were, however, of opinion that the new Act did not make any change in the law. They therefore held the same view as that of the Allahabad High Court before the Act of 1908.[9]

The Limitation Act of 1908, Art. 182, has now been amended by Act IX of 1927 by which clauses 5 and 6 of the Article has been amended and substituted as follows:—

(1905) 2 Cal L Jour 544 (545); *Bipin Behari Mitter* v. *Bibi Zohra*, (1908) 35 Cal 1047 (1049); *Stevens* v. *Kamta Prasad*, (1909) 2 Ind Cas 941 (942): 10 Cal L Jour 19; *Deo Narain Singh* v. *Sri Bhagwat Naik*, (1911) 10 Ind Cas 411 (412) Cal; *Saday Chandra Jana* v. *Poresh Nath*, 1922 Cal 44 (46): 35 Cal L Jour 82: 64 Ind Cas 571; *Amin Chand* v. *Khiali*, 1927 Lah 106 (107): 9 Lah L Jour 76: 28 Pun L R 93: 100 Ind Cas 475; *Samia Pillai* v. *Chockalinga Chettiar*, (1894) 17 Mad 76 (77): 4 Mad L Jour 8; *Ramayyan* v. *Kadir Bacha*, (1908) 31 Mad 68 (71): 17 Mad L Jour 596: 3 Mad L Tim 254; *Kamakshi Pillai* v. *Ramasami Pillai*, (1908) 18 Mad L Jour 14 (15); *Sreekakulam Venkatasubbayya* v. *Layauru Dade Sahib*, (1909) 2 Ind Cas 433 (434): 8 Mad L Tim 232; *Maharaja of Bobbili* v. *Sree Raja Narasaraju Peda*, (1912) 15 Ind Cas 738 (739): 37 Mad 231: 12 Mad L Tim 119: 1912 Mad W N 721: 23 Mad L Jour 236; *Mukund Ram Sukal* v. *Har Narain*, (1898) 11 C P L R 157 (160); *Sri Ram* v. *Mohan Lal*, (1916) 34 Ind Cas 280 (280): 19 Oudh Cas 17; *Sheo Gobind* v. *Mt Kishun Bansi Koer*, 1932 Pat 222 (223): 13 Pat L Tim 318; *Muhammad Nawaz Khan* v. *Ram Das*, 1905 Pun Re No 22: 57 Pun L R 1905: 33 Pun W R 1905; *Shankar Lal* v. *Zorawar Singh*, 1907 Pun Re No 116: 1907 Pun W R 143. Contra *Ganga Ram* v. *Mt Durgi*, 1908 Pun L R 125: 1908 Pun W R 95.

(2-a) *Damodar Shaligram* v. *Sonaji*, (1903) 27 Bom 622 (625): 5 Bom L R 594; *Alagamuthu Pillai* v. *Devasagaya Fernandez*, (1916) 32 Ind Cas 484 (485): 3 Mad L W 34: 19 Mad L Jour 146: 1916 Mad W N 78. But see *Gauri Shanker* v. *Lachhmin Kunwar*, (1916) 33 Ind Cas 663 (664): 18 Oudh Cas 374.

(3) *Kammal Singh* v. *Laraiti*, (1905) 2 All L J 67 (68); *Unnoda Pershad* v. *Koorpan Ally*, (1878) 3 Cal 518 (521): 1 Cal L Rep 408; *Prabhakara Row* v. *Potannah*, (1878) 2 Mad 1 (3): 3 Ind Jur 208.

(4) *Udit Narain* v. *Rampartab Singh*, 1881 All W N 120 (120); *Baldeo* v. *Harrison*, 1890 All W N 244 (245); *Jumai Karjar* v. *Abdul Karim Khan*, (1908) 30 All 536 (537): 5 All L J 524: 4 Mad L Tim 446: 1908 All W N 245.

(5) *Damodar* v. *Sonaji*, (1903) 27 Bom 622 (623): 5 Bom L R 594; *Gobind* v. *Dada*, (1904) 28 Bom 416 (420): 6 Bom L R 457.

(6) *Kadaressur* v. *Mohim*, (1902) 6 Cal W N 656 (657); *Rattan Chand* v. *Deb Nath*, (1906) 4 Cal L Jour 530 (531): 10 Cal W N 303; *Cheruvath* v. *Nerath*, (1907) 30 Mad 30 (32): 1 Mad L Tim 395: 16 Mad L Jour 548. See also the following cases under the Act of 1871:—*Sheo Sahoy* v. *Brij Beharee*, (1875) 23 Suth W R 195 (195); *Shaikh Subhan Ali* v. *Sheikh Sufdar Ali*, (1875) 24 Suth W R 227 (227); *Bemul Das* v. *Ikbal Narain*, (1876) 25 Suth W R 249 (249); *Nilmoney* v. *Nilcomul*, (1876) 25 Suth W R 546 (547).

(7) *Nilkanth* v. *Ragho*, (1918) 43 Ind Cas 559 (559): 42 Bom 553: 20 Bom L R 351.

(8) *Nilkanth Laxman Joshi* v. *Ragho Mahadu Pavale*, (1918) 45 Ind Cas 559 (559): 42 Bom 553: 20 Bom L R 351; *Jugol Kishore Marwari* v. *Chintamoni Roy*, (1914) 24 Ind Cas 80 (81): 20 Cal L Jour 15; *Krishna* v. *Dhurendra Nath*, (1920) 54 Ind Cas 1 (2): 24 Cal W N 55: 30 Cal L Jour 518; *Khoda Buksh* v. *Bahadur Ali*, (1918) 45 Ind Cas 203 (203): 3 Pat L Jour 285: 4 Pat L W 324: 1918 Pat H C C 130 [Following 36 Ind Cas 999]. See also *Alagamuthu Pillai* v. *Devasagaya Fernandez*, (1916) 32 Ind Cas 484 (485): 3 Mad L W 34: 19 Mad L Jour 146: 1916 Mad W N 78.

(9) *Kalka Baksh* v. *Ram Charan*, (1918) 46 Ind Cas 584 (585): 40 All 630: 16 All L J 633; *Gaya Prasad* v. *Gur Dayal*, (1919) 51 Ind Cas 549 (550): 22 Oudh Cas 32: 6 Oudh L J 270. But see *Mohammad Abdul Karim Khan* v. *Nawaz Singh*, (1910) 8 Ind Cas 377 (378): 13 Oudh Cas 203.

O.21, R.22, Note 13.

Cl. 5. "(Where the application next hereinafter mentioned has been made) the date of the *final order passed on an application made* in accordance with law to the proper Court for execution, or to take such some step-in-aid of execution of the decree or order, or".

Cl. 6 "(In respect of any amount recovered by execution of the decree or order, which the decree-holder has been directed to refund) the date of the last-mentioned decree, or, in the case of an appeal therefrom, the date of the final decree of the appellate Court or of the withdrawal of the appeal".

Under the present Act, as amended, therefore, the time is to be computed from the date of the *final order passed* on such an application. Where no notice has been issued at all a mere *order* for issuing notice will not, however, be a step-in-aid of execution.[10]

In respect of decrees of Chartered High Courts the limitation for execution is prescribed in Art. 183 of the Limitation Act. The said article makes no specific mention of a notice under this rule, but it contains a provision that such decrees may be executed within 12 years from the date when they have been *"revived"*. The term "Revivor" has nowhere been defined. It was introduced on the basis of the English Common Law Practice (which prevailed in the Supreme Courts of India) under which, if a writ of execution was not served out within a year and a day it was necessary to revive the decree by a process known as *Scire Facias*. Till then the decree will be in a "dormant" condition. It will have to be "revived" so as to be made executable. The "revivor" therefore, consists in getting a declaration recorded that execution is intended to be enforced under the decree.

The question, therefore, is whether a notice under this rule will operate as a "revivor". In this connection it has been held that an *order for execution* made *after the issue of a notice under this rule* will operate as a revivor.[11] It is important to note that to constitute a revivor the following three conditions must be satisfied, *viz.*:—

(1) There must be an application for execution. An application for transmission of decree is not enough.[12]

(2) There must be an order for execution passed on the application. The mere fact that an application has been made and notice has been issued to the judgment-debtor is not enough.[13]

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(10) *Hari* v. *Yamunabai*, (1899) 23 Bom 35 (38); *Khosal Chandra* v. *Ukiladdi*, (1909) 3 Ind Cas 47 (49): 14 Cal W N 114; *Sripaticharan* v. *Belchambers*, (1910) 8 Ind Cas 22 (24) Cal; *Kaniz Fatima* v. *Md Jafar Ali Khan*, (1910) 6 Ind Cas 746 (748): 13 Oudh Cas 90; *Chengaya* v. *Appasami*, (1883) 6 Mad 172 (173); *Gauri Shanker* v. *Mt Lachhmin Kunwar*, (1916) 33 Ind Cas 663 (664): 18 Oudh Cas 374.

(11) *Umrao Singh* v. *Lachmi Narain*, (1904) 26 All 361 (364): 1904 All W N 51: 1 All L J 80; *Ashootosh Dutt* v. *Doorga Churn*, (1881) 6 Cal 504 (511): 8 Cal L Rep 23; *Futteh Narain* v. *Chundrabali Chowdhrain*, (1893) 20 Cal 551 (559); *Suja Hossein* v. *Monohur Das*, (1897) 24 Cal 244 (247); *Jogendra Chundra* v. *Syam Das*, (1909) 1 Ind Cas 168 (173): 9 Cal L Jour 271: 36 Cal 543; *Kamini* v. *Aghore*, (1909) 4 Ind Cas 402 (403): 14 Cal W N 357: 11 Cal L Jour 91; *Chutterput* v. *Sait*, (1916) 36 Ind Cas 602 (607): 43 Cal 903: 28 Cal L Jour 645: 20 Cal W N 889; *Ganapathi* v. *Balasundara*, (1884) 7 Mad 540 (542); *Tinoowrie* v. *Dembendro*, (1890) 17 Cal 491 (497) [But if such order itself is made out of time, then there can be no revivor].

(12) *Chatterput Singh* v. *Dayachand*, (1911) 11 Ind Cas 216 (217) Cal. See also *Chutterput Singh* v. *Sait Subari Mal*, (1916) 36 Ind Cas 602 (606): 43 Cal 903: 28 Cal L Jour 645: 20 Cal W N 889.

(13) *Monohar Das* v. *Fattehchand*, (1903) 30 Cal 979 (982): 7 Cal W N 793; *Amulya Ratan Banerjee* v. *Banku Behari Chatterjee*, 1925 Cal 668 (670): 41 Cal L Jour 159: 87 Ind Cas 61.

(3) The said order for execution should have been passed after the issue of a notice under this rule.[14] If there were several judgment-debtors and notice under this rule was issued to only one or some of them there will be a revivor only against them and not against the other judgment-debtors.[15] O.21, R.22, Notes 13—16.

14. Court executing the decree.—The rule provides that the notice shall be issued by "the Court executing the decree." The expression will include the Court to which the decree has been transferred for execution. In cases, therefore, where the decree is transferred for execution, the transferee Court can, and in fact is, the only Court competent to issue the notice.[1]

But an *application* to execute against the legal representatives has to be made to the Court which passed the decree.[2] In such cases, therefore, the application will be made to the Court which passed the decree but notice under the rule will be issued by the transferee Court.[3]

15. Revivor of decree by notice to one judgment-debtor.—*Vide* under Note 13. *supra*.

16. Sub-R. 2.—The mandatory character of the rule is not in any way abrogated by sub-R. (2).[1] The sub-rule only gives a discretion to the Court to *dispense* with the notice under certain circumstances. If such notice is dispensed with, the reasons should be recorded.[2] The Rangoon High Court is of opinion that the omission to record reasons is not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction.[3] The Bombay,[4] Calcutta,[5] Madras[6] and Oudh[7] Courts have, however, held that such omission will be a mere irregularity and that the proceedings will not be totally invalid merely by reason of the omission.

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(14) *Desoo Venkatesa* v. *Srinivasa Ranga Row*, (1909) 4 Ind Cas 306 (306): 33 Mad 187: 7 Mad L Tim 32.

(15) *McLaren* v. *Veeriah*, (1916) 32 Ind Cas 1003 (1005): 38 Mad 1102; *Krishnaya* v. *Gajendra Naidu*, (1917) 40 Ind Cas 608 (609): 40 Mad 1127: 22 Mad L Tim 20: 6 Mad L W 290: 33 Mad L Jour 533.

Note 14.

(1) *Rajah Sreenath Roy* v. *Ramachandra Acharjya Chowduri*, (1908) 12 Cal W N 897 (899); *Pierce* v. *Perumal*, (1917) 42 Ind Cas 294 (298): 40 Mad 1069: 33 Mad L Jour 130: 6 Mad L W 203: 22 Mad L Tim 139: 1917 Mad W N 712; *Sreepati Charan* v. *Belchambers*, (1910) 8 Ind Cas 22 (25): 15 Cal W N 661: 15 Cal L Jour 123; *Hazari Lal* v. *Baidya Nath Saha*, 1922 Cal 3 (4): 26 Cal W N 292: 63 Ind Cas 116; *Jung Bahadur* v. *Bank of Upper India, Ltd*, 1925 Oudh 448 (450): 12 Oudh L J 146: 2 Oudh W N 73: 87 Ind Cas 21: 28 Oudh Cas 330.

(2) *Hira Chand Harjivan Das* v. *Kastur Chand Kasidas*, (1893) 18 Bom 224 (226).

(3) *Swaminatha Ayyar* v. *Vaidinatha Sastri* (1905) 28 Mad 466 (469): 15 Mad L Jour 116 F B; *Thamboo Pillai* v. *Sreeramulu Naidu*, (1907) 17 Mad L Jour 300 (301); *Nachiappa* v. *Ponnusami*, (1912) 17 Ind Cas 293 (294): 1912 Mad W N 888: 23 Mad L Jour 287.

Note 16.

(1) *Monmotha Nath* v. *Mt Luchmi Debi*, 1928 Cal 60 (62): 46 Cal L Jour 579: 105 Ind Cas 65: 55 Cal 96.

(2) *Srinivasa Ayyangar* v. *Narayana Ayyangar*, (1917) 40 Ind Cas 670 (672): 33 Mad L Jour 539: 1917 Mad W N 498: 6 Mad L W 861.

(3) *Ramdas* v. *Kannamal*, 1929 Rang 161 (161): 7 Rang 110: 117 Ind Cas 245.

(4) *Yakub* v. *Mahadev*, 1982 Bom 509 (511): 34 Bom L R 987 ["No reason to issue notices" held sufficient compliance].

(5) *Rajani Kanta Saha* v. *Emperor*, 1931 Cal 443 (444): 85 Cal W N 228: 132 Ind Cas 244: 1931 Cr C 595: 58 Cal 940: 32 Cr L Jour 886.

(6) *Rajagopala* v. *Ramanujachariar*, 1924 Mad 431 (436): 47 Mad 288: 46 Mad L Jour 104: 19 Mad L W 179: 34 Mad L Tim 37: 1924 Mad W N 182: 80 Ind Cas 92; *Somu Ayyar* v. *Chettiah Pillai*, 1929 Mad 718 (719): 30 Mad L W 230: 1929 Mad W N 74: 119 Ind Cas 43.

(7) *Girwar Sahai* v. *Mangal*, 1924 Oudh 120 (120): 26 Oudh Cas 288: 73 Ind Cas 241.

O.21, R.22, Note 17.

17. **Appeal.**—An order on a question of notice under the rule will come under S. 47 and is, therefore, appealable as a decree.[1] But an order of arrest without notice is not a *final* order and is not, therefore, appealable.[2] Even in such cases, however, the High Court will interfere in its revisional jurisdiction in extreme cases.[3]

An order allowing or refusing an application to set aside a sale for want of a notice under the rule comes under S. 47 and is, therefore, appealable as a decree.[4]

O.21, R.23, Note 1.

R. **23.** [S. 249.] (1) *Where* the person to whom notice is issued under the last preceding *rule* does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

Procedure after issue of notice.

(2) *Where such person* offers any objection to the *execution* of the decree, the Court shall consider such objection and *make* such order as it thinks fit.

[1877—S. 249; 1859—S. 247. *See* Ss. 38, 47, 51 and Rr. 24 and 57 below.]

Synopsis.

1. Scope of the rule.
2 "The Court shall consider such objection."
3. Appeal.

Execution without objection—Effect. See Note 1, Pts. (1) and (2).

Form of objection and non-verification. See Note 2, Pt. (2).

1. **Scope of the rule.**—If the person to whom notice has issued under R. 22, does not appear and show cause against execution, the Court is bound to order execution. Thereupon the person will be concluded and bound by the order and cannot go behind it.[1] If, however, the execution application is subsequently dismissed under R. 57 of this order, the dismissal has been held to have the effect of vacating the previous order for execution.[2]

Note 17.

(1) *Bihari Lal Miller* v. *Tanuk Lal Mander*, 1926 Pat 397 (397): 97 Ind Cas 798: 8 Pat L Tim 28; *Sarada Prosad Roy* v. *Krishna Dome*, 1926 Cal 538 (539): 91 Ind Cas 711.

(2) *Somu Ayyar* v. *Chellah Pillai*, 1929 Mad 718 (720): 30 Mad L W 230: 1929 Mad W N 74: 119 Ind Cas 43.

(3) *Ramdas* v. *Kannamal*, 1929 Rang 161 (162): 7 Rang 110: 117 Ind Cas 245.

(4) *Parashram* v. *Balmukund*, (1908) 32 Bom 572 (574): 10 Bom L R 752; *Rasaraj Kunai* v. *Prasanna*, (1912) 40 Cal 45: 15 Ind Cas 506 (507); *Rajagopala* v. *Ramanujachariar*, 1924 Mad 431 (432): 47 Mad 288: 46 Mad L Jour 104: 19 Mad L W 179: 34 Mad L Tim 87: 1924 Mad W N 182: 80 Ind Cas 92; *Das Narayan Singh* v. *Mir Mahammad Yusuf*, 1921 Pat 145 (149): 1921 Pat H C C 181: 6 Pat L Jour 319: 2 Pat L Tim 401: 61 Ind Cas 823: 3 U P L R (Pat) 33.

Order 21, Rule 23—Note 1.

(1) *Samuel Cochrane* v. *Maharanee Brojo Soondaree Dabia*, (1875) 23 Suth W R 310 (311): 14 Beng L R 330; *Jogendranath Bhattacharya* v. *Hiranyakumar Muhuri*, (1905) 2 Cal L Jour 499 (503); *Fazar Banu* v. *Uzir Ali*, (1909) 1 Ind Cas 284 (285); *Nobin Chandra Chatterji* v. *Mazhar Ali Khan*, (1899) 2 Oudh Cas 377 (340); *Ganga Din* v. *Dip Singh*, 1922 Oudh 117 (118): 25 Oudh Cas 13: 68 Ind Cas 267 [Where in the course of a previous execution proceeding, it was open to the judgment-debtor to plead limitation, but he failed to do so, he would be precluded from raising the same in a subsequent application which is within time from the prior application]; *Maharajadhiraj Kameshwar Singh Bahadur* v. *Beni Mahdeo Singh*, 1931 Pat 422 (424): 134 Ind Cas 425: 12 Pat L Tim 701.

(2) *Peria Karuppan Chettiar* v. *Manikka Vachaka*, (1915) 31 Ind Cas 293 (293): 2 Mad L W. 1055.

If, on the day fixed, neither party appear, the application can be dismissed.[8] O.21, R.23, Notes 1—3.

2. **"The Court shall consider such objection."**—If the person to whom the notice is issued appears and offers objections the Court is equally bound to consider those objections.[1] There is no particular form in which the objections are to be presented and, if in writing, it need not be verified.[2]

Such objections should, however, go to the root of the executability of the decree,[3] and not merely formal or immaterial ones which do not prevent execution.[4] For, apart from considering whether the decree is executable or not, the executing Court cannot go behind the decree. *See* S. 38, Note 8.

3. **Appeal.**—An order allowing or refusing execution under this rule is appealable as a decree.[1]

PROCESS FOR EXECUTION.

R. **24.** [Ss. 250, 251, Para. 1.] (1) When the preliminary measures (if any) required by the foregoing *rules* have been taken, the Court shall, unless it sees cause to the contrary, issue its *process* for the execution of the decree. O.21, R.24.

Process for execution.

(2) *Every* such *process* shall *bear* date the day on which it is issued, *and shall be* signed by the Judge or such officer as the Court *may* appoint in this behalf, *and shall be* sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In *every* such *process* a day shall be specified on or before which it *shall* be executed.

[1877—Ss. 250, 251 (1), 343; 1859—Ss. 221, 222. *Cf.* R. S. C., O. 42, Rr. 14 and 16. *See* S. 51.]

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(3) *Tukaram* v. *Khandu*, (1895) 20 Bom 541 (542).

Note 2.

(1) *Kalian Das* v. *Bhavani Shankar*, (1910) 5 Ind Cas 546 (547); *Sunt Gopal Chunder* v. *Jugut Indur Bunwaree*, (1867) 8 Suth W R 200 (200); *Rajballab Shaha* v. *Ramsudoy Ghose*, (1870) 14 Suth W R 155 (155): 5 Beng L R (App) 65; *Sham Lal Pal* v. *Modu Sudan*, (1895) 22 Cal 558 (561).

(2) *Sunt Gopal Chunder* v. *Maharajah Jugut Indur Bunwaree*, (1867) 8 Suth W R 200 (200).

(3) *Abdul Hayai Khan* v. *Chunnia Kuar*, (1886) 8 All 377 (380): 1886 All W N 127.

(4) *Jawahir Mal* v. *Kishur Chand*, (1891) 13 All 343 (344): 1891 All W N 119 [That decree did not correctly represent the amount as per judgment—Only a defect in drawing up decree]; *Ramacharya* v. *Anantacharya*, (1897) 21 Bom 314 (317) [Or that a judgment-debtor had died after hearing but before judgment].

Note 3.

(1) *Pattah Veeran Kutty* v. *Veethilappu*, (1911) 9 Ind Cas 760 (760): 2 Mad W N 181: 9 Mad L Tim 347; *Perumal* v. *Venkatarama*, (1888) 11 Mad 130 (132); *Hazoora Singh* v. *Mt Maya Devi*, (1911) 9 Ind Cas 823 (823): 1911 Pun W R 64: 1911 Pun L R 101 [But order of a Court that no warrant of attachment should issue before a certain date is not appealable as no order in execution had been made].

O.21, R.24, Notes 1—2.

Local Amendments.

ALLAHABAD.

After the words at the end of the sub-Rule (3) "he executed", *add* the words "and a day shall be specified on or before which it shall be returned to Court".

BOMBAY.

The following proviso shall be added to sub-Rule (2) of Rule 24 of Order 21, namely:

"Provided that a First-class Subordinate Judge may, in his special jurisdiction, send a process to another Subordinate Court in the same district for execution by the proper officer in that Court."

NAGPUR.

In sub-Rule (3) of Rule 24, *for* the word "executed" *substitute* the words "returned to the Court".

OUDH.

In Rule 24 (3) after the words at the end of the sub-rule, "be executed" *add* the words "and a day shall be specified on or before which it shall be returned to Court."

RANGOON.

In sub-Rule (3) of Rule 24, the following shall be added, namely:—

"and a day shall also be specified on or before which it shall be returned to the Court."

SINDH.

Add the following proviso to sub-Rule (2) of Rule 24 of O. 21:—

"Provided that *First-class Subordinate Judge* may, in his special jurisdiction, send a process to another Subordinate Court in the same district for execution by the proper officer in that Court."

Synopsis.

1. Shall issue process.
2. Shall be sealed.
3. Delegation of authority to execute, if can be made.
4. Arrest or attachment without warrant.
5. Shall be signed.
6. "A day shall be specified on or before which it shall be executed."
7. Application of the rule to revenue Courts.

Presumption as to authority to sign and onus. See Note 5, Pts. (4) and (5).

"Unless it sees cause to the contrary." See Note 1, Pts. (1), (2) and (3).

1. **Shall issue process.**—If the preliminary measures prescribed by the previous rules have been taken, the Court is bound to issue process and cannot refuse to do so, unless "it sees cause to the contrary" such as the judgment-debtor being entitled to a right to set-off, or the applicant asking for simultaneous execution.[1]

In the absence of any such cause, the Court cannot refuse issue of process.[2] The fact that a previous execution application proved infructuous will not justify such a refusal.[3]

2. **Shall be sealed.**—Every process issued under this rule *shall* be sealed. The provision is mandatory and without the seal, the process will be

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Order 21, Rule 24—Note 1.

(1) *Ishan Chunder v. Ahsonoollah,* (1884) 10 Cal 817 (819).

(2) *Dholan Das v. Rahim Baksh,* 1897 Pun Re No 57.

(3) *Seton v. Bijohn,* (1871) 17 Suth W R 165 (168): 8 Beng L R 255.

invalid and its execution illegal.[1] Resistance to the execution of such a process will therefore constitute no offence.[2] O.21, R.24, Notes 2—6.

3. **Delegation of authority to execute, if can be made.**—The rule only says that the process shall be *delivered* to the proper officer *to be executed.* It is not necessary that the "proper officer" should himself execute the process,[1] and there is nothing to prevent his delegating a subordinate of his to execute the process.[2] But a process issued to a bailiff cannot be executed by a Nazir.[3]

4. "**Arrest or attachment without warrant.**"—An officer effecting an arrest or attachment should have the warrant in his possession, otherwise the arrest[1] or attachment[2] will be illegal.

5. **Shall be signed.**—A process issued under this rule which is not signed by the judge is illegal.[1] If, however, any other officer of the Court is specially authorised in this behalf it is enough if it is signed by him.[2] Such authority should be in writing and kept in the Court.[3] If, however, such process is signed by a sheristadar "by order" the presumption will be that he was authorised in this behalf,[4] and the *onus* of showing that he had no such authority will be on the party who denies the authority.[5]

6. "**A day shall be specified on or before which it shall be executed**".—A warrant which does not specify the date on or before which it is to be executed is invalid and its execution is illegal.[1]

If such date is specified the process should be executed on or before that date; its execution later is illegal.[2]

If the time has been extended, the extended date should be specified; otherwise the execution of the process will again be illegal.[3]

Note 2.

(1) *Khidir Bux* v. *King-Emperor*, (1918) 49 Ind Cas 171 (173): 3 Pat L Jour 636.

(2) *Badri Gope* v. *King-Emperor*, 1926 Pat 237 (238, 239): 5 Pat 216: 7 Pat L Tim 80: 93 Ind Cas 146.

Note 3.

(1) *Dharamchand Lal* v. *Queen-Empress*, (1895) 22 Cal 596 (604, 605).

(2) *Abdul Karim* v. *Bullen*, (1884) 6 All 385 (388): 1884 All W N 133: 8 Ind Jur 692; *Jagannath* v. *Emperor*, 1932 All 227 (227): 1932 All L Jour 179: 1932 Cr C 225; *Dharam Chand* v. *Queen-Empress*, (1895) 22 Cal 596 (608); *Sheo Progash* v. *Bhoop Narain*, (1895) 22 Cal 759 (761); *Shaik Nasur* v. *Emperor*, (1910) 5 Ind Cas 409 (410): 37 Cal 122: 14 Cal W N 282 [But a warrant under S 45 of the Chaukidari Act cannot be delegated].

(3) *Mohini Mohan Banerji* v. *Emperor*, (1916) 36 Ind Cas 871 (872): 1 Pat L Jour 550: 3 Pat L W 64.

Note 4.

(1) *Emperor* v. *Amar Nath*, (1883) 5 All 318 (321): 1883 All W N 54.

(2) *Emperor* v. *Ganeshi*, (1905) 27 All 258 (259): 1 All L J 595: 1904 All W N 229.

Note 5.

(1) *Ram Dayal* v. *Mahtab Singh*, (1885) 7 All 506 (509) P C [Execution sale was set aside].

(2) *Deputy Legal Remembrancer* v. *Mir Sarwar Jan*, (1902) 6 Cal W N 845 (846).

(3) *Hulasi* v. *Ramdin*, 1887 All W N 42 (42); *Karamatulla* v. *Emperor*, (1920) 55 Ind Cas 852 (853): 18 All L J 284: U P L R (A) 101; *Queen-Empress* v. *Janki Prasad*, (1886) 8 All 293 (294): 1886 All W N 106 [The signature may be confined to the initials].

(4) *Girdhar* v. *Harish*, 1928 Cal 584 (585): 37 Cal L Jour 881: 73 Ind Cas 328: 27 Cal W N 1042.

(5) *Khidir Bux* v. *King-Emperor*, (1919) 49 Ind Cas 171 (172): 3 Pat L Jour 636.

Note 6.

(1) *Sheikh Nasur* v. *Emperor*, (1910) 5 Ind Cas 409 (410): 37 Cal 122: 14 Cal W N 282; *Mohini* v. *King-Emperor*, (1916) 86 Ind Cas 871 (872): 1 Pat L Jour 550: 3 Pat L W 64.

(2) *Ananda Lal Bera* v. *Emperor*, (1884) 10 Cal 18 (19): 13 Cal L Rep 209; *Abinash Chandra Aditya* v. *Ananda Chandra Pal*, (1904) 31 Cal 424 (426); *Sabed Ali* v. *Emperor*, (1913) 19 Ind Cas 706 (706): 40 Cal 849: 17 Cal W N 941 [But a warrant issued by the Court to be executed by bailiff endorsed by the Nazir to a peon with a direction to execute it at a date earlier than that fixed by the Court and executed by the peon between the two dates, is executed rightly].

(3) *Sheikh Nasur* v. *Emperor*, (1910) 5 Ind Cas 409 (410): 37 Cal 122: 14 Cal W N 282.

O.21, R.24, Note 7.

7. **Application of the rule to Revenue Courts.**—The provisions of this rule have been held to apply to warrants issued under S. 131 of the Central Provinces Land Revenue Act.[1]

O.21, R.25.

R. **25.** [Ss. 343, and 251 last para.] (1) The officer entrusted with the execution of the *process* shall endorse thereon the day on, and the manner in which it was executed, and, if the latest day specified in the *process* for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the *process* with such endorsement to the Court.

Endorsement on *process*.

(2) *Where* the endorsement is to the effect that such officer is unable to execute the *process*, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine *witnesses* as to *such* inability, and shall record the result.

[1877—S. 251 last para.; 1859—S. 222 last para.]

Local Amendments.

ALLAHABAD.

Substitute the following for paragraph (2) in Rule 25:—

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result.

MADRAS.

Amendment to Order 21, Rule 25 (2) of Schedule I:—

Insert the words "or cause him to be examined by any other Court" *after* the words "examine him".

Add the following proviso to Clause 2 of Rule 25 of Order 21, Schedule I:—

"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause."

OUDH.

For the existing Rule 25 (2), *substitute* the following:—

"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result."

Note 7.

(1) *Nandalal* v. *Emperor*, 1924 Nag 68 (69): 19 Nag L R 183: 25 Cr L Jour 223: 76 Ind Cas 655 [Where the date fixed for the return had already expired on the day the process-server went to execute it, he was not acting in the execution of his duty]. See also *Ramprasad Agarwalla* v. *Emperor*, 1933 Cr C 31: 1933 Cal 11: 36 Cal W N 1071.

Synopsis.

1. "Officer entrusted with executions."
2. Delegation of process.
3. Proof of execution.

1. "Officer entrusted with execution."—The "Officer entrusted with execution" is the peon who himself executed the process and not the Nazir.[1]

2. Delegation of process.—*See* under R. 24.

3. Proof of execution.—The report of the Nazir regarding execution of process is by itself not evidence. It must be proved like any other documentary evidence.[1]

STAY OF EXECUTION.

R. **26**. [Ss. 239, 240.] (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was *passed*, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

When Court may stay execution.

(2) *Where* the property or person of the judgment-debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or *the* discharge *of such* person pending the result of the application.

Power to require security from, or impose conditions upon judgment-debtor.

(3) Before *making* an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

[1877—Ss. 239, 240; 1859—Ss. 290, 291. *Cf.* R. S. C., O. 42, R. 17, cl. (*b*). *See* Ss. 42 and 47.]

Order 21, Rule 25—Note 1.

(1) *Sabed Ali* v. *Emperor*, (1913) 19 Ind Cas 706 (706): 40 Cal 849: 17 Cal W N 941.

Note 3.

(1) *Mohunt Megh Lall* v. *Shib Pershad, Madi*, (1881) 7 Cal 34 (38): 8 Cal L Rep 369: 5 Ind Jur 476: 4 Shome L R 169; *Okhoy Ohunder* v. *Erskine & Co*, (1865) 3 Suth W R Mis 11 (15); In re, *Nilkant*, (1864) Suth W R Mis (Gap) 9 (9); *Sreenath Thakur* v. *Watson*, (1865) 4 Suth W R Mis 4 (5); *Ram Soondur* v. *Kalee Kamal*, (1866) 6 Suth W R Act X 92 (93); *Shah Koondun Lall* v. *Noor Ali*, (1868) 10 Suth W R 3 (4); *Raj Kishore* v. *Bydo Nath*, (1869) 12 Suth W R 365 (366); *Meah Khan* v. *Narain*, (1872) 18 Suth W R 197 (197).

O.21, R.26, Note 1.

Local Amendments.

ALLAHABAD.

For the words "the Court may" *read* the words "the Court shall, unless good cause to the contrary is shown", in sub-Rule (3).

LAHORE.

For the words "the Court may" *substitute* the words "the Court shall, unless sufficient cause is shown to the contrary", in sub-Rule (3).

NAGPUR.

In sub-Rule (3) of Rule 26, *for* the word "may" *substitute* the words "shall, unless good cause to the contrary is shown".

N-W. F. P.

In sub-Rule (3) of Rule 26 *for* the words "the Court may" *substitute* the words "the Court shall, unless good cause to the contrary is shown".

OUDH.

In Rule 26 (3) *for* the words "the Court may" *read* the words "the Court shall, unless good cause to the contrary is shown".

RANGOON.

In sub-Rule (3) of Rule 26 *for* the word "may" the words "shall, unless sufficient cause is shown to the contrary" shall be substituted.

Synopsis.

1. Scope of the rule.
2. Appeal.

Forum for appeal. See S. 42.
Powers of transferee Court. See Note 1.
Simultaneous execution. See Rule 24, Note 1, Pt. (2).
Sub-Rule (3). See Note 1, Pt. (8).

1. **Scope of the rule.**—Under S. 42 *ante* the Court executing a decree sent to it has the same powers in *executing* such a decree as if the decree had been passed by itself. But such Court cannot question the legality of the order under which the decree was sent to it for execution nor can it decide the question whether the decree was barred by limitation on the date of the order. *See* S. 42, Note 1, *ante*.

Such question can properly be dealt with only by the Court which passed the decree and, therefore, to enable the judgment-debtor to apply to such Court for an order in respect of the decree for execution thereof, the Court to which a decree is sent for execution may order stay of execution under this rule.[1]

Thus the executing Court may order stay of execution:—

(*i*) To enable the judgment-debtor to get the decree amended;[2]

(*ii*) to enable him to show that the decree is satisfied,[3] or is not existing;[3-a]

Order 21, Rule 26—Note 1.

(1) *Beerchunder Manikya* v. *Maymana Bibee*, (1880) 5 Cal 736 (737); *Shibnarain* v. *Gobind Dass*, (1875) 23 Suth W R 154 (155); *Ram Lall* v. *Radhey Lall*, (1885) 7 All 830 (833): 1885 All W N 21.

(2) *Charat Singh* v. *Khushal Singh*, 1889 Pun Re No 78; *Raman* v. *Dasoundhi*, 1887 Pun Re 61 [Where the judgment contained a provision for payment of the amount due by instalment but the decree was silent].

(3) *Hashim* v. *Martin*, 1927 Rang 104 (105): 4 Rang 562: 100 Ind Cas 285: 5 Bur L Jour 239.

(3-a) *Kishub Chunder* v. *Khelat Chunder*, (1868) 9 Suth W R 361 (361).

(*iii*) to enable him to get the decree passed *ex parte* against him set aside[4]; O.21, R.26, Notes 1--2.

(*iv*) to enable him to get the decree passed against him set aside on the ground that it was obtained by fraud[5]

(*v*) for deciding if the decree is barred[6].

An order for stay of execution under this rule can only be passed on the application of the *judgment-debtor* and no stay can be granted on the application of *third* parties or of the *decree-holder*.[7]

Under sub-R. (3) of this rule, the Court may impose conditions or require security, as it thinks fit, before directing stay of execution.[8]

Under S. 265 (3) of the Chota Nagpur Tenancy Act VI of 1908 the provisions of the Code relating to stay of execution apply to proceedings referred to in that section.

2. **Appeal.**—*See* "Stay of execution". Note 44 to S. 47 *ante*.

An order directing security under sub-R. (3) is not an order determining the *rights of parties* and is not therefore appealable as a decree under Ss. 47 and 96.[1]

Liability of judgment-debtor discharged.

R. **27.** [S. 241.] No *order of restitution or* discharge under *rule* 26 shall prevent the property or person of a judgment-debtor from being re-taken in execution of the decree sent for execution. O.21, R.27, Note 1.

[1877—S. 241; 1859—S. 293. *See* S. 58, sub-S. (2) and R. 40, sub-Rule (4) of O. 21.]

Synopsis.

1. Scope of the rule.

1. **Scope of the rule.**—Under S. 58, sub-S. (2) *supra*, a judgment-debtor released from detention under *that section* is not liable to be re-arrested in execution of the same decree.[1] But an order of discharge of the judgment-debtor consequent on the stay of execution *under R.* 26 above will not prevent the judgment-debtor from being re-arrested in execution of the decree.[2]

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(4) *Hirtoonjoy* v. *Cochrane*, (1867) 8 Suth W R 202 (203); *Subramanian* v. *Panjamma*, (1882) 4 Mad 324 (325).

(5) *Srihary Mundul* v. *Murari*, (1886) 13 Cal 257 (261).

(6) *Jassoda Koer* v. *Land Mortgage Bank of India*, (1882) 8 Cal 916 (918): 11 Cal L Rep 348.

(7) *Allah Baksh* v. *Karam Chand*, 1931 Lah 690 (691): 133 Ind Cas 643; *Brojendra Kumar* v. *Roop Lall*, (1886) 12 Cal 515 (519); *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee*, (1889) 16 Cal 457 (464): 18 Ind Jur 418.

(8) *Guranditta* v. *Firm Gurdasmal*, 1925 Lah 532 (554): 7 Lah L Jour 343: 26 Pun L R 634: 91 Ind Cas 772.

Note 2.

(1) *Saraswati* v. *Moti Barmonya*, (1913) 20 Ind Cas 72 (72): 41 Cal 160: 17 Cal W N 1240.

Order 21, Rule 27—Note 1.

(1) *Secretary of State* v. *Judah*, (1886) 12 Cal 652 (657); In re, *Bolye Chund Dutt*, (1893) 20 Cal 874 (878).

(2) See *Secretary of State* v. *Judah*, (1886) 12 Cal 652 (657). See also *Shamji* v. *Poonja*, (1902) 26 Bom 652 (659): 4 Bom L R 483.

O.21, R.28, Note 1.

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

R. **28**. [S. 242.] Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

[1877—S. 242; 1859—S. 292. *See* S. 42 and O. 21, Rule 26.]

Synopsis.

1. **Scope of the rule.**

Duties and powers of transferee Court. See Note 1. See also S. 42.

1. **Scope of the rule.**—*See* S. 42, Notes 1 and 3, *supra*. This rule states that any order of the Court which passed the decree in relation to execution of such decree shall be binding on the Court executing the decree.[1] In the absence of any such order it is the duty of the Court executing the decree to enforce the decree in the same manner and to exercise the same powers as if the decree had been passed by itself.[2]

O.21, R.29.

Stay of execution pending suit between decree-holder and judgment-debtor.

R. **29**. [S. 243.] *Where* a suit *is* pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as *to security or otherwise*, as it thinks fit, stay execution of the decree until the pending suit has been decided.

[1877—S. 243; 1859—S. 209.]

Local Amendments.

ALLAHABAD.

Add "or any person whose interests are affected by the decree, or by any order made in execution thereof" after the words "was passed" and before the words "The Court may".

N.-W. F. P.

After Rule 29 of Order 21 the following rule shall be added:—

"**29-A.** When a suit under R. 63 of this Order is pending the Court in which such suit is filed, may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided."

Synopsis.

1. Scope of the rule.
2. "Such Court."
3. "Until the pending suit has been decided.
4. Execution of award if can be stayed under this rule.
5. Inherent power to stay execution. See Note 3, supra.
6. Appeal.

Order 21, Rule 28—Note 1.

(1) *Balkrishna* v. *Debi Prasad*, 1930 Oudh 305 (308): 7 Oudh W N 363: 123 Ind Cas 881; *Badri Prasad* v. *Gauri Nath*, (1915) 27 Ind Cas 597 (597): 2 Oudh L J 18. *See also* S 42, Note 3, F-N (11).

(2) *Badri Prasad* v. *Gauri Nath*, (1915) 27 Ind Cas 597 (597): 2 Oudh L J 18 [Objection against right of decree-holder to proceed against property not charged in decree can be determined by Court executing decree].

O.21, R.29, Notes 1—2.

1. Scope of the rule.—If a suit by a judgment-debtor is pending in a Court against the holder of a decree of that Court, the execution of the decree may, under this rule, be stayed until the disposal of the suit.[1] The object of this rule is twofold:—

(*i*) To enable the judgment-debtor and the decree-holder to adjust their claims against each other, and

(*ii*) to prevent a multiplicity of execution proceedings.[2]

But the execution Court has no power, under this rule, to stay execution of the decree if, at that time, no suit is pending against the holder of the decree[3] or if the suit is against the decree-holder, but filed by *third* parties.[4]

If the execution of the decree has been carried out and the decree-holder has obtained possession of the property, the Court has no power under this rule to order *restitution* of such property.[5]

The mere pendency of a suit in which the decree-holder is a party is not a ground for stay of execution; such stay can be granted only on sufficient grounds being made out.[6] Thus the pendency of a suit for administration of the estate of the mortgagor is no ground for the stay of execution of the mortgage decree.[7] It has been held by the High Court of Calcutta that if the suit against the decree-holder is for a declaration that the decree is satisfied by an uncertified adjustment out of Court, no stay of execution of the decree can be granted under this rule.[8]

2. "Such Court."—The Court in which the suit is pending has power to stay execution of the decree under this rule, only if the decree is a decree of *that* Court.[1] Such power can be exercised by it even if the decree has been transferred for execution to another Court,[1-a] But if the judgment-debtor's suit is pending before the transferee Court, that Court has no power, under this rule, to stay execution of the decree.[2]

The words "decree of such Court" include also the decree passed on *appeal* from the decree of that Court.[3] *See* S. 37 *ante*.

Order 21, Rule 29—Note 1.

(1) *Cooke* v. *Hiseba Bibee*, (1874) 6 N W P H C R 181.

(2) *Mahesh Chandra Sadhu* v. *Jogendra Lal Sarkar*, 1928 Cal 222 (224): 32 Cal W N 181: 55 Cal 512: 107 Ind Cas 79.

(3) *Fitzholmes* v. *Waryam Singh*, 1928 Lah 514 (515): 75 Ind Cas 419.

(4) *Purshottam Vithal* v. *Purshottam Ishwar*, (1884) 8 Bom 532 (534).

(5) *Ghazidin* v. *Fakir Bakhsh*, (1885) 7 All 73 (78, 79): 1884 All W N 226: 9 Ind Jur 231; *Ujagar Singh* v. *Puran Singh*, 1930 Lah 961 (968): 129 Ind Cas 204.

(6) *Mittun Bibee* v. *Buzloor Khan*, (1867) 8 Suth W R 392 (392).

(7) *Krishna Mohiny* v. *Baba Churn Nag*, (1881) 7 Cal 733 (735): 9 Cal L Rep 344.

(8) *Reily* v. *Golap Khan*, 1923 Cal 645 (646): 27 Cal W N 575: 72 Ind Cas 38.

Note 2.

(1) *Mittun Bibee* v. *Buzloor Khan*, (1867) 8 Suth W R 392 (393); *Ujagar Singh* v. *Puran Singh* 1930 Lah 961 (968): 129 Ind Cas 204; *Mr W H Guest* v. *Mrs Mecregor*, 1904 Pun Re No 41: 59 Pun L R 1904.

(1-a) *Narsidas Nathubhai* v. *Manharsingh*, 1931 Bom 247 (248): 33 Bom L R 370: 132 Ind Cas 507.

(2) *Inayut Beg* v. *Umrao Beg*, 1930 All 121 (121): 122 Ind Cas 182. See also *Mittun Bibee* v. *Buzloor Khan*, (1867) 8 Suth W R 392 (393). But see *Kassa Mal* v. *Gopi*, (1888) 10 All 389 (393, 394): 1888 All W N 51 [Obiter]; *Cooke* v. *Hiseba Beebee*, (1874) 6 N W P H C R 181; *Bhagwan Kaur* v. *Gajindra Singh*, 1908 Pun Re No 130: 205 Pun L R 1908: 175 Pun W R 1908.

(3) *Kassa Mal* v. *Gopi*, (1888) 10 All 389 (393): 1888 All W N 51.

O.21, R.29, Notes 2—6.

The words "such Court" refer only to the *Court* and not to the *judge* presiding over the Court. Where there are two judges attached to the Court, and the suit is pending before one judge and the decree is sought to be executed before the other, the judge before whom the suit is pending, has power under this rule to stay execution of the decree.[4]

3. "Until the pending suit has been decided."—The Calcutta High Court has held in the undermentioned case[1] that these words should be interpreted to mean "until the *claim* in the pending suit has been *finally* decided after an exhaustion of all rights of appeal and not merely after a decree has been passed by the Court in which the suit is pending." But this view has been dissented from in a recent Calcutta case[2] approving of an earlier view of the Punjab Chief Court,[3] wherein it was held that the Court may stay execution, pending appeal, under its *inherent powers* though not under this rule.

4. Execution of award if can be stayed under this rule.—An award filed into Court under S. 11 of the Indian Arbitration Act of 1899 is *enforceable* as a decree of the Court under S. 15 of that Act. But S. 15 does not enact that the award, when filed, is to be *deemed* to be a decree of the Court.[1] Nor does it give any "power to turn such an award into a judgment".[2] Therefore, it has been held by the High Court of Bombay that the provisions of this rule cannot apply to *stay* execution of an award.[3] The Calcutta High Court has held that the words "*enforceable* as a decree" mean that *all* the provisions relating to execution of decrees such as O. 21, R. 16 (transfer of decrees)[4] and O. 21, R. 50 (execution by or against firms[5]) are applicable to the execution of awards as well.

5. Inherent power to stay execution.—*See* Note 3 *supra.*

6. Appeal.—*See* Note 44 to S. 47, *supra.* An order directing security, to be given is not appealable as it does not determine conclusively the rights of the parties; but the High Court may, if the discretion is not judicially exercised. interfere in revision.[1]

MODE OF EXECUTION.

O.21, R.30.

R. **30.** [S. 254.] Every decree *for the payment of* money, *including a decree for the payment of money* as the alternative to some other relief, may be *executed* by the *detention in the civil prison* of

Decree for *payment of* money.

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(4) *Narsidas* v. *Manhar Singh*, 1931 Bom 247 (248, 249): 33 Bom L R 870: 132 Ind Cas 507.

Note 3.

(1) *Mahesh Chandra Sadhu* v. *Jogendra Lal Sarkar*, 1928 Cal 222 (222): 55 Cal 512: 32 Cal W N 181: 107 Ind Cas 79.

(2) *Radha Ballav Khan* v. *Peary Lall Ghosh*, 1932 Cal 19 (20): 35 Cal W N 540: 58 Cal 1113: 134 Ind Cas 939.

(3) *Sardarni Bhagwan* v. *Rani Harnam*, (1910) 7 Ind Cas 1017 (1018): 82 Pun Re 1910: 149 Pun L R 1910: 122 Pun W R 1910.

Note 4.

(1) *E D Sassoon & Co* v. *Ram Dutt*, (1923) 27 Cal W N 660 (665): 1922 P C 374 (377): 49 Ind App 366: 50 Cal 1: 32 Mad L Tim 19: 37 Cal L Jour 336: 44 Mad L Jour 758: 70 Ind Cas 777: 1923 Mad W N 372: 18 Mad L W 537 P C.

(2) *See* In re, *a Bankruptcy Notice*, (1907) 1 K B 478 at 482 [*Per* F Moulton, L J].

(3) *T J Gaffar* v. *Lallubai*, (1910) 8 Ind Cas 179 (179): 35 Bom 196: 12 Bom L R 860.

(4) *Gladstone Wyllie & Co* v. *Joosub*, 1924 Cal 117 (118): 27 Cal W N 666: 77 Ind Cas 868.

(5) *Louis Dreyfus & Co* v. *Purshotham Das*, (1920) 56 Ind Cas 325 (326): 47 Cal 29.

Note 6.

(1) *Jiwandas Virbhandas* v. *Khemchand Ramdas*, 1929 Sind 110 (111): 116 Ind Cas 101.

the judgment-debtor, or by the attachment and sale of his property, or by both. O.21, R.30, Notes 1—4.

[1877—S. 254; 1859—Ss. 201, 232.]

Synopsis.

1 Scope of the rule.
2. Decree for the payment of money.
3. As an alternative to some other relief. See Notes to O. 20, R. 10.
4. Option as to mode of execution.
5. Detention in civil prison. See Note 14 to S. 145.
6. Attachment and sale.
7. Rules not exhaustive of modes of execution.

Decrees creating charge—How enforced. See Note 6, Pt. (2).

1. Scope of the rule.—The words "every decree for the payment of money" have been substituted for the words "every decree or *order directing a party* to pay money" which occurred in S. 254 of the old Code. It was held under the old Code that an order directing a party to refund money wrongly drawn out by him in land acquisition proceedings, could be enforced under that section.[1] The same procedure will apply under this Code in view of the provisions of S. 36, *ante*.

Under clauses (4) and (5) of S. 36 of the Presidency Towns Insolvency Act III of 1909, the Insolvency Court is authorised to order payment of money or delivery of property by strangers to the official assignee where their liability to the insolvent is established on enquiry. Clause 6 of S. 36 of that Act enacts that such orders shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Civil Procedure Code.

2. Decree for the payment of money.—A decree under which maintenance is payable periodically at a certain rate is a decree for money.[1]

See also Note 6 to S. 73.

3. As an alternative to some other relief.—*See* Notes to O. 20, R. 10.

4. Option as to mode of execution.—It is for the *decree-holder* to decide how he should execute his decree for the payment of money, whether by the arrest of the judgment-debtor, or by attachment and sale of his property. While the Court has discretion to refuse execution against the person and property simultaneously under R. 21, *supra*, it cannot compel the decree-holder to adopt any particular mode of execution.[1] A decree for rent under the Bengal Tenancy Act is a decree "for the payment of money" and the decree-holder

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Order 21, Rule 30—Note 1.

(1) *Nobin Kali Debi* v. *Banalata Debi*, (1905) 32 Cal 921 (928): 2 Cal L Jour 595.

Note 2.

(1) *Peareenath* v. *Juggessuree*, (1871) 15 Suth W R 128 (129); *Broja Sundar* v. *Sivaranjan*, (1921) 59 Ind Cas 282 (285): 1 Pat L Tim 647.

Note 4.

(1) *Hargobind Kishen Chand* v. *Hakim Singh*, 1926 Lah 110 (111): 6 Lah 548: 93 Ind Cas 54; *J Davis & Co* v. *Mrs M A Middleton*,, (1867) 8 Suth W R 282 (284); *Raj Chunder* v. *Shama Soondari*, (1879) 4 Cal 583 (586, 587); *Badri Das* v. *B Bevan Petman*, 1927 Lah 153 (153): 28 Pun L R 86: 99 Ind Cas 291; *Bhagwan Singh* v. *Girdhari Lall*, 1930 Lah 220 (221): 30 Pun L R 736: 125 Ind Cas 61 [Cannot compel to accept payment in instalments]. See also *Juharimal* v. *Sant Lall*, (1887) 9 All 484 (485): 1887 All W N 101 [Prior to the introduction of O 34 it was held that decree on hypothecation bond can be executed against property or person. Not law under this Code—*See* O 34, R 6]. But *see Wali Muhammad* v. *Turab Ali*, (1882) 4 All 497 (498): 1882 All W N 127: 7 Ind Jur 210 [Where execution against hypothecated property was refused on the ground of fraud—Not law under this Code].

O.21, R.30, Notes 4—7.

has the right to ask for personal execution against the judgment-debtor, notwithstanding that he has also the right to sell the tenure in arrears.[2]

5. **Detention in civil prison.**—*See* Note 14 to S. 145.

6. **Attachment and sale.**—The words "attachment and sale" in this rule must be taken together and not distributively. Therefore, an attachment is a necessary preliminary to a sale.[1] As to what property can be attached, *see* S. 60 and as to whether absence of attachment is a material irregularity or not, *see* notes to R. 90, *infra*.

This rule applies only to cases of decrees for money which do not affect any specific immoveable property. Thus, where a consent decree provided that if a certain sum of money is not paid by a certain date, some specific immoveable property should be sold, no attachment is necessary under this rule.[2]

See also Note 4 to S. 60.

7. **Rule not exhaustive of modes of execution.**—The words "*may* be executed" in this rule show that it does not purport to be exhaustive of the modes of execution of money decrees. *See also* O. 21, R. 11. Therefore, rateable distribution of assets is a mode of execution of a decree for the payment of money.[1] Though S. 51 prescribes the appointment of a receiver as one of the modes of execution, nothing is mentioned about it in this rule, since the subject is dealt with in O. 40 *infra*.[2] Execution of a money decree by ejectment of a tenant is a method provided by S. 61 of the Oudh Rent Act in addition to the modes prescribed by this Code.[3]

O.21, R.31.

R. **31**. [S. 259.] (1) *Where* the decree *is* for any specific moveable, or for any share in a specific moveable, it may be *executed* by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the *detention in the civil prison* of the judgment-debtor, or by the *attachment of* his property, or by both.

Decree for specific moveable *property.*

(2) *Where* any attachment under *sub-rule* (1) has remained in force for six months, if the judgment-debtor has not obeyed

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(2) *Bhabani Charan* v. *Pratab Chandra*, (1904) 8 Cal W N 575 (577); *Fotick Chunder* v. *Foley*, (1888) 15 Cal 492 (496); *Tarinprosad* v. *Narayan*, (1889) 17 Cal 301 (303).

Note 6.

(1) *Baboo Luchmeeput* v. *Baboo Lekraj Roy*, (1867) 8 Suth W R 415 (419).

(2) *Jagannath Sao* v. *Debi Prasad Dhandhania*, 1924 Pat 258 (258): 2 Pat 768: 73 Ind Cas 598; *Arunbati Kumari* v. *Ram Niranjan*, 1921 Pat 320 (321): 2 Pat L Tim 38: 58 Ind Cas 299. See also *Dayachand* v. *Hemchand*, (1880) 4 Bom 515 (520) [In case of mortgage decrees direction for sale in the decree is the authority to sell and therefore no attachment is necessary]; *Broja Sundar* v. *Sivaranjan*, (1921) 59 Ind Cas 282 (285): 1 Pat L Tim 647 [Decree for future maintenance with a charge on property—Property can be sold in execution—No separate suit].

Note 7.

(1) *Gobardhan Das* v. *Jang Bahadar*, 1926 Oudh 616 (617): 3 Oudh W N 749: 98 Ind Cas 33; *Ghanaya Lal* v. *Punjab National Bank, Ltd., Lahore*, 1928 Lah 7 (9): 111 Ind Cas 259. But see *Ali Muhammad* v. *Muhammad Noor*, 1925 Nag 382 (383): 87 Ind Cas 1025.

(2) *Lahanu* v. *Harak Chand*, (1915) 31 Ind Cas 285 (287): 11 Nag L R 118.

(3) *Deputy Commissioner, Fyzabad* v. *Udit Singh*, (1913) 19 Ind Cas 38 (39): 15 Oudh Cas 381.

the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed *by the decree to be paid as an alternative to delivery of moveable property*, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application. O.21, R.31.

(3) *Where* the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or *where*, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

[1877—Ss. 259, 260; 1859—S. 200.]

Local Amendments.

ALLAHABAD.

For the words wherever they occur in each sub-rule, "six months" *read* the words "three months, or such extended time as the Court may for good cause direct."

LAHORE.

In sub-Rule (2) for the word "six" *substitute* the word "three".

Add the following proviso after sub-Rule (2):—

"Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months; but it shall in no case exceed six months in all."

In sub-Rule (3) *for* the words "six months" *substitute* the following words:—

"three months or such other period as may have been prescribed by the Court."

NAGPUR.

In sub-Rules (2) and (3) of Rule 31, *for* the words "six months" wherever they occur, *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct".

N.-W. F. P.

In sub-Rules (2) and (3) of Rule 31, *for* the words "six months" *substitute* the words "three months", and add the following as sub-Rule (4):—

"(4). The Court may, on application, extend the period of three months mentioned in sub-Rules (2) and (3) to such period, not exceeding six months in all as it may think fit."

OUDH.

In Rule 31, sub-Rules (2) and (3), *for* the words "six months", *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct".

RANGOON.

In sub-Rules (2) and (3) of Rule 31, *for* the words "six months" the words "three months" shall be substituted.

The following shall be added as sub-Rule (4) of Rule 31:—

"(4) The Court may, on application, extend the period of three months mentioned in sub-Rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit."

O.21, R.31, Notes 1—5.

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Decree for specific moveable property.
4. Seizure of property not in the possession of the judgment-debtor.
5. Alternative damages—Sub-Rule (2).

1. Legislative changes.—

The words "or for the recovery of a wife" which occurred in S. 259 of the old Code after the words "share in a specific moveable" have been omitted in this rule. The reason is that the wife is not a chattel and cannot, therefore, be delivered to her husband. *See* Notes to R. 33, *infra*.

2. Scope of the rule.—This rule does not apply to a case where the property sought to be seized is not in the possession of the judgment-debtor, but in the custody of a third party.[1] The words "specific moveable" in this rule do not include money and therefore a decree for money cannot be executed under the provisions of this rule.[2]

In order to enable a person to obtain delivery of specific moveable property by suit and to enforce the decree by the stringent methods prescribed in this rule, the plaintiff must allege and prove facts which give him a right to compel the delivery of the specific moveables under S. 11 of the Specific Relief Act (I of 1877).[3]

An order under S. 36, Cl. (5) of the Presidency Towns Insolvency Act (III of 1909) for delivery of any property be executed in the manner specified in this section.

3. Decree for specific moveable property.—A decree for possession of three-fourths of a person's estate consisting of moveable and immoveable property is a decree that can be executed under this rule so far as the *moveable* property is concerned.[1]

4. Seizure of property not in the possession of the judgment-debtor.—It has been held in the undermentioned case[1] that R. 58, *infra* is applicable not only to attachments in execution of money decrees, but also to seizures under this rule.

5. Alternative damages—Sub-R. 2.—O. 20, R. 10 provides that the decree, in a suit for moveable property, should state a certain amount of money as an alternative, if delivery of the chattel in dispute cannot be had. This rule provides that if the goods are capable of delivery they must be delivered and that if they are not, then the assessed damages should be paid.[1] Where a decree is passed as provided by O. 20, R. 10 the decree-holder cannot execute

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Order 21, Rule 31—Note 2.

(1) *Raja Pudmanand Singh* v. *Chandi Dat Jha*, (1897) 1 Cal W N 170 (172).

(2) *Sankunni* v. *Govinda*, (1914) 14 Ind Cas 254 (255): 37 Mad 381: 11 Mad L Tim 325: 1912 Mad W N 516: 22 Mad L Jour 485.

(3) *Venkatasubba Rao* v. *The Asiatic Steam Navigation Company of Calcutta*, (1915) 30 Ind Cas 840 (844): 39 Mad 1: 29 Mad L Jour 342: 2 Mad L W 805: 18 Mad L Tim 236: 1915 Mad W N 644 F B.

Note 3.

(1) *Radhamal* v. *Imam Baksh*, 1908 Pun W R 60.

Note 4.

(1) *Samran Das* v. *Makunddass*, (1894) 7 C P L R 105 (110).

Note 5.

(1) *Kashee Nath* v. *Debkisto*, (1871) 16 Suth W R 240 (244); *Sirdar Randheer Singh* v. *Sardarni Dharam Kour*, 1890 Pun Re No 64. See also *Bhoobun Mohwee* v. *Gobind Chunder*, (1878) 19 Suth W R 82 (83).

the money portion of the decree alone without following the procedure prescribed by this rule, *i.e.*, without applying for delivery of the moveable property.[2] **O.21, R.31, Note 5.**

O.21, R.32.

R. **32.** [S. 260.] (1) *Where* the party against whom a decree[2] for the specific performance of a contract[3], or for restitution of conjugal rights[4], or for *an injunction*[6], has been *passed*, has had an opportunity of obeying the decree[7] and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction[1] by his *detention in the civil prison*, or by the attachment of his property, or by both.

Decree for specific performance, for restitution of conjugal rights *or for an injunction.*

(2) *Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.*

(3) *Where* any attachment under *sub-Rule* (1) *or sub-Rule* (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold[8], such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and *shall* pay the balance (if any) to the judgment-debtor on his application.

(4) *Where* the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or *where*, at the end of one year from the date of the attachment, no application to have the property sold has been made, *or if made has been refused*, the attachment shall cease.

(5) *Where a decree for the specific performance of a contract or for an injunction has not been obeyed*[9], *the Court may, in lieu of or in addition to all or any of the processes aforesaid*[10], *direct that the act required to be done may be done*

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(2) *Bal Mukunda Bisseswarlal* v. *Bengal Nagpur Railway Co. Ltd.* 1927 Cal 652 (653): 31 Cal W N 850: 103 Ind Cas 740: 55 Cal 26; *Manavikraman* v. *Moyankutti*, (1903) 13 Mad L Jour 444 (444).

O.21, R.32. *so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.*

Illustration.

A, a person of little substance, erects a building which renders un-inhabitable a family mansion belonging to B. A in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution-proceedings.

[1877—Ss. 259, 260; 1859—S. 200. *Cf.* R. S. C., O. 42, Rr. 7 and 30.]

Local Amendments.

ALLAHABAD.

For the words "one year" *read* the words "three months", and *after* the words at the end of the sub-rule, "on his application", *add* the words "the Court may for good cause extend the time".

LAHORE.

In sub-Rule (3) *for* the words "one year", *substitute* the words "three months", and *add* the following proviso to sub-Rule (3):

"Provided that the Court may for sufficient reasons, on the application of the judgment-debtor, extend the period beyond three months; but it shall in no case exceed one year in all."

In sub-Rule (4), *for* the words "one year", *substitute* the words "three months or such other period as may have been prescribed by the Court".

NAGPUR.

In sub-Rule (3):—

(*a*) (*i*) for the words "one year", *substitute* the words "three months";

(*ii*) *after* the word "application", *insert* the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year"; and

(*b*) (*iii*) in sub-Rule (4), *for* the words "one year", *substitute* the words "three months, or such further time as may have been fixed by the Court under sub-Rule (3)".

N.-W. F. P.

In sub-Rule (3) of Rule 32, *for* the words "for one year", *substitute* the words "for three months or such further period not exceeding one year in the whole as may be fixed by the Court".

OUDH.

In Rule 32 (3), *for* the words "one year", *substitute* the words "three months", and at the end of the sub-rule, *add* the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year".

In Rule 32 (4), *for* the words "one year", *substitute* the words "three months, or such further time as may have been fixed by the Court under the previous sub-rule".

RANGOON.

In sub-Rule (3) of Rule 32, *for* the words "for one year", the words "for three months or for such further period, not exceeding one year in the whole, as may be fixed by the Court on the application of the judgment-debtor" shall be *substituted*.

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Decree for specific performance.
4. Restitution of conjugal rights.
5. Form of decree for restitution of conjugal rights.
6. Decree for injunction.
7. Opportunity of obeying the decree.
8. Sale of property—Sub-R. (3).
9. Disobedience of order for injunction or specific performance.
10. Effect of procedure under this rule.
11. Limitation.

Notice not necessary. See Note 7, Pt. (2).

1. Legislative changes.—

1. The words "or for an injunction" have been substituted for the words "or for the performance of or abstention from any other particular act."
2. Sub-Rules (2) and (5) are new.
3. In sub-Rule (3), the word "shall" has been substituted for the word "may".
4. The words "or if made has been refused" are new.

Amendment after 1903.

The words "in the case of a decree for restitution of conjugal rights specific performance of a contract or for an injunction" have been newly inserted by Act XXIX of 1923. *See* Note 4, *infra.*

2. Scope of the rule.—A decree which does not contain any direction to the defendant to do or to refrain from doing any act, but is merely a *declaratory* one cannot be executed under this rule.[1]

3. Decree for specific performance.—As to the cases in which specific performance can be decreed *see* Ss. 12 to 30 of the Specific Relief Act (I of 1877). In a suit for specific performance of a contract of sale, the passing of the decree and the payment of money, if any, transfers the ownership.[1] It has been held by the High Court of Patna that the Court executing a decree for specific performance of a contract of sale is competent to grant possession of the property to the decree-holder even though no relief for possession was either asked for in the plaint or awarded by the decree.[2] *See also* O. 2, R. 2, N. 16, *supra.*

4. Restitution of conjugal rights.—A decree for the restitution of conjugal rights passed under the Parsi Marriage and Divorce Act (XV of 1865) is not executable under this rule, since S. 36 of that Act provides a remedy in substitution of the remedy under this rule.[1] But such a decree between Hindus or Mahammedans can be enforced under this rule.[2]

A wife is not a chattel and cannot, therefore, be delivered as such in execution under the previous rule or this rule.[3] A suit for recovery of a wife must, therefore, be treated as a suit for the restitution of conjugal rights.[4] It was held in the undermentioned cases[5] that where a wife disobeyed a decree

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Order 21, Rule 32—Note 2.

(1) *Alla Baksh* v. *Nisar Husain*, (1904) 1 All L J 541 (542).

Note 3.

(1) *Dhondiba* v. *Ramchandra*, (1881) 5 Bom 554 (560): 6 Ind Jur 92.

(2) *Atal Behary* v. *Baroda Prasad*, 1931 Pat 179 (180, 181): 131 Ind Cas 529: 12 Pat L Tim 686.

Note 4.

(1) *Ardesar Jahangir Framji* v. *Avabai*, (1872) 9 Bom H C R 290.

(2) *Yamunabai* v. *Narayan*, (1875-77) 1 Bom 164 (167).

(3) *Mt Imamun* v. *Md Majeed-ool-lah*, (1868) 3 Agra 88; *Mt Toofeah* v. *Jussouda*, (1867) 2 Agra 337.

(4) *Fakirgauda* v. *Gangi*, (1901) 23 Bom 307 (309): 1896 Bom P J 369; *Melaram Nudial* v. *Thanooram Bamun*, (1868) 9 Suth W R 552 (552).

(5) *Oholun Beebee* v. *Ameer*, (1866) 6 Suth W R 105 (106): 1 Ind Jur N S 317; *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*, (1867)

O.21, R.32, Notes 4—6.

for the restitution of conjugal rights passed against her, the decree could be enforced by her imprisonment or by the attachment of her property or by both. But since the amendment of this rule by Act XXIX of 1923 referred to in Note 1 *ante* such a decree can be enforced only by the *attachment* of the defendant's Property. *See also* Notes to R. 33, *infra*.

5. **Form of decree for restitution of conjugal rights.**—In a suit for the restitution of conjugal rights against the wife and other defendants who prevent her from going to her husband, the decree should declare the husband's right and direct that the other defendants to refrain from preventing the plaintiff's wife from returning to him.[1] Where they do not obey the decree, execution can proceed against them under this rule.[2]

Where, in a decree for the restitution of conjugal rights, the plaintiff's mother-in-law who was impleaded as a defendant in the suit, was directed to refrain from preventing the plaintiff's wife from returning to him, it was held that her action in merely permitting her daughter, who was of age, to reside in her home after decree, did not justify the attachment of her property under this rule.[3]

6. **Decree for injunction.**—This rule applies to cases where a party is directed to do some act, as well as to cases where he is directed to abstain from doing an Act.[1] The High Court of Madras has expressed an *obiter dictum* in the undermentioned case[2] that an interim injunction may be enforced under this rule read with S. 36, *ante*.

As to whether a decree for injunction can be executed against vendees from the defendant and against the legal representatives of a deceased defendant *see* Note 18 to S. 50, *ante*.

Under the old Code it was held that disobedience to an order directing the defendant to render accounts within a particular time was disobedience to an order "requiring the performance of a particular act" within the meaning of S. 260 and consequently was punishable under that section.[3] But under

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8 Suth W R 3 (13): 11 Moo Ind App 551 P C; *Alla Baksh* v. *Allah Baksh*, 1876 Pun Re No 15; *Mt Begum Khatun* v. *Abdul Ki*, 1871 Pun Re No 2. But see *Gatha Ram Mistree* v. *Moohita Kochin Atteah*, (1875) 23 Suth W R 179 (180): 14 Beng L R 298.

Note 5.

(1) *Biseeshwar Ram* v. *Pallu Ram Kahar*, (1921) 59 Ind Cas 887 (889) Pat; *Ram Tahul* v. *Madho*, (1867) 2 Agra 111; *Jaffree Khanum* v. *Imdad Hossein*, (1870) 2 N W P 314; *Lal Nath* v. *Sheoburn*, (1878) 20 Suth W R 92 (92); *Kuroona Moyee Debee* v. *Gunga Dhur Surmah*, (1878) 20 Suth W R 50 (50); *Koobur Khansama* v. *Jan Khansama*, (1867) 8 Suth W R 467 (467).

(2) *Sivarama Pillai* v. *Veerappa Pillai*, (1914) 23 Ind Cas 828 (830) Mad. See *Bai Jamna* v. *Dayaji Makanji*, (1920) 57 Ind Cas 571 (572): 44 Bom 454: 22 Bom L R 214 [Where execution by imprisonment of wife was prohibited by decree, injunction in decree against parents allowing their daughter to live with them was held to be improper].

(3) *Ajnasi Kuar* v. *Suraj Prasad*, (1875-78) 1 All 501 (503). See also *Sampath Chetty* v. *Sankara Iyer*, 1930 Mad W N 809 [Consent decree specifying the doing and non-doing of certain acts —Can be enforced as a decree for injunction].

Note 6.

(1) *Sachi Prasad* v. *Amarnath*, (1919) 45 Ind Cas 864 (866): 46 Cal 103: 22 Cal W N 851: 27 Cal L Jour 506 [Per Richardson, J]; *Sampath Chetty* v. *Sankara Ayyar*, 1930 Mad W N 809; *Mrs Annie Besant* v. *Narayaniah*, (1918) 21 Ind Cas 789 (802): 25 Mad L Jour 661: 15 Mad L Tim 1: 1914 Mad W N 1 Sup [Mandatory injunction directing a guardian to hand over custody of a minor]; *Velu Manikaran* v. *Pakarvoor Manakal Jatavedam Nambudripad's L R Narayana Somayajipad*, (1910) 6 Ind Cas 289 (289): 21 Mad L Jour 465: 1910 Mad W N 157: 7 Mad L Tim 227.

(2) *Bellary Press Co, Ltd* v. *Venkata Rao*, (1910) 8 Ind Cas 7 (8): 21 Mad L Jour 829: 8 Mad L Tim 374: 1910 Mad W N 631.

(3) *Raghunath* v. *Ganpatji* (1905) 27 All 374 (377, 378): 1905 All W N 3: 1 All L J 722; *Degamber* v. *Kally Nath*, (1881) 7 Cal 654 (656, 657): 9 Cal L Rep 265.

the present rule those words have been omitted and an order requiring the defendant to furnish accounts is not an injunction within the meaning of this rule and therefore, the disobedience of that order cannot be dealt with under this rule.[4]

7. Opportunity of obeying the decree.—Before allowing execution under this rule against a judgment-debtor, the Court should see if he has had an opportunity of obeying the decree and whether he has wilfully failed to obey it.[1] If he has had such an opportunity, then execution may issue against him without giving him a further opportunity to obey the decree and the Court is not bound to issue notice calling upon him to obey the decree.[2]

Where an application for enforcing a decree under this rule has been dismissed on the ground that the judgment-debtor had no opportunity of obeying the decree, a second application after such opportunity has been given is not barred.[3]

8. Sale of property—Sub-Rule (3).—This rule is a highly penal one and must be construed strictly. When a sale is ordered under sub-R. (3) the following three conditions must exist:

(*a*) a valid original attachment,

(*b*) application, *within* one year of the attachment, by the decree-holder, and

(*c*) lapse of one year from date of attachment.[1]

Thus where an order of attachment was made on 27-6-1908 and was carried out on 20-7-1908 and no application for sale was made before 20-7-1909, it was held that the attachment ceased to exist and the order for sale was, therefore, set aside.[2] A sale held under sub-R. (3) cannot be set aside under O. 21, R. 89, sub-R. (1) even where the execution of the decree under which the sale took place is restrained by an injunction granted subsequent to the sale in a separate suit.[3]

9. Disobedience of order for injunction or specific performance.—Where a defendant has wilfully failed to obey a decree for injunction or for specific performance passed against him, the decree may be enforced by his detention in the civil prison or by the attachment of his property or by both.[1]

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(4) *Arjun Sule* v. *Emperor*, (1918) 44 Ind Cas 737 (738): 3 Pat L Jour 106 [The change makes 27 All 374 and 7 Cal 654 no longer law].

Note 7.

(1) *Bhagwan Das* v. *Sukhdei*, (1905) 28 All 300 (302): 1906 All W N 10: 3 All L J 836; *Umed Kika* v. *Nagindas Narotamdas*, (1870) 7 Bom H C R O C 122; *Durga Das* v. *Dewraj*, (1906) 33 Cal 306 (311): 3 Cal L Jour 112: 10 Cal W N 297.

(2) *Durgadas Nandi* v. *Dewraj Agarwallah*, (1906) 33 Cal 306 (310, 311, 312): 3 Cal L Jour 112: 10 Cal W N 297.

(3) *Kishore Bun* v. *Dwarka Nath Adhikari*, (1894) 21 Cal 784 (788): 21 Ind App 89: 6 Sar 429 P C.

Note 8.

(1) *Badri Pershad* v. *Fakira*, (1911) 10 Ind Cas 341 (343): 69 Pun Re 1911: 127 Pun W R 1911: 170 Pun L R 1911.

(2) *Badri Pershad* v. *Fakira*, (1911) 10 Ind Cas 341 (343): 69 Pun Re 1911: 127 Pun W R 1911: 170 Pun L R 1911.

(3) *Gahurali* v. *Asia Khatun*, (1932) 56 Cal L Jour 140 (143, 144) [In such a case no money could be said to be due to the decree-holder which could be deposited under O 21, R 89 (1)].

Note 9.

(1) *Damodar Bhat* v. *Bhogi Lal*, (1900) 24 Bom 45 (49): 1 Bom L R 509; *Kishore Bun Mohunt* v. *Dwarkanath Adhikari*, (1894) 21 Cal 784 (788): 21 Ind App 89: 6 Sar P C J 429 P C; In the matter of *Chandra Kanta*, (1881) 6 Cal 445 (446): 7 Cal L Rep 350: 5 Ind Jur 412 [He cannot be prosecuted under S 188, I P Code for disobedience of injunction of Civil Court]; *Gouri Prasad Moitra* v. *Bhola Nath Sanyal*, (1881) 8 Cal L Rep 487 (488); *Bhoobun Mohun Mondul* v. *Nobin Chunder Bullub*, (1873) 10 Beng L R App 12: 18 Suth W R 282 (283);

O.21, R.32, Note 9.

But the Court has no power to order the defendant to execute a security bond for obeying the decree.[2]

Where a decree requires the plaintiff to do certain acts necessary for the enjoyment of his property and restrains the defendant from interfering with it, the defendant is bound to give the plaintiff reasonable facilities for doing it and the refusal to do so can be punished under this rule.[3]

Under the old Code, a Court, in executing a decree which directs a defendant to do a particular act, had no power to have the thing done by an officer of the Court, when the defendant failed to obey the decree, inasmuch as it was not one of the modes of execution prescribed by S. 260.[4] But now under sub-R. 5 of this rule the Court has got the power to direct the act to be done so far as practicable by the decree-holder or by some other person appointed by the Court at the expense of the judgment-debtor.[5] The Court is, however, not justified in ordering the police to interfere in the matter, or in appointing a commissioner to see that the decree-holder performs without obstruction the acts required to be done.[6]

Where, after a decree for injunction has been passed, the defendant does not obey it, the plaintiff's remedy is by execution under this rule and not by a separate *suit*.[7] The reason is that a separate suit would be barred by S. 47.

The words "the act required to be done" in sub-R. (5) mean the act that has to be done to enforce the injunction granted by the decree.[8] Thus, where a decree directs a wall to be demolished as being an obstruction to a right of way and is so demolished in execution of the decree, but the judgment-debtor erects another wall at a different place obstructing the right of way, the remedy of the decree-holder is a fresh *suit* for injunction.[9]

Aiyanachariar v. *Vathiar Ramanuja Ayyangar*, (1916) 32 Ind Cas 698 (699): 3 Mad L W 161: 19 Mad L Tim 182: (1916) 1 Mad W N 147 [Even a temporary disobedience is punishable under this rule—In this case it was held that contempt was purged].v

(2) *Aiyanachariar* v. *Vathiar Ramanuja*, (1916) 32 Ind Cas 698 (698): 3 Mad L W 161: 19 Mad L Tim 182: (1916) 1 Mad W N 147.

(3) *Bapu* v. *Narayan*, 1891 Bom P J 317.

(4) *Sakarlal* v. *Parvatibai*, (1902) 26 Bom 283 (287): 4 Bom L R 14; *Sha Karamchand Gokaldas* v. *Ghelabhai Chakaldas*, (1895) 19 Bom 34 (35); *Lallibhanji* v. *Jaswant Singh*, 1887 Bom P J 74 (74); *Durga Das* v. *Dewaraj*, (1906) 33 Cal 306 (309, 311): 3 Cal L Jour 112: 10 Cal W N 297 [Though execution petition prayed for the act to be done, the Court allowed attachment]; *Protap Chundra Das* v. *Peari Chowdhrain*, (1882) 8 Cal 174 (176): 9 Cal L Rep 458: 6 Ind Jur 308; *Bhoobun Mohun* v. *Nobin Chunder*, (1872) 18 Suth W R 282 (283): 10 Beng L R App 12; *Nanun Mal* v. *Uttam Chand*, 1889 Pun Re No 107; *Vaman* v. *Lakshmanshet*, 1890 Bom P J 22. See also *Gaya Prasad* v. *Bihari*, 1883 All W N 149 (149).

(5) *Sachi Prasad* v. *Amar Nath*, (1918) 45 Ind Cas 864 (866): 46 Cal 103: 22 Cal W N 851: 27 Cal L Jour 506; *Motilal* v. *Nanhelal*, 1930 P C 287 (290): 26 Nag L R 333: 57 Ind App 333: 128 Ind Cas 652: 85 Cal W N 93: 60 Mad L Jour 228 [Action for specific performance of a contract to sell property with cultivating rights—Requiring sanction of Board of Revenue—Defendant can be compelled to prosecute the application]; *Mt Janki* v. *Sobhagmal*, 1926 Nag 465 (465, 466): 22 Nag L R 101: 9 Nag L J 125: 96 Ind Cas 898 [Affirmed on appeal in 1930 P C 287]. See *Maluka* v. *Sunder Singh*, 1921 Lah 376 (377): 25 Pun L R 1921: 59 Ind Cas 594 [Sub-Rule 5 will apply only when decree is not obeyed].

(6) *Goswami Gordhan Lalji* v. *Goswami Madhusudan Ballabh*, (1918) 48 Ind Cas 26 (27, 28): 40 All 648: 16 All L J 700.

(7) *Sachi Prasad* v. *Amarnath*, (1919) 45 Ind Cas 864 (865, 866): 46 Cal 103: 22 Cal W N 851: 27 Cal L Jour 506; *Habibullah* v. *Abdullah*, (1914) 23 Ind Cas 247 (248): 12 All L J 347; *Jawatri* v. *Emili*, (1891) 13 All 98 (100): 1890 All W N 232. See *Rama Saran* v. *Chatar Singh*, (1901) 23 All 465 (466): 1901 All W N 142 [Suit barred by *res judicata*].

(8) *Sachi Prasad* v. *Amarnath*, (1918) 45 Ind Cas 864 (866): 46 Cal 103: 22 Cal W N 851: 27 Cal L Jour 506.

(9) *Maluka* v. *Sundar Singh*, 1921 Lah 376 (377): 25 Pun L R 1921: 59 Ind Cas 594; *Maluka* v. *Sundar Singh*, (1923) 5 Lah L Jour 70.

10. Effect of procedure under this rule.—The provisions of this rule are intended to punish the defendant for disobedience of the decree and are not intended to be a satisfaction of the decree so as to prevent the decree-holder from taking further steps. Thus, where a decree for possession of a certain plot of land and for the demolition of a house situate thereon, was passed, and the decree-holder had received some compensation under this rule by the attachment and sale of the house on the land, it was held that he could still enforce his right to the possession of the property.[1]

11. Limitation.—It has been held by the High Court of Allahabad that disobedience to an injunction is a contempt of Court and can be punished, therefore, at any time and that the provisions of Art. 182 of the Limitation Act do not apply to an application to enforce the order under this rule.[1] But the High Court of Madras has held that Art. 182 cannot apply from the very nature of the provisions therein but that the decree-holder may enforce his decree by an application made within three years of each successive breach of the injunction and that the application is governed by Art. 181 of the Limitation Act.[2] The decree-holder, however, is not obliged to take action in regard to every petty infringement on pain of allowing the decree to become inoperative after three years and depriving him of the fruits of his decree, if a serious infringement of it were afterwards made.[3] The Chief Court of Lower Burma has, on the other hand, held that the application to enforce the decree under this rule is governed by Art. 182 of the Limitation Act.[4]

R. **33**. [New.] (1) *Notwithstanding anything in rule* 32, *the Court, either at the time of passing a decree against a husband for the restitution of conjugal rights or at any time afterwards, may order that the decree shall be executed in the manner provided in this rule.*

Discretion of Court in executing decrees for restitution of conjugal rights.

(2) *Where the Court has made an order under sub-rule* (1), *it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.*

Note 10.

(1) *Ahmadi Begam* v. *Amanat Husain*, (1904) 1 All L J 431 (432).

Note 11.

(1) *Ram Saran* v. *Chatar Singh*, (1901) 23 All 465 (466): 1901 All W N 142; *Bhagwan Das* v. *Sukhdei*, (1906) 28 All 300 (302): 1906 All W N 10: 3 All L J 886.

(2) *Venkatachalam Chetty* v. *Veerappa Pillai*, (1906) 29 Mad 314 (317).

(3) *Venkatachalam Chetty* v. *Veerappa Pillai*, (1906) 29 Mad 314 (317).

(4) *Haji Ahmed Moola Dawood* v. *Poker Mull*, (1912) 15 Ind Cas 945 (949): 6 L B R 85: 5 Bur L Tim 116.

O.21, R.33, Notes 1—2.

(3) *The Court may from time to time vary or modify any order made under sub-rule* (2) *for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.*

(4) *Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.*

Synopsis.

1. Amendments after 1908. 2. Scope of the rule.

Decree disallowing imprisonment—High Court whether will interfere. See note 2, F.-N. (1).

1. Amendments after 1908.—(1) The words "against a husband" in sub-R. (1) after the words "passing a decree" have been newly inserted by Act 29 of 1923.

(2) By the same amending act the words "shall be executed in the manner provided in this rule" have been substituted for the words "shall not be executed by detention in prison."

(3) The words "and the decree-holder is the wife" after the words "under sub-R. (1)" occurring in sub-R. (2) have been omitted by Act XXIX of 1923, because the rule as amended applies only to cases of decrees against *husbands*.

2. Scope of the rule.—Before the amendment of this rule by Act XXIX of 1923 it was held that the tendency of modern legislation is against sending women to jail in civil matters and therefore, ordinarily, a Court passing a decree for the restitution of conjugal rights against a wife, should direct, in the exercise of its discretion under this rule that the decree shall not be executed by the detention of the wife in civil prison.[1] In view of the amendment of R. 32 *ante* under Act XXIX of 1923 a decree for the restitution of conjugal rights can no longer be executed by imprisonment, whether the decree be against the husband or the wife. *See* Note 1 to R. 32, *ante*.

Order 21, Rule 33—Note 2.

(1) *Dharinee* v. *Piari*, 1924 All 836 (837): 78 Ind Cas 190 [Condition in decree of trial Court disallowing imprisonment will not be interfered with by High Court in appeal]; *Bai Parvati* v. *Mansukh Jetha*, (1921) 59 Ind Cas 361 (362): 44 Bom 972: 22 Bom L R 1097 [The fact that wife had been in criminal jail is immaterial]; *Amir Bibi* v. *Nur Mahomed*, 1924 Lah 244 (245): 73 Ind Cas 716 [Where wife disobeys she is not entitled to claim maintenance]; *Sivarama Pillai* v. *Veerappa Pillai*, (1914) 23 Ind Cas 828 (829) Mad; *Karam Allahi* v. *Maraim*, (1911) 10 Ind Cas 177 (177) Sind [Imprisonment will not be allowed when the marriage has been unhappy]. See *Jagan Nath* v. *Basant Ram*, 1923 Lah 595 (596): 75 Ind Cas 24 [But if wife persists in immorality she may be detained in jail in execution if she disobeys].

R. **34.** [Ss. 261, 262.] (1) *Where a* decree *is* for the execution of a *document* or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses *to obey* the decree, the decree-holder may prepare *a* draft of *the document* or endorsement in accordance with the terms of the decree and deliver the same to the Court.

Decree for execution of *document*, or endorsment of negotiable instrument.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice *requiring* his objections (if any) *to* be made within such time as the Court fixes in this behalf.

(3) *Where the judgment-debtor* objects to the draft, his objections shall be stated in writing within *such* time, and the Court shall *make* such order *approving or altering the draft*, as it thinks fit.

(4) The decree-holder *shall deliver* to the Court *a copy* of the draft *with such alterations (if any) as the Court may have directed* upon the proper stamp-paper if a stamp *is* required by *the* law *for the time being in force*; *and* the *Judge* or such officer as *may be* appointed in this behalf shall execute *the document so delivered.*

(5) The execution of a *document* or the endorsement of a negotiable instrument under *this rule* may be in the following form, *namely*:—

"C. D., Judge of the Court of.

(*or as the case may be*), for A. B., in a suit by E. F. against A. B.", and shall have the same effect as the execution of the *document* or *the* endorsement of the *negotiable* instrument by the party ordered to execute or endorse the same.

(6) *The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.*

[1877—Ss. 261, 262; 1859—S. 202.]

Synopsis.

1. **Legislative changes.**
2. **Decree for execution of document.**
3. **Compromise decree for execution of document.**

O. 21, R. 34, Notes 1—4.

4. Execution by Court on behalf of father is binding on son.
5. Registration.
6. Lis Pendens.
7. Limitation.
8 Appeal.

Registrar of High Court—Whether can enter into a covenant on behalf of judgment-debtor. See Note 2, Pt. (3).

1. Legislative changes.—

1. The word "document" has been used in this rule instead of the word "conveyance" in the old Code.

2. Sub-Rule (6) is new. *See* Note 5, *infra*.

2. Decree for execution of document.—A decree directing a defendant to execute a document in favour of the plaintiff is executable in the manner provided by this rule, on the failure of the defendant to obey the directions given in the decree.[1] Where the judgment-debtor makes any alteration in the draft submitted to the Court, he could not be compelled to execute the document, but the proper procedure is to act under this rule.[2]

The Registrar of a High Court can, if directed by the Court, execute a document: but he cannot enter into any covenant on behalf of the judgment-debtor.[3] The title of the decree-holder is complete only after the execution of the document: till then there is only an inchoate right capable of being completed.[4]

A British Indian Court cannot, under this rule, direct a party to convey by a document, property which is outside its jurisdiction.[5]

Where a decree directed a defendant to endorse certain promissory notes to the plaintiff and the defendant failed to do so and in the meantime the promissory notes were barred by limitation, it was held that a suit for compensation for failure to carry out the terms of the decree is not maintainable and that the proper remedy of the plaintiff was by way of execution under this rule.[6]

3. Compromise decree for execution of document.—Where a compromise decree directs the plaintiff to execute a document in favour of the defendant in respect of properties which are the subject-matter of the suit, the defendant can enforce the decree under this rule.[1]

4. Execution by Court on behalf of father is binding on son.—A document executed by the Court under this rule on behalf of a Hindu father, in

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Order 21, Rule 34—Note 2.

(1) *Brojendra Kumar Saha* v. *Kali Nath Saha*, (1917) 41 Ind Cas 77 (79) Cal; *Chunder Kant* v. *Krishna*, (1884) 10 Cal 710 (712): 8 Ind Jur 672. See *Karima Bibi Daud Bhai* v. *Abder Rehman Sayad Banu*, 1923 Bom 26 (27): 46 Bom 990: 67 Ind Cas 667: 24 Bom L R 496 [Defendant also may execute a decree for specific performance].

(2) *Sami Dayal* v. *Sheoraj Bali*, (1902) 5 Oudh Cas 370 (371, 372). See also *Hare Krishna* v. *Priya Nath*, (1909) 10 Cal W N 845 (846).

(3) *Ram Chunder* v. *Dwarkanath*, (1889) 16 Cal 330 (344).

(4) *Atul Kristo* v. *Mutty Lal*, (1898) 3 Cal W N 30 (32).

(5) *Ramaswami* v. *Karuppan*, (1915) 31 Ind Cas 216 (220): 29 Mad L Jour 551.

(6) *Muthu Karau Venalagappa Chettiar* v. *Kanakasabai Pillai*, (1918) 45 Ind Cas 689 (689): 7 Mad L W 568: 1918 Mad W N 333: 24 Mad L Tim 34.

Note 3.

(1) *Soudamini Dasi* v. *Behari Lal Biswas*, 1921 Cal 227 (229): 25 Cal W N 68: 61 Ind Cas 535; *Ashwini Kumar Banerjee* v. *Ram Gopal Mukerjee*, 1926 Cal 975 (976): 95 Ind Cas 179.

execution of a decree is binding on his son.[1] The reason is that sub-R. (5) provides that such a document shall have the same effect as if it had been executed by the party himself. O.21, R.34, Notes 4—8.

5. **Registration.**—Even under the old Code the High Court of Allahabad held that where a document required to be registered under the provisions of the Indian Registration Act, it must be registered even though executed by a Court acting under this rule.[1] Sub-R. (6) gives legislative recognition to the above mentioned decision.

6. **Lis pendens.**—Action taken by the Court in executing a decree under this rule is a proceeding in the suit and therefore a transfer of the property in dispute made by the judgment-debtor after the date of the decree but before the proceeding under this rule, will be affected by the doctrine of *Lis pendens*[1].

7. **Limitation.**—An application under this rule is an application for execution of the decree and is, therefore governed by Art. 182 of the Indian Limitation Act, 1908.[1]

8. **Appeal.**—Under O. 43, R. 1, Cl. (*i*) an appeal lies against an order passed under this rule, on an objection to the draft of a document or of an endorsement: but a second appeal is prohibited by S. 104.[1]

R. **35.** [S. 263.] (1) *Where a* decree is for the delivery of any immoveable property, possession thereof shall be delivered[3] to the party to whom it has been adjudged, or to such person as he *may* appoint[7] to receive delivery on his behalf, and, if *necessary*, by removing[9] any person bound by the decree who refuses[11] to vacate the property. O.21, R.35.

Decree for immoveable property.

(2) *Where a decree is for the joint possession*[6] *of immovable property, such possession shall be delivered by affixing*[8] *a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.*

(3) *Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not*

Note 4.

(1) *Gurshai* v. *Girdhari Lal*, (1919) 52 Ind Cas 75 (78): 22 Oudh Cas 84: 1 U P L R (J C) 54: 6 Oudh L J 411.

Note 5.

(1) *Kanahia Lal* v. *Kali Dhin*, (1880) 2 All 392 (394).

Note 6.

(1) *Pandu* v. *Sital Prasad*, (1918) 48 Ind Cas 188 (190): 14 Nag L R 176.

Note 7.

(1) *Chatur Kushal Chand* v. *Mahadu*, (1886) 10 Bom 91 (93).

Note 8.

(1) *Ashwini* v. *Ram Gopal*, 1926 Cal 975 (976): 95 Ind Cas 179.

O.21, R.35, Notes 1—2.

appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open[13] *any door or do any other act*[10] *necessary for putting the decree-holder in possession.*

[1877—S. 263; 1859—Ss. 199, 223 *Cf.* R. S. C., O. 42, R. 5 & O. 88, R. 1: *See* Rr. 36 & 95 to 103 below. *See also* S. 51, cl. (*a*).]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Delivery of possession—Symbolical and actual.
4. Effect of symbolical possession.
5. Symbolical possession and limitation. See Note 4, supra.
6. Joint possession—Undivided share.
7. Delivery of possession to agent.
8. Affixture of copy of warrant.
9. Removal of person bound by decree.
10. Use of force in giving possession.
11. Resistance to delivery of possession.
12. Identification of land.
13. Break open—Sub-Rule (3).

Actual possession after symbolical possession. See Note 3, Pts. (4) and (5).
Declaratory decrees or decrees for possession. See Note 6, Pts. (2) and (3).
Delivery of land includes delivery of things attached to earth. See Note 2, Pt. (8).
Delivery of land not involving delivery of buildings thereon. See Note 9, F.-N. (3).
Second delivery of possession. See Note 2, Pts. (2) to (5).

1. Legislative changes.—

Sub-Rules (2) and (3) are new.

2. Scope of the rule.—This rule and R. 36, *infra* point out the mode of executing decrees *for possession* of immoveable property. Rules 95 and 96 of this order provide for the mode of delivery of possession to the auction-purchaser of the properties purchased by him in a Court sale. This rule corresponds with R. 95 and R. 36 corresponds with R. 96. The procedure for delivery of possession is the same in both sets of rules.[1]

Where property is delivered to the decree-holder in execution of his decree for possession, the decree is satisfied and, therefore, a second application for possession on the ground that he was *dispossessed* by the judgment-debtor, is not maintainable.[2] But a subsequent application will lie when the first application has been *ineffectual.*[3] Thus, where the decree-holder asked

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Order 21, Rule 35—Note 2.

(1) *Sardar Khan* v. *Abdulla Khan*, 1924 Lah 301 (302): 71 Ind Cas 885.

(2) *Gopal Das* v. *Than Singh*, (1882) 4 All 184 (185): 1882 All W N 4; *Lakhrani Kuar* v. *Dhanraj Singh*, (1916) 32 Ind Cas 634 (636): 14 All L J 102; *Kali Shanker Sahai* v. *Protap Udai Nath Saha*, (1912) 16 Ind Cas 708 (709) Cal; *Ibrahim Sahib* v. *Konammal*, 1923 Mad 25 (26, 27): 43 Mad L Jour 179: 31 Mad L Tim 356: 70 Ind Cas 755; *Thandavaroya Mudali* v. *Subramania Gurukal*, (1916) 32 Ind Cas 44 (44): 29 Mad L Jour 504; *Chokkalinga* v. *Gopalathatha Chariar*, (1916) 32 Ind Cas 46 (47) Mad; *Pathambi* v. *Mytheen Bibi*, (1902) 12 Mad L Jour 96 (97); *Chindha* v. *Narayan Govind Rao*, 1927 Nag 36 (36): 97 Ind Cas 705; *Pandurang* v. *Sampat*, 1923 Nag 237 (238): 6 Nag L J 157: 72 Ind Cas 318; *Lakshmi Narayan* v. *Shridhar*, 1928 Nag 100 (101): 105 Ind Cas 420 [A case of auction purchaser]; See also *Gunesh Pershad* v. *Jykishun*, (1869) 1 N W P H C 218.

(3) *Venkatalakshmi Ammal* v. *Sadasiva Ayyar*, 1924 Mad 200 (200): 18 Mad L W 883: 76 Ind Cas 861; *Kali Shanker Sahay* v. *Protap Udai Nath*, (1912) 16 Ind Cas 708 (709) Cal [Possession after unconditional order of stay is a nullity and hence a second application lies]; *Banee Muhtoon* v. *Gopee Bhuggat*, (1869) 12 Suth W R 285 (286).

for delivery of the immoveable property with standing crops, and he was given delivery of the land only and not of the crops, he can apply again for effective possession of the land and of the crops.[4] Where, however, a decree-holder allows his decree to get time-barred without executing it, and the defendant continues in possession, a second suit for possession is not maintainable.[5] O.21, R.35, Notes 2—3.

A delivery of possession in execution of a decree has not the effect of dispossessing a *third* person (not a party to the suit), who was previously in possession and was *not present* when the delivery took place.[6] But it will be operative as an ouster or dispossession of the third person if it takes place in his presence and adversely to his claim.[7]

Where delivery of possession is made under this rule, the delivery must be deemed to have been made, not of the land alone, but of all things attached to it.[8]

An order for delivery of possession, should not, ordinarily, be made *ex parte*.[9]

This rule applies to proceedings under the following Acts,[10] but not to the following proceedings.[11]

3. Delivery of possession—Symbolical and actual.—This rule provides that where the property is in the occupation of the judgment-debtor or some one on his behalf, possession shall be given, if necessary, by removing the judgment-debtor or any person bound by the decree and placing the decree-holder (or the auction-purchaser in cases coming under R. 95, *infra*) in occupation of the same. But if the property is of such a nature that the judgment-debtor cannot be in actual possession of it, as, for instance, where the property is in the possession of a tenant, then delivery should be effected by the officer of the Court by going through the process prescribed in R. 36, *infra* and proclaiming to the occupant of the property that possession has been given to the decree-holder (or auction-purchaser in cases coming under R. 96).[1] The former kind of delivery is called *khas* or *actual*

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(4) *Dodda Basappa* v. *Puddi Errappa*, 1927 Mad 71 (71): 97 Ind Cas 567.

(5) *Ramlal* v. *Masum*, (1903) 25 All 35 (37): 1902 All W N 175; *Ramchand* v. *Jana*, 1921 Lah 236 (237): 3 Lah L Jour 138: 43 Pun L R 1921: 59 Ind Cas 770; *Hafiz Bahaud Din* v. *Fateh Bibi*, 1893 Pun Re No 16. See also *Kishore Singh* v. *Gobind Singh*, (1875) 24 Suth W R 33 (34).

(6) *Ram Chandra* v. *Ravji*, (1896) 20 Bom 351 (353) F B; *Kocherlakota Venkatakrishna Rao* v. *Vadrevu Venkappa*, (1904) 27 Mad 262 (270).

(7) *Kocherlakota Venkatakrishna Rao* v. *Vadrevu Venkappa*, (1904) 27 Mad 262 (270).

(8) *Aung Baw* v. *Tun Gaung*, (1902) 3 L B R 129 (130) [It was held in this case that growing crops would also be deemed to be delivered. This was a decision under the old Code where "growing crops" was not movable property as in the present Code. *Quaere* whether the decision under the present Code would be different. *See* S 2, sub-S (13), *ante*].

(9) *Karshan Bhaban Chatalia* v. *Indra Narayan Chandra*, 1923 Pat 597 (599): 4 Pat L Tim 508: 1 Pat L R 393: 76 Ind Cas 49: 79 Ind Cas 188.

(10) *See* Ss 93 and 210 of The Agra Tenancy Act [U P Act III of 1926]; S 18, Cl (2) of The Bundelkhand Encumbered Estates Act [U P Act I of 1903]; Ss 74, 47 and 22 of the Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879); S 19 of the Gujarat Talukdar's Act (Bombay Act VI of 1888); S 25, Cl (*b*) of The Central Provinces Tenancy Act (Act I of 1920); S 36, Cl (6) of The Presidency Towns Insolvency Act (India Act III of 1909).

(11) Proceedings of Provincial Small Causes Court, *See* O 50, R 1, Cl (*a*), sub-Cl (2); Proceedings of Presidency Small Cause Courts in the towns of Calcutta, Madras and Bombay. *See* O 51, R 1; Proceedings of The Rangoon Small Cause Court Act (Act VI of 1920). *See* O 53, S 111, Cl (*a*), sub-Cl (2) (inserted in Schedule I to the said Act); Proceedings for ejectment of a tenant for arrears. *See* S 24, Cl (1) of The Central Provinces Tenancy Act (Act I of 1920).

Note 3.

(1) *Ram Prasad Ojha* v. *Bakshi Bindeshwari Prasad*, 1932 Pat 145 (147, 148): 13 Pat L Tim

O.21, R.35, Notes 3—4.

possession, while the latter is called *symbolical* or *formal* delivery of possession. Where the property is capable of immediate actual possession, possession must be delivered under sub-R. (1) and there can be no symbolical possession in such a case as between the parties to the decree.[2] The term "symbolical possession" is applied where delivery is made under sub-R. (2) of this rule and Rr. 36 and 96 *infra*.[3]

A decree-holder who has been given symbolical possession, is entitled to apply again under this rule to be put in actual possession, if he is entitled to it,[4] unless he deliberately accepts such symbolical possession and does not repudiate it.[5] In the latter case, his remedy is to file a separate suit.

4. Effect of symbolical possession.—The distinction between the effect of the delivery of symbolical possession as between parties to the suit and as against third persons, is important with reference to the question of limitation applicable to suits for actual possession by decree-holders or auction-purchasers who have obtained only symbolical possession.

The effect of delivery of symbolical possession in execution in cases where such possession alone can be delivered is the same as the actual transfer of possession from the judgment-debtor to the decree-holder; that being the only means by which, *as between the parties*, the Court can effectuate and carry out its own decree. Where, therefore, subsequent to this delivery the judgment-debtor dispossesses the decree-holder and remains in possession, such possession would be adverse to the decree-holder only from the date of such dispossession.[1]

121: 11 Pat 165; *Sita Ram* v. *Ram Lal*, (1896) 18 All 440 (449, 450): 1896 All W N 162; *Juggobundhu Mukerjee* v. *Ramchunder Byeack*, (1880) 5 Cal 584 (588): 5 Cal L Rep 548: 3 Shom L R 68 F B.

(2) *Pandurang* v. *Sampat*, 1923 Nag 237 (238): 6 Nag L J 157: 72 Ind Cas 318; *Raj Mungul* v. *Anundo Moyee*, (1869) 11 Suth W R 63 (64).

(3) *Pandurang* v. *Sampat*, 1923 Nag 237 (238): 6 Nag L J 157: 72 Ind Cas 318.

(4) *Khetra Mohan Kundu* v. *Jogendra Chandra Kundu*, (1918) 45 Ind Cas 7 (9) Cal; *Hur Kishore Audhicary* v. *Sudoy Chunder Nandee*, (1872) 17 Suth W R 80 (80); *Banee Muhtoon* v. *Gopee Bhuggat*, (1869) 12 Suth W R 285 (286); *Adoremonee Dassee* v. *Prem Chand*, (1868) 9 Suth W R 454 (454, 455); *Ramsurn Muhton* v. *Jinonath Bhugut*, (1868) 10 Suth W R 396 (397); *Robson* v. *Maseyk*, (1865) 3 Suth W R Mis 2 (2).

(5) *Jagadish Nath Roy* v. *Nafar Chandra Pramanik*, 1931 Cal 427 (430): 35 Cal W N 12: 131 Ind Cas 698. See also *Ramchand* v. *Gopal Singh*, 1930 Lah 914 (915): 31 Pun L R 519: 129 Ind Cas 699 [Symbolical possession to auction purchaser of undivided share—Starting point for suit for partition and possession against co-sharers].

Note 4.

(1) *Juggobundhu* v. *Ram Chunder*, (1880) 5 Cal 584 (588): 5 Cal L Rep 548: 3 Shom L R 68 F B [Overruling 24 W R 418]; *Radha Krishna* v. *Ram Bahadur*, 1917 P C 197 (201): 16 All L J 33: 20 Bom L R 502: 27 Cal L Jour 191: 22 Cal W N 330: 34 Mad L Jour 97: 28 Mad L Tim 26: 7 Mad L W 149: 1918 Mad W N 163: 4 Pat L W 9: 43 Ind Cas 268 [5 Cal 584 approved]; *Harpal Kurmi* v. *Mohan Kurmi*, 1924 All 844 (845): 79 Ind Cas 1047; *Rajendra* v. *Bagwan Singh*, (1917) 39 Ind Cas 745 (747, 748: 39 All 460: 15 All L J 361; *Rahim Baksh* v. *Muhammad Hafiz*, (1911) 10 Ind Cas 319 (320) All; *Mangli Prasad* v. *Debi Din*, (1897) 19 All 499 (502): 1897 All W N 127; *Ram Lallan* v. *Harakh Narain*, (1922) All 463 (465): 20 All L J 641 73 Ind Cas 920; *Pandharinath* v. *Mahabub Khan*, (1897) 21 Bom 98 (101, 102); *Jogendra Krishna Chaudhry* v. *Joy Shib Chaudhury*, 1926 Cal 1172 (1178): 96 Ind Cas 481; *Janaki* v. *Baikunthanath*, 1922 Cal 176 (178): 36 Cal L Jour 140: 27 Cal W N 259: 70 Ind Cas 602; *Joggobundhu* v. *Purnanand*, (1889) 16 Cal 530 (534) [Overruling 10 Cal 402—A case of joint possession]; *Harish Chandra* v. *Sarat Chandra*, (1917) 40 Ind Cas 605 (606): Cal; *Girija Kanta Chakra Butty* v. *Mohim Chandra Acharjya*, (1916) 35 Ind Cas 294 (295): 20 Cal W N 675: 23 Cal L Jour 587 [Second suit is not barred by S 47]; *Giri Narain* v. *Modhu Sudan*, (1913) 18 Ind Cas 751 (752): 17 Cal W N 324; *Basanta Kumar* v. *Kafi Mahomed*, (1906) 3 Cal L Jour 53 (n); *Mt Dhapi* v. *Barham Deo Pershad*, (1900) 4 Cal W N 297 (302); *Bindu Bashini* v. *Renny*, (1871) 7 Beng L R App 20: 15 Suth W R 307; *Rabia Khanum* v. *Wise*, (1875) 23 Suth W R 329 (329, 330); *Bagdu Majhi* v. *Durga Prosad*, (1905) 9 Cal W N 292 (298, 300) [But after 12 years from date of symbolical possession suit will be barred]; *Pirthi* v. *Ratti Ram*, (1914) 21 Ind Cas 972 (974): 18 Pun L R 1914: 19 Pun W R 1914; *Amolak Shah* v. *Maula Baksh*, (1910) 8 Ind Cas 236 (238): 70 Pun L R 1910: 58 Pun W R 1911; *Karam Baksh* v. *Nund Lal*, (1884) Pun Re No 103; *Karim Nissan* v. *Basho*, 1882 Pun Re No 75; *Salamat Ali* v. *Ali Akbar*, (1920) 55 Ind Cas 646 (650) Lah [Second suit is not barred by S 47]; *Renganatha* v. *Srinivasa*, 1926 Mad 42 (44): 49 Mad L Jour 656: 22 Mad L W 274: 90 Ind Cas 1037; *Sowcar Sahanada* v. *Rajah*

O.21, R.35, Note 4.

Illustrations.

1. *J* obtained a foreclosure decree for possession on 16th May, 1864, against the mortgagor and took formal possession in execution on 30th January, 1873. When attempting to take possession *J* was prevented by one *R* who had purchased the property from the mortgagor in 1865. *J* filed a suit for actual possession against *R* within 12 years of the date of formal possession. It was held that the delivery of symbolical possession had the effect of interrupting *R's* adverse possession inasmuch as he was a person bound by the decree, and that his possession after such delivery is a fresh act of trespass giving rise to a new cause of action. *Juggobandhu* v. *Ram Chunder*, (1880) 5 Cal. 584 (F.B.).

2. *M* purchased immoveable property belonging to *D*, the defendant, in Court auction in execution of a decree against him on 21st August, 1880. Symbolical possession was delivered to *M* on 14th July, 1884. *M* filed the present suit for possession on 29th May, 1895, against *D* who remained in actual possession since the date of the auction purchase. *D* contended that the suit was barred by limitation inasmuch as he was in possession for more than 12 years prior to suit. It was held that a fresh period of limitation must be computed from the *date of delivery* of symbolical possession and that therefore, the suit was in time. *Mangli Prasad* v. *Debi Din*, (1897) 19 All 499.

But the delivery of symbolical possession has no such operation as against *third* persons who are not parties to the decree.[2]

"A suit might be brought, and a decree obtained, by a person who has neither title nor possession, against another person, who has neither title nor possession; and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner, who had been in actual possession for many years, and who was no party to the suit, it would operate most unjustly."[3]

Illustration.

S mortgaged his property to *L* who obtained a decree on his mortgage in 1883, and in execution of that decree, purchased *S's* rights on 20th August, 1884 and

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Venkata, (1914) 26 Ind Cas 537 (540, 542): 27 Mad L Jour 195; *Ali Husain* v. *Mohammad*, 1928 Oudh 8 (9): 4 Oudh W N 1005: 105 Ind Cas 781: 3 Luck 130; *Gulab Khan* v. *Alaullah*, 1928 Oudh 251 (254, 256): 5 Oudh W N 372: 3 Luck 506: 110 Ind Cas 70 F B [Auction purchaser of undivided share being put in constructive possession by beat of drum]; *Babu Edal Singh* v. *Babu Ram Bahori Lal*, 1921 Pat 344 (349): 2 Pat L Tim 743: 62 Ind Cas 843; *Gouri Shankar* v. *Ibrahim Ali*, 1929 Nag 298 (301): 116 Ind Cas 70 [Possession of judgment-debtor after symbolical delivery deemed fresh act of trespass]. See also *Krishnabhupati* v. *Ramamurthi*, (1895) 18 Mad 405 (407) [Formal possession amounts to dispossession of judgment-debtor]; *Gunga Gobind* v. *Bhoopal Chunder*, (1873) 19 Suth W R 101 (102): 2 Suth 750 P C [Symbolical possession puts an end to limitation in re., parties under O 21, R 96]. But see *Ramalingam Pillai* v. *Raja of Ramnad*, (1915) 31 Ind Cas 176 (176) Mad [Symbolical possession (without prejudice) not actual possession for purposes of S 145, Cr P C. See contra R 36, N 4, Pt (1) below].

(2) *Bhole Singh* v. *Bhagwant Singh*, (1912) 15 Ind Cas 10 (12): 10 All L J 13; *Narain Das* v. *Lalta Prasad*, (1899) 21 All 269 (272): 1899 All W N 56; *Harijivan* v. *Shivram*, (1895) 19 Bom 620 (625); *Ranjit Singh* v. *Bunwari Lal*, (1888) 10 Cal 993 (995); *Waziruddin* v. *Deoki Nandan*, (1907) 6 Cal L Jour 472 (483, 484); *Satish Chandra* v. *Brojo Gopal*, (1918) 46 Ind Cas 104 (106): 22 Cal W N 807; *Dokarijoddar* v. *Nilmani*, (1918) 42 Ind Cas 709 (710): 22 Cal W N 319: 26 Cal L Jour 339; *Abdul Majid* v. *Baksha Ali*, (1917) 40 Ind Cas 662 (662) Cal; *Jitendra* v. *Mohendra*, (1916) 37 Ind Cas 239 (240, 241): 24 Cal L Jour 62; *Gosain Dalmar Puri* v. *Bepin Behari Mitter*, (1891) 18 Cal 520 (525); *Dayanidhi* v. *Kalai*, (1882) 11 Cal L Rep 395 (398); *Ram Sumnun* v. *Genda Lal*, (1915) 29 Ind Cas 841 (842): 22 Cal L Jour 574; *Nasiruddin* v. *Sayudar Rahman*, (1914) 23 Ind Cas 811 (813): 19 Cal L Jour 209; *Deo Nandan Prasad* v. *Udit Narain*, (1914) 23 Ind Cas 298 (298, 299): 18 Cal W N 940; *Sadulla* v. *Joynabunnessa*, (1916) 32 Ind Cas 703 (705); *Rampicherla* v. *Sheik Ismail*, (1913) 21 Ind Cas 765 (767) Mad: In re. *Rama Morthan*, (1911) 9 Ind Cas 271 (272): 9 Mad L Tim 359; *Chunni* v. *Ashrafan*, (1917) 42 Ind Cas 192 (193): 4 Oudh L J 481; *Kishori Lal* v. *Lala Shib Lal*, (1897) 1 Cal W N 343 (344): *Jobada Khatun* v. *Tulsi*, 1923 Cal 82 (84): 36 Cal L Jour 472: 77 Ind Cas 564; *Ataullah Khan* v. *Hansraj*, 1928 Oudh 391 (392): 3 Luck 668: 5 Oudh W N 616: 111 Ind Cas 362; *Jhari Singh* v. *Gopi*, (1917) 42 Ind Cas 449 (450): 3 Pat L W 133; *Tasadduq Hussain* v. *Asghar Hussain*, (1918) 45 Ind Cas 606 (607): 21 O C 70.

(3) *Ranjit Singh* v. *Banwari Lal*, (1884) 10 Cal 993 (995).

O.21, R.35, Notes 4—5.

obtained formal possession on 4th May, 1885. *N*, purchased the same property on 21st April, 1884, in execution of a money decree held by him against *S* and obtained actual possession in January, 1885, and was in possession since then, *L* brought this suit on 27th April, 1897, for possession against *N*, a week before the expiry of twelve years from the date of delivery to him. It was held that the suit was barred by limitation. *Narain Das* v. *Lalta Prasad*, (1899) 21 All. 269.

Now suppose that symbolical possession is given in circumstances in which *actual possession* ought to have been delivered. What is its effect upon limitation? There is a conflict of opinion on this question. On the one hand it has been held by the High Courts of Calcutta,[4] Lahore,[5] Madras[6] and Patna[7] and by the Chief Court of Lower Burma[8] and the Judicial Commissioner's Court of Nagpur[8-a] that the delivery of such possession amounts to delivery of actual possession so far as the judgment-debtor and his representatives are concerned, and that if after that date the judgment-debtor continues in possession, his possession became that of a trespasser giving rise to a fresh cause of action. They proceed on the view that though actual possession might have been taken, still, as it was obtained through Court and by process of law, and as the judgment-debtor must be deemed to have been present at the proceedings relating to the taking of possession, it is not open to him to say, that the whole proceeding should be taken as a nullity, and that the plaintiff should be treated as one who never obtained possession at all. The High Courts of Allahabad[9] and Bombay[10] have, on the other hand, held that where the judgment-debtor is in possession and the decree-holder or the auction-purchaser is entitled to actual possession, he cannot get anything less than that and if he does not get actual possession, he cannot rely upon symbolical possession; for the law does not allow a person who is entitled to actual possession to get only symbolical possession.

5. **Symbolical possession and limitation.**—*See* Note 4, *supra*.

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(4) *Hari Mohan* v. *Baburali*, (1897) 24 Cal 715 (719); *Bhulu Beg* v. *Jatindra Nath*, 1923 Cal 138 (140): 27 Cal W N 24: 77 Ind Cas 1035; *Lokessur* v. *Purguy*, (1881) 7 Cal 418 (420); *Hassan Raja Chaudry* v. *Kalidas Chandra Singha*, (1904) 8 Cal W N 49 (51); *Shama Charan Chatterji* v. *Madhub Chandra Mookerjee*, (1884) 11 Cal 93 (98, 102); *Umbika Churn Goopta* v. *Madhub Ghosal*, (1879) 4 Cal 870 (876): 4 Cal L Rep 55: 4 Ind Jur 180. But see *Shotee Nath* v. *Obhoy Nund*, (1880) 5 Cal 331 (333): 5 Ind Jur 136.

(5) *Harbhagwan* v. *Taja*, 1926 Lah 35 (37): 26 Pun L R 546: 89 Ind Cas 596 [General principles of estoppel similar to *res judicata* will apply]; *Mukand Lal* v. *Ham Din*, 1925 Lah 61 (61, 62): 6 Lah L Jour 302: 84 Ind Cas 952; *Surja* v. *Mulchand*, 1930 Lah 823 (823): 126 Ind Cas 526. But see *Sardarkhan* v. *Abdullah Khan*, 1924 Lah 301 (302): 71 Ind Cas 885.

(6) *Dharmala Kamayya* v. *Bhimara Setti Mahalakshmi*, 1927 Mad 849 (850): 53 Mad L Jour 339: 26 Mad L W 285: 1927 Mad W N 670: 105 Ind Cas 243 [Reversing 1925 Mad 1140 in Letters Patent Appeal]; *Gobind* v. *Venkata*, (1907) 17 Mad L Jour 598 (600, 601). But see *Govindasami* v. *Pethaperumal*, (1917) 44 Ind Cas 839 (840) Mad.

(7) *Maharaja Pratap Udhi Nath Sahi Deo* v. *Bhaiain Sunder Bans Koer*, 1928 Pat 76 (82): 3 Pat L Tim 628: 71 Ind Cas 999.

(8) *Maung Lu Gyi* v. *Maung Nyun Bu*, (1910) 8 Ind Cas 463 (464): 3 Bur L Tim 88.

(8-a) *Dhansingh* v. *Ganpat*, (1914) 24 Ind Cas 850 (851): 10 Nag L R 60.

(9) *Jang Bahadur* v. *Hanwant Singh*, 1921 All 9 (10): 43 All 520: 19 All L J 469: 63 Ind Cas 212 F B. But see *Jagan Nath* v. *Seth Mlap Chand*, (1906) 28 All 722 (723): 1906 All W N 213: 3 All L J 504 [No longer law in view of 1921 All 9 F B].

(10) *Raghunath* v. *Kondiba*, 1922 Bom 2 (3): 46 Bom 932: 24 Bom L R 499: 68 Ind Cas 91; *Sirdhar* v. *Ganpati*, (1919) 51 Ind Cas 72 (73): 43 Bom 559: 21 Bom L R 857; *Mahadev* v. *Janu*, (1912) 14 Ind Cas 447 (449): 36 Bom 373: 14 Bom L R 115 [Overruling 25 Bom 275 and 25 Bom 358 and following 16 Bom 722]; *Lakshman* v. *Moru*, (1892) 16 Bom 722 (728); *Namdev* v. *Ramchandra*, (1894) 18 Bom 37 (40); *Bhaichand Galachand* v. *Bala Khandu Teli*, (1909) 4 Ind Cas 834 (835): 11 Bom L R 1344. But see *Mahadevappa* v. *Bhima*, 1922 Bom 27 (28): 66 Ind Cas 320: 24 Bom L R 232: 46 Bom 710 [36 Bom 373 doubted in view of 1917 P C 197].

6. Joint possession—Undivided share.—Sub-R. (2) does not confer on Courts a new power of granting decrees for joint possession. Such decrees were given before this Code was enacted and sub-R. (2) merely defines the manner in which such a decree is to be executed.[1] A person who is entitled to possession of immovable property jointly with others is not merely entitled to a decree declaring his rights in the land, but also to a decree for *joint possession;* and it is immaterial whether he was originally in possession and was subsequently dispossessed or whether he had never been in possession at all.[2] But the Court has a discretion in granting such a decree and the discretion must be exercised in accordance with the principles of justice, equity and good conscience.[3] **O.21, R.35, Notes 6—8.**

Under the old Code it was held that a decree for joint possession may be executed by putting the plaintiff in actual possession of a portion of the property.[4] The difficulty which arose in giving such delivery of joint possession has now been removed by the enactment of sub-R. (2), prescribing the mode in which such delivery should be made.[5] The delivery of joint possession under this rule is merely a symbolical transaction.[6]

Whenever it is a question of giving effective possession of an undivided share in immoveable property to an auction-purchaser under a decree, the provisions of R. 95, *infra*, may be read with sub-R. (2) of this rule.[7]

7. Delivery of possession to agent.—Delivery of possession can be made to a person who is orally authorised by the decree-holder.[1]

8. Affixture of copy of warrant.—The provisions of this rule, and of Rr. 36 and 96, *infra* imperatively require that a copy of the warrant for delivery of possession should be affixed in some conspicuous place on the property, the object of the provision being that co-sharers and tenants may

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Note 6.

(1) *Hanuman Prasad* v. *Mathura Prasad*, 1928 All 472 (474): 26 All L J 992: 112 Ind Cas 148 F B; *Sheo Pher Singh* v. *Bhola Singh*, (1911) 11 Ind Cas 87 (88) All.

(2) *Bishesar Singh* v. *Hanuman Singh*, 1922 All 314 (316): 44 All 1: 9 All L J 780: 63 Ind Cas 802; *Sarbjit Singh* v. *Raj Kumar Rai*, 1922 All 162 (163): 44 All 5: 19 All L J 783: 63 Ind Cas 806; *Jagar Nath Ojah* v. *Ram Phal*, (1912) 18 Ind Cas 79 (80): 34 All 150: 8 All L J 1312; *Bhairon Rai* v. *Saran Rai*, (1901) 26 All 588 (590, 591): 1 All L J 183: 1904 All W N 106 F B; *Sheo Dial* v. *Mt Porbatia*, (1914) 22 Ind Cas 841 (841): 12 All L J 23. See also *Ram Chandra* v. *Damodhar*, (1896) 20 Bom 467 (468); *Krishnaji* v. *Vithu*, (1894) 18 Bom 505 (506); *Rajani Kant* v. *Ramnath Neogy*, (1883) 10 Cal 244 (246).

(3) *Hanuman Prasad* v. *Mathura Prasad*, 1928 All 472 (474): 26 All L J 992: 112 Ind Cas 143. See the undermentioned cases in which joint possession was refused:—*Watson & Co* v. *Ram Chund Dutt*, (1890) 18 Cal 10 (21, 22): 17 Ind App 110: 5 Sar 535 P C; *Kota Balabhadra Patri* v. *Khetra Dass*, (1914) 25 Ind Cas 401 (402): 16 Mad L Tim 229 [Per Napier, J: Must not injure another who is legally in possession]; *B Petman* v. *Ramsay*, 1898 Pun Re No 16 [Where property is enjoyed only through receipt of rent]. See also *Maruti* v. *Lilachand*, (1881-2) 6 Bom 564 (567) [Suit for declaration that mortgage by elder brother is not binding and for recovery of half-share against purchaser—Could have asked for possession of whole, leaving purchaser to sue for partition—But possession decreed as prayed for].

(4) *Brohmo Moyee* v. *Raj Chunder*, (1866) 5 Suth W R Mis 15 (15); *K Bijoy Keshub* v. *Shama Soonduree*, (1865) 2 Suth W R Mis 30 (31). Beng L R Sup Vol 172. But see *Annoda Pershad* v. *Troylucknath*, (1870) 13 Suth W R 123 (124).

(5) *Debi Sahai* v. *Ramji Lal*, 1926 Lah 668 (669): 27 Pun L R 617: 97 Ind Cas 170 [The case is not covered by R 36, *infra*]; *Ram Chand* v. *Jana*, 1921 Lah 236 (237): 3 Lah L Jour 138: 43 Pun L R 1921: 59 Ind Cas 770.

(6) *Kundan Lal* v. *Gauri Mal*, 1928 Lah 719 (719): 108 Ind Cas 396 [But it stops adverse possession]; *Mahadev* v. *Jannu Namji*, (1912) 14 Ind Cas 447 (449): 36 Bom 373: 14 Bom L R 115 F B.

(7) *Sarvi Begam* v. *Taj Begum*, (1914) 22 Ind Cas 971 (971): 36 All 181: 12 All L J 259; *Gulab Khan* v. *Ataullah*, 1928 Oudh 251 (256): 5 Oudh W N 372: 3 Luck 506: 110 Ind Cas 70 [Per Misra, J].

Note 7.

(1) *Lava* v. *Emperor*, (1917) 40 Ind Cas 689 (690): 13 Nag L R 87 [Even without a power-of-attorney].

O. 21, R. 35, Notes 8—10.

know that possession has been transferred to the decree-holder or the auction-purchaser as the case may be. Therefore, the failure to comply with the procedure laid down in those rules is fatal to the delivery, which is no delivery at all in the eye of the law, and cannot be the basis for a fresh suit for possession.[1] But where the parties concerned had actually come to know of the proceedings taken to give symbolical possession, it must be presumed that there had been a substantial compliance with the requirements of the rules.[2]

It must also be asumed that a process recorded as served through Court was served with all the formalities required by law and the burden of proof lies on the person asserting the contrary, to prove that the formalities, such as the fixing of copy of the warrant, had not been complied with.[3]

9. Removal of person bound by decree.—The words "any person bound by the decree" in this rule include the judgment-debtor as well as any person who may be held under law as bound by the decree.[1] Therefore, if the property for which a decree for possession has been made is in the occupancy of a person claiming under a title created by the defendant subsequent to the institution of the suit, actual possession under sub-R. (1) must be given to the decree-holder,[2] by removing, if necessary, the person bound by the decree and who refuses to vacate the property.[3] As to cases in which a party is bound by the decree according to principles of *lis pendens*, *see* S. 52, Transfer of Property Act and the undermentioned cases.[4]

10. Use of force in giving possession.—Where a person bound by a decree for possession of immovable property refuses to vacate or deliver possession of the property, a reasonable degree of force may be used in removing such person.[1] But the removal by force of a person other than

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Note 8.

(1) *Jauhri Lal* v. *Peman*, (1920) 55 Ind Cas 19 (22): 2 Lah L Jour 202: 2 U P L R (Lah) 47; *Yusif Ali Khan* v. *Abbas Ali Khan*, 1925 Lah 264 (265): 6 Lah L Jour 522: 84 Ind Cas 733: 26 Pun L R 27; *Nidhi Ram* v. *Parsa Ram*, 1923 Lah 693 (693): 5 Lah L Jour 507: 74 Ind Cas 1; *Kahan Chand* v. *Jawandi*, (1917) 41 Ind Cas 752 (753): 53 Pun W R 1917; *Khub Ram* v. *Surat*, (1917) 39 Ind Cas 753 (754): 20 Pun Re 1917: 26 Pun L R 1917: 22 Pun W R 1917; *Harnam Singh* v. *Mukhi Ram*, 1929 Lah 545 (545): 11 Lah L Jour 146: 118 Ind Cas 391; *Court of Wards* v. *Burra Lall*, (1871) 15 Suth W R 99 (99).

(2) *Harnam Singh* v. *Mukhi Ram*, 1929 Lah 545 (545): 11 Lah L Jour 146: 118 Ind Cas 391; *Juhur Lal* v. *Peman*, (1922) 68 Ind Cas 182: 2 Lah L Jour 563.

(3) *Chhajju* v. *Kirpa Ram*, (1930) 31 Pun L R 1001: 1930 Notes 25-a: 132 Ind Cas 181; *Piara Ram* v. *Shohawa*, 1928 Lah 910 (911): 109 Ind Cas 561.

Note 9.

(1) *Sheikh Yusuf* v. *Jyoti Chandra Banerjee*, 1932 Cal 241 (241, 242): 35 Cal W N 1132: 54 Cal L Jour 493: 137 Ind Cas 139: 59 Cal 789 [Decree for landlord for possession against lessee—Can be executed against sub-lessee].

(2) *Golam Nabi Chapawa* v. *F W Needham*, 1925 Cal 1243 (1244): 85 Ind Cas 1004; *Gobind Chunder Roy* v. *Guru Churn Kurmokar*, (1887) 15 Cal 94 (99); *Chandra Koomar* v. *Gopi Kristo Gossanee*, (1873) 20 Suth W R 204 (204, 205 and 206); *Hardhun Dutta* v. *Joy Kisto Banerjee*, (1869) 11 Suth W R 444 (444); *Balaji Ganesh* v. *Khushalji*, (1874) 11 Bom H C R 24. See *Hurrish Kristo Dose* v. *Motee Chand*, (1868) 10 Suth W R 444 (445) [Property in possession of Sarbarkar under an order of Court—Not entitled to *khas* possession—But must apply to Court for his removal]. See also *Dhondiba Krishnaji* v. *Ram Chandra*, (1880-1) 5 Bom 554 (560): 6 Ind Jur 92 [Decree for specific performance of sale —Decree-holder entitled to possession].

(3) *Radha Gobind* v. *Brojendra Coomar*, (1872) 18 Suth W R 526 (528) [Delivery of land not involving delivery of buildings thereon].

(4) *Thakur Prasad* v. *Gaya Sahu*, (1898) 20 All 349 (351): 1898 All W N 63; *Shaik Khan Ali* v. *Pestonji Edulji Guydar*, (1895) 1 Cal W N 62 (64); *Tinoodhan* v. *Trilokhya*, (1913) 18 Ind Cas 177 (179): 17 Cal W N 413; *Raj Kishen* v. *Radha Madhub*, (1874) 21 Suth W R 349 (351); *Nufur Merdha* v. *Ram Lal*, (1871) 15 Suth W R 308 (309); *Umamoyi Burmonee* v. *Tarini Prasad*, (1867) 7 Suth W R 225 (226, 227); *Anund Moyee* v. *Dhurundro Chunder*, (1864) 1 Suth W R 103 (105, 106); *Kasim Shaw* v. *Unnodapersad Chatterjee*, (1862-3) 1 Hyde 160; *Harasit Golder* v. *Jaladhar Biswas*, 1930 Cal 15 (16): 33 Cal W N 963: 56 Cal 1130

Note 10.

(1) *H Meredith* v. *Sanji Bani Dasi*, (1915) 28 Ind Cas 1000 (1003): 42 Cal 818: 19 Cal W N 273.

the one bound by the decree is an offence punishable under S. 323 of the Indian Penal Code.[2]

11. Resistance to delivery of possession.—Resistance to a warrant for delivery of actual possession by a person in possession who is not a party to the decree and who is not bound by it is not an offence under S. 186, Indian Penal Code.[1]

See also Notes to O. 21, R. 98.

12. Identification of land.—If in the course of the proceedings in execution of a decree for possession of land, it appears that the boundaries described in the plaint are no longer in existence, the Court can make an enquiry to ascertain the land decreed.[1] Where the plaintiff, who has obtained a decree for possession of land, describes the land as having a particular area and as lying within certain boundaries, the boundaries must prevail even if the land exceeds the area stated in the plaint.[2]

See also Note 3 to O. 7, R. 3 and O. 21, R. 94.

13. Break open—Sub-R. 3.—Though in the old Code there was no provision corresponding to this sub-rule, it was held that where the building or enclosure to be given possession of was locked by the judgment-debtor or some person claiming under him and bound by the decree, the officer of the Court had the power to break open the lock, and place the decree-holder in possession.[1]

Decree for **delivery of immoveable property when in occupancy of tenant.**

R. **36.** [S. 264.] *Where a* decree *is* for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

[1877—S. 264; 1859—S. 224 *Cf.* R. 96 below.]

Synopsis.

1. Scope and applicability of the rule.
2 Form of Symbolical Possession.
3. Possession without the intervention of the Court.
4. Effect of delivery on criminal proceedings.

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(2) *Abdul Sattar* v. *Moti Bibi*, 1930 Cal 720 (720): 34 Cal W N 583: 127 Ind Cas 551.

Note 11.

(1) *Murugappa Naicker* v. *Emperor*, 1925 Mad 613 (614): 48 Mad L Jour 97: 21 Mad L W 82: 86 Ind Cas 286.

Note 12.

(1) *Rajendra* v. *Hyabul*, (1872) 17 Suth W R 379 (380); *Kalee Debi* v. *Modhoosoodun*, (1871) 16 Suth W R 171 (172). But see *Dwarkanath Haldar* v. *Kunnolekant Haldar*, (1869) 12 Suth W R 99 (99): 3 Beng L R App 128.

(2) *Zeenut Ali* v. *Ram Dayal*, (1872) 18 Suth W R 25 (25).

Note 13.

(1) *Gunesh Chander* v. *Ram Dhunee*, (1874) 22 Suth W R 283 (284); *Radha Gobind* v. *Brojendro*, (1872) 18 Suth W R 527 (528).

O.21, R.36, Notes 1—4.

"Other persons." See Note 1, Pts. (3) to (5). Tenant. See Note 1, Pt. (2).

1. Scope and applicability of the rule.—This rule applies only to a case where the property is in the exclusive possession of a person who is not bound by the decree and who is entitled to remain in possession; it does not apply to a case of joint holding which is covered by R. 35, *ante*.[1] Where the property which is the subject-matter of a suit for possession is in the possession of a tenant[2] or of a usufructuary mortgagee whose term has not expired[3] or in the possession of a person having a right of residence,[4] delivery of the property in execution should be made under this rule provided, of course, such person is not bound by the decree. But where a third person claims to enter on the land under certain contractual rights and has not derived title from the defendant in the suit, he cannot be regarded as a tenant against whom an order under this rule could be made.[5]

Delivery of symbolical possession under this rule does not pass the right to the crops on the land, where a third person not bound by the decree is in possession.[6]

2. Formal or symbolical possession.—*See* Notes to R. 35, *ante*.

3. Possession without the intervention of the Court.—A person who has obtained a decree for possession of immoveable property may take possession of such property otherwise than in execution and may rely, for the support of his possession, on the title vested in him under the decree.[1] Where after having obtained possession without the aid of the Court, he is subsequently dispossessed, he can maintain an action against the persons who have dispossessed him, although he has not taken out execution of his decree.[2]

4. Effect of delivery on criminal proceedings.—Where a short time before the institution of proceedings under S. 145 of the Criminal Procedure

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Order 21, Rule 36—Note 1.

(1) *Debi Sahai* v. *Ramji Lal*, 1926 Lah 668 (669): 27 Pun L R 617: 97 Ind Cas 170.

(2) *Sitaram* v. *Ram Lal*, (1896) 18 All 440 (449, 450 and 451): 1896 All W N 162 F B; *Bindubashini Dossee* v. *Renny*, (1871) 15 Suth W R 307 (308): 7 Beng L R App 20; *Ranee Shama Soonderee* v. *Jardine, Skinner & Co*, (1867) 7 Suth W R 376; *Tiruvengada Konan* v. *Venkatachalla Konan*, (1916) 32 Ind Cas 198 (199): 39 Mad 1042: 30 Mad L Jour 258; *Rathnasabapathy Pillai* v. *Ramaswamy Aiyar*, (1910) 5 Ind Cas 630 (631): 33 Mad 452: 1910 Mad W N 112: 7 Mad L Tim 311: 20 Mad L Jour 301; *Uppala Raghava* v. *Uppala Ramanuja*, (1903) 26 Mad 78 (79); *D H Atchia & Co* v. *M E Jeewa*, 1925 Rang 98 (98, 99): 3 Bur L Jour 263: 85 Ind Cas 501. See also *Gibbon* v. *Sheo Purshun Misser*, (1872) 17 Suth W R 236 (236) [In executing a decree under this rule Court should not direct ryots to pay rent to the decree-holder].

(3) *Thekhian Rangacharlu Chettiar* v. *Muthukarnapan Kothan*, (1912) 16 Ind Cas 420 (421): 1913 Mad W N 134; *Lachmi Narain* v. *Raj Narayan*, (1920) 54 Ind Cas 269 (271): 22 Oudh Cas 278): 2 U P L R (O) 13. See also *Sitaram* v. *Madho Pande*, (1914) 28 Ind Cas 875 (876): 12 All L J 521 [Need not even obtain symbolical possession]; *Raghubir Singh* v. *Jodha Singh*, 1923 All 507 (508): 21 All L J 417: 73 Ind Cas 646: 45 All 482: 4 L R A Civ 223, (Do.).

(4) *Jiban Krishna Ghose* v. *Simrikha Koer*, (1913) 20 Ind Cas 571 (572) Cal.

(5) *Ibrahim* v. *Konammal*, 1923 Mad 25 (27): 43 Mad L Jour 179: 70 Ind Cas 755: 31 Mad L Tim 356.

(6) *Aung Baw* v. *Tuno Gaung*, (1908) 3 L B R 129 (130).

Note 3.

(1) *Bandu* v. *Naba*, (1891) 15 Bom 238 (241): 1891 Bom P J 105; *Salig Ram* v. *Meheen Lall*, (1867) 2 Agra 235; *Obhoya Churn* v. *Rajendro Coomar*, (1874) 22 Suth W R 406 (406); *Lillu* v. *Annaji*, (1880-81) 5 Bom 387 (391) [If in taking such possession, he uses violence, he can be prosecuted].

(2) *Dhanraj* v. *Lakhrani*, (1916) 35 Ind Cas 601 (603): 38 All 509: 14 All L J 709 [Twelve years after such dispossession suit will be barred]; *Ram Newaz Singh* v. *Kishen Rai*, (1874) 6 N W P 137; *Idine Beary* v. *Ummathamma*, (1915) 30 Ind Cas 606 (607) Mad [Execution is not the remedy]; *Rup Chand* v. *Allah Jawaya*, 1922 Lah 459 (460): 68 Ind Cas 744.

Code, a party has been put in possession of the disputed land by the Civil Court in execution of a decree, it is the duty of the Magistrate to find possession with that party in accordance with the Civil Court's order, even though he might have got only symbolical possession.[1] **O.21, R.36, Note 4.**

ARREST AND DETENTION IN THE CIVIL PRISON.

O.21, R.37, Note 1.

R. **37.** [S. 245-B.] (1) Notwithstanding anything in *these rules, where* an application is for the execution of a decree for *the payment of* money by the arrest and *detention in the civil prison* of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to *the civil prison*.

Discretionary power to permit judgment-debtor to show cause against *detention in prison.*

(2) *Where* appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

Synopsis.

1 Discretion to issue notice.

2. Privilege from arrest. See S. 135.

"For the payment of money." See Note 1, Pt. (3).

Judgment-debtor residing ouside jurisdiction—Whether notice could be issued. See Note 1, Pt. (4).

1. **Discretion to issue notice.**—Under Rr. 16 and 22 of this order, a Court is bound to issue notice to the judgment-debtor, preliminary to ordering the execution of the decree, in three classes of applications for execution, viz.:—

(1) those made by transferees of decrees;

(2) those made more than one year after the decree; and.

(3) those made against the legal representatives of a party to a decree.

Where, after such preliminary notice the party does not show cause against execution, the Court is bound, under R. 24, to issue *process* for the execution of the decree. But, even in those cases, the Court has a discretion under this rule to issue, in the first instance, a *notice* to the judgment-debtor to appear and show cause why he should not be committed to the

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Note 4.

(1) *Kunja Behari* v. *Khetra Pal*, (1902) 29 Cal 208 (210): 6 Cal W N 38; *Doulat Kuar* v. *Rameswari Koeri*, (1899) 26 Cal 625 (628, 629): 3 Cal W N 461; *Gulraj* v. *Sheik Bhatoo*, (1905) 32 Cal 796 (797, 798). But see *Ramalingam Pillai* v. *Raja of Ramnad*, (1915) 31 Ind Cas 176 (176) Mad [Symbolical possession without prejudice to persons in actual possession—Not actual possession for purposes of S 145, Cr P Code].

O.21, R.37, Notes 1—2.

civil prison in execution of the decree.[1] But the Court cannot issue a notice and a warrant of arrest at the same time with directions for arrest in case the judgment-debtor intimates he does not propose to appear.[2]

This discretionary power is provided only in respect of the execution of *money decrees* by the *arrest and imprisonment* of the judgment-debtor. The classes of cases in which the discretion to issue notice can be exercised are indicated in the provisions of R. 40, *infra*. It has been held that it will be a proper exercise of discretion to order notice where the Court has reason to believe that the judgment-debtor is too ill for imprisonment.[3]

Though a judgment-debtor cannot be *arrested* because he is outside the jurisdiction of the Court at the time of the arrest a notice under this rule may nevertheless be issued.[4]

2. Privilege from arrest.—*See* S. 135.

O.21, R.38, Note 1.

Warrant for arrest to direct judgment-debtor to be brought up.

R. **38**. [S. 337.] Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the cost (if any) to which he is liable, be sooner paid.

[1877—Ss. 251, 343; 1859—S. 222.]

Local Amendment.

RANGOON.

In Order 21, the following shall be inserted as Rule 38-A:—

Costs of conveyance of civil prisoners to be borne by Court.

38-A. The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be, and shall not be charged to the judgment-creditor.

Synopsis.

1. "With all convenient speed."

1. "With all convenient speed."—Detention, without authority, beyond such time as is reasonably necessary to bring the judgment-debtor to Court after arrest, is illegal.[1]

The date for the return of the warrant should also be specified in the warrant.[2]

Order 21, Rule 37—Note 1.

(1) *Ganpat* v. *Mahadev*, (1898) 22 Bom 731 (733); *Haji Musa Haji Ahmed* v. *Purmanand Nursey*, (1891) 15 Bom 216 (218).

(2) *Puna Mahton* v. *Emperor*, (1932) 13 Pat L Tim 502 (503, 504): 1932 Pat 315.

(3) *Dip Chand* v. *Naushad Ali*, (1911) 9 Ind Cas 746 (747): 14 Oudh Cas 86.

(4) *Fatehchand* v. *Utanmal*, 1926 Sind 51 (53): 89 Ind Cas 401. See also *Krishna Prasad* v. *Bidya Nanda*, (1918) 44 Ind Cas 296 (296): 3 Pat L Jour 95.

Order 21, Rule 38—Note 1.

(1) In re *Shamboo Chunder Haldar*, 18[illegible] Bourke 59.

(2) *Krishna Prasad* v. *Bidya Nanda*, (1918) 44 Ind Cas 296 (296): 3 Pat L Jour 95.

O.21, R.39.

R. **39.** [Ss. 339, 340.] (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

Subsistence *allowance.*

(2) *Where* a judgment-debtor is committed to *the civil prison* in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales *fixed under section* 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the *judgment-debtor* has been *arrested* by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the *civil prison*, and the subsequent payments (if any) shall be made to the officer-in-charge of the *civil prison*.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in *the civil prison* shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in *the civil prison* or arrested on account of any sum so disbursed.

[1877—Ss. 339, 340; 1859—Ss. 276, 279.]

Local Amendments.

ALLAHABAD.

Delete the words "in the Civil Prison" under sub-Rule (5).

LAHORE.

Delete the words "in the Civil Prison" under sub-Rule (5).

MADRAS.

Delete the present sub-Rules (4) and (5) and *substitute* the following :—

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the Civil Prison and from the Civil Prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-Rule (3) for such portion of the current month as

O.21, R.39, Note 1.

remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the Civil Prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the Civil Prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit."

NAGPUR.

(*a*) To sub-Rule (1) of Rule 39, the following words shall be added, namely:—

"and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house."

(*b*) For sub-Rules (4) and (5) of Rule 39, the following sub-rules shall be substituted, namely:—

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the Civil Prison and from the Civil Prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-Rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the Civil Prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the Civil Prison.

"(5) Sums disbursed under this rule by the decree-holder for the subsistence and the cost of the conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit."

N.-W. F. P.

For sub-Rule (4) of Rule 39, *substitute* the following:—

"(4) All payments shall be made to the officer-in-charge of the Civil Prison."

In sub-rule (5) *omit* the words "in the Civil Prison".

OUDH.

In Rule 39 (5), *delete* the words "in the Civil Prison".

RANGOON.

In Rule 39, the following shall be inserted as sub-Rule (2-A):—

"(2-A). When a civil prisoner is kept in confinement at the instance of more than one decree-holder, he shall only receive the same allowance for his subsistence as if he were detained in confinement upon the application of one decree-holder. Each decree-holder shall, however, pay the full allowance for subsistence, and when the debtor is released, the balance shall be divided rateably among the decree-holders, and paid to them."

In sub-Rule (5) of Rule 39, the words "in the Civil Prison" shall be deleted.

Synopsis.

1 Subsistence money. 2. Arrest before judgment.

Process-fee under the old Code—When to be paid. See Note 1, F.-N. (6).

1. **Subsistence money.**—This rule is to be strictly followed. The subsistence allowance payable to the officer-in-charge of the civil prison must always be paid for a whole month in advance.[1] Thus the payment for the month of January must be actually made to the Officer-in-charge of

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Order 21, Rule 39—Note 1.

(1) *Dutt v. Cornelius,* (1870) 5 Beng L R App 79; *Haladhar Dey v. Ambika Charan,* (1870) 5 Beng L R App 80 [Unspent amount of previous month may be taken into account].

the civil prison *before the* 1st *of* January.[2] Otherwise, the judgment-debtor will be released from imprisonment. *See* S. 58, Note 3 and the following cases.[3] The decree-holder is bound to pay, however, only the amount due as *subsistence allowance* according to the prescribed scales[4] and not the cost of bedding, clothing, etc., for the prisoner which are governed by the Prison Rules.[5] O.21, R.39, Notes 1—2.

In case the judgment-debtor is not committed to prison, the decree-holder is entitled to a refund of any money unspent between the dates of arrest and release from custody.[6]

2. Arrest before judgment.—The same rules apply equally to cases of arrest *before* judgment.[1]

O.21, R.40

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

R. **40.** [S. 337-A.] (1) *Where* a judgment-debtor appears before the Court in obedience to a notice issued under *rule* 37, or is brought before the Court after being arrested in execution of a decree for *the payment of* money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and *detention*, or directing his release, as the case may be.

(2) Before making an order under *sub-rule* (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely :—

(*a*) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account :

(*b*) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was *passed*, or the commission by him after that date of any other act of bad faith in relation

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(2) *Arukasthanath Moideen Kutti* v. *Parambath Kundi Mamu*, (1914) 22 Ind Cas 25 (26) Mad [Remittance by postal money order—Must actually reach officer *before* the first day of the month].

(3) *Aga Ali Khan* v. *Joy Doyal Parsaud*, Bourke O C 52; *Dwarkaloll Mitter's case*, 1 Bourke 109; In the matter of *Thompson*, Bourke, O C 421; *O Appiah Chetty* v. *Chengadoo*, (1868-69) 4 Mad H C R 76.

(4) *Aga Ali* v. *Joydolal*, 1 Bourke 52 [The corresponding section of the Code of 1859 contained no reference to any scales]; In re *Sumboo Chunder Haldar*, Bourke 59, (Do.).

(5) *Sawan Mal* v. *Nandu*, 1893 Pun Re No 43. See Note 2 to S 58.

(6) Ex parte *Kashinath Balalok*, (1868-69) 5 Bom H C R 84; *Kasturchand* v. *Ravji Sadashiv*, (1879-80) 4 Bom 65 (69, 70) [Time for payment of process fee for arrest under the Code of 1859 was different].

Note 2.

(1) *Rampersaud Roy* v. *Callachund Doss*, Bourke O C 423.

O.21, R.40. to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree:

(*c*) any undue preference given by the judgment-debtor to any of his other creditors :

(*d*) refusal or neglect *on the part of the judgment-debtor* to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;

(*e*) the likelihood of *the judgment-debtor* absconding or leaving the jurisdiction of the Court with the object or effect *of obstructing or delaying the decree-holder in the execution of the decree.*

(3) While any of the matters mentioned in sub-*rule* (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be *detained in the civil prison*, or leave him in the custody of an officer of the Court, or release him on his furnishing security, *to the satisfaction of the Court*, for his appearance *when required* by the Court:

(4) A judgment-debtor released under this *rule* may be re-arrested.

(5) *Where* the Court does not make an order *under* sub-*rule* (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to *the civil prison.*

Local Amendments.

ALLAHABAD.

Add the following proviso to Rule 40 (5):—

"Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding 10 days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period, if the decree be not sooner satisfied. When the Court sees fit to leave a judgment-debtor in the custody of an officer of the Court and the judgment-debtor does not pay the costs incidental to such intermediate custody, it shall be competent for the Court to require the decree-holder, on pain of his application for arrest being disallowed, to pay into Court such sum as the judge deems sufficient to cover such costs including fees for process-server, subsistence of the judgment-debtor and cost of conveyance, if any; and sums disbursed by the decree-holder under this proviso shall be deemed to be costs in the suit."

MADRAS. **O.21, R.40.**

Substitute the following for Rule 40:—

"40. (1) When a judgment-debtor appears before the Court in obedience to a notice issued under Rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that an insolvency petition has been presented *by or against the judgment-debtor* or that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the burden of proving the inability to pay being on the judgment-debtor, the Court may upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-Rule (1), the Court *shall* take into consideration any allegation of the decree-holder touching any of the following matters, namely:—

(*a*) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account;

(*b*) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;

(*c*) any undue preference given by the judgment-debtor to any of his other creditors;

(*d*) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;

(*e*) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-Rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the Civil Prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-Rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the Civil Prison:

Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

When the Court sees fit to leave a judgment-debtor in the custody of an officer of the Court and the judgment-debtor does not pay the costs incidental to such intermediate custody, it shall be competent for the Court to require the decree-holder, on pain of his application for arrest being disallowed to pay into Court such sum as the Judge deems sufficient to cover such costs including batta for process-server, subsistence of the judgment-debtor

O.21, R.40, Note 1.

and cost of conveyance, if any; and sums disbursed by the decree-holder under this proviso shall be deemed to be costs in this suit.

(5-A) During the temporary absence of the Judge who issued the warrant under Rule 37 or 38, the warrant of committal may be signed by any other Judge of the same Court or by any judicial officer superior in rank who has jurisdiction over the same locality, or where the arrest is made on a warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsif, empowered in writing by the District Judge in this behalf.

(6) No judgment-debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub-Rule (2) unless and until the decree-holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort for the journey to and from the prison. Sub-R. (5) of R. 39 shall apply to such payments.

Synopsis.

1. Scope of the rule.
2. "Poverty or other sufficient cause."
3. Insolvency.
4. Transfer, concealment, removal or any other act of bad faith.
5. Undue preference.
6. Refusal or neglect to pay the amount of the decree.
7. Likelihood of the judgment-debtor absconding.
8. Sub-Rule (3).
9. Appeal.

Lunacy—Whether sufficient cause for refusing arrest. See Note 2, Pt. (3).

"Shall cause the judgment-debtor to be arrested." See Note 1, Pt. (2).

"Unable to pay." See Note 1, Pts. (3) and (4).

1. Scope of the rule.—Inability to pay the amount of the decree has been recognised under this rule as a ground for disallowing an application for arrest. But the inability must be a *bona fide* one as implied in sub-R. (2). An order releasing the judgment-debtor without considering the allegations of the decree-holder touching any of the matters referred to in sub-R. 2 is not proper.[1-a] The object of the rule is to prevent creditors from unduly harassing indigent debtors[1] but if no sufficient cause as required by this rule exists, the Court cannot refuse the decree-holder the right of arrest and detention.[2] The finding as to inability to pay must be based on evidence,[3] and the burden of proof of such inability rests on the judgment-debtor.[4]

A judgment-debtor committed to the civil prison will be deemed to be in unlawful detention if he is delivered to an officer other than the officer named in the warrant of committal issued under the last sub-rule, and will be entitled to be released from such custody.[5] Though in the case of a judgment-debtor against whom a warrant has been issued, sub-R. 1 in terms is applicable *on his being brought under arrest*, he is not precluded from

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Order 21, Rule 40—Note 1.

(1-a) *Bank of Bihar, Ltd.* v. *Bihari Prasad*, 1929 Pat 728 (729): 118 Ind Cas 312 [Fraudulent concealment of property since date of suit].

(1) *Ponnusami* v. *Narayanaswami Chetty*, (1913) 21 Ind Cas 293 (297): 25 Mad L Jour 545: 14 Mad L Tim 305.

(2) *Gubboy* v. *Ramdoyal Chowbay*, (1897) 2 Cal W N 588 (589) [Court is bound to cause the arrest at once]; *Dukh Bhajan Ram* v. *Sarfraz Khan*, 1926 Jour 128 (3): 27 Pun L R 229: 94 Ind Cas 279.

(3) *Dharani Mohan Roy* v. *Kshitipati Ray*, 1928 Cal 62 (63): 54 Cal 782: 106 Ind Cas 66 [And not on a statement at the bar].

(4) *Ohas R Oowie & Co* v. *Skidmore*, (1914) 23 Ind Cas 833 (834): 7 L B R 339: 7 Bur L Tim 242; *Bhaimia Ahmed Ismaljee* v. *Kadir Set*, (1897-1901) U B R Vol II, 279.

(5) *Shamsonessa Begum* v. *Anne Love*, (1885) 11 Cal 527 (530).

surrendering to the Court before arrest and claiming the protection of this rule.[6]

2. "Poverty or other sufficient cause".—Inability to pay may arise from poverty or other sufficient cause. Where the object of the decree-holder is to harass a judgment-debtor, whose properties have all been sold in execution of decrees, and the amount can be realised from solvent co-judgment-debtors[1] or where the assets of a judgment-debtor cannot be readily called in, for no fault of his[2] the Court may, in its discretion, refuse arrest or detention and, in the latter instance, grant him a reasonable time to pay the amount.

Lunacy of the judgment-debtor has been held to be a sufficient cause under this rule for refusing arrest or detention.[3]

3. Insolvency.—In the absence of a *protection order* from the insolvency Court, the insolvency of a judgment-debtor is not necessarily a ground for release under this rule.[1] The Court is, however, bound to consider, under this rule, the question of his inability to pay, if pleaded, notwithstanding the want of a protection order.[2]

Prior to any enquiry under this rule, the Court must, under S. 55, sub-S. 4, inform the judgment-debtor that he may apply to be declared an insolvent[3] and the judgment-debtor must express his intention to do so also before the proceedings under this rule are terminated.[4]

4. Transfer, concealment, removal or any other act of bad faith.—The acts of bad faith contemplated by Cls. (*b*) and (*c*) of sub-R. 2, are akin to those dealt with in S. 53 of the Transfer of Property Act, Ss. 55 to 57 of the Presidency Towns Insolvency Act, and Ss. 53 and 54 of the Provincial Insolvency Act of 1920. Under Cl. (*b*), however, the alleged act must be subsequent to the suit in question and intended to defeat or delay the decree-holder in particular.[1]

One test of good faith is whether the transaction complained of is genuine or colourable.[2]

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(6) *Jiwandas Virbhandas* v. *Khemchand Ramdas*, 1929 Sind 110 (111): 116 Ind Cas 101.

Note 2.

(1) *Lala Das* v. *Minamal*, 1922 Lah 259 (260): 4 Lah L Jour 266: 79 Ind Cas 551.

(2) *Bishen Das* v. *Jiwa Ram*, (1911) 11 Ind Cas 848 (849): 246 Pun L R 1911: 153 Pun W R 1911 [Decree debt due to judgment-debtor—His only property—Obstruction in its realisation]. See also *Peruri Sooryaprakasam* v. *Muniswmi Chetty*, 1925 Mad 42 (43): 20 Mad L W 175: 84 Ind Cas 134: 48 Mad 494 [Merchant—If short time will enable him to raise money, should not be ruined by arrest].

(3) *Bhanabhai* v. *Cholabhai*, (1898) 22 Bom 961 (962).

Note 3.

(1) *See* Note 16 to S. 55 *ante*. *Bhasker Woman* v. *Sridhar Kishan*, (1907) 9 Bom L R 893 (900); *Md Abdul Gafar* v. *Mahabir Parshad*, 1930 Lah 1070 (1072): 31 Pun L R 456: 128 Ind Cas 314.

(2) *Tara Chand* v. *Jawahar Mal*, 1931 Lah 121 (122): 32 Pun L R 811: 131 Ind Cas 208 [Insolvency application—Property in the hands of *ad interim* receiver—Sufficient cause].

(3) *Ram Lal* v. *Mackenzie*, (1909) 1 Ind Cas 102 (403): 16 Pun Re 1909: 50 Pun L R 1909: 15 Pun W R 1909; *Ganpat* v. *Mahadev*, (1898) 22 Bom 731 (733) [The Court may proceed under S. 55 of this rule].

(1) *Daulat Ram* v. *Rup Lal*, 1898 Pun Re No 59.

Note 4.

(1) *Sukrit Narain* v. *Raghunath*, (1885) 7 All 145 (146): 1885 All W N 108. See *Gopal Das* v. *Bihari Lal*, (1895) 17 All 218 (220): 1895 All W N 63. See *Musahar Sahu* v. *Hakim Lal*, 1915 P C 115 (116): 43 Cal 521: 43 Ind App 104: 14 All L J 198: 18 Bom L R 378: 23 Cal L Jour 406: 20 Cal W N 393: 30 Mad L Jour 116: 19 Mad L Tim 203: 3 Mad L W 207: (1916) 1 Mad W N 198: 32 Ind Cas 343 P C

(2) See *Mahammadunnissa Begum* v. *J O Bachalor*, (1905) 29 Bom 428 (431): 7 Bom L R 177.

O.21, R.40, Notes 5—9.

5. **Undue preference.**—The Court may be guided by the relevant provisions of the Insolvency Acts in dealing with the question of undue preference under Cl. (*c*) of sub-R 2.[1] *See also* the undermentioned cases.[2]

6. **Refusal or neglect to pay the amount of the decree.**—The word "thereof" in Cl. (*d*) of sub-R. 2 refers to the decree amount generally, whether payable in instalments or otherwise.[1]

7. **Likelihood of the judgment-debtor absconding.**—*See* the undermentioned case.[1]

8. **Sub-R. (3).**—This sub-rule is intended to give facility for the enquiry contemplated in the preceding sub-rule.[1] The security to be furnished under this sub-rule must be a substantial one and not a personal security of the judgment-debtor himself.[2] A security bond given under this sub-rule will be in force until the execution proceedings are terminated by a final order.[3]

9. **Appeal.**—By the operation of Ss. 2 (2) and 47 of this Code, an appeal lies from an order disallowing an application for the arrest and imprisonment of the judgment-debtor[1] as well as from an order refusing him the benefit of this rule.[2]

ATTACHMENT OF PROPERTY.

O.21, R.41. *Examination of judgment-debtor* as to *his* property.

R. **41**. [S. 267.] *Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—*

(a) the judgment-debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and

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Note 5.

(1) In the matter of *Hastie*, (1885) 11 Cal 451 (451).

(2) *Brown* v. *Ferguson*, (1893) 16 Mad 499 (505) [Preference must be *voluntary* and devoid of consideration]; *Joakim* v. *Secretary of State*, (1881) 3 All 530 (532, 533): 1881 All W N 21. (Do.); *Dadapa* v. *Vishnudas*, (1888) 12 Bom 424 (426); *Chidambaram* v. *Sami*, (1907) 30 Mad 6 (11): 1 Mad L Tim 351: 16 Mad L Jour 427; *Narayan* v. *Viraraghavan*, (1900) 23 Mad 184 (189).

Note 6.

(1) *Chas R Cowie & Co* v. *W H A Skidmore*, (1914) 23 Ind Cas 833 (835): 7 L B R 339: 7 Bur L Tim 242.

Note 7.

(1) In re *Dhunpat Singh*, (1893) 20 Cal 771 (787).

Note 8.

(1) *Chas R Cowie & Co* v. *W H A Skidmore*, (1914) 23 Ind Cas 833 (835): 7 L B R 339: 7 Bur L Tim 242.

(2) *Dharani Mohan Roy* v. *Kshitipati Ray*, 1928 Cal 62 (63): 54 Cal 782: 106 Ind Cas 66. See also *Sundaram Mudaliar* v. *Muthuswami Pillai*, 1925 Mad 908 (909): 21 Mad L W 635: 88 Ind Cas 439 [Unconditional stay without security of some kind not proper].

(3) *Adu* v. *Firm Hardev Sahai Ohuranji Lal*, 1929 Lah 776 (777): 116 Ind Cas 178 [Surety bond—Execution proceedings consigned to record room on judgment-debtor applying for "being declared insolvent"—Fresh execution application on dismissal of insolvency petition—Surety's liability continues].

Note 9.

(1) *Raj Karni* v. *Karm Ilahi*, (1920) 53 Ind Cas 68 (69): 1 Lah 77: 22 Pun L R 1920; *Lala Das* v. *Mina Mal*, 1922 Lah 259 (259): 4 Lah L Jour 266: 79 Ind Cas 551; *Abdul Rahiman* v. *Mahomed Kassim*, (1898) 21 Mad 29 (30); *Sewa Singh* v. *Dhaun Kal*, 1895 Pun Re No 69. See *Subbarama Ayyar* v. *Arunachalam*, (1916) 32 Ind Cas 731 (732): 3 Mad L W 35.

(2) *Jaider Singh* v. *Fusaf Ali*, 1929 Lah 141 (141): 111 Ind Cas 707.

examination of such judgment-debtor, or officer or other person, and for the production of any books or documents. O.21, R.41, Notes 1—5.

[1877—S. 267; 1859—S. 219.]

Synopsis.

1. Legislative changes.
2. Scope and object of the rule.
3. "Any other person."
4. "Any and what other property."
5. Production of books of account.

Circumstances necessary for examination. See Note 2, Pt. (1).

1. Legislative changes.—

"Order 21, R. 41, is an amplification of S. 219 of Act VIII of 1859, modified by S. 267 of Act X of 1877".[1] Under the former Codes the Court was also expressly empowered to act *suo motu*.

2. Scope and object of the rule.—The object of the rule is to obtain discovery for purposes of execution in cases where there is any difficulty or cause for delay in obtaining particulars of the judgment-debtor's property. An application under this rule can be made at any stage, though it should not be allowed if it is calculated to harass any person by personal examination when an order for examination or production is made *ex parte*. It is open to the Court to hear the objections of the respondent without an application by him.[1]

3. "Any other person."—The Court may order the examination of any person who is alleged to be a mortgagee in possession of the property of the judgment-debtor and if it finds such person not to be in possession, may order the attachment of the property.[1]

4. "Any and what other property".—The rule applies to every description of property of the judgment-debtor legally liable to be proceeded against in satisfaction of the decree.[1]

5. Production of books of account.—To prevent the judgment-debtor from defeating the decree-holder's rights, the Court may require the former to produce his books of account and leave them in Court custody.[1]

R. **42.** [S. 255.] *Where* a decree *directs an inquiry as to rent* or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for *the payment* of money. O.21, R.42

Attachment in case of decree for *rent* or mesne profits or other matter, amount of which to be subsequently *determined.*

[1877—S. 255. *See* O. 21, Rr. 12, 15 and 16.]

Order 21, Rule 41—Note 1.

(1) *National Bank of India, Ltd* v. *A K Ghuznavi*, (1916) 34 Ind Cas 287 (287): 43 Cal 285.

Note 2.

(1) *National Bank of India, Ltd* v. *A K Ghuznavi*, (1916) 34 Ind Cas 287 (287, 288): 43 Cal 285.

Note 3.

(1) In re *Premji Trikum Das*, (1893) 17 Bom 514 (518, 519).

Note 4.

(1) See In re *Premji Trikumdas*, (1893) 17 Bom 514 (517, 520) [*E.g.*, equity of redemption].

Note 5.

(1) *Ajoodhya* v. *Middleton*, (1871) 3 N W P 334.

O.21, R.42, Notes 1—3.

Synopsis.

1. Scope of the rule.
2. Attachment under a preliminary decree.
3. Enquiry into state of account in suits under S. 92 of this Code.

1. Scope of the rule.—This rule is analogous to the provision of the Code relating to attachment before judgment and its object is to secure to the decree-holder the fruits of his decree. Although unlike O. 38, R. 5 this rule makes no specific provision for avoiding attachment by furnishing security it has been held that the Court will be justified in requiring security before acting under this rule.[1]

2. Attachment under a preliminary decree.—An attachment of the property of a *judgment-debtor* under a preliminary decree fixing his *liability* can be validly made under this rule pending enquiry as to the amount due.[1] But where the preliminary decree does not fix the liability but directs enquiry in order to *ascertain* the liability, this rule does not apply.[2] An operative decree obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced."[3] To such a case the present rule can have no application.

3. Enquiry into state of account in suits under S. 92 of this Code.—This rule applies also to the case of trustee against whom a decree has been passed in a suit under S. 92 of this Code, with a direction to take accounts of the trust moneys.[1]

O.21 R.43.

R. **43.** [S. 269.] *Where* the property *to be attached is* moveable property, other than *agricultural produce*, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Attachment of moveable property *other than agricultural produce*, in possession of judgment-debtor.

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody *is likely to* exceed its value, the *attaching* officer may sell it at once.

[1877—S. 269; 1859—S. 233. *See* Ss. 2, 13 and 145.]

Order 21, Rule 42—Note 1.

(1) *Kali Shankar Sahay* v. *Protab Udai Nath Saha*, (1912) 16 Ind Cas 708 (710) Cal; *Jai Narain* v. *Bankey Lal*, (1917) 41 Ind Cas 89 (91) All.

Note 2.

(1) *Sharoda Moyee* v. *Wooma Moyee*, (1867) 8 Suth W R 9 (10) [*E.g.*, a preliminary decree for mesne profits directing enquiry into the account]; *Jai Narain* v. *Bankey Lal*, (1917) 41 Ind Cas 89 (91) All.

(2) *Moolio* v. *Md Azim*, 1926 Sind 178 (179): 93 Ind Cas 306 [Preliminary decree directing taking of accounts in partnership suit—Not covered by the rule—It cannot be said "who is judgment-debtor" till after taking of accounts"]; *Immidisetti Dhanaraju* v. *Motilal*, 1929 Mad 641 (648): 29 Mad L W 823: 52 Mad 563: 116 Ind Cas 343: 57 Mad L Jour 264 [Do. *per* Thiruvenkatachariar].

(3) *Radha Prasad* v. *Lal Sahab Rai*, (1891) 13 All 53 (65): 17 Ind App 150: 5 Sar 600 P C.

Note 3.

(1) *Jai Narain* v. *Bankey Lal*, (1917) 41 Ind Cas 89 (91) All.

Local Amendments. O.21, R.43.

LAHORE.

The rule was numbered as sub-Rule (1) and the following further proviso and sub-Rules (2) and (3) were added:—

"and provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(*a*) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for; or

(*b*) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance; or

(*c*) in the charge of a village *lambardar* or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No. 15-B of Appendix E with one or more sureties for its production.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rules 55, 57 or 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under sub-Clause (*a*) or (*c*) of Clause (1), the Schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and dated and signed by:—

(*a*) the custodian and his sureties.

(*b*) the officer of the Court who made the attachment.

(*c*) the person whose property is attached and made over.

(*d*) two respectable witnesses.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian."

Rules 43-A to 43-D—

"**43-A.** (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the Court-house and delivered to the proper officer of the Court.

(3) A custodian appointed under the second proviso to Rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian, he shall be granted a receipt for the same.

43-B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is retained shall

O.21, R.43

provide for its maintenance and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock, from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

43-C. When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for 15 days. If within three clear days, before the expiry of any such period of 15 days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

43-D. Any person who has undertaken to keep attached property under Rule 43 (1) (*c*) shall be liable to b proceeded against as a surety under S. 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him."

MADRAS.

Substitute the following rules for Rule 43 of Order 21, Schedule I:—

"43. (1) Where the prop rty to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of ke ping it in custody is likely to exceed its value, the attaching officer may sell it at once; and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be int rested in such property leave it in the village or place where it has been attached—

(*a*) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for; or

(*b*) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rule 55 or Rule 57 or Rule 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

43-A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court. O.21, R.43. Note 1.

43-B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings."

N.-W. F. P.

Add the following further proviso to Rule 43:—

"Provided further that when the attached property consists of live-stock or articles which cannot conveniently be removed, and the attaching officer does not act under the first proviso to this rule, he may leave it in the village or place where it has been attached in the charge of a village lambardar or such other respectable person as will undertake to keep the property, subject to the orders of the Court, if such person enters into a written bond for its production.

Any person who has so undertaken to keep attached property may be proceeded against as a surety under S. 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him."

Synopsis.

1 Scope of the rule.
2. "Moveable property."
3. "Actual seizure."
4. Effect of wrongful attachment.
5. "Shall be responsible for the due custody thereof."
6. Security bond to produce attached property.

Property outside jurisdiction of Court—Procedure. See S. 38, Note 6 also R. 46, Note 9, F.-N. (1).

1. Scope of the rule.—This rule deals with the mode of attachment of all moveable property except (*a*) agricultural produce and (*b*) property not in the possession of the judgment-debtor, for both of which provision is made in Rr. 44 to 46, *infra*.

The attachment is legally effected only by actual seizure.[1] As to the procedure for the custody and maintenance of such property as live-stock *see* the rules framed under this Code by the various High Courts and the undermentioned cases.[2]

Order 21, Rule 43—Note 1.

(1) See *Ram Sakal Singh* v. *Emperor*, 1931 All 142 (142): 1931 Cr C 208: 129 Ind Cas 715: 32 Cr L Jour 437.

(2) See *In re*, Reference under Stamp Act, (1914) 20 Ind Cas 775 (777): 37 Mad 17: 24 Mad L Jour 637 F B; *Shakir Hussain* v. *Chandoo Lal*, 1931 All 567 (568, 573): 1931 All L J 865: 134 Ind Cas 836 [Attachment of moveables —Amin entrusting goods to Sapurdar—Action approved by Court—Liability of amin for custody of goods—Sapurdar, whether surety].

O.21, R.43, Notes 2—6.

2. **"Moveable property."**—*See* Notes on Ss. 2 (13) and 16.

3. **"Actual seizure."**—Unlike a prohibitory order under R 46, attachment by actual seizure involves a change of possession from the judgment-debtor to the Court.[1] But *actual seizure* does not always imply the doing of something which would bring the property into physical contact with the person attaching.[2] Any overt act short of direct physical apprehension, sufficient to pass possession to the Court amounts to actual seizure, as for example the affixing of the Court seal to the outer door of a warehouse containing the property to be attached,[3] or in the case of an attachment of cattle already tied and secured, the announcement on the spot by the attaching officer of his intention to attach.[4] The seizure by a peon of the attaching officer is valid if done in the presence and under the instructions of such officer.[5] Continuance of attachment necessarily involves continuance of Court custody. If such custody is once lost, there can be no further attachment without a fresh seizure.[6]

4. **Effect of wrongful attachment.**—*See* Note 23 to S. 60.

5. **"Shall be responsible for the due custody thereof."**—This rule deals only with the liability of the attaching officer so far as the Court is concerned. It does not affect in any way the liability of a surety who expressly takes charge of the attached property either to the Court or to the decree-holder.[1]

Attaching officers have been authorised by rules to leave the attached property in the custody of the judgment-debtor or other person. *See* rules by the various High Courts. Rule 93 of the Calcutta High Court General rules and Circular orders (civil) and also R. 122 of this order passed by the Allahabad High Court.

6. **Security bond to produce attached property.**—On the question whether liability under such a security bond is enforceable in execution or by a separate suit *see* S. 145, Note 4.

Note 3.

(1) *Yellammal* v. *Ayyappa Naick*, (1914) 22 Ind Cas 870 (873): 1 Mad L W 162: 38 Mad 972 F B.

(2) *Pinnamraju Rajam Raju* v. *Potturi Tirupatiraju*, 1930 Mad 670 (671): 1930 Mad W N 347: 32 Mad L W 23: 31 Cr L Jour 1086: 1930 Cr Cas 755: 126 Ind Cas 601: 3 M Cr C 172; *Toolsa* v. *John Antone*, (1887) 11 Bom 448 (454): Chitty's S C C R 147.

(3) *Multanchand Kanyalal* v. *Bank of Madras*, (1904) 27 Mad 346 (348).

(4) *Pinnamraju Rajam Raju* v. *Potturi Tirupatiraju*, 1930 Mad 670 (671): 1930 Mad W N 347: 32 Mad L W 23: 31 Cr L Jour 1086: 1930 Cr Cas 755: 126 Ind Cas 601: 3 M Cr C 172.

(5) *Ruppa Balusamy Iyer* v. *Emperor*, 1929 Mad 188 (189): 29 Cr L Jour 1062: 112 Ind Cas 566: 2 M Cr C 60: 11 A I Cr R 362.

(6) *Lakshmichand Srinivas* v. *M V E V R M Chettiar*, 1930 Rang 247 (248): 8 Rang 491: 126 Ind Cas 223 [Attachment of moveables—Claim—Attachment released—Suit under O 21, R 63—Decree in favour of attaching creditor—Attachment not revived].

Note 5.

(1) *Madho Prosad* v. *Peari Lal*, 1921 All 220 (220, 221): 62 Ind Cas 719: 19 All L J 247; *Badri Prosad* v. *Chokhe Lal*, 1926 All 406 (407): 24 All L J 561: 95 Ind Cas 828: 48 All 510 [Attaching officer entrusting the attached property to a third person without the permission of Court —Loss of the property—Court can order the attaching officer to make good the loss]; *Darbari Mal* v. *Kanshi*, (1919) 51 Ind Cas 653 (654): 74 Pun L R 1919: 60 Pun Re 1919. See *Bhana Mal* v. *Ganpat Rai*, 1899 Pun Re No 21; *Emperor* v. *Ahmed Shaikh*, 1928 Cal 815 (817): 48 Cal L Jour 288: 33 Cal W N 174.

O.21, R.44, Note 1.

Attachment of agricultural produce.

R. **44.** [*New.*] *Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—*

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

[*See* S. 2 (13).]

Local Amendment.

BOMBAY.

After Rule 44 of Order 21, the following shall be *inserted*, namely:—

44-A. Where the property to be attached is agricultural produce a copy of the warrant or the order of attachment shall be sent by post to the office of the Collector of the District in which the land is situate.

Synopsis.

1. Attachment of agricultural produce.

1. Attachment of agricultural produce.—Agricultural produce whether standing crop[1] or severed from the soil is moveable property. Unlike other moveable property agricultural produce of either description cannot be attached by *actual seizure* as provided in R. 43. *The custodia Legis* in the case of agricultural produce on attachment is only symbolical and is not validly created unless the rules of affixture herein provided are strictly complied with.[2]

This rule, like the preceding one applies only when the property is in the *possession* of the judgment-debtor and not of a *third* party.[3]

Order 21, Rule 44—Note 1.

(1) Section 2 (13). Decisions *contra* under older Code no longer law. *Oheda Lal* v. *Mulchand*, (1892) 14 All 30 (34): 1891 All W N 174; *Sadhu* v. *Sambhu*, (1881-82) 6 Bom 592 (593); *Gopal Chunder* v. *Rumzan Sirdar*, (1870) 13 Suth W R 275 (275): 5 Beng L R 194; *Madayya* v. *Yenkata*, (1888) 11 Mad 193 (196).

(2) *Ram Sakal Singh* v. *Emperor*, 1931 All 142 (142): 129 Ind Cas 715: 1931 Cr C 208: 32 Cr L Jour 437 [Attachment by beat of drums without affixtures—Invalid—Possession does not pass].

(3) *Munshi Ram* v. *Lachhi Ram*, 1929 Lah 200 (201): 112 Ind Cas 848; *Bikchand* v. *Sajandas*, 1921 Sind 95 (95, 96): 15 Sind L R 128: 64 Ind Cas 1007.

O 21, R 44, Note 1. As regards the mode of attachment of growing crops, standing timber or other products of the earth, under the Estates Land Act V of 1908. *See* S. 192 (*i*) thereof.

O. 21, R. 45.

Provisions as to agricultural produce under attachment.

R. **45**. [*New.*] (1) *Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.*

(2) *Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.*

(3) *Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.*

(4) *Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.*

(5) *A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.*

Local Amendments.

BOMBAY.

The following words shall be *added* to sub-Rule (1) of Rule 45 of Order 21, after *substituting* a semi-colon *for* the full-stop:—

"and the applicant shall deposit in Court at the time of the application such sum as the Court shall d em sufficient to defray the cost of watching and tending the crop till such time." O. 21, R. 45.

LAHORE.

Add the following proviso to sub-Rule (1) of Rule 45:—

"and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court."

RANGOON.

O. 21, Rr 45-A and 45-B:—

Deposit, disbursement and refund of watching fees for attached moveable property.

45-A. (1) Before issuing a warrant for the attachment of moveable property which it will be necessary to place in charge of one or more peons, permanent or temporary, the Court shall satisfy itself that the attaching decree-holder has produced a receipt in Form 15-A. Appendix E from the Bailiff that he has paid in cash as process fees under Rr. 17 (1) (*e*) (*ii*) (2) of the Process Fees Rul s not less than Rs. 10, for each person whom the Bailiff considers should be employed.

(2) In sending the warrant for execution to the Bailiff, the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been fil d in the record. The Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for ex cution. If a temporary peon is employed for the custody of the attached property, the process-server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced.

(3) At the time of granting the receipt in Form 15-A, for payments made by the decree-holder as required by such sub-Rule (1), the Bailiff shall state in the lower portion of the form the date on which the fees paid will be exhausted, warning the decree-holder that the property will not be kept under attachment after that date, unless further fees are paid before that date. If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs.

(4) The payment of fees under sub-Rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff's Register No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment (Form 15-A) file it in the record and make an entry to that effect in the diary.

(5) Temporary peons employed for the custody of attached property shall be remunerated at the rate provided for in Rule 15 of the rules regarding process-serving establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process-fees actually paid under the foregoing sub-rules. Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilized, the fees paid shall be credited direct into the Treasury to "Process-servers' Fees", "XVI-A, Law and Justice"—"Courts of Law"—"Court-fees realized in cash".

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge. Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of

O.21, R.45.

the fees deposited with the Bailiff, or, if any payments have already b en made in the case of the unexpended balance of such deposits and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiff's Register I, the Bailiff shall draw the amount necessary for payment from the Tr asury as if it were a repayment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons, that the total amount of the fees actually paid under sub-Rules (1) and (3) exceeds the total amount that is chargeable for peons including the amount of the last payment, he shall direct that the excess be refunded to the payer.

(9) The Judge shall in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record, to make such refund. If a sufficient portion of the amount paid by the decree-holder to pay such refund is in the hands of the Bailiff, that officer shall make the refund in the ordinary way prescribed in his Register II for re-payments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed Treasury Form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the Judge must satisfy himself that the amount is available for refund by examining Bailiff's Register I and the record. The Bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or sub-treasury.

45-B. (1) In addition to the fees payable before a warrant issues for the attachment of moveable property under Rule 45-A, the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

Charges incurred in connection with custody and conveyance of attached moveable property and feeding and tending of live-stock.

Explanation.—The costs in question might be, for example:

(*a*) rent of building in which to store attached furniture,

(*b*) cost of conveying the attached property from the place of attachment to Court or to a secure place of custody,

(*c*) costs of feeding and tending live-stock,

(*d*) cost of proceeding to the place of attachment to sell perishable property.

(2) If the attaching decree-holder fails to comply with the Bailiff's requisition, the warrant shall not be issued.

(3) Sums thus deposited shall be entered in the Bailiff's Registers I and II and any repayments thereof shall be made according to existing orders. A receipt for such sums shall be granted by the Bailiff in Form 15-A, Appendix E.

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted.

(5) The officer actually attaching the property, shall, unless the Court otherwise directs, give the debtor, or, in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court. Where the attached property consists of cattle these may be employed, so far as is consistent with Rule 43, in agricultural operations.

(6) If no such suitable place be provided or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop, when Rule 45 applies. Whenever live-stock is placed at the place where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer.

(7) Whenever property is attached, the officer shall forthwith report to the Court and shall with his report forward an accurate list of the property seized.

(8) If the judgment-debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in Rule 68, the officer shall receive the written consent and forward it without delay to the Court for its orders.

(9) When property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the Court premises or in the personal custody of the Bailiff he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical.

(10) If there be a cattle-pound maintained by Government or any local authority in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly there kept, in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it, the officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court.

(12) If the decree-holder shall withdraw an attachment or if it shall cease under sub-Rule (2) or (4), the Bailiff's officer shall inform the debtor or, in his absence, an adult member of his family that the property is at his disposal.

(13) If any portion of the deposit made under sub-Rule (1) or (4) remains unexpended, it shall be refunded to the decree-holder in the manner prescribed for such refunds in sub-Rule (9) of Rule 45-A. Any difference between the cost of attachment of movable property (other than the costs referred to in Rule 45-A) and the sums deposited by the attaching decree-holder shall, unless the difference is due to the fault of the Bailiff, be recovered from the sale-proceeds of the attached property, if any, and if there are no sale-proceeds, from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency, the amount shall be paid by Government.

O.21, R.45, Note 1.

1. Shall specify the time at which it is likely to be fit to be cut and gathered.—The attachment of agricultural produce does not prevent the judgment-debtor from doing or continuing all necessary acts of husbandry with respect to the crop or produce. In fact, the Court is bound, under this rule, to make proper arrangements for the custody tending, cutting, gathering, storing, maturing and preservation of the produce either at the instance of the judgment-debtor, or if he neglects to perform the acts of preservation, at the instance of the decree-holder or otherwise. The attached property continues to be in the possession of the Court during the process of husbandry.

To enable the Court to make the necessary arrangements, an application for attachment must state the time at which the crop is likely to be ready for harvest. If the application is made a considerable time before the harvest, the Court may postpone attachment and prohibit the present removal of the produce.

O. 21, R.46. **Attachment of debt, share and other property not in possession of judgment-debtor.**

R. **46.** [S. 268.] (1) In the case of—

(*a*) a debt[2] not secured by a negotiable instrument,

(*b*) a share[11] in the capital of *a* corporation,

(*c*) other movable property[12] not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

(*i*) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

(*ii*) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(*iii*) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be *affixed* on some conspicuous part of the court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other

movable property (except as aforesaid), to the person in possession of the same[13]. O.21, R.46, Note 1.

(3) A debtor prohibited under clause (*i*) of *sub-rule* (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

[1877—Ss. 268, 301; 1859—Ss. 236, 239.]

Local Amendment.

RANGOON.

Sub-Rule (3) of Rule 46 shall be deleted.

Synopsis.

1. Attachment of debt, share, or other movable property—General.
2. "Debt," meaning of—Annuity, monthly allowance, or money due in instalments.
3. Salary, whether a debt.
4. Attachment of mortgage debt.
5. Attachment of decree. See R. 53, infra.
6. Attachment of debt already paid by cheque.
7. Procedure where garnishee denies debt.
8. Set-off by garnishee of cross debt.
9. Procedure where garnishee resides outside jurisdiction.
10. Procedure where garnishee admits liability but does not pay.
11. Attachment of share.
12. Attachment of other movable property.
13. Service of prohibitory order.
14. Effect of non-compliance with sub-R. (2).
15. Notice to debtor.
16. Effect of attachment.
17. Inherent power of Court to pass prohibitory orders in proper cases.

Claims. See Note 1, Pt. (6). and Note 2, F.-N. (1).
Insurance policy. See Note 1, F.-N. (4)

1. Attachment of debt, share, or other movable property—General.—There is a broad distinction between the attachment of movable property *in the possession* of the judgment-debtor, and the attachment of debts (other than negotiable instruments), shares in a corporation or other movable property *not in the possession* of the judgment-debtor; in the former case the attachment is effected by *actual seizure* while in the latter case it is done by a *prohibitory order*.[1]

A debt, in order to be attachable under this rule must be due *solely* to the judgment-debtor[2] and should be described with reasonable certainty in the application for attachment.[3] The Court, cannot, on an application under this rule, direct the *garnishee* (judgment-debtor's debtor) to *pay* the amount into Court: it can only pass a prohibitory order as mentioned in

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Order 21, Rule 46—Note 1.

(1) *Yellammal* v. *Ayyappa Naick*, (1914) 22 Ind Cas 870 (872, 873): 38 Mad 972: 26 Mad L Jour 166: 1 Mad L W 162: 1914 Mad W N 348; *Nagarmal Marwari* v. *Emperor*, (1932) 11 Pat 493 (497): 1932 Pat 279 [Property not in possession of judgment-debtor—Officer cannot seal up premises].

(2) *Hajee Abdulla Sahib* v. *Alanji Abdul Latif*, (1920) 57 Ind Cas 854 (855): 39 Mad L Jour 91: 28 Mad L Tim 34: 12 Mad L W 70 [A debt due to the estate of a deceased, one of whose heirs is the judgment-debtor, not attachable]; *Umrao Singh* v. *Suganchand*, (1914) 23 Ind Cas 156 (156): 10 Nag L R 17 [The share of an undivided brother in the ancestral family money lending business cannot be attached].

(3) *Viswanatha Pandara* v. *South India Bank, Tinnevelly*, (1917) 42 Ind Cas 609 (610): 6 Mad L W 712: 1917 Mad W N 879; *Madho Das* v.

O.21, R.46, Notes 1—4.

the rule.[4] It is, however, *open* to the *garnishee* to deposit the amount of the debt in Court and thereby obtain a valid discharge.[4-a] But in the case of dispute as to the title to the amount in deposit, the Court must decide the question before ordering payment to the decree-holder.[5] Rules 58 and 63 of this order are applicable to attachments hereunder.[6]

2. **"Debt" meaning of—Annuity, monthly allowance, or money due in instalments.**—*See* Notes 7, 14 and 22 to S. 60 and also the undermentioned case.[1]

3. **Salary, whether a debt.**—*See* Notes 16 and 17 to S. 60. A pay or pension in private service *becomes due* on the last day of the month even though it is not paid till the first of the next month and can be attached on the last day of the month.[1]

4. **Attachment of mortgage debt.**—A mortgage debt due under a *simple* mortgage is a "debt" within the meaning of this rule and can be attached by a prohibitory order.[1] Such attachment carries with it the security of the immovable property without any further attachment of the *property* itself; the purchaser of the mortgage interest in execution is entitled, therefore, to sue for the *sale* of the mortgaged property for the debt.[2]

Ramji, (1894) 16 All 286 (294): 1894 All W N 84; *Mahomed Sadik* v. *Tikaram*, (1911) 9 Ind Cas 240 (241) Oudh.

(4) *Seeni Asan Usan Rowthen* v. *Sethuram Chetty*, (1910) 5 Ind Cas 145 (145): 33 Mad 264: 7 Mad L Tim 79: 20 Mad L Jour 84. See also *Ranganatha Tawker* v. *Seetharama Chetty*, (1910) 5 Ind Cas 820 (820): 7 Mad L Tim 110 [Order absolute for injunction to the disburser to pay the judgment-debtor's salary into Court, is not an order effecting attachment]; *John* v. *Oriental Government Security Life Assurance Co, Ltd*, 1929 Mad 347 (348): 56 Mad L Jour 299: 29 Mad L W 628: 121 Ind Cas 155 [Order for payment by garnishee of amount under life policy before proof of death according to rules of company, not valid].

(4-a) *See* sub-R 3. See also *Fida Hussain* v. *Maula Baksh*, (1899) 21 All 145 (148): 1899 All W N 12 [Payment out of Court to person entitled and duly certified by Court is equivalent to deposit under sub-R (8)]; *Mahadeo Prasad* v. *Dirgbijai Singh*, 1921 All 81 (85): 43 All 272: 19 All L J 41: 60 Ind Cas 881 [Motive of depositer not material]. *See also* Note 7, *infra*.

(5) *Harinath* v. *Haradas*, (1916) 29 Ind Cas 580 (582, 583): 23 Cal L Jour 168: 20 Cal W N 188: 43 Cal 263; *The Firm of Kanhaya Lal* v. *Seth Radhakishen*, (1913) 18 Ind Cas 205 (207): 112 Pun L R 1913: 92 Pun W R 1913 [Rival receivers claiming debt—Garnishee's liability for interest not thereby taken away, except on deposit in Court].

(6) *Chidambara Pattar* v. *Ramasamy Pattar*, (1904) 27 Mad 67 (71): 13 Mad L Jour 467; *Pitche Pillay* v. *Maung Pet*, (1910) 8 Ind Cas 608 (609): 3 Bur L Tim 34; *Subramaniya Pillai* v. *Dakshinamurthi Mudaliar*, (1912) 15 Ind Cas 193 (194): 1912 Mad W N 863: 11 Mad L Tim 262.

Note 2.

(1) *John* v. *Oriental Government Security Life Assurance Company*, 1929 Mad 347 (347, 348): 56 Mad L Jour 299: 29 Mad L W 628: 121 Ind Cas 155 [Life policy—Requiring proof of death before payment—Money payable by company becomes debt only on proof of death].

Note 3.

(1) *Imperial Bank of India, Akyab* v. *Muthiya Chettiar*, 1930 Rang 161 (161): 126 Ind Cas 648.

Note 4.

(1) *Karamunnissa* v. *Phulchand*, (1893) 15 All 134 (185): 1893 All W N 51; *Debendra Kumar* v. *Ruplal*, (1886) 12 Cal 546 (550); *Nataraja Iyer* v. *South Indian Bank of Tinnevelly*, (1914) 13 Ind Cas 91 (92): 37 Mad 51: (1911) 2 Mad W N 590: 22 Mad L Jour 105: 10 Mad L Tim 503; *Chullile Peetikayil Nurmad* v. *Othenam Nambiar*, (1915) 26 Ind Cas 508 (509): 27 Mad L Jour 239; *Balwant Rao* v. *Mt Ratna Bai*, (1901) 14 C P L R 5; *Sami Ayyar* v. *Krishnaswami*, (1887) 10 Mad 169; *Shah Muhammad* v. *Lachmi Narain*, (1918) 50 Ind Cas 157 (158): 6 Oudh L J 49: 21 Oudh Cas 400; *Lal Umrao Singh* v. *Lal Singh*, 1924 All 796 (798): 5 L R (All) Civ 674: 22 All L J 840: 80 Ind Cas 890: 46 All 917 [It is movable property under this Rule]; *Bholanatha* v. *Bai Kashi*, (1902) 26 Bom 305 (312): 4 Bom L R 18, (Do.); *Subramaniya Iyer* v. *Subba Iyer*, (1912) 16 Ind Cas 816 (816) Mad (Do.); *Sri Ram* v. *Nanhu Mal*, 1930 Oudh 473 (474): 7 Oudh W N 944: 128 Ind Cas 274, (Do.); *Bantu* v. *Gauda Singh*, (1909) 1 Ind Cas 450 (451): 18 Pun Re 1909: 22 Pun W R 1909, (Do.); *Baijnath* v. *Binoyendra*, (1905) 6 Cal W N 5 (6) [Decree on a mortgage not immovable property].

(2) *Baldev* v. *Ramachandra*, (1895) 19 Bom 121 (123); *Bholanatha* v. *Bai Kashi*, (1902) 26 Bom 305 (310, 312): 4 Bom L R 18; *Lal Umrao Singh* v. *Lal Singh*, 1924 All 796 (798): 5 L R (All) Civ 674: 22 All L J 840: 80 Ind Cas 890: 46 All 917; *Balwant Rao* v. *Mt Ratna Bai*, (1901) 14 C P L R 5 (8). See also *Appasamy* v. *Scott*, (1886) 9 Mad 5 (8); *Noordin Kutti* v. *Kunhi Bava*, (1912) 16 Ind Cas 438 (438): 1912 Mad W N 879: 12 Mad L Tim 300 [Attachment though under wrong section passes the mortgagee's rights]. See also *Kasinath* v. *Sadasiv*, (1893) 20 Cal 805 (809); *Sami* v. *Krishnaswami* (1887) 10 Mad 169 (172, 179), (Do.); *Muniappa* v. *Subramaniya*, (1895) 18 Mad 437 (439): 5 Mad L Jour 60, (Do.); *Sheo Charan Lal* v. *Sheo Sewak Singh*, (1896) 18 All 469 (471): 1896 All W N

A *usufructuary* mortgage in which there is a covenant to pay is also a "debt" which can be attached under this rule.[3] But a purely usufructuary mortgage without any liability to pay the mortgage amount is not a "debt" at all and cannot be attached under this rule.[4] Such a mortgage should be attached under R. 54 as *immovable property*.[5] *See also* Note 4 to S. 16.

5. **Attachment of decrees.**—*See* R. 53, *infra*.

6. **Attachment of debt already paid by cheque.**—Payment of a debt by *delivery* of a cheque extinguishes the debt. There is, therefore, no debt that can be attached in the hands of the garnishee where the latter has delivered a cheque for the debt to the judgment-debtor, even though the latter had not cashed the debt.[1]

7. **Procedure where garnishee denies debt.**—Under sub-R. 3 a garnishee may, *at his option*, pay the amount of the debt into Court. But the Court has no jurisdiction to *compel* the garnishee to do so[1]; nor can the Court proceed against him or his property for the recovery of the amount,[2] though the Court, in practice, calls on him to pay.[3] In case the garnishee denies the debt, it is not the duty of the Court to enquire and decide if the debt is due.[4] The only course in such cases is either to have a Receiver appointed for the collection of the debt or to sell the debt notifying the fact of denial.[5] An order so appointing a Receiver or for sale does not, however, debar the garnishee in a suit on the debt, from setting up the defence that no debt is

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154, (Do.). See however *Sewa Ram* v. *Dheru Shah*, (1912) 18 Ind Cas 318 (318): 125 Pun L R 1913: 79 Pun W R 1913; *Srinath Dutt* v. *Gopal Chandra Mittra*, (1883) 9 Cal 511 (512): 12 Cal L Rep 445 [There must be attachment under Rules 46 and 54].

(3) *Ramaswamy* v. *Srinivasa*, (1916) 28 Ind Cas 284 (286): 39 Mad 389: 28 Mad L Jour 338 [In such a case, a prohibitory order under this rule is the only appropriate and *effective* procedure]; *Thandayuthapani Chetty* v. *Alagar Chettiar*, 1931 Mad 38 (39): 1930 Mad W N 719: 38 Mad L W 189: 129 Ind Cas 255; *Sinna Pillai* v. *Karuppatti Alla*, 1932 Mad 283 (284): 35 Mad L W 257: 1932 Mad W N 282: 138 Ind Cas 819 [*Othi* mortgagee]; *Gajadhar Rai* v. *Bechraj Marwari*, 1931 Pat 63 (64): 130 Ind Cas 265.

(4) *Subraya Pai* v. *Subramaniya Pattar*, 1928 Mad 648 (650): 111 Ind Cas 218; *Manilal* v. *Moti Rai*, (1911) 10 Ind Cas 812 (812): 35 Bom 288: 13 Bom L R 233.

(5) See *Gajadhar Rai* v. *Bechraj Marwari*, 1931 Pat 63 (64): 130 Ind Cas 265; *Manilal* v. *Motibai*, (1911) 10 Ind Cas 812 (812): 35 Bom 288: 13 Bom L R 233.

Note 6.

(1) *R M A R M Arunachallam Chetty* v. *S N R M Somasundaram Chetty*, (1911) 12 Ind Cas 869 (870): 4 Bur L Tim 148 [Cheque delivered to assignee of judgment-debtor before attachment]. See also *Bhagrandas* v. *Abdul Hussain*, (1878) 3 Bom 49 (52) [After a cheque has been given, its payment cannot be stopped]: *Elwell* v. *Jackson*, (1885) 1 T L R 454 C A, (Do.).

Note 7.

(1) *Siriah* v. *Muckanachary*, (1887) 10 Mad 194 (196); *Pannalal* v. *Bhagirathibai*, 1924 Nag 98 (100, 101) 20 Nag L R 11: 78 Ind Cas 601; *Kishen* v. *Bhowya*, (1872) 18 Suth W R 40 (41).

(2) *Lachman Singh* v. *Ram Sahai*, 1886 Pun Re No 95.

(3) *Toolsa Goolal* v. *John Antone*, (1887) 11 Bom 448 (454): Chitty's S C C R 147; *Nanakchand* v. *Chheda Lal*, 1927 All 41 (43): 97 Ind Cas 467; *M R R M Firm* v. *U Zan*, (1916) 35 Ind Cas 469 (470): 10 Bur L Tim 6.

(4) *Maharaja of Benares* v. *Patraj Kunwar*, (1906) 28 All 262 (263): 1905 All W N 277; *Ma Saw Yin* v. *Hock To*, 1926 Rang 175 (176): 4 Rang 100: 97 Ind Cas 247; *N Seshgiri Ayyar* v. *T N Ramachandra Iyer*, 1931 Mad 570 (571): 1931 Mad W N 259: 135 Ind Cas 543; *Sinna Pillai* v. *Karuppatti Alla*, 1932 Mad 283 (284): 35 Mad L W 257: 1932 Mad W N 282: 138 Ind Cas 819; *Panna Lal* v. *Bhagirathibai*, 1924 Nag 98 (101): 20 Nag L R 11: 78 Ind Cas 601: *Suryanarayana* v. *Venkata Rathamma*, (1915) 27 Ind Cas 812 (813) Mad. See *Maruti Babaji* v. *Ramachandra Balvant*, 1931 Bom 288 (290): 33 Bom L R 396: 133 Ind Cas 248 [Quaere].

(5) *Ma Saw Yin* v. *Hokto*, 1926 Rang 175 (176): 4 Rang 100: 97 Ind Cas 247; *Pannalal* v. *Mt Bhagirathibai*, 1924 Nag 98 (100, 101): 20 Nag L R 11: 78 Ind Cas 601; *Toolsa Goolal* v. *John Antone*, (1887) 11 Bom 448 (455): Chitty's S C C R 147; *Maharajah of Benares* v. *Patraj Kunwar*, (1906) 28 All 262 (263): 1905 All W N 277; *Nanakchand* v. *Chhedal*, 1927 All 41 (43): 97 Ind Cas 467; *M R R M Firm* v. *U Zan*, (1916) 35 Ind Cas 469 (470): 10 Bur L Tim 6. See *Hari Lal Amthabhai* v. *Abhesang*, (1879-80) 4 Bom 323 (326): 5 Ind Jur 257 [In case of *order for sale*, Court must be satisfied of the existence of debt]. See *Siriah* v. *Muckanachary*, (1885) 10 Mad 194 (196), (Do.).

O.21, R.46. Notes 7—11.

due.[6] It has been held by the High Court of Rangoon that a decree-holder who has attached future rents is not thereby entitled to sue the tenants for the amount of the rent due without his being duly appointed a Receiver for the purpose.[7]

8. Set-off by garnishee of cross-debt.—The garnishee is entitled to a set-off in respect of any cross-debt due to him from the judgment-debtor, at the date of the attachment[1] or of the sale.[2]

9. Procedure where garnishee resides outside jurisdiction.—"In its essential elements a garnishment proceeding is a proceeding by the defendant in the suit against the garnishee in the name and for the benefit of the plaintiff . . . wherever the garnishee could be sued by the defendant for the payment he may be charged as garnishee on account of it.[1]" If, therefor, the garnishee resides outside the jurisdiction of a Court and the debt is also payable outside its jurisdiction no prohibitory order can be made against the garnishee[2] unless specifically provided for by the Code.[3]

A *garnishee* submitting, in the first instance, to a prohibitory order in ignorance of the want of jurisdiction, may, however, refuse to abide by it subsequently.[4]

As to attachment of property outside jurisdiction, *see* Note 7 to S. 39.

10. Procedure where garnishee admits liability but does not pay.—*See* Note 7 above. *See also* the undermentioned cases[1] under that rule as regards the procedure to be followed in Rangoon.

11. Attachment of share.—An attachment of shares in a corporation is made in the form required by Cl. (*ii*) of sub-R. (1) and by sub-R. (2) of this rule.[1]

See also Rr. 79 and 80, *infra* as to sale of such shares.

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(6) *Pethu Naidu* v. *Lakshumana Pillai*, 1926 Mad 1011 (1011): 24 Mad L W 333: 97 Ind Cas 780; *Rambutty* v. *Kamessar*, (1874) 22 Suth W R 36 (37) [Although the garnishee's objection to the attachment on the same ground had been ruled out].

(7) *Maung Thein Zan* v. *S A S Firm*, 1925 Rang 318 (319): 3 Rang 235: 89 Ind Cas 794; *Jowri Mal* v. *Mahomed Hoosein*, (1874) Pun Re No 24 F B; *Tribeni Sahai* v. *Raman Lal*, 1880 Pun Re No 11.

Note 8.

(1) *Tayaballi* v. *Atmaram*, (1914) 25 Ind Cas 375 (376): 38 Bom 631: 16 Bom L R 520; *Tapp* v. *Jones*, (1875) L R 10 Q B 591: 44 L J Q B 127: 33 L T 201: 23 W R 694: Ref 13 Cal W N 966: 36 Cal 936: 38 Bom 631: 16 Bom L R 520: 25 Ind Cas 375.

(2) *Rambhaj* v. *Ram Das*, 1923 Lah 261 (262): 3 Lah 414: 69 Ind Cas 720.

Note 9.

(1) *Begg Dunlop & Co.* v. *Jagannath*, (1911) 11 Ind Cas 417 (421): 39 Cal 104 (116): 16 Cal W N 402: 14 Cal L Jour 228 [Proper course is by transfer or under S 46 C P C Pages 111, 112]. See also *The Bank of Bengal* v. *Sarat Chandra Mitra*, (1918) 48 Ind Cas 943 (946): 4 Pat L Jour 141: 1919 Pat H C C 155; *Khantabala Debya* v. *Bhijnath Marwari*, 1932 Pat 148 (149): 137 Ind Cas 377: 11 Pat 473: 13 Pat L Tim 466. See also *Gregory* v. *Thomson*, (1915) 30 Ind Cas 487 (488): 116 Pun W R 1915: 177 Pun L R 1915.

(2) *Begg Dunlop & Co* v. *Jagannath*, (1911) 11 Ind Cas 417 (419): 39 Cal 104: 16 Cal W N 402: 14 Cal L Jour 228; *Hossain Alli* v. *Ashutosh*, (1879) 3 Cal L Rep 30 (31). See *Nazarali* v. *Bala*, 1928 Nag 210 (210): 107 Ind Cas 663. See also *Chunilal Onkarmal* v. *Chaturbhuj Peramal*, 1932 Bom 206 (208): 56 Bom 349: 137 Ind Cas 483: 34 Bom L R 17 [The locality of a debt is the place of residence of the debtor]; *Ghanashamalal* v. *Bhanasali*, (1881) 5 Bom 249 (252) [So also, an attachment of claim over which no Court in British India has jurisdiction is invalid]. See, however, In re *Hollick*, (1868) 10 Suth W R 447 (449): 2 Beng L R A C 108.

(3) *Bilas Mal Damodar Das* v. *Hari Das*, 1929 Lah 645 (646): 118 Ind Cas 908 [*e.g.*, Rule 48]; *Begg Dunlop & Co.* v. *Jagannath*, (1911) 11 Ind Cas 417 (420): 39 Cal 104 (113): 16 Cal W N 402: 14 Cal L Jour 228.

(4) *Abdul Gafur* v. *Albyn*, (1903) 30 Cal 718 (718): 7 Cal W N 821.

Note 10.

(1) *P L M Firm* v. *Daisy M Stacey*, (1916) 33 Ind Cas 169 (169) Rang.

Note 11.

(1) See *Nagabhushanam Tadepalli* v. *Siram Ramachandra Rao*, 1923 Mad 241 (242): 45 Mad 537: 42 Mad L Jour 449: 15 Mad L W 470:

O.21, R.46, Notes 12—16.

12. Attachment of other moveable property.—A judgment-creditor does not, by virtue of his judgment, get a right to the property of the judgment-debtor in his hands or in the hands of a third party, and his remedy is not by way of suit but by attachment and sale in execution.[1] But, where a property in the possession of another is *declared to belong to plaintiff*, the proper remedy for its recovery is by a suit and not in execution.[1a]

Attachment of agricultural produce not in the possession of the judgment-debtor is covered by the rule.[1b] Unpaid purchase money due to the judgment-debtor is movable property attachable under this rule.[2] Where money was deposited by a judgment-debtor with a Railway Company as security for the due performance of his duties as a servant of the Company, an attachment of such deposit is subject to all the rights of the Company on the deposit, though the interest, if any, payable to the judgment-debtor on the deposit amount may be made available to the decree-holder by virtue of the attachment.[3]

13. Service of prohibitory order.— A prohibitory order under this rule must be duly served on the garnishee.[1]

14. Effect of non-compliance with sub-R.(2) —Want of affixture of the order as required by sub-R. (2) is fatal to the validity of the attachment and a *bona fide* assignee from the judgment-debtor after such attachment acquires good title.[1]

15. Notice to debtor.—Under sub-R. (2) a copy of the prohibitory order shall be sent to the debtor. When it is not so sent, the attachment is ineffectual and the garnishee remains liable to pay the debt to the judgment-debtor.[1] A notice to the *judgment-debtor* is, however, not a condition precedent to the validity of the attachment.[2]

16. Effect of attachment.—An attachment under this rule prohibits the creditor from *collecting* the debt, but does not prevent him from *suing* on the debt,[1] nor is the attachment a bar to a contest of non-liability by the

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1922 Mad W N 331: 30 Mad L Tim 231: 70 Ind Cas 659.

Note 12.

(1) *Mirza Muhammed* v. *Widow of Balmakund*, (1875-76) 3 Ind App 241 (248, 251): 26 Suth W R P C 82: 3 Sar 648: 3 Suth 330 P C.

(1-a) *Raja Padmanand Singh* v. *Chandi Dat Jha*, (1897) 1 Cal W N 170 (172).

(1-b) *Bilkchand* v. *Sajandas*, (1921) Sind 93 (96): 15 Sind L R 128.

(2) *A G Sambasiva Iyer* v. *Venkatarama Iyer*, 1926 Mad 903 (904): 51 Mad L Jour 95: 1926 Mad W N 569: 95 Ind Cas 447.

(3) *Karuthan* v. *Subramaniya*, (1886) 9 Mad 203 (206).

Note 13.

(1) *Gobind* v. *Kherode*, (1873) 10 Beng L R App 12 [Service ought to be by delivery, or by registered letter]: *M E Moolla* v. *Chartered Bank*, 1928 Rang 36 (38): 5 Rang 685: 107 Ind Cas 860 [Prohibitory order addressed to Secretary—Acceptance by Managing Director—Attachment valid].

Note 14.

(1) *Satya Charan Mukherjee* v. *Madhub Chunder Karmokar*, (1905) 9 Cal W N 693 (695): *Arunachellam* v. *Somasundaram*, (1911) 12 Ind Cas 869 (870): 4 Bur L Tim 148. See *Mya Gyok* v. *Emperor*, 1928 Rang 285 (285) [Removal of property after such attachment—No offence].

Note 15.

(1) *Thakoor Das* v. *Luchmeeput*, (1867) 7 Suth W R 10 (11). See *Ramasami Moopan* v. *Srinivasa Iyengar*, (1915) 28 Ind Cas 284 (285): 39 Mad 389: 28 Mad L Jour 338

(2) *Rajab Ali Shah* v. *Upper India Cowper*, (1912) 17 Ind Cas 420 (420): 15 Oudh Cas 289: *Nebraj* v. *Uttam Chand*, 1877 Pun Re No 67. But see *Sadha Ram* v. *Karam Chand*, 1906 Pun Re No 118: 79 Pun L R 1907: 143 Pun W R 1906.

Note 16.

(1) *Shib Singh* v. *Nita Ram*, (1891) 13 All 76 (78): 1890 All W N 194: *Beti Maharani* v. *The Collector of Etawah*, (1895) 17 All 198 (210, 211): 22 Ind App 31: 6 Sar 551 P C [In fact a suit is proper if to save limitation]: *Amrit Lal* v. *Shyma Charan*, (1911) 10 Ind Cas 569 (569) Cal: *Nandu* v. *Sunder*, (1894) Pun Re No 142: *Sheo Raja* v. *Jagan*, (1919) 49 Ind Cas 88 (88): 7 Oudh L J 766.

O.21, R.46, Notes 16—17.

garnishee.[2]

The attaching decree-holder gets no higher rights in the debt than what the judgment-debtor could give him at the date of the attachment and any disposition of the debt by the judgment-debtor prior to attachment binds the decree-holder,[3] nor can a decree-holder compel the judgment-debtor to create larger rights for him.[4] If, on the day of attachment, there was no debt and the attachment was raised, a subsequent accrual of a debt does not by itself revive the attachment.[5] But where a debt existed at the time of attachment, the attaching decree-holder is not precluded from realising the debt by the fact of the debt having been subsequently paid to the judgment-debtor by the garnishee.[6]

A prohibitory order under this rule is a process in execution, and money deposited in Court under sub-R. (3) is "assets" within the meaning of S. 73 of the Code.[7] When there are attachments of more Courts than one of varying grades, the garnishee acting under sub-R. (3), is bound to deposit the money in the Court of the superior grade on the analogy of S. 63.[8]

As against an Official Assignee, in bankruptcy, the attaching decree-holder obtains rights in the property attached, only on complete realisation by him before vesting.[9]

17. Inherent power of Court to pass prohibitory orders in proper cases.—Even in cases not strictly governed by O. 21, R. 46 a prohibitory order can be passed under the inherent powers of the Court, where the ends of justice require it to be done.[1]

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(2) *Hari Ram* v. *Hukam Chand*, (1915) 28 Ind Cas 317 (318): 50 Pun L R 1915 [Payment to attaching decree-holder by garnishee without contest —Liability of garnishee to—Rightful creditor not absolved].

(3) *Amarendra Nath Saha* v. *S Banerjee & Co*, 1924 Cal 1068 (1069): 40 Cal L Jour 228: 84 Ind Cas 1022; *Megji* v. *Ramji*, (1871) 8 Bom H C Rep (O C) 169; *Badeley* v. *Consolidated Bank*, (1888) 38 Ch D 238: 57 L J Ch 468: 59 L T 419: 36 W R 745 C A; *Davis* v. *Freethy*, (1890) 24 Q B D 519: 59 L J Q B 318 (C A). See *Sorabji* v. *Govinda*, (1892) 16 Bom 91 (110, 111).

(4) *Jetha Devji & Co* v. *Durgadutt*, 1927 Bom 365 (366): 29 Bom L R 416: 102 Ind Cas 418 [Attachment of deposit with association—Article of Association providing for return of deposit only on termination of membership—Decree-holder cannot compel debtor to resign membership for making deposit payable].

(5) *Tulsi Ram* v. *Harkh Narain Bhagat*, 1922 All 384 (385).

(6) *Alagirisamy Pillai* v. *Lakshmanan Chetty*, 1926 Mad 371 (372, 376): 50 Mad L Jour 79: 92 Ind Cas 1021 [Debt-attachment of— Decree obtained on debt by judgment-debtor— Effect—Payment of debt to judgment-debtor or order of Court recording satisfaction thereof—Attaching creditor's right to execute the decree not affected. On the question whether after attachment of debt, attachment of the decree obtained thereon is also necessary, the two judges in the case take opposite views]; *The Coimbatore Bazar Bank, Ltd* v. *The Union Bank, Ltd*, 1927 Mad 1147 (1148): 39 Mad L Tim 196: 26 Mad L W 209: 105 Ind Cas 246 [Attachment of share in company—Subsequent resolution by company appropriating share—Valid].

(7) *Sorabji* v. *Govinda*, (1892) 16 Bom 91 (98).

(8) *Ramasamy Udayar* v. *Chakrapany Chettiar*, (1907) 17 Mad L Jour 488 (489, 490).

(9) *Official Receiver of Secunderabad* v. *Lakshmi Narayana*, 1931 Mad 474 (477, 478): 33 Mad L W 562: 1931 Mad W N 444: 132 Ind Cas 297: 54 Mad 727: 61 Mad L Jour 774; *Krishnaswamy Mudaliar* v. *The Official Assignee*, (1903) 26 Mad 673 (679): 13 Mad L Jour 278. See *Mohan Lal* v. *Mr J Potts*, (1892) 5 C P L R 112 (114).

Note 17.

(1) *Abdul Gani* v. *Simla Banking and Industrial Co, Ltd, Simla*, 1932 Lah 295 (296): 136 Ind Cas 4: 33 Pun L R 435.

O.21, R.47, Note 1.

R. **47.** [New.] *Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.*

Attachment of share in moveables.

Synopsis.

1. Attachment of share in moveable property.

1. Attachment of share in moveable property.—A share or interest in moveable property is incapable of actual seizure,[1] and attachment by a prohibitory order is the only proper course where such share or interest is to be proceeded against.[2]

O.21, R.48.

R. **48.** [New.] (1) *Where the property to be attached is the salary or allowances of a public officer or of a servant of a Railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section* 60, *be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may, by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.*

Attachment of salary or allowances of public officer or servant of railway company or local authority.

(2) *Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.*

Order 21, Rule 47—Note 1.

(1) *Rajendra Nath Das* v. *Chairman, Jessore District Board*, 1932 Cal 408 (408): 54 Cal L Jour 488: 137 Ind Cas 672: 59 Cal 808; *Kamisetti Pedda Venkatasubbiah* v. *Tangatoor Subbiah*, (1915) 28 Ind Cas 62 (64): 1915 Mad W N 159.

(2) *Rajendra Nath Das* v. *Chairman, Jessore District Board*, 1932 Cal 408 (408): 54 Cal L Jour 488: 137 Ind Cas 672: 59 Cal 808. See *Marina Narasanna* v. *Emperor*, 1932 Mad 538 (540): 1932 Mad W N 457: 5 M Cr C 155: 63 Mad L Jour 142: 138 Ind Cas 548: 1932 Cr C 566: 33 Cr L Jour 622: 36 Mad L W 402.

O.21, R.48, Note 1.

(3) *Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule* (2), *shall, without further notice or other process, bind the Government or the Railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian Revenues or the funds of a Railway company carrying on business in any part of British India or local authority in British India; and the Government or the Railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.*

Local Amendment.

MADRAS.

Substitute a comma for the period at the end of the last sentence of sub-Rule (1) and *add* the following clause "such amount or instalment being calculated to the nearest anna by fractions of an anna of Six pies and over being considered as one anna and omitting amounts less than Six pies".

Synopsis.

1. Attachment of salary of public officer, etc.
2. Sub-R. (2) and S. 64, Expl.
3. Sub-R. (3).

Disbursing officer or judgment-debtor outside the Court's jurisdiction—Effect. See Note 1, Pts. (1) and (2).

Extent of attachment. See Notes 15 to 18 of S. 60.

1. Attachment of salary of public officer, etc.—Under the old Code the salary of a public officer or of a railway servant or of a servant of a local authority could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree.[1] As this led to considerable inconvenience and needless expense, this rule has been newly enacted to provide for such cases; the salary of this class of judgment-debtors, can now be attached under this rule whether they, or the disbursing officers reside within such local limits, or not.[2] The distinction between this rule and R. 52, *infra* is, that the latter refers specifically to property *actually* in the hands of public officers, while the former provides for the *anticipatory* attachment of salaries.[3]

This rule has no application to the attachment of salaries of judgment-debtors in *private service*. Such salaries are attachable only as *debts* after

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Order 21, Rule 48—Note 1.

(1) *Parbati Charan* v *Panchanand*, (1884) 6 All 243 (248): 1884 All W N 69; *Rango Jairam* v. *Balkrishna*, (1888) 12 Bom 44 (45); *Sheokaran Das* v. *Earle*, 1895 Pun Re No 40; *Abdul Gafur* v. *Albyn*, (1903) 30 Cal 713 (716): 7 Cal W N 821; *Sayad Khan* v. *Davies*, (1904) 28 Bom 198 (200): 5 Bom L R 803.

(2) *Begg Dunlop & Co* v. *Jaganath*, (1912) 39 Cal 104 (110, 112, 113): 16 Cal W N 402: 11 Ind Cas 417: 14 Cal L Jour 228; *Bilas Mal Damodar Das* v. *Hari Das*, 1929 Lah 645 (646): 118 Ind Cas 903.

(3) See *Tulaji* v. *Balabhai*, (1898) 22 Bom 39 (41).

they fall due.[3-a] The wages of domestic servants[4] or monies due to railway contractors[5] are not salary or allowances, within the meaning of this rule. The attachment of salaries or allowances at the disposal of the disbursing officer is not invalid by reason merely of the fact that the sanction of the superior authority is necessary before the money is actually disbursed.[6] O.21. R.48, Notes 1—3.

Attachment under this rule can be made also by the Court to which a decree is transferred for execution.[7]

2. **Sub-R. (2) and S. 64, Explanation** —Salary attached under this rule is "assets" within the meaning of S. 73 of the Code, and successive attaching decree-holders are entitled to rateable distribution thereof. There is no inconsistency between the explanation to S. 64 and sub-R. 2 of this rule. The latter provision only lays down what the officer concerned should do.[1] *See also* Note 13 to S. 64.

3. **Sub-R. (3).**—The effect of this sub-rule is that any sum paid by a disbursing officer in contravention of this rule can[1] and should be[2] recovered directly from the Government or the railway company or the local authority, as the case may be. But no order for recovery thereof can be made without bringing the Government[3] or the railway company or the local authority on the record as a party.

R. **49.** [New.] (1) *Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.* O.21, R.49.

Attachment of partnership property.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing)

(3-a) *Byramji & Co* v. *Khemkaran*, 1929 Nag 333 (334): 120 Ind Cas 209 [Pay of a servant which falls due on the 1st of each month cannot be attached *as a debt* on an earlier date, as the right to receive pay for a period shorter than a month is contingent on the due performance of service for the entire month].

(4) *Byramji & Co* v. *Khemkaran*, 1929 Nag 333 (334): 120 Ind Cas 209; *Ayyavayyar* v. *Virasami Mudali*, (1808) 21 Mad 393 (395).

(5) *Nazarali* v. *Bala*, 1928 Nag 210 (210): 107 Ind Cas 663. See *Surendra Nath* v. *Bansi Badan*, (1916) 36 Ind Cas 457 (458): 24 Cal L Jour 533: 22 Cal W N 160.

(6) *Burma Railway Co* v. *Hira Singh*, (1914) 24 Ind Cas 725 (726): 7 Bur L Tim 238: 8 L B R 62.

(7) *Lal Bahadur* v. *Beni Madho*, 1927 Oudh 112 (112): 1 Luck 46: 91 Ind Cas 1043: 13 Oudh L J 174.

Note 2.

(1) *Velchand* v. *Munson* (1912) 16 Ind Cas 640 (640): 14 Bom L R 633.

Note 3.

(1) *Burma Railway Co* v. *Hira Lal*, (1914) 24 Ind Cas 725 (726): 7 Bur L Tim 238: 8 L B R 62.

(2) *Oakes & Co* v. *Discarcie*, (1910) 5 Ind Cas 802 (803): 10 Pun Re 1910: 23 Pun W R 1910: 65 Pun L R 1910 [The Government should settle with the disbursing officer].

(3) *Nindar Mal* v. *Biddulph*, (1912) 14 Ind Cas 737 (737): 93 Pun Re 1912: 255 Pun L R 1912: 164 Pun W R 1912.

O.21, R.49, Note 1.

and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) *The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.*

(4) *Every application for an order under sub-rule* (2) *shall be served on the judgment-debtor and on his partners or such of them as are within British India.*

(5) *Every application made by any partner of the judgment-debtor under sub-rule* (3) *shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.*

(6) *Service under sub-rule* (4) or *sub-rule* (5) *shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.*

[*Cf.* R. S. C., O. 46, Rr. 1-A, 1-B.]

Synopsis.

1 Attachment of partnership property.
2. "Against the partners in the firm as such."
3. Decree against individual partner.
4. Direct accounts. See Note 3 above.
5. Order under this rule and insolvency.

Decree against firm—Receiver holding assets—What is proper order. See Note 1, F.-N. (2).

1. **Attachment of partnership property.**—This rule and the next deal with the mode of execution affecting partnership property. Execution can be taken against any partnership *property* only on a decree passed against the firm or against all the partners thereof as such.[1] Where the decree is only against an individual partner, the *property* of the partnership cannot be attached but an order creating *a charge on the interest* of the judgment-debtor in the partnership can be obtained, with or without the appointment of a Receiver.[2] The provisions of this rule are closely modelled on S. 23 of the English Partnership Act, Ss. 53 and 54, Vict., Ch. 39.

Order 21, Rule 49—Note 1.

(1) See *Karimbhai* v. *Conservator of Forests*, (1879-80) 4 Bom 222 (226): 5 Ind Jur 86.

(2) *Thama Singh* v. *Kalidas*, (1870) 5 Beng L R 386; *Haji Ismail & Co* v. *Rabiabhai*, (1909) 4 Ind Cas 135 (135, 136): 34 Bom 484: 11 Bom L R 1062 [Even though the firm assets are in the hands of a Receiver in a suit for dissolution]; *Keeney* v. *Attrill*, (1886) 34 Ch D 345: 56 L J Ch 448: 55 L T 805: 35 W R 191, Ref. 28 Bom 176, (Do.); *Gulam Mustafa* v. *Madan*

O.21, R.49, Notes 2—5.

2. "Against the partners in the firm as such."—These words do not occur in S. 23 of the English Partnership Act. The introduction of these words in this rule makes it clear that a decree against partners as such is on the same footing as a decree against the firm for the purposes of this rule.

3. Decree against individual partner.—The holder of a decree against an individual partner gets no higher rights in execution than what a voluntary assignee of a partner of his share in the partnership gets under such assignment. Such an assignment "does not, as against the other partners, entitle the assignee during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only *to receive the share of profits* to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners."[1]

"In case of a *dissolution* of the partnership whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.[2]

4. Direct accounts.—*See* Note 3 above.

5. Order under this rule and insolvency.—An order under this rule charging the interest of the judgment-debtor in partnership property is not a "transaction" protected by S. 57 of the Presidency Towns Insolvency Act or by S. 55 of the Provincial Insolvency Act, 1920.[1]

O.21, R.50.

R. **50.** [New.] (1) *Where a decree has been passed against a firm, execution may be granted—*

Execution of decree against firm.

(a) against any property of the partnership ;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;

Lal, 1931 Cal 167 (168): 58 Cal 624: 34 Cal W N 1051: 130 Ind Cas 877 [Obiter]; *Lachmi Narain* v. *Peary Lal*, 1932 All 468 (469): 1932 All L J 516 [Partner's interest alone vests in Receiver. He cannot be appointed to manage entire partnership]. See *Krishnadhan Banerjee* v. *Sanyasi Charan Mandal*, (1919) 51 Ind Cas 597 (605): 23 Cal W N 500: 29 Cal L Jour 280. See also *Abbot* v. *Abbot*, (1870) 5 Beng L R 382. See also *Dwarika Mohun* v. *Luchhmoni*, (1887) 14 Cal 384 (385). But see *Jagat Chunder* v. *Ishwar Chunder*, (1893) 20 Cal 693 (696) [Decision under the Code of 1882].

Note 3.

(1) See S. 31 (1), Partnersip Act, 1890: 53 and 54 Vict., Ch. 39; *Gowa Petha* v. *Moos*, 1932 Pat 15 (20): 133 Ind Cas 40: 10 Pat 792: 12 Pat L Tim 361 [Nor can Receiver appointed under this rule sue for accounts of a continuing partnership]; *Brown, Janson & Co* v. *Hutchinson*, (1895) 2 Q B 126: 64 L J Q B 619: 73 L T 8: 43 W R 545: 11 T L R 437: 14 R 485 C A [Accounts directed only under special circumstances, *e.g.*, with a view to dissolution]

(2) *See* S. 31 (2) of the Partnership Act, 1890, 53 and 54 Vict., Ch. 39; *Juggut Chunder* v. *Radha Nath*, (1884) 10 Cal 669 (672, 673): 8 Ind Jur 619; *Parvatheesam* v. *Bapanna*, (1890) 13 Mad 447 (449); *Deendyal* v. *Jugdeep*, (1877-78) 3 Cal 198 (209): 1 Cal L Rep 49: 4 Ind App 247: 3 Sar 730: 1 Ind Jur 604: 8 Suth 468 P C [Obiter].

Note 5.

(1) *Wild* v. *Southwood*, (1897) 1 Q B 317: 66 L J Q B 166: 75 L T 388: 45 W R 224: 3 Manson 303; *O'Shea*, Re: *Courage* v. *O'Shea*, (1895) 1 Ch 325: 64 L J Ch 263: 71 L T 827: 43 W R 232: 2 Manson 4: 17 R 70 C A.

O.21, R.50, Note 1.

(c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 *of the Indian Contract Act*, 1872.

(2) *Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule* (1), *clauses* (*b*) *and* (*c*), *as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.*

(3) *Where the liability of any person has been tried and determined under sub-rule* (2) *the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.*

(4) *Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.*

[*Cf.* R. S. C., O. 48-A, R. 8.]

Synopsis.

1. Scope of the rule.
2. "Where a decree has been passed against a firm." See O. 30, R. 6, Note 4.
3. Award.
4. "Against any person who has appeared."
5 Execution against persons other than those referred to in sub-R. (1)—Sub-R. (2).
6. Determination of liability under sub-R. (2) operates as a decree.
7. Sub-R. (4).
8. Minor partner—Proviso to sub-R. (1).
9. Insolvency of firm.

Appeal. See Note 6, Pt. (2).
"Court which passed the decree." See Note 3, Pt. (4).
Execution in case of deceased partners. See Note 5, Pt. (9).
Sub-R. (3), if covers orders ex parte. See Note 6, Pt. (3).

1. Scope of the rule.—This rule should be read with the provisions of O. 30, *infra;* the latter deals with the procedure in suits instituted by or against firms, while this rule deals with the mode of *execution* of decrees, which have been obtained *against* firms in the firm name.[1]

Order 21, Rule 50—Note 1.
(1) In re *Malabar Forests and Rubber Co, Ltd,* 1932 Bom 334 (335): 34 Bom L R 617: 138 Ind Cas 314.

O.21, R.50. Notes 1—3.

As will be seen in Note 1 to O. 30, R. 1 a decree against a firm in the name of the firm has the same effect as a decree against all the partners. It can, therefore, be executed against the whole of the Partnership Property[2] [sub-R. 1, Cl. (*a*)]. It can also be executed against anyone or more of the partners *personally*,[3] (*i.e.*, against their person or their personal property) though, before this is done, certain conditions have to be satisfied and a certain procedure has to be followed as prescribed by this rule. Thus it can be executed personally against any person coming under clauses (*b*) and (*c*) of sub-R. 1[4] inasmuch as, in such cases, it may safely be presumed that the person proceeded against knows of the suit and that his liability as a partner is, in some way, established.[5] The decree can also, *with the leave of the Court* be executed personally against any *other* person as being a partner of the firm (sub-R. 2).[6]

It is not necessary that the decree-holder should proceed against the *property* of the partner before applying for execution against his person.[7]

As regards execution against a *dissolved firm* see O. 30, R. 3, Note 2 and the undermentioned case.[8]

2. "**Where a decree has been passed against a firm.**"—*See* O. 30, R. 6, Note 4.

3. Award.—An award can be validly passed against a *firm*[1] as well as against individuals, and when the award against a firm is filed in Court under the provisions of the Arbitration Act 1899, it is enforceable as a decree of the Court, and the provisions of O. 21, R. 50 apply thereto.[2] But though an award when filed in Court is on the same footing as a decree of Court, the proceedings before the arbitrators up to the stage of the passing of the award do not consti-

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(2) *The Bank of Bengal* v. *Ramanadhan Chetty*, (1915) 28 Ind Cas 260 (261): 1915 Mad W N 180 [Leave of Court necessary only for arresting partner not served].

(3) *Bhagwandas Parasaram* v. *Jado Nath*, 1926 Lah 236 (236): 92 Ind Cas 898.

(4) *Firm of Fatehchand Madan Gopal* v. *Firm of Uttammal Jhamandas*, 1926 Sind 51 (53): 89 Ind Cas 401; *Baishnab Charan Saha* v. *Bank of Bengal*, (1915) 26 Ind Cas 866 (869): 19 Cal L Jour 581: 19 Cal W N 1008 [Case of constructive service *as partner* under O 30, R 5]. See *Sahib Thambi Marakayar* v. *Hamid Marakayar*, (1911) 12 Ind Cas 1006 (1007): 36 Mad 414: 22 Mad L Jour 109: 10 Mad L Tim 515: (1911) 2 Mad W N 534; *Lal Chand* v. *Dwarka Dass Badri Prasad*, 1928 Lah 528 (529): 108 Ind Cas 528 ["Individual" service, construed].

(5) *Natvarlal* v. *Sassoon & Co*, 1927 Bom 447 (448): 29 Bom L R 921: 103 Ind Cas 256: 51 Bom 794. See also *Jugal Chandra* v. *Gunny Hajee*, 1926 Cal 271 (274, 276, 277): 30 Cal W N 11: 91 Ind Cas 824: 53 Cal 214.

(6) See *Lal Chand* v. *Ghanaya Lal*, 1930 Lah 243 (244): 120 Ind Cas 611; *Baisnab Charan* v. *Bank of Bengal*, (1915) 26 Ind Cas 866 (870): 19 Cal L Jour 581: 19 Cal W N 1008; *Lim Kar Chang* v. *T S Chetty Firm*, 1925 Rang 317 (318): 4 Bur L Jour 116: 91 Ind Cas 778 [Dispute under sub-R (2)—Leave cannot be granted by Deputy Registrar of High Court]; *Mangalsen Lala Ramdittamal* v. *Lakhmichand Ghandamal*, 1925 Sind 317 (318): 18 Sind L R 146: 86 Ind Cas 435 [The fact that a decree itself provided for execution personally against certain persons as partners is no bar to applying for leave against others under sub-R (2)].

(7) *Vaishnodas* v. *The Firm Tirathdas Jamna Das*, 1925 Lah 379 (379): 7 Lah L Jour 165: 89 Ind Cas 138: 26 Pun L R 494.

(8) *Adiveppa Shidlingappa* v. *Pragji Mahanji*, 1924 Bom 366 (367, 368): 26 Bom L R 388: 80 Ind Cas 773.

Note 3.

(1) *Louis Drefus & Co* v. *Purusottum Das Narain Das*, (1920) 56 Ind Cas 325 (326): 47 Cal 29; *Bombay Co, Ltd* v. *Kahan Singh*, 1931 Lah 736 (737): 134 Ind Cas 1026. But see *Vallabdas Narandas & Co* v. *Keshavlal Himatlal*, 1927 Bom 428 (430): 29 Bom L R 660: 104 Ind Cas 94 [Obiter].

(2) *Louis Drefus & Co* v. *Purusottum*, (1920) 56 Ind Cas 325 (326): 47 Cal 29; *Gladstone Wyllie & Co* v. *Joonub*, 1924 Cal 117 (118): 27 Cal W N 666: 77 Ind Cas 868; *Bombay Co, Ltd* v. *Kahan Singh*, 1931 Lah 736 (737, 738): 134 Ind Cas 1026; *Adam Jafferji* v. *Shamsudin Imamdin*, 1925 Sind 293 (294): 86 Ind Cas 1013: 19 Sind L R 1; *Mangtrmal Tekchand* v. *Akbarali & Co*, 1929 Sind 28 (29): 112 Ind Cas 126: 23 Sind L R 422; *Shivchandrai Surajmal* v. *Shivaldas Hotchand*, 1931 Sind 82 (84): 131 Ind Cas 712: 25 Sind L R 460. See also *Pokhar Das* v. *Radha Kishen*, 1924 Lah 544 (544): 75 Ind Cas 927: 6 Lah L Jour 564. But see *Vallabhdas* v. *Keshav Lal*, 1927 Bom 428 (430): 29 Bom L R 660: 104 Ind Cas 94 [Obiter].

O.21, R.50, Notes 3—5.

tute 'a suit' for the application of the provisions of O. 30 (*See* Note 11 to O. 30, R. 1). Consequently, the service of any notice or summons by the arbitrators on an alleged partner of the firm, is not service within the meaning of sub-R. 1 so as to enable the decree-holder to take out execution against the *person* of such partner without the leave of the Court. Before ordering execution of an *award*, the Court will, therefore, have to determine in every case whether the alleged partner is liable as a partner or not, and grant or refuse leave under sub-R. 2.[3]

Leave may be granted also by the Court to which the decree on an award, is sent for execution.[4]

4. "Against any person who has appeared."—*See* Notes on Rr. 3 and 5 to 8 of O. 30.

Where an alleged partner *refuses* a summons sent to him under O. 30, R. 3 he must be deemed to be "individually served" and if he fails to appear, execution can proceed against him under sub-R. 1, Cl. (*c*) without any leave of the Court.[1] The words "or who has been adjudged to be a partner" in sub-R. 1 evidently provide for a case where the person served on behalf of the firm denies that he is a partner, and the plaintiff asks for an issue being raised in the suit, as to whether the services on him is good service or not.[2] *See* Notes to R. 8, O. 30.

5. Execution against persons other than those referred to in sub-R. 1 —sub-R. 2.—It has already been seen in Note 1 above, that execution of a decree against a firm can be taken against the *property* of the partnership as well as *personally* against the partners referred to in Cls. (*b*) and (*c*) of sub-R. 1 and that, as against an alleged partner not referred to therein, the leave of the Court is a condition precedent to an order for execution. The principle of the distinction is that, in the case of persons who cannot in law be fixed individually with the knowledge of the suit against the firm, an opportunity must be given to them to dispute the liability under the decree.[1] *See also* sub-R. 4.

Ordinarily, a decree is binding on the executing Court and no question of the liability of the judgment-debtor under the judgment can be allowed to be raised in execution. But as, in the case of a suit against a firm, the decree is passed on service of summons in an extremely technical form as set forth in

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(3) *E D Sasson & Co, Ltd* v. *Shivji Ram Devi Das*, 1929 Lah 228 (229, 230): 115 Ind Cas 536; *Bombay Co, Ltd* v. *Kahan Singh*, 1931 Lah 736 (738): 134 Ind Cas 1026; *Pokardas Jashomal* v. *Forbes, Forbes, Campbell & Co, Ltd*, (1913) 19 Ind Cas 363 (366, 367): 6 Sind L R 127 [The arbitrator cannot decide this question]. See also *Babu Kirparam* v. *Jawahar Singh Harnam Das*, 1932 Bom 375 (377): 34 Bom L R 737 [The arbitrators cannot decide this question unless it is specially referred to them]. See *Adamji Jafferji & Co* v. *Shamsudin Imamdin*, 1925 Sind 293 (294): 86 Ind Cas 1013: 19 Sind L R 1.

(4) *Sital Prasad* v. *Clement Robson & Co*, 1921 All 199 (201): 19 All L J 187: 61 Ind Cas 401: 43 All 394; *E D Sassoon Co, Ltd* v. *Shivji Ram Devi Das*, 1929 Lah 228 (230): 115 Ind Cas 536; *Abdul Hamid* v. *Dhanpat Mal Diwan Chand*, 1931 Lah 507 (508): 131 Ind Cas 376; *Bombay Co, Ltd* v. *Kahan Singh*, 1931 Lah 736 (738): 134 Ind Cas 1026. See also *Jagan Nath Sobha Ram of Amritsar* v. *Buta Mal*, 1926 Jour 183 (3): 98 Ind Cas 855. But see *Shivchandrai Surajmal* v. *Shival Das Hotchand*, 1931 Sind 82 (83): 131 Ind Cas 712: 25 Sind L R 460 and *Kalu Ram* v. *Sheonand Rai Johki*, 1932 Pat 323 (324): 11 Pat 580 [Case of a decree of Court —Not an award].

Note 4.

(1) *Baishnab Charan Shah* v. *Bank of Bengal*, (1915) 26 Ind Cas 866 (869): 19 Cal L Jour 581: 19 Cal W N 1008.

(2) *Jetha Devji Co* v. *Javhersing Harnamdas*, 1932 Sind 199 (201): 26 Sind L R 228.

Note 5.

(1) *Bhagvan Manaji Marwadi* v. *Hiraji Premaji Marwadi*, 1932 Bom 516 (519): 34 Bom L R 1112. See also *Jagat Chandra* v. *Gunny Hajee*, 1926 Cal 271 (274, 275): 30 Cal W N 11: 91 Ind Cas 824: 53 Cal 214.

O. 21, R. 50 Note 5.

O. 30, R. 3 and as each partner is not necessarily a defendant in the suit, and is not required to be served with the summons in the suit before the decree is passed, it is provided specifically in sub-R. (2) read with sub-R. (4), that in the case of persons not served in the suit, their liability under the decree, when disputed, may be heard and determined in *execution*.[2]

The liability may be disputed not merely on the ground that the alleged partner is not really a partner, but also on any other appropriate ground of defence. *See* Notes 3 and 4 to R. 8, O. 30 and the cases cited therein and also the undermentioned case.[3]

When the liability is decided in favour of the decree-holder and leave is granted, the effect is, that the decree against the firm, which was executable or had been executed[4] against the property of the firm or against the persons referred to in Cls. (*b*) and (*c*) of sub-R. (1), becomes also *executable personally* against partners not served in the suit. Accordingly, an application for leave under sub-R. (2), is only ancillary to an application for execution, and will not be barred by reason of its being made beyond three years from the date of the decree so long as the decree itself is otherwise kept alive according to law.[5] Though the words "may *apply*" occur in sub-R. (2), it has been held that no separate application for leave is necessary as the application for execution itself implies a prayer for leave.[6]

In the case of a Hindu son, when the Court finds under sub-R. (2) that the son is *not a partner*, the application against him under O. 21, R. 50 as such must be disallowed, and the decree-holder left to remedies otherwise available to him.[7]

Order 30, R. 2 provides that in a suit by a firm the plaintiff shall declare on demand by the defendant the names of all the partners constituting the plaintiff firm. Where in such a suit the defendant makes a counter claim against the plaintiff firm and succeeds, the persons so declared as partners cannot be proceeded against personally without an adjudication of liability against them under sub-R. (2).

The reason is that O. 21, R. 50 is not controlled by O. 30, R. 2.[8]

As regards execution under sub-R. (2) in case of death of a partner *see* Note 14 to R. 1, Note 2 to R. 3, and R. 4 of O. 30 and the undermentioned case.[9]

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(2) *Bhagwan Manaji* v. *Hirajee Premaji*, 1932 Bom 516 (520, 521, 522): 34 Bom L R 1112 [In absence of fraud or collusion, the liability must be contested in execution and not by separate suit]. See also *Jetha Devji* v. *Jacher Singh*, 1932 Sind 199 (201): 26 Sind L R 228 [A case of appearance under protest under O 30, R 8].

(3) *Bhagwan Manaji* v. *Hiraji Premaji*, 1932 Bom 516 (520): 34 Bom L R 1112 [Award—Defence on the ground that reference to arbitration was unauthorised].

(4) *Bombay Co. Ltd* v. *Kahan Singh*, 1931 Lah 736 (739): 134 Ind Cas 1026.

(5) *Bhagwan Manaji* v. *Hiraji Premaji*, 1932 Bom 516 (519): 34 Bom L R 1112; *Bombay Co. Ltd* v. *Kahan Singh*, 1931 Lah 736 (739): 134 Ind Cas 1026; *Shivchandra* v. *Shivaldas*, 1931 Sind 82 (83): 131 Ind Cas 712: 25 Sind L R 460. See however *Firm of Vishinji Govardhan Das* v. *Firm of Vassumal Wadhumal*, 1930 Sind 180 (181, 182): 24 Sind L R 132: 122 Ind Cas 392 [Though application for leave is not an execution application falling under Art 182, Limitation Act, it falls under Art. 181 and must be filed within *three years* of the *decree*].

(6) *E D Sassoon & Co* v. *Shivji Ramji*, 1929 Lah 228 (230): 115 Ind Cas 536; *Bombay Co, Ltd, Karachi* v. *Kahan Singh*, 1931 Lah 736 (738): 134 Ind Cas 1026.

(7) *Satchidanand* v. *Prayag Sah Saheb Ram*, 1930 Pat 205 (207): 127 Ind Cas 573; *Rajmal Trilokchand* v. *Isherdas Kishenchand*, 1927 Sind 247 (248): 107 Ind Cas 221.

(8) *Natvarlal Tribhovandas* v. *E D Sassoon & Co. Ltd*, 1927 Bom 447 (448): 29 Bom L R 921: 103 Ind Cas 256: 51 Bom 794.

(9) *Firm of Gokaldas Khataoo* v. *Lachmandas*, 1927 Sind 130 (139, 142): 100 Ind Cas 201 F B [1925 Sind 298 set aside].

O.21, R.50, Notes 5—7.

As to the power of an executing Court to grant leave *see* Note 3 above.

6. **Determination of liability under sub-R. (2) operates as a decree.**—In the case of persons referred to in Cls. (*b*) and (*c*) of sub-R. (1) they can be deemed to be parties to the decree by reason of service of summons or admission or adjudication as partners. The proceedings in execution as against them fall under S. 47 of the Code and an order therein will be a decree under S. 2, sub-S. (2).[1] But a person not coming under Cls. (*b*) and (*c*) of sub-R. (1) cannot be considered to be a party to the decree as the very fact of his being a partner or of his liability to the decree is allowed to be put in issue under sub-R. (2) for determination. The proceedings as against him under sub-R. (2) cannot fall under S. 47, nor is the determination one in the *suit*, having arisen only after decree. Hence it is not a decree. In order, however, to confer a right of appeal which does not otherwise exist, from such adjudication sub-R. (3) lays down specifically that the order shall have the force of a decree.[2] It may also be noted that sub-R. (4) requires a *summons* to be served, and sub-R. (2) prescribes that the issue of liability be tried, as in a *suit*. Where, however, the partner is *ex parte* and there is no trial and determination of the liability, the order granting leave *ex parte* does not have the force of a decree.[3] An application to set the *ex parte* order aside is not governed by Art. 164 of the Limitation Act as the said article applies only to *decrees*.[4]

An order having the force of a decree under sub-R. (3) is governed by Sch. I, Art. 1 and not Sch. II, Art. 11 of the Court Fees Act.[5]

An order under this sub-rule amounting to a decree bars the re-opening of the same matter in any subsequent application for leave against the same person.[6] The order having the force of a decree will not, however, make the proceedings a *suit* within the meaning of S. 38 of the Presidency Small Cause Courts Act.[7] But the fact that the proceedings are not proceedings in a suit will not bar a reference to the High Court of Bombay from an appeal decided by the Resident of Aden in a matter under sub-R. (2).[8]

7. **Sub-R. (4).**—Where a decree-holder against a firm claims to execute the decree against a partner not coming within Cls. (*a*) and (*b*) of sub-R. (1), *i.e.*, a partner who was not *served in the suit*, he has to apply under sub-R. (2) for leave to execute the decree against such partner[1] and for this purpose, a summons to appear and answer the *application* should be issued to such part-

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Note 6.

(1) *Baishnab Charan Saha* v. *The Bank of Bengal*, (1915) 26 Ind Cas 866 (867): 19 Cal L Jour 581: 19 Cal W N 1008.

(2) See *Kanji* v. *Vasanji*, 1929 Bom 386 (387, 388): 31 Bom L R 995: 53 Bom 839: 120 Ind Cas 833; *Bhagwan Manaji* v. *Hiraji Premaji*, 1932 Bom 516 (518): 34 Bom L R 1112.

(3) *Atherton & Co* v. *Habib Baksh*, 1929 All 390 (391, 392): 1929 All L J 553: 115 Ind Cas 865.

(4) *Kanji* v. *Vasanji*, 1929 Bom 386 (387, 388): 31 Bom L R 995: 53 Bom 839: 120 Ind Cas 893.

(5) *Jagal Kishore Gulab Singh* v. *Dina Nath Siri Ram*, 1930 Lah 825 (827): 126 Ind Cas 562 [Court-fee to be paid *ad valorem*]; *Punjab National Bank, Ltd* v. *Ranchoredas Gordhan Das*, 1930 Sind 255 (256): 127 Ind Cas 704; *Valliappa* v. *Rangasamy*, (1916) 35 Ind Cas 429 (430): 8 L B R 300: 10 Bur L Tim 42.

(6) *Kapur Chand* v. *Kanhaya Lal*, 1924 All 34 (37): 45 All 785: 21 All L J 641: 4 L R A (Civ) 441: 74 Ind Cas 513.

(7) *Kanji* v. *Jivraj*, 1930 Bom 412 (413): 32 Bom L R 1009: 128 Ind Cas 17.

(8) *Haji Abadi Hassan & Sons* v. *A Besse*, 1930 Bom 57 (58): 31 Bom L R 1302: 54 Bom 26: 122 Ind Cas 851 [Reference under S 8 of the Aden Civil and Criminal Justice Act (Bombay) (II of 1864)].

Note 7.

(1) *Bhagwan* v. *Hiraji*, 1932 Bom 516 (518): 34 Bom L R 1112.

ner under sub-R. (4). The object of this is to give the partner an opportunity of disputing his liability as a partner if he desires to do so.[2] The summons referred to in this sub-rule is not the summons sent in the suit against the firm but means a notice or summons to appear and answer the *application* for leave to execute under sub-R. (2).[3] O.21, R.50, Notes 7—9.

8. Minor partner—Proviso to sub-R. 1.—*See* Note 4, O. 30, R. 1 and the undermentioned cases.[1]

9. Insolvency of firm.—The insolvency of a firm does not operate as the insolvency of every member thereof and is, therefore, no impediment to the execution of the decree personally against any partner individually served.[1]

O.21, R.51, Note 1.

Attachment of negotiable instruments.

R. **51**. [S. 270.] *Where* the property *is* a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

[1877—S. 270; 1859—S. 238.]

Synopsis.

1. Attachment by actual seizure.

1. Attachment by actual seizure.—An attachment of a negotiable instrument *whether in the possession of the judgment-debtor or not*, should be made only *by actual seizure*. Unless this is done, there is always a danger that third parties may *bona fide become* possessed of it, and, if a prohibitory order is held to be a valid attachment, they would be prejudiced by such an order of which they may know nothing.[1] A prohibitory order is, however, sufficient attachment as against the debtor or the promisor.[2]

O.21, R.52.

Attachment of property *in custody of* Court or *public* officer.

R. **52**. [S. 272.] *Where* the property *to be attached is* in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable theron, may be

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(2) *Jagat Chandra Bhattacharya* v. *Gunny Hajee Ahmed*, 1926 Cal 271 (274, 277): 30 Cal W N 11: 91 Ind Cas 824: 53 Cal 214.

(3) *Jagat Chandra Bhattacharya* v. *Gunny Hajee Ahmed*, 1926 Cal 271 (273, 277): 30 Cal W N 11: 91 Ind Cas 824: 53 Cal 214; *Jivraj Lalloobhai Patel* v. *Bhagvandas Gordhandas*, 1923 Bom 66 (67): 24 Bom L R 1037: 68 Ind Cas 627.

Note 8.

(1) *Ohhatoo Lal* v. *Naraindas Baijnath Prasad*, 1930 Cal 53 (54): 56 Cal 704: 121 Ind Cas 403 [Defendant a ward under U P Court of Wards Act IV of 1912—No ground of defence under sub-R 2 *outside* U P]; *O A M K Chetty Firm* v. *K P Chetty Firm*, (1915) 31 Ind Cas 271 (271): 8 L B R 112 [Extent of liability of minor partner of Hindu joint family firm].

Note 9.

(1) *Vaishno Das* v. *Tirath Das*, 1925 Lah 379 (379): 7 Lah L Jour 165: 89 Ind Cas 138: 26 Pun L R 494.

Order 21, Rule 51—Note 1.

(1) *Subramania* v. *Chokkalinga*, 1923 Mad 317 (318, 319): 44 Mad L Jour 206: 17 Mad L W 314: 1923 Mad W N 91: 72 Ind Cas 189; 46 Mad 415 [Attachment of pro-note under O 21, R 46 not valid for operation of S 64, C P Code].

(2) *Namagiri Ammal* v. *Muthuvelappa Goundan*, 1928 Mad 940 (942): 1928 Mad W N 466: 56 Mad L Jour 70: 28 Mad L W 565: 111 Ind Cas 887.

O.21, R.52, Note 1.

held subject to the further orders of the Court from which the notice *is* issued :

Provided that, *where* such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

[1877—S. 272; 1859—S. 237—*Cf.* R. S. C., O. 46, R. 12.]

Synopsis.

1. Scope of the rule.
2. Property in the custody of the Court or the Public Officer.
3. Property in the hands of a Receiver.
4. Property in the hands of the Official Assignee.
5. Anticipatory attachment.
6. Determination of questions of title and priority—Proviso.
7. Effect of attachment under this rule on any previous attachment.
8. Step-in-aid.
9. Appeal.

Service of notice, whether sufficient attachment. See Note 1, F.-N. (5).

Setting aside an order under the proviso—Suit for. See Note 6, Pts. (9) and (10).

1. Scope of the rule.—This rule deals with the attachment of property in the custody of a *Court* or of a *public officer*. The property sought to be attached must, however, *belong to the judgment-debtor*. Thus, Government promissory notes standing in the name of the judgment-debtor in a bank, but which have been declared to belong to another, cannot be attached under this rule.[1]

The Court has no discretion to refuse to order attachment in cases under this rule.[2] The circumstance that one decree-holder has attached the property is no ground for preventing another decree-holder of the same judgment-debtor from attaching the same property.[3]

Where a decree-holder seeks to attach money of the judgment-debtor already deposited in Court, it is necessary that he should put in an execution application in his suit to that effect, and give notice to the judgment-debtor.[4] The attachment is to be made by issuing a notice to the custody Court, to hold the property subject to the orders of the Court issuing the notice.[5] Where the attaching Court and the custody Court are the same, the High Court of

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Order 21, Rule 52—Note 1.

(1) *Raja Padmanand Singh* v. *Chandi Dat Jha*, (1897) 1 Cal W N 170 (172). See also *Hamilton* v. *Shankar Das*, (1915) 29 Ind Cas 791 (793): 1916 Pun L R 86: 1915 Pun W R 120 [Money deposited by agreement as security for decree to be passed cannot be attached].

(2) *Noorjehan* v. *Mushitty*, (1881) 8 Cal L Rep 17 (18).

(3) *Natesa Pillai* v. *Govindaswami Pathan*, 1930 Mad 4 (11).

(4) *Ramanatha Chettiar* v. *Karuppayya Nadar*, 1926 Mad 1104 (1105): 1926 Mad W N 683: 51 Mad L Jour 486: 97 Ind Cas 1020.

(5) *Surajamull Agarwala* v. *Ramchandra Mistry*, (1915) 28 Ind Cas 123 (125): 20 Cal W N 412; *John Tiel & Co* v. *Abdool Hye*, (1876) 19 Suth W R 37 (40) [Service of notice on the custody Court sufficient to complete attachment]; *Ramachandra* v. *Latchman Pillai*, (1915) 26 Ind Cas 941 (942): 7 Bur L Tim 277 [Courts in different districts—Attachment without transfer held illegal]; *Maung Taung Bo* v. *Vyravan Chetty*, (1911) 11 Ind Cas 859 (859): 4 Bur L Tim 192 [Attachment without notice to the custody Court irregular].

Lahore has held, that it would be a meaningless formality to issue a precept to itself requesting it to hold the property subject to its own orders.[6] O.21, R.52, Notes 1—3.

2. Property in the custody of the Court or the public officer.—The rule permits of attachment of property not merely in the custody of Court but also of property in the custody of public officer, such as moneys in the hands of the Official trustee[1] or insured letters addressed to the judgment-debtor lying in the custody of the post office.[2] Revenue, or interest or dividends payable, in *future* can also be attached under this rule.[3] For definition of the word public officer *see* S. 2 (17), *ante*. As to assets in the hands of the Collector in execution, *see* the following.[4] The word custody in the rule means *actual custody*.[5]

3. Property in the hands of a receiver.—Moneys in the hands of a receiver must be regarded as being in the custody of the Court and can be attached under his rule.[1] Leave of Court is, however, necessary before such attachment can be levied, of property in his hands. The present rule does not affect the prevailing practice as to the necessity of obtaining leave in such cases.[2]

Where a Receiver is appointed for the assets of a partnership in a partnership suit, the practice on the original side of the High Court of Bombay has been, to pass a *charging order* against the assets held by the receiver, on the application of an attaching creditor. By virtue of such order the receiver is bound to deal with the charge as per order of the Court issuing the same.[3] Where a receiver is appointed in a suit for administration of the estate of a deceased but no decree is passed, it has been held that the Receiver appointed in the suit ought not to be directed to pay a judgment-creditor who has obtained an attachment under this rule.[4]

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(6) *Gian Chand* v. *Gopi Chand*, 1928 Lah 593 (594): 108 Ind Cas 173.

Note 2.

(1) *Abdul Lateef* v. *Doutre*, (1889) 12 Mad 250 (253).

(2) *Narasimhalu* v. *Adiappa*, (1890) 13 Mad 242 (247); *Parmer* v. *Cowasjee*, (1916) 33 Ind Cas 723 (724): 14 All L J 236.

(3) *Umabai Shankar Godhole* v. *Amritrao Anant*, (1915) 28 Ind Cas 18 (19): 17 Bom L R 133: 39 Bom 80; *Jugraj Hemraj* v. *Kissan Singh*, (1890) 3 C P L R 147 (150).

(4) *Govindji Viramji* v. *Sakharam Govind*, (1912) 16 Ind Cas 59 (60): 36 Bom 519: 14 Bom L R 527 [Assets held by Collector in execution are assets of the Court transferring the decree—No other Court can attach them]; *Sarfoolah Khan* v. *Lachmeeput*, (1892) 13 Suth W R 58 (58), (Do.).

(5) *Muthukaruppan* v. *Muthuramalinga*, (1884) 7 Mad 47 (48): 7 Ind Jur 615.

Note 3.

(1) *Rani Debendra Bala Dasi* v. *Babu Chandra Sekhar Prasad Singh*, (1916) 35 Ind Cas 589 (591): 1 Pat L Jour 449.

(2) *Md Zohuruddin* v. *Md Nooroodeen*, (1894) 21 Cal 85 (91); *Sarat Chandra* v. *Apurba Krishna*, (1911) 11 Ind Cas 187 (189): 15 Cal W N 925: 14 Cal L Jour 55; *J Kahn* v. *Ali Mahomed*, (1892) 16 Bom 577 (579) [Leave to be granted on such terms as to ensure equality between creditors]; *Natesa Pillai* v. *Govindasami Pathan*, 1930 Mad 4 (11) [Court woud not ordinarily refuse leave]. See also *Thayumana* v. *Ramasami*, 1925 Mad 51 (51): 19 Mad L W 681: 79 Ind Cas 632; *Parayagag Kumar Devi* v. *Bhudhar Mal Chaudhury*, 1931 Pat 204 (204): 12 Pat L Tim 318: 130 Ind Cas 836.

(3) *Shadingappa* v. *Shankarappa*, (1904) 28 Bom 176 (180): 5 Bom L R 912; *Haji Ismail & Co* v. *Rabiabai*, (1909) 4 Ind Cas 135 (136): 34 Bom 484: 11 Bom L R 1062; *Bai Rukhia Bai* v. *Vadilal Purushottamdas & Co*, 1930 Bom 451 (454): 32 Bom L R 850: 54 Bom 667: 127 Ind Cas 481. But see *Kesser Bai* v. *Kaku Vallabhdas*, 1927 Bom 394 (397, 398): 29 Bom L R 665: 106 Ind Cas 113 [Per Mirza, J—Charging orders not warranted by Code]; *Nensukhgauri* v. *Rajabally*, 1927 Bom 405 (410): 29 Bom L R 689: 106 Ind Cas 184, (Do.).

(4) *Gulamali* v. *Moos*, (1930) 32 Bom L R 1315: 1930 Notes 7 (*d*); *Durgadutt* v. *Bholaram*, 1927 Bom 657 (659): 29 Bom L R 409: 102 Ind Cas 413 [Right of receiver in an administrative suit paramount to that of attaching decree-holder to realise debts of the deceased].

O.21, R.52, Notes 4—6.

4. Property in the hands of the Official Assignee.—The Official Assignee is a public officer coming within the definition of S. 2, cl. (17) sub-cl. (*d*) of the Code. The amount in his hands payable by way of dividend to the judgment-debtor can be attached under this rule.[1]

5. Anticipatory attachment.—The rule applies only to attachment of property actually in the hands of the Court or the officer and not of property expected to reach the hands of such Court or officer.[1]

6. Determination of questions of title and priority—Proviso.—Under the proviso to this rule, a question of title or priority arising between the decree-holder and any other person, is to be determined by the *custody* Court and not by the *attaching* Court.[1] Thus where Courts *B*, *C* and *D* have in execution of decrees obtained by *X*, *Y* and *Z* respectively, successfully attached a fund in the custody of Court *A*, it is the latter Court that has to determine the priority between *X*, *Y* and *Z*. It has been held by a Full Bench of the High Court of Madras that *X* is entitled, as being the first attaching decree-holder, to priority over the claims of *Y* and *Z*, and that the custody Court *A* is not entitled to award a *rateable distribution* among *X*, *Y* and *Z*.[2] The reason given is that S. 73 does not, in terms, apply to such cases inasmuch the decree-holders have not applied to Court *A* for execution of their decrees before the receipt by it of such assets, and that there cannot be any rateable distribution of property apart from S. 73, on equitable grounds, among any other class of decree-holders than those specified in S. 73. The High Court of Calcutta has, on the other hand, held that attachment does not create any title in the attaching creditor and that the custody Court is bound to apply the rules of justice, equity and good conscience and distribute the fund attached rateably amongst the attaching decree-holders.[3] The question has arisen in the High Court of Bombay with reference to the attachment of funds in the hands of a receiver appointed in a partnership action. In the undermentioned case Farran, J held that one of several creditors cannot, by attachment obtain priority over the other creditors and that a Court of equity will refuse permission to attach

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Note 4.

(1) *Hardayal* v. *Haji Adam*, 1925 Bom 344 (344): 49 Bom 638: 27 Bom L R 545: 87 Ind Cas 1011.

Note 5.

(1) *Tulaji* v. *Balabhai*, (1898) 22 Bom 39 (41); *Padmanand Singh* v. *Rama Prasad Malvi*, (1911) 11 Ind Cas 422 (425): 16 Cal W N 14: 14 Cal L Jour 127; *Thakurdas Moti Lal* v. *Joseph Iskendar*, (1917) 41 Ind Cas 516 (519): 44 Cal 1072: 25 Cal L Jour 595: 21 Cal W N 887; *Thiruvengadial* v. *R Chinnaswamian*, (1914) 24 Ind Cas 617 (618): 26 Mad L Jour 364.

Note 6.

(1) *Goppe Nath Acharjee* v. *Achcha Bibee*, (1881) 7 Cal 553 (555): 9 Cal L Rep 395; *Hari Charan Marwari* v. *Kedar Nath Manjilal*, (1931) 35 Cal W N 517: 1931 Notes 19 (*b*); *J Cowie* v. *Elias* (1868) 10 Suth W R 43 (43); *Debee Pershad* v. *Gujadhur Ram*, (1873) 20 Suth W R 73 (75); *Nachiappa* v. *Subbier*, 1923 Mad 505 (507): 46 Mad 506: 72 Ind Cas 820: 44 Mad L Jour 413: 17 Mad L W 390: 32 Mad L Tim 198; *Atchayya* v. *Bangarayya*, (1893) 16 Mad 117 (119); *Debendra* v. *Chandra Sekhar*, (1916) 35 Ind Cas 589 (591): 1 Pat L Jour 449; *Nga San Balu* v. *Mi Thaik*, (1917) 39 Ind Cas 345 (345): 2 U B R 136: 11 Bur L Tim 41; In re, *Balchand Devmal Lilaram*, 1928 Sind 165 (166): 22 Sind L R 345: 118 Ind Cas 819 [Hold the Official Receiver is entitled to priority over attaching decree-holders]; *Kristodass* v. *Ramkant*, (1881) 6 Cal 142 (148): 7 Cal L Rep 396 [Collector having custody cannot however decide claims]; In the matter of *Brojonath Mitter*, (1870) 13 Suth W R 301 (302), (Do.); *Jeynarayan* v. *Ismail*, (1895) 19 Bom 710 (713).

(2) *Viswanathan Chetty* v. *Arunachalam Chetty*, 1921 Mad 218 (221): 44 Mad 100: 39 Mad L Jour 608: 12 L W 744: 28 Mad L Tim 412: 1921 Mad W N 14: 60 Ind Cas 302 [Overruling 29 Ind Cas 239]. See also *Umma Venkatarathnam & Co* v. *Methawala Adamji & Co*, (1919) 50 Ind Cas 925 (927): 42 Mad 692: 26 Mad L Tim 82: 1919 Mad W N 623; *Thiruvengadial* v. *R Chinnaswamian*, (1914) 24 Ind Cas 617 (618): 26 Mad L Jour 364.

(3) *Thakurdas Motilal* v. *Joseph Iskender*, (1917) 41 Ind Cas 516 (520, 522): 44 Cal 1072: 25 Cal L Jour 595: 21 Cal W N 887. But see *Gopee Nath Acharji* v. *Achcha Bibi*, (1881) 7 Cal 558 (555): 9 Cal L Rep 395.

except on terms which ensure equality among all the creditors.[4] A contrary view was taken by Mirza, J., in the cases cited below[5] following the Madras Full Bench case. The same High Court has also in a recent case held that a creditor who has obtained a charging order in his favour is entitled to priority over other non-attaching creditors.[6]

Where *X* obtains a decree in Court *B* and in execution thereof attaches a fund in Court *A* and, before the transfer of the fund to Court *B* to the account of *X's* suit, other decree-holders have applied for execution to the Court *B*, the matter falls within S. 73 and *X* and other decree-holders will be entitled to rateable distribution.[7]

The order passed under the proviso is not an administrative but a *judicial* order binding on the parties.[8] The enquiry under the proviso is of the same nature as an investigation of claim proceedings and a suit lies to set aside the order passed therein[9] unless the determination of the question is one falling under S. 47.[10]

7. **Effect of attachment under this rule on any previous attachment.**—*A* files a suit against *B* and attaches before judgment certain moveable properties belonging to *B*. The attached property being perishable is sold and the proceeds are kept in Court. *C* who has obtained a decree against *B* attaches the amount in Court deposit under the provisions of this rule. If, at that time *A* has not obtained a decree in his suit and applied for execution thereof, *C* will be entitled to apply the amount attached in satisfaction of his decree and the prior attachment before judgment obtained by *A* will confer no right in his favour so as to affect the right of *C*.[1] But if *A* has actually obtained a decree and applies for execution at the time of *C's* attachment, different equities would arise and both *A* and *C* will be entitled to share the proceeds rateably between themselves.[2]

8. **Step-in-aid.**—Where an attachment is effected under this rule of moneys lying to the credit of the judgment-debtor in the treasury, and more than three years after the attachment an application is made for payment of the amount attached, the latter application is not one for execution but a step-in-aid of the prior execution application and is not barred.[1]

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(4) *J Khan* v. *Alli Mahomed Haji Umer*, (1892) 16 Bom 577 (579).

(5) *Nensukhgavri* v. *Raja Bally*, 1927 Bom 405 (410): 29 Bom L R 689: 106 Ind Cas 184; *Kesserbai* v. *Kaku Vallabdas*, 1927 Bom 394 (397, 398): 29 Bom L R 665: 106 Ind Cas 113.

(6) *Bai Rukhiabai* v. *Vadilal Purshottamdas & Co.* 1930 Bom 451 (455): 32 Bom L R 850: 54 Bom 667: 127 Ind Cas 481.

(7) *Visvanadhan Chetty* v. *Arunachalam Chetty*, 1921 Mad 218 (222): 44 Mad 100: 1921 Mad W N 14: 60 Ind Cas 302: 30 Mad L Jour 608: 12 Mad L W 744: 28 Mad L Tim 412.

(8) *Jitendra Nath* v. *Ashutosh Dey*, 1925 Cal 354 (355): 82 Ind Cas 240.

(9) *Tikam Singh* v. *Sheo Ram Singh*, (1892) 19 Cal 286 (288); *Bisheshar Das* v. *Ambika Pershad*, (1915) 29 Ind Cas 622 (625): 37 All 575: 13 All L J 732; *Ramchandra* v. *Lachman Pillai* (1915) 26 Ind Cas 941 (942): 7 Bur L Tim 277.

(10) *Firm Ajodhiya Prasad* v. *Mahadeo Prasad* 1927 All 574 (575): 102 Ind Cas 179.

Note 7.

(1) *Bisheshar Das* v. *Ambika Pershad*, (1915) 29 Ind Cas 622 (624): 37 All 578: 13 All L J 732.

(2) *Seedut* v. *Sreecant*, (1906) 33 Cal 639 (642, 644): 10 Cal W N 634.

Note 8.

(1) *Venkataramanamma* v. *Purushottam*, (1901) 24 Mad 188 (194): 10 Mad L Jour 342.

O.21, R.52. Note 9.

9. **Appeal.**—It was held in the undermentioned case where a decree-holder in a Munsif's Court obtained an order of attachment under this rule of certain moneys lying to the credit of the judgment-debtor in the Sub-Court and in pursuance thereof obtained an order of payment from the sub-Court, that an appeal lay to the District Court and not directly to the High Court. The dispute was held to be one relating only to the Munsif's Court decree.[1] As to whether the questions arising under the proviso to this rule fall within the scope of S. 47 so as to be open to appeal. *See* S. 47, N. 5, Pt. (10) and the cases cited there.

O.21, R.53

Attachment of decrees.

R. **53.** [S. 273] (1) *Where* the property *to be attached is* a decree, *either* for *the payment of money*[3] *or for sale in enforcement of a mortgage or charge*[3a], the attachment shall be made,—

(*a*) *if the decrees were passed by the same Court*[5] *then* by order of *such* Court, and

(*b*) *if the* decree *sought to be attached was* passed by *another* Court[6], *then* by *the issue* to such *other Court of* a notice *by* the Court which passed the decree sought to be executed, requesting *such other Court* to stay the execution[8] of its decree unless and until—

(*i*) the Court which passed the decree sought to be executed cancels the notice, or

(*ii*) the holder of the decree sought to be executed *or his judgment-debtor* applies to the Court receiving such notice to execute its own decree.

(2) *Where a Court makes an order under clause* (*a*) *of sub-rule* (1), *or receives an application under sub-head* (*ii*) *of clause* (*b*) *of the said sub-rule, it shall, on the application of the creditor who has attached the decree of his judgment-debtor,* proceed to execute the *attached decree*[9] and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) *The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule* (1)[4] *shall be deemed to be the representative*[10] *of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.*

Note 9.

(1) *Krishna Pattar v. Kavalappara Moopil Nair,* (1917) 38 Ind Cas 772 (778): 5 Mad L W 264.

(4) *Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule* (1), the attachment shall be made, by a notice *by* the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way ; and, *where* such decree has been passed by any other Court, also by sending to such *other* Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. O.21,R.53.

(5) The holder of a decree attached under this *rule* shall give the Court executing the *decree* such information and aid as may reasonably be required.

(6) *On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment*[11] *of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.*

[1877—S. 273.]

Local Amendments.

ALLAHABAD.

In sub-Rule (1) (*b*) and in sub-Rule (4), *after* the words "**to such other Court**" *add* the words "and to any other Court to which the decree has been transferred for execution".

And in sub-Rule (6), *for* the words "after receipt of notice thereof", *read* the words "after receipt of notice, or with the knowledge thereof".

LAHORE.

(1) *Add* the following words under sub-Rule (1) (*b*), *after* the words "to such other Court":—

"and to the Court to which it has been transferred for execution."

(2) In sub-Rule (1) (*b*) (*ii*), *substitute* the words "the attached" for the words "its own", and *add* the following proviso to the same:—

"with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

(3) In sub-Rule (6), *substitute* the words "with the knowledge", *for* the words "after receipt of notice".

O.21, R.53. **MADRAS.**

Add the following as sub-Rule (1) (*c*):—

"(*c*) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of Clause (*b*) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it."

NAGPUR.

In sub-Clause (*ii*) of Clause (*b*) of sub-Rule (1):—

(*a*) *After* the word "judgment-debtor", *insert* the words "with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court";

(*b*) *for* the words "its own", *substitute* the words "the attached".

In Clause (*b*) of sub-Rule (1), and in sub-Rule (4), of Rule 53, *after* the words "to such other Court", *insert* the words "and to any other Court to which the decree has been transferred for execution".

N-W. F. P.

In sub-Rule (1) (*b*) of Rule 53 and in sub-Rule (4), *after* the words "to such other Court", *add* the words "or to any other Court to which the decree has been transferred for execution".

In sub-Rule (1) (*b*) (*ii*), *for* the words "its own decree", *substitute* the words "the attached decree".

In sub-Rule (6) *for* the words "after receipt of notice thereof", *read* "after receipt of notice or with the knowledge thereof".

OUDH.

In Rule 53, sub-Rule (1) (*b*), and in sub-Rule (4), *after* the words "to such other Court", *add* the words "and to any other Court to which the decree has been transferred for execution".

In sub-Rule (6), *for* the words "after receipt of notice thereof", *read* the words "after receipt of notice, or with the knowledge thereof".

RANGOON.

In Clause (*b*) of sub-Rule (1) of Rule 53, *after* the words "to such other Court" occurring in the second and third lines of the clause, the words "and to any Court to which it may have been transferred for execution" shall be added, and for the word "its" occurring in the fifth line, the word "the" shall be substituted.

In sub-Clause (*ii*) of Clause (*b*) of sub-Rule (1) of Rule 53 for the words "its own", the words "the attached" shall be substituted.

To sub-Clause (*ii*) of Clause (*b*) of sub-Rule (1) of Rule 53, the following shall be added, namely:—

"with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

In sub-Rule (6) of Rule 53, for the words "after receipt of notice thereof", the words "with the knowledge thereof" shall be substituted.

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Decree for money.
3-a. Decree for sale in enforcement of a mortgage or charge.
4. Other decrees.
5. Decree passed by the same Court.
6. Decree passed by different Courts.
7. Effect of attachment.
8. Stay of execution—Sub-R. (1).
9. Execution of attached decree—Sub-R. (2).
10. Representative—Sub-R. (3).
11. Adjustment of attached decree—Sub-R. (6).
12. Step-in-aid.

Defective attachment. See Note 6, F.-N. (1).
Maintenance decrees. See Note 4, Pt. (5).
Revenue Court decrees. See Note 3, F.-N. (1).

1. Legislative changes.—

1. In sub-Rule (1), the words "or for sale in enforcement of a mortgage or charge" have been newly added.
2. In Clause (*b*) (*ii*) of the same sub-rule the words "or his judgment-debtor" are new.
3. Sub-Rules (2), (3) and (6) and Clause (*a*) of sub-Rule (1) are new.

2. Scope of the rule.—This rule makes a distinction, for the purposes of attachment between decrees for the payment of money or for sale in enforcement of a mortgage or charge, and *other* decrees. Where a decree of the former class is attached the mode of realisation of the attached decree is by *execution* thereof.[1-a] The holder of the decree sought to be executed is conferred the power of executing such attached decree and for that purpose the rule declares that he should be deemed to be a representative of the holder of the attached decree.

In the case of other decrees sub-R. (4) prescribes the manner of attachment thereof. But the rule is silent as to how they should be realised after attachment. Such decrees should therefore be *sold* after attachment by Court auction as being "other saleable property of the judgment-debtor" under S. 60.[1]

The rule applies to attachment of decrees whether made before or after judgment.[2] It does not apply to a case where the creditor of a mortgagee attached the deposit made in Court by the mortgagor to redeem the property before sale in execution.[3] For the attachment and the subsequent execution of decrees of Civil Courts in execution of certificates issued under the provisions of certain Local Public Demands Recovery Acts, *see* the undermentioned provisions.[4]

3. Decree for money.—A decree for the payment of money is not attachable as a debt under R. 46, but should be attached under this rule.[1] The following have been held to be money decrees attachable as such under this rule:—

Order 21, Rule 53—Note 2.

(1-a) *Maung Lun Bye* v. *Maung Po Nyun*, 1924 Rang 21 (21): 1 Rang 360: 2 Bur L Jour 151: 76 Ind Cas 679; *Sultan Kuar* v. *Gulzari Lal*, (1878-80) 2 All 290 (291): 4 Ind Jur 359; *Takiya Begam* v. *Sirajuddaula*, (1885) All W N 123 (123); *Jotindro Nath Chowdhry* v. *Dwarkanath Dey*, (1893) 20 Cal 111 (114); *Gholam Muhammad* v. *Indro Chand*, (1871) 15 Suth W R 34 (35): 7 Beng L R 318.

(1) *Sudarsun Podder* v. *Manindra Chandra Pal*, 1932 Cal 80 (82): 58 Cal 934: 133 Ind Cas 181.

(2) *Gorrijala Venkayya* v. *Pothigunta Laxmiah*, (1912) 22 Mad L Jour 394 (395): 14 Ind Cas 285 (285).

(3) *Asia Khatun* v. *Nurjahan Khatun*, (1932) 36 Cal W N 955 (958): 1933 Cal 39: 59 Cal 1464.

(4) The Bengal Public Demands Recovery Act, III of 1913, S 19 (2); The Bihar and Orissa Public Demands Recovery Act, IV of 1914, S 21 (2).

Note 3.

(1) *Thiruvengadachari* v. *Vythilingam Pillai*, (1883) 6 Mad 418 (419); *Fateh Lal* v. *Sher Singh*, 1925 All 264 (265): 6 L R (All) Civ 63: 85 Ind Cas 660 [Revenue Court decree—Attachable under this Rule]; *Alia Bibi* v. *Abu Jafar*, (1899) 21 All 405 (407): 1899 All W N 157 [Revenue Court decree—Held under the old Code, cannot be attached as a debt].

O.21, R.53, Notes 3—3-a.

1. Decree for mesne profits[2] whether ascertained or unascertained.[3]
2. Decree for arrears of rent.[4]
3. A certificate as to deficiency of price granted under R. 71 of this order.[5]
4. Decree in a suit for dissolution of partnership though part of the assets of the partnership are immovable properties.[6]

But the rule applies only to cases where the right attached is expressly settled by the decree. Thus a right to recover mesne profits by way of restitution by reason of reversal of the decree in appeal cannot be attached.[7]

As noticed in Note 2, after attachment under this rule, the money decree should be executed and not sold (*see also* Note 9, *infra*).

3-a. **Decree for sale in enforcement of a mortgage or charge.**—In the absence of these words under the Old Code there was a conflict of opinion as to whether a decree for sale in enforcement of a mortgage was or was not a money decree and as to the mode of execution of such a decree after attachment. The High Courts of Allahabad[1] and Calcutta[2] held that it was not a money decree and that it should be *sold* after attachment. The High Court of Madras[3] on the other hand held that it was a money decree which should be attached and *executed* under the corresponding S. 273. The conflict has been set at rest by the Legislature by giving effect to the Madras view. Under the present rule such decrees are placed on the same footing as money decrees.[4] In the case of a decree for maintenance charging immovable property also, the proper course for the decree-holder is to apply for execution, and not for the sale of the decree attached.[5]

If, however, in contravention of the provisions of this rule, a decree for money or a mortgage decree for sale, if sold and not executed, after attachment, the sale cannot be regarded as a nullity which confers no rights on the purchasers. The rule is merely one of procedure and ought not to be given a

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(2) *Lachman Ojha* v. *Chariter Ojha*, (1918) 18 Ind Cas 183 (184): 4 Pat L Jour 336: 1918 Pat H C C 257: 5 Pat L W 191; *Sharodu Moyee* v. *Wooma Moyee*, (1867) 8 Suth W R 9 (11).

(3) *Ramaswamy Iyer* v. *Ramaiyar*, (1892) 2 Mad L Jour 288 (290); *Sharada Moyee* v. *Wooma Moyee*, (1867) 8 Suth W R 9 (10).

(4) *Banku Behary* v. *Syama Charan*, (1898) 25 Cal 322 (323).

(5) *Abdul Jabbar* v. *Sita Ram*, 1926 All 379 (382): 24 All L J 885: 95 Ind Cas 1033.

(6) *Nidlingappa* v. *Shankarappa*, (1903) 27 Bom 556 (560): 5 Bom L R 529; *Dhanaraju* v. *Motilal Daga*, 1929 Mad 641 (643): 29 Mad L W 823: 52 Mad 563: 116 Ind Cas 343: 57 Mad L Jour 264 [Thiruvenkatachari, J dissenting].

(7) *Vasudeva Ravi Varman* v. *Narayana Pattar*, (1901) 24 Mad 341 (345).

Note 3-a.

(1) *Delhi London Bank, Ltd* v. *Kunwar Partab Singh*, (1906) 28 All 771 (774): 3 All L Jour 585: 1906 All W N 236: 1 Mad L Tim 247.

(2) *Macnaghten* v. *Surja Prasad*, (1910) 5 Ind Cas 302 (304): 11 Cal L Jour 78; *Baij Nath Lohea* v. *Binoyendra Nath Palit*, (1902) 6 Cal W N 5 (6); *Macnaghten* v. *Surja Prosad*, (1899) 4 C W N (35); *Jogendra Nath Bhattacharya* v. *Hiranyakumar Muhuri*, (1905) 2 Cal L Jour 499 (503).

(3) *Subbaraya Rawthu Minda Nainar* v. *Kuppusamy Iyengar*, (1909) 1 Ind Cas 535 (537): 34 Mad 442: 5 Mad L Tim 278; *Vaidhinadaswamy* v. *Somasundaram*, (1905) 28 Mad 473 (478): 15 Mad L Jour 126.

(4) *Vithaldas* v. *Subraya*, 1921 Bom 127 (127): 45 Bom 343: 59 Ind Cas 541: 22 Bom L R 1304; *Kuppusamy Iyengar* v. *Subbaraya Rawutha Minda Nainar*, (1912) 13 Ind Cas 324 (325): 22 Mad L Jour 161: 11 Mad L Tim 15: 1912 Mad W N 1.

(5) *Venkata Ramamurthy* v. *Sundara Ramiah*, (1918) 47 Ind Cas 630 (631): 23 Mad L Tim 355. But see *Nanammal* v. *The Collector of Trichinopoly*, (1910) 5 Ind Cas 879 (879): 20 Mad L Jour 97 [Decree for future maintenance not attachable]; *Monessur Doss* v. *Beer Protap Sahee*, (1871) 15 Suth W R 188 (189): 6 Beng L R 646, (Do.).

scope which will interfere with the substantive rights of creditors conferred by S. 60 of the Code.[6]

4. Other decrees.—A decree relating to immovable property is not itself immovable property. Such a decree should therefore be attached only under this rule and not under the next rule.[1] Thus a decree for possession of immovable property[2] or a preliminary decree for partition[3] or a decree for foreclosure[4] should be attached under this rule. As pointed out in Note 1, such decrees should be *sold* after attachment, and cannot be executed.

5. Decree passed by the same Court.—In the case of a decree for the payment of money or for sale in enforcement of a mortgage or charge, where the decree sought to be executed and the decree sought to be attached are passed by the same Court, the attachment is made under sub-R. 1, Cl. (a) by order of the Court. In the case of other decrees, the attachment is made under sub-R. 4 by the issue of a *notice* to the holder of the decree sought to be attached prohibiting him from transferring or charging the same in any way.

6. Decree passed by different Courts.—An order of attachment under this rule, by Court *X*, of a decree passed by Court *Y* can be made either by Court *X* or by the Court to which the decree is transferred for execution.[1]

After receiving notice of attachment under this rule, the Court whose decree is attached has no jurisdiction to proceed with the sale ignoring the order. The sale in such a case is void.[2]

7. Effect of attachment.—The effect of attachment of a decree under this rule is to stay execution of the attached decree until the conditions mentioned therein happen. The decree is not permanently rendered incapable of execution by reason of the attachment, nor is the decree-holder's interest destroyed.[1] "The judgment-creditor" as pointed out by Maclean, C.J., "still had an interest in the decree which he had obtained and the attachment order did not prevent him from presenting the decree with a view to execution."

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(6) *Subbaraya Rawthu Minda Nainar* v. *Kuppusamy Iyengar*, (1909) 1 Ind Cas 535 (537, 538): 35 Mad 442: 5 Mad L Tim 278. See also *Kamini Kumar Bhowmik* v. *Protap Chandra Bhowmik*, 1921 Cal 382 (383): 25 Cal W N 400: 66 Ind Cas 608.

Note 4.

(1) *Krishnaji* v. *Baliram*, (1918) 44 Ind Cas 252 (253); *Surbani* v. *Puran Singh*, (1911) 12 Ind Cas 924 (924): 8 All L J 1327; *Abdul Majid* v. *Muhammad*, (1891) 13 All 89 (91): 1890 All W N 186; *Naigar Timapa* v. *Bhaskar Parmaya*, (1886) 10 Bom 444 (445); *Bunshee Mohun Doss* v. *Huro Chunder Doss Chowdhry*, (1864) Suth W R Mis 28 (28).

(2) *Birendra Nath Mitra* v. *Uma Charan Banerjee*, (1921) 64 Ind Cas 388 (389, 390) Cal; *Ganesh Lall* v. *Shamnarain*, (1881) 6 Cal 213 (217): 6 Cal L Rep 533: 4 Ind Jur 419: 3 Shom L R 215: 3 Suth 773: 4 Sar 161; *Grish Chunder* v. *Grish*, (1881) 6 Cal 243 (246): 3 Shom L R 240: 4 Sar 170: 3 Suth 776: 7 Cal L Rep 420: 4 Ind Jur 470.

(3) *Sudarsan Poddar* v. *Manindrachandra Pal*, 1932 Cal 80 (82): 58 Cal 934: 133 Ind Cas 181.

(4) *Barhma Din* v. *Baji Lal*, (1904) 26 All 91 (93): 1903 All W N 206.

Note 6.

(1) *Arumuga Mudaliar* v. *Yogamba Bai Ammani*, (1912) 17 Ind Cas 323 (326, 329): 13 Mad L Tim 227 [Even if the attachment by the transferee Court is considered defective it is not void. Such defect, if any, may be waived by parties—Per Sundara Iyer, J].

(2) *Manikulal Seal* v. *Bannuli Mukerjee*, (1905) 32 Cal 1104 (1105): 10 Cal W N 193: 3 Cal L Jour 27.

Note 7.

(1) *Kiran Shashi Debi* v. *Chandrika Prosad Singh*, (1915) 30 Ind Cas 587 (588) Cal; *Gouri Dutt* v. *Amar Chand*, (1912) 13 Ind Cas 907 (907): 15 Cal L Jour 49; *Patumma* v. *Idivi Beari*, (1903) 13 Mad L Jour 265 (266); *Ara Payil Pathuthi Umma* v. *Thacharakavil Ummi Koya*, (1910) 5 Ind Cas 56 (56): 7 Mad L Tim 262; *Sami Pillai* v. *Krishnaswamy Chetty*, (1898) 21 Mad 417 (419): 8 Mad L Jour 77. But see *Thuchakovil Unni Koya* v. *Arapavil Pathutti*, (1911) 9 Ind Cas 786 (787): 35 Mad 622: (1911) 1 Mad W N 187: 9 Mad L Tim 312: 21 Mad L Jour 577 [Not good Law under the present Code].

O.21, R.53, Notes 7—9.

The addition of the words "or his judgment-debtor" in sub-R. (1), Cl. (*b*) gives legislative recognition to the right of the holder of the decree attached, to apply for execution after attachment.[2]

The rule mentions only the *holder of the decree* sought to be executed or his *judgment-debtor* as having the right to apply for execution after attachment. But can a *transferee* of the decree whose transfer is prior to attachment apply for execution of the decree after attachment under this rule? The High Court of Madras in its carlier decisions[3] held that the words "his judgment-debtor" do not include a transferee from the judgment-debtor and that the remedy of the latter is only to prefer a claim under R. 58 of this order and have the attachment raised before he can apply for execution. In a later decision[4] however, it has dissented from such a view and held, that the transferee is entitled to execute the decree notwithstanding the subsequent attachment inasmuch as his rights are prior to the attachment and R. 16 confers a right of execution in his favour. The High Court of Rangoon[5] and the Judicial Commissioner's Court of Nagpur[6] have also held that a transferee stands in the same position as his transferor, and is entitled to apply for execution. The High Court of Patna[7] has gone a step further and held that a transferee of the decree *even after attachment* is entitled to apply for execution by virtue of R. 16. The reasoning of the Patna High Court is that in the case of money decrees, the present rule does not prohibit a transfer of the decree during the pendency of the attachment, and the general prohibition contained in S. 64 does not apply to the specific provision in this rule. But the right of the assignee to execute the decree in such a case, is subject to the right of the attachers just as the assignor's right would be.[8]

8. **Stay of execution—Sub-R. (1).**—The object of the stay is to prevent the holder of the attached decree from realising and taking away the fruits of that decree.[1] But the stay is not an absolute stay but a limited one and, as already noticed, does not prevent the holder of the decree sought to be executed or his judgment-debtor from executing the attached decree.[2]

9. **Execution of attached decree—Sub-R. (2).**—Under sub-R. (2) the attaching decree-holder is entitled to apply for execution of the attached decree. He can take the necessary steps for the realisation of the proceeds of the attached decree and apply them in satisfaction of his decree.[1]

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(2) *Adhar Chandra* v. *Lal Mohun*, (1897) 24 Cal 778 (779): 1 Cal W N 676.

(3) *Thiruvengadam Pillai* v. *Doridla Subbiah*, (1912) 13 Ind Cas 659 (660): (1912) 1 Mad W N 176: 11 Mad L Tim 144; *Chillaloor Yeera Musala Reddi* v. *Pathangi Ramaiya*, (1910) 5 Ind Cas 1010 (1010): 7 Mad L Tim 83; *Sadagopachariar* v. *Ragunadachariar*, (1909) 3 Ind Cas 938 (939): 33 Mad 62: 6 Mad L Tim 273.

(4) *Arumuga Mudaliar* v. *Yogamba Bai Ammani*, (1912) 17 Ind Cas 323 (325): 13 Mad L Tim 227. See also *Venkatarama Iyer* v. *Esumsa Rowthen*, (1910) 5 Ind Cas 92 (94): 33 Mad 429: 20 Mad L Jour 330: 7 Mad L Tim 143 [Attachment and assignment on the same date].

(5) *Co-operative Town Bank of Padigon* v. *Raman Chettiar*, 1928 Rang 25 (26): 5 Rang 595: 6 Bur L Jour 221: 106 Ind Cas 853.

(6) *Atma Ram* v. *Ganapati*, 1927 Nag 132 (133): 23 Nag L R 30: 99 Ind Cas 635.

(7) *Hazariram* v. *Kedar Nath Marwari*, 1929 Pat 1 (3): 7 Pat 726: 9 Pa. L Tim 822: 118 Ind Cas 673.

(8) *Arumuga Mudaliar* v. *Yogamba Bai Ammani*, (1912) 17 Ind Cas 323 (325): 13 Mad L Tim 227.

Note 8.

(1) *Adhar Chandra Dass* v. *Lall Mohun Dass*, (1897) 24 Cal 778 (782): 1 Cal W N 676.

(2) *Chanbasappa Nagappa Haveri* v. *Holibasappa Basappa Motinbennur*, 1924 Bom 383 (384): 48 Bom 485: 26 Bom L R 317: 80 Ind Cas 239.

Note 9.

(1) *Rengasamy* v. *Periasami*, (1893) 17 Mad 58 (60): 3 Mad L Jour 211; *Maharajah Bahadur*

O.21, R.53, Notes 10—11.

10. Representative—Sub-R. (3).—Sub-R. (3) makes it quite clear that once a decree has been attached by another decree-holder, the latter becomes a representative of the holder of the attached decree and is entitled to take out execution in the same way as the original holder thereof could have done[4]. *See also* Note 25 to S. 47.

Thus where in execution of a decree obtained by *A* against *B*, a decree which *B* holds against a company in liquidation is attached, the Court will direct the liquidator to recognise *A* as the representative of *B* and allow him to prove for the decree debt in the name of *B* and to receive and apply dividends payable to *B* in satisfaction of *A's* decree debt.[2]

The attaching decree-holder is entitled to take moneys deposited by the judgment-debtor and certify payment.[3] Moneys brought into Court by the judgment-debtor become forthwith available for the satisfaction of the decree sought to be executed and the interest ceases to run from the date of the attachment.[4] The attaching creditor has the same remedies as his judgment-debtor and can also proceed against any sureties for the decree amount.[5] If the decree is attached after execution sale but before confirmation, it has been held that the attaching decree-holder is entitled to apply for confirmation of sale in his favour.[6]

11. Adjustment of attached decree—Sub-R. (6).—As pointed out by their Lordships of the High Court of Madras in a recent Full Bench[1] Cl. 6 of the rule provides an exception to the General rule embodied in S. 64 of the Code, and is a special case of the application of the well-known principle of justice and equity intended for the protection of parties to a *bona fide* transaction. After the judgment-debtor under the attached decree receives either through Court or otherwise notice of the order of attachment, any payment

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Singh v. *Jawahir Lal*, (1900) All W N 99 (100) [Death of judgment-debtor after transfer of the attached decree to the attaching Court—Legal representative not to be impleaded]. See *Alagirisami* v. *Lakshmanan*, 1926 Mad 371 (372, 376): 50 Mad L Jour 79: 92 Ind Cas 1021 [Debt attached—Subsequent suit and a decree on the debt—Does the attachment fasten itself on the decree without fresh attachment of the decree itself! Yes, *Per* Venkatasubba Rao, J; No, *Per* Reilley, J].

Note 10.

(1) *Unao Commercial Bank, Ltd* v. *Mohar Gobind Rai*, 1930 All 659 (661): 1930 All L J 945: 129 Ind Cas 382; *Krishna* v. *Venkatapathi*, (1906) 29 Mad 318 (319); *Sah Man Mall* v. *Kanagasabapathi*, (1893) 16 Mad 20 (22); *Brojonath* v. *Gaya Sundari*, (1907) 6 Cal L Jour 141 (142) [Acknowledgment in favour of attaching decree-holder saves limitation in favour of the original decree-holder also]; *Seethammal* v. *Narayana Iyengar*, 1928 Mad 976 (977): 1928 Mad W N 710: 113 Ind Cas 63 [Attachment before judgment of decree—Suit dismissed attaching creditor cannot execute]; *Chandrapal Dube* v. *Muhammad Salamatullah*, 1929 Oudh 413 (414): 6 Oudh W N 710: 120 Ind Cas 399 [Attaching decree-holder becomes a representative only on the date when the attachment is effected]; *Ram Ratan* v. *Jugraj*, (1905) 8 Oudh Cas 186 (188); *Piare Lal* v. *Muhammad Mahmud*, (1915) 27 Ind Cas 363 (364): 17 Oudh Cas 374; *Peary Mohan* v. *Ramesh Chunder*, (1888) 15 Cal 371 (375); *Adhar Chandra* v. *Lalmohan*, (1897) 24 Cal 778 (783): 1 Cal W N 676.

(2) *Sesha Iyer* v. *T. S. Sugar Mill Co*, (1907) 30 Mad 533 (535).

(3) *Unao Commercial Bank, Ltd* v. *Mohar Gobind Rai*, 1930 All 659 (661): 1930 All L J 945: 129 Ind Cas 382.

(4) *Madan Mohan Dey* v. *Bishnu Pada Dey*, 1921 Cal 580 (581, 582): 35 Cal L Jour 109: 64 Ind Cas 780.

(5) *Mohibuddin* v. *Partab Mal*, (1918) 46 Ind Cas 584 (584): 44 Pun Re 1919: 86 Pun W R 1918: 85 Pun L R 1918: 51 Pun L R 1919.

(6) *Bhooria Rudrani Koer* v. *Ram Pertab*, (1907) 11 Cal W N 158 (160).

Note 11.

(1) *Lakshminarasimham* v. *Lakshminarasimham*, 1927 Mad 728 (731): 50 Mad 677: 53 Mad L Jour 150: 26 Mad L W 103: 103 Ind Cas 502 F B. See also *Naga Reddiar* v. *Veerappa Mudaliar*, 1921 Mad 135 (136): 13 Mad L W 34: 61 Ind Cas 815; *Kuppusamy Iyer* v. *Kuppusamy Iyer*, (1918) 48 Ind Cas 109 (113): 9 Mad L W 32: 1918 Mad W N 874: 24 Mad L Tim 195; *Gopal Nanashet* v. *Joharimal*, (1892) 16 Bom 522 (524); *Baij Nath Lohea* v. *Binoyendra Nath Patit*, (1902) 6 Cal W N 5 (7) [Service on the judgment-debtor can be implied]; *Raja Sir S R M M A Firm* v. *Burmah Oil Co, Ltd*, 1931 Rang 185 (188): 9 Rang 110: 134 Ind Cas 506 [Adjustment after knowledge of attachment though imperfect is invalid].

O.21, R.53, Notes 11—12.

or adjustment by him to his decree-holder will not be recognised by the Court.[2] But if such judgment-debtor should, in ignorance of the attachment, have made any payment or adjustment it should be regarded as a payment or adjustment properly made under the decree to the rightful person.

The rule prohibits an adjustment between the judgment-debtor under the decree attached and the decree-holder thereof and not an adjustment between the attaching decree-holder and the judgment-debtor.[3]

If an application for execution by the attaching decree-holder is struck off for default, it has been held that the attachment is not put an end to and the judgment-debtor cannot therefore make any payment to his decree-holder. The provisions of R. 57 of this order do not apply to a default on the part of the attaching decree-holder.[4]

12. Step-in-aid.—An application for execution of a decree under attachment by the attaching decree-holder is a step-in-aid of execution of the decree within the meaning of Art. 182 of the Limitation Act.[1]

O.21, R.54,

R. **54**. [S. 274.] (1) *Where* the property *is* immoveable[1], the attachment[3] shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from *taking any benefit from such transfer or charge.*

Attachment of immoveable property.

(2) *The* order shall be proclaimed[6] at some place on or adjacent to such property by beat of drum[7] or other customary mode, and a copy of the order shall be *affixed on* a conspicuous part of the property[8] and *then upon a conspicuous part of the* Court-house[9] *and also, where* the property is land paying revenue to *the* Government, in the office of the Collector[10] of the district in which the land is situate.

[1877—S. 274; 1859—Ss. 235, 239. *See* S. 64, & O. 21, R. 67.]

Local Amendment.

ALLAHABAD.

Add the following as sub-Rule (3):—

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and

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(2) *Bujanath Sahoo* v. *Doolar Chand Sahoo*, (1875) 24 Suth W R 245 (246); *Lachhmi Narain Girdhari Lal* v. *Mansa Ram Murlidhar*, 1932 All L J 792 (794).

(3) *Ramcharan Singh* v. *Jangbahadur Singh*, 1924 Pat 696 (698): 5 Pat L Tim 631: 79 Ind Cas 900.

(4) *Prem* v. *Muhammad Habibullah*, (1914) 24 Ind Cas 795 (795) All; *Ramakrishna Iyer* v. *Mari Goundan*, 1927 Mad 1025 (1028): 1927 Mad W N 680: 105 Ind Cas 606.

Note 12.

(1) *Gya Loan Office Co, Ltd* v. *Dhirit Kundal Lal*, (1910) 8 Ind Cas 675 (676) Cal; *Lachman* v. *Thondi*, (1885) 7 All 382 (383): 1885 All W N 64: 9 Ind Jur 363; *Mullaseri Gopala Menon* v. *Kriseki Kovilaknath Manavikraman*, (1912) 13 Ind Cas 179 (179): 22 Mad L Jour 146: 10 Mad L Tim 568.

against all other transferees from the judgment-debtor from the date on which such order is made.'' **O.21, R.54.**

BOMBAY.

The following shall be added to sub-Rule (1) of Rule 54:—

"Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged.''

LAHORE.

The following was added as sub-Rule (3) for Rule 54:—

''(3) The order shall take effect, as against persons claiming under a gratuitous transfer from the judgment-debtor, from the date of the order of attachment, and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation, whichever is earlier.''

NAGPUR.

After sub-Rule (2) of Rule 54, *insert* the following sub-rule:—

''(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made.''

N.-W. F. P.

Add the following sub-rule to Rule 54:—

''54. (3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made.''

OUDH.

To Rule 54, *add* the following sub-Rule (3):—

''(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made.''

RANGOON.

To Rule 54, the following shall be added as sub-Rule (3), namely:—

''(3) The order of attachment shall take effect, as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-Rule (2), whichever is the earlier.''

Synopsis.

1. Attachment of immovable property—General.
2. Attachment of mortgage debt. See Note 4 to R. 46.
3. Immovable property.
3-a. Attachment of property belonging to a Hindu co-parcener.
4. Attachment when complete.
5. Proof of service of prohibitory order.
6. Proclamation of order of attachment.
7. Beat of drum.
8. Affixing copy on conspicuous part of the property.
9. Affixing copy in Court-house.
10. Affixing copy in Collector's office.
11. Effect of attachment and reattachment.
12. Absence of attachment and irregular and invalid attachment.

O.21, R.54, Notes 1—3a.

Property outside jurisdiction. See Note 7. **See S. 39, Shrotriyam villages—Mode of proclamation.** See Note 10, Pt. (2).

1. Attachment of immoveable property—General.—The rule deals with attachment of *immoveable property*. The word "attachment" in S. 64 of the Code means, so far as immoveable property is concerned, an attachment effected in the manner provided for by this rule.[1] An attachment is a necessary preliminary to execution proceedings[2] and the object of the rule in prescribing a particular way of notifying the attachment is as pointed out by Mahmood, J., in *Ganga Din* v. *Khushali*[3] "to give notice to the judgment-debtor not to alienate his property and to the public not to accept any alienation from him." *See* Note 2 to S. 64, *ante*.

As already pointed out in R. 53 above, a decree, though relating to immoveable property, is not itself immoveable property, and cannot be attached as such under this rule but only under R. 53.[4]

This rule extends to attachment of immoveable property under Chota Nagpur Tenancy Act VI of 1920. *See* S. 50.

2. Attachment of mortgage debt.—*See* Note 4 to R. 46.

3. Immoveable property.—*See* Note 4 to S. 16 *ante* for the meaning of the words "immoveable property". The following have been held to be immoveable property within the meaning of this rule:—

1. The equity of redemption in a mortgage.[1]
2. The life interest taken by a Parsee widow under her husband's will in the income of his immoveable property.[2]

3-a. Attachment of property belonging to Hindu co-parcener.—An attachment of the share of an undivided co-parcener in a joint Hindu family should be made in respect of his undivided share in the *whole family property*, and not of his share in *each item* of it.[1] Such an attachment has the effect of preventing the accrual of title by survivorship to the other members, in the event of the member whose share is attached, dying after attachment and before sale.[2]

Order 21, Rule 54—Note 1.

(1) *Simrick Lal* v. *Radharaman*, (1917) 39 Ind Cas 857 (857) Cal.

(2) *Tata Iron and Steel Co., Ltd.* v. *Charles Joseph Smith*, 1930 Pat 108 (110): 8 Pat 801: 124 Ind Cas 90; *Mahadeo Dobey* v. *Bhola Nath*, (1883) 5 All 86 (91): 1882 All W N 186; *Doshbhai* v. *Ishwardas Jagjivandas*, (1891) 15 Bom 222 (228): 18 Ind App 22: 6 Sar 10: 15 Ind Jur 154 and 281 P C [No attachment is necessary in the case of mortgage decree for sale]; *Pedro Antonio* v. *Jaebhai*, (1888) 12 Bom 368 (370), (Do.); *Daya Chand* v. *Hem Chand*, (1878-80) 4 Bom 515 (520), (Do.); *Jogendra* v. *Debendra*, (1899) 26 Cal 127 (129): 3 Cal W N 90, (Do.); *Tincowrie Debya* v. *Shib Chandra Pal*, (1894) 21 Cal 639 (641), (Do.); *Muniappa* v. *Subramania*, (1895) 18 Mad 437 (439): 5 Mad L Jour 60, (Do.)].

(3) (1885) 7 All 702 (707): 1885 All W N 179.

(4) *Krishnaji* v. *Baliram*, (1918) 44 Ind Cas 252 (253): 16 Nag L R 252; *Baij Nath* v. *Binayindra*, (1902) 6 Cal W N 5 (6); *Naigar Timapa* v. *Bhaskar*, (1886) 10 Bom 444 (447). But see *Hari* v. *Ram Chandra*, (1871) 9 Bom H C R 64 [Not good law].

Note 3.

(1) *Barendra Nath Mitter* v. *Martin & Co*, 1921 Cal 801 (803): 33 Cal L Jour 7: 62 Ind Cas 167; *Parashram* v. *Govind*, (1897) 21 Bom 226 (228).

(2) *Natha* v. *Dhunbaiji*, (1899) 23 Bom 1 (11).

Note 3-a.

(1) *Janganathar Subbiah* v. *Kame Setti Chinna Venkatasubbiah*, (1919) 53 Ind Cas 336 (336): 10 Mad L W 449; *Saroop Narain* v. *Ram Tohul*, (1872) 18 Suth W R 106 (107).

(2) *Thadi Ramamurthi* v. *Moola Kamiah*, (1914) 24 Ind Cas 667 (667): 16 Mad L Tim 123: 1914 Mad W N 738; *B Krishna* v. *Lakshmana*, (1882) 4 Mad 302 (307); *Fagirchand* v. *Sant Lal*, 1926 All 157 (158): 89 Ind Cas 291: 23 All L J 877: 6 L R A (Civ) 611: 48 All 4.

O.21, R.54, Notes 4—7.

4. Attachment when complete.—An attachment under this rule is not complete unless *first,* the *order* of attachment has been issued and secondly in execution of that order, the other formalities prescribed by the Code have been done.[1] *See* for a full discussion, Note 3 to S. 64, *ante.*

5. Proof of service of prohibitory order.—The mere writing of an order is not enough. It must be served on the judgment-debtor and he must have an opportunity of knowing that he is prohibited.[1] There is a presumption that official acts are regularly performed. Where it was found that the prohibitory order was duly served on the judgment-debtors, but that portion of the record which would show that the service was effected in the prescribed manner had been destroyed, it was held that the execution sale was not vitiated on that account.[2]

6. Proclamation of order of attachment.—A mere prohibitory order will not constitute a sufficient attachment so as to operate as a valid prohibition against any alienation by the judgment-debtor unless the proclamation described in the second part of the rule is carried out.[1] The publication of the proclamation as required by the rule, constitutes sufficient notice to the judgment-debtor.[2]

The proclamation is merely a *ministerial act,* and the delay on the part of the officer in effecting it, as for instance, where an attachment which was ordered before judgment, is not completed till after judgment, does not vitiate the proceedings.[3] As to the effect of the omission to publish the sale proclamation, *see* Notes to R. 90, *infra.*

7. Beat of drum.—A proclamation of attachment should be proclaimed by beat of drum at some place on, or adjacent to the property attached. The omission to have the drum beaten as required by the rule is a material irregularity which will vitiate the execution sale.[1]

Beni Pershad v. *Parbati,* (1892) 20 Cal 895 (899); *Muthuswami* v. *Chunammal,* (1914) 24 Ind Cas 320 (320): 26 Mad L Jour 517 [Attachment before judgment followed by decree has the same effect]; *Ramanayya* v. *Rangappayya,* (1894) 17 Mad 144 (145) [Attachment before judgment—Defendant dying before decree—Held survivorship not affected]. But see *Subrao* v. *Mahadeo,* (1913) 21 Ind Cas 330 (332): 15 Bom L R 848: 38 Bom 105 [Attachment before judgment without an order for sale is not sufficient to operate as a bar to survivorship].

Note 4.

(1) *Kicrnander* v. *Benimadhab Khettri,* 1931 Cal 763 (766): 58 Cal 598: 134 Ind Cas 561; *Kanai Lal* v. *Ahed Bux,* (1917) 39 Ind Cas 562 (563) Cal; *Indra Chandra Babu* v. *The Agra and Masterman's Bank,* (1868) 1 Beng L R S N 20; *G Venkatappayya* v. *Venkatachalapati Rao,* 1927 Mad 450 (452): 99 Ind Cas 989; *Ganesh Pershad* v. *P Brij Behari,* (1905) 1 Cal L Jour 565 (570): 10 Cal W N 79.

Note 5.

(1) *Yuna Ramanayakuda* v. *Boya Pedda Basappa* (1919) 50 Ind Cas 261 (262): 36 Mad L Jour 284: 42 Mad 565: 26 Mad L Tim 45; *Bhoobun Mohun Mundul* v. *Nobin Chunder,* (1873) 10 Beng L R App 12: 18 Suth W R 282 [Service by affixture held not sufficient under S 239 of Act VIII of 1859]; *Emperor* v. *Ganeshi Lal,* (1905) 27 All 258 (259): 1 Cr L Jour 896: 24 All W N 229: 1 All L J 595 [Warrant of attachment should show the amount for which property is attached].

(2) *Mahomed Abdul Gafoor Khan* v. *Akram Hasan,* 1924 All 747 (748): 83 Ind Cas 878: 22 All L J 703, 5 L R All (Civ) 525: 46 All 741.

Note 6.

(1) *Mula Ram* v. *Jivanda Ram,* 1923 Lah 423 (424): 4 Lah 211: 5 Lah L Jour 200: 72 Ind Cas 452; *Saroop Singh* v. *Nar Singh,* 1929 All 846 (847); *Bharat Chandra Pal* v. *Gouranga Chandra Pal,* 1927 Cal 885 (886): 104 Ind Cas 340; *Hira Lal* v. *Jagatpati Sahai,* 1928 Pat 600 (602): 8 Pat 1: 9 Pat L Tim 523: 111 Ind Cas 797; *Hla Ban* v. *A V P L Ramanathan Chettiar,* 1925 Rang 89 (91): 3 Bur L Jour 287: 85 Ind Cas 308 [Warrant of attachment not legal evidence against person disputing it].

(2) *Sher Khan* v. *Misri Lal,* 1926 Oudh 45 (46): 89 Ind Cas 107.

(3) *Rudravaram Venkatasubbiah* v. *Rudavaram Venkata Seshayya,* (1918) 48 Ind Cas 232 (235): 42 Mad 1: 24 Mad L Tim 346: 1918 Mad W N 606: 35 Mad L Jour 387: 8 Mad L W 369.

Note 7.

(1) *Trimbak Ravji* v. *Nana,* (1886) 10 Bom 504 (505). See also *Sukhraj Kuar* v. *Harnam Singh,* 1932 Oudh 76 (76): 136 Ind Cas 335: 8 Oudh W N 1353 [Drum not beaten owing to resistance—Order proclaimed in a loud voice—Held there was sufficient compliance].

O.21, R.54, Notes 8—11.

8. **Affixing copy on conspicuous part of the property.**—A copy of the proclamation order must be affixed on a conspicuous part of the property.[1] Where *prima facie* this is not done, it is a material irregularity which will afford a ground for setting aside the execution sale.[2]

9. **Affixing copy in Court-house.**—A copy of the proclamation of sale must, under R. 67, *infra*, read with this rule, be affixed on a conspicuous part of the Court-house and, under R. 68, the sale must take place only after the expiration of at least 30 days from the day on which it was so affixed.[1]

An omission to affix a copy of the attachment order in a conspicuous part of the Court-house is also a material irregularity within the meaning of R. 90.[2]

10. **Affixing copy in Collector's office.**—Where the property attached is land paying revenue to Government, the rule requires, in addition, that the order of attachment should be affixed in the Collector's office.[1] Rent payable in the case of enfranchised *shrotriem* villages in the Presidency of Madras is "Revenue" within the meaning of this rule and the procedure prescribed should be followed in attaching such properties.[2] Where a house stands on a site which is assessed to revenue, the property is still land paying revenue to Government and omission to affix a copy of the order in the Collector's office constitutes a material irregularity under R. 90, *infra*.[3]

11. **Effect of attachment and re-attachment.**—An attachment under this rule does not constitute dispossession of the party in actual possession.[1] Nor does it confer any interest or title in the property in favour of the attaching party.[2] As noticed in Note 5 to S. 64, *ante*, the effect of attachment is to restrain alienation by the judgment-debtor and any rights acquired by reason of a private transfer subsequent to the attachment are void against all claims enforceable under the attachment.[3]

Note 8.

(1) *Kali Tara* v. *Ram Coomar*, (1881) 7 Cal 466 (469): 9 Cal L R 114; *Gobind Chunder* v. *Ram Komul*, (1876) 25 Suth W R 364 (365); *Maharaj Bahadur Singh* v. *Rai Bahadur P C Lal Chaudhury*, 1928 Pat 25 (27): 6 Pat 588: 105 Ind Cas 689: 9 Pat L Tim 387 [A separate proclamation of sale need not be served on every *mauza* comprising an estate or tenure].

(2) *Wish Nath* v. *Rambhat Ullah*, 1923 Lah 671 (671): 77 Ind Cas 879; *Ishra Singh* v. *Jhandha*, (1897) Pun Re No 5; *Chowdri Hiat* v. *Jai Kishen*, (1878) Pun Re No 32; *Chatturpatt Singh* v. *Surendra Nath Singh*, (1918) 44 Ind Cas 412 (413): 1918 Pat H C C 33.

Note 9.

(1) *Lakshminarayan* v. *Purnabai*, (1918) 48 Ind Cas 611 (612) Nag.

(2) *Attar Singh* v. *Ghulam Mahomed*, (1921) 60 Ind Cas 527 (528) Lah. See also *Nur Ahmed* v. *Altaf Ali*, (1880) 2 All 58 (60). See however, *Sunder Singh* v. *Jiwan Ram*, 1898 Pun Re No 83.

Note 10.

(1) *Nagar Mull* v. *Benares Bank, Ltd*, 1931 Pat 58 (59): 9 Pat 860: 129 Ind Cas 142: 12 Pat L Tim 398.

(2) *Pamidimarri Gnamma* v. *Ketireddi Krishna Reddi*, 1924 Mad 217 (219, 223): 46 Mad 736: 1923 Mad W N 463: 75 Ind Cas 369: 45 Mad L Jour 263; *Bandy Ali* v. *Madhub Chunder*, (1882) 8 Cal 932 (932).

(3) *Nawab Ahmed Yarkhan* v. *S K Bose*, 1925 Lah 583 (584): 88 Ind Cas 321: 7 Lah L Jour 501: 26 Pun L R 726.

Note 11.

(1) *Narayana Rao Damodar* v. *Balkrishna Mahadev*, (1878-80) 4 Bom 529 (535); *Lyon Lord & Co* v. *Virbhandas*, 1926 Sind 199 (200): 19 Sind L R 35; *Renganatha Ayyar* v. *Srinivasa Ayyangar* 1926 Mad 42 (43): 49 Mad L Jour 656: 22 Mad L W 274: 90 Ind Cas 1037 [Adverse possession not put an end to by attachment]; *Karuppan Chetty* v. *Kandasami*, (1907) 30 Mad 207 (209): 17 Mad L Jour 84 [Attaching creditor cannot maintain an action for wrongful removal of attached property].

(2) *Narayan Kondaji Temkar* v. *Govind Krishna Abhyankar*, 1929 Bom 200 (201): 31 Bom L R 345: 116 Ind Cas 271; *Bishambhar Nath* v. *Girdhari Lal*, (1920) 55 Ind Cas 481 (484): 23 Oudh Cas 18: 7 Oudh L J 1: 2 U P L R (Oudh) 46. *See also* Note 5 to S 64.

(3) *See* Notes 5 and 10 to S 64 and also the following cases.—*Manohar Das* v. *Ram Autar Pande*,

A re-attachment of property *ex majori cautela* after decree does not imply an abandonment of the attachment obtained before decree.[4] *See also* Note 7 to S. 64. **O.21, R.54, Notes 11—12.**

12. Absence of attachment and irregular and invalid attachment.— Attachment is a step taken only in order to keep the property of the judgment-debtor intact and to enable the decree-holder to bring it to sale. Where, therefore, a sale takes place without the property sold having been attached, it is not a nullity and will not be set aside unless substantial loss or injury is proved to have resulted therefrom.[1] The absence of attachment is only an *irregularity* which does not affect the jurisdiction of the Court to sell.[2] Similarly any defect or error in the *mode* of attachment is only an irregularity which does not render the sale *ipso facto* void.[3] *See* Notes to R. 90, *infra*.

But as between the decree-holder and the auction-purchaser on the one hand, and an alienee from the judgment-debtor on the other, different equities come into operation.[4] As pointed out in Note 4, *ante*, a *regularly perfected attachment* is a condition precedent to a restraint on alienation after attachment so as to attract the provisions of S. 64.[5] A private alienation of property after an order of attachment which has not been carried into effect is valid unless proof is given that all the requirements of the rule have been complied with.[6]

(1903) 25 All 431 (434): 1903 All W N 92 [Property not belonging to judgment-debtor attached. Rightful owner not prevented from alienating]; *Babu Lal* v. *Narain Das*, (1889) 9 All W N 132 (133); *Gosta Behari* v. *Sankar Nath*, (1916) 36 Ind Cas 510 (512): 26 Cal L Jour 127; *Anund Lol Dass* v. *Jullodhur Shaw*, (1873) 10 Beng L R 134: 14 Moor Ind App 543: 17 Suth W R 313: 2 Suth 559 P C; *Lahori Mal* v. *Ganga Ram*, (1908) Pun Re No 81: 148 Pun W R 1908; *Bura Mal* v. *Ghulam Nabi*, (1893) Pun Re No 139; *Ananthalwar* v. *Narayana Prasad*, 1927 Mad 190 (191): 24 Mad L W 836: 99 Ind Cas 656.

(4) *Kosri Suraparaju* v. *Mandapaka Narasimham*, (1915) 26 Ind Cas 81 (82): 1 Mad L W 932; *Syud Nadir* v. *Pearoo Thovildarinee*, (1875) 14 Beng L R 425 Note: 19 Suth W R 255; *Ram Khelawan Singh* v. *Sunder Raut*, (1916) 34 Ind Cas 34 (36) Pat. But see *Goonjessur* v. *Inchmee*, (1873) 20 Suth W R 418 (418).

Note 12.

(1) *Sivakolundu* v. *Ganapathi Ayyar* (1917) 37 Ind Cas 964 (965): 1917 Mad W N 89; *Noordin Kutti* v. *Kunhi Bava*, (1912) 16 Ind Cas 438 (438): 1912 Mad W N 879: 12 Mad L Tim 300; *Achamma* v. *Basuppa*, (1898) 8 Mad L Jour 1 (3); *Tarak Nath* v. *Shyama Charan*, (1916) 36 Ind Cas 292 (295) Cal; *Hari Charan* v. *Chandra Kumar*, (1907) 34 Cal 787 (802): 11 Cal W N 745; *Patit Sahu* v. *Hari Mahanti*, (1900) 27 Cal 789 (792): 5 Cal W N 126; *Kishory* v. *Mahomed*, (1891) 18 Cal 188 (192). But see *Ramchand* v. *Pitam Mal*, (1888) 10 All 506 (511): 1888 All W N 195.

(2) *Sheo Dhyan* v. *Bholanath*, (1899) 21 All 311 (314): 1899 All W N 84; *Muhammad Abdulla* v. *Jamiat Rai*, 1930 Lah 685 (687): 121 Ind Cas 369.

(3) *Madho Lal* v. *Jawahir Singh*, (1910) 6 Ind Cas 713 (714): 40 Pun Re 1910: 211 Pun L R 1910: 63 Pun W R 1910; *Rai Balkishen* v. *Rai Sitaram*, (1885) 7 All 731 (733): 1885 All W N 210 [Order not affixed in Collector's office]; *Sheo Charan Lal* v. *Sheo Sewak Singh*, (1896) 18 All 469 (471): 1896 All W N 154 [Attachment under wrong provision of law]; *Mahpal Bahadur* v. *Ram Bahadur Singh*, (1919) 52 Ind Cas 167 (167): 1 U P L R (B R) 7 [Case of revenue sale]; *Basanta Kumari Dasi* v. *Tulsi Charan*, 1930 Cal 353 (355): 34 Cal W N 139: 127 Ind Cas 54; *Nana Kumar* v. *Golam Chunder*, (1891) 18 Cal 422 (426); *Peari Lal* v. *Chandi Charan* (1907) 5 Cal L Jour 80 (83): 11 Cal W N 163; *Kooranee Bibee* v. *Bhubhan Mohinee*, (1907) 6 Suth W R Mis 53 (53); *Yakin-ud-din Khan* v. *Hazari Gir*, 1929 Lah 441 (442): 11 Lah L Jour 55: 117 Ind Cas 231; *Arunachalam* v. *Kudandusami*, (1895) 5 Mad L Jour 70 (73, 74) [Delay in affixing sale proclamation]; *Malidi Doraya* v. *Satti Veerayya*, (1918) 44 Ind Cas 4 (5): 35 Mad L Jour 312: 1918 Mad W N 143; *Kamala Nayak* v. *Ranga Rau*, (1862-63) 1 Mad H C R 24 (26); *Jodhan* v. *Kapilnath*, 1923 Nag 78 (79): 69 Ind Cas 563; *Adil Khan* v. *Md Sadik Ali Khan*, (1910) 5 Ind Cas 798 (799): 13 Oudh Cas 43. But see *Lala Seva Ram* v. *Kanti Ram*, (1890) Pun Re No 76; *Hargu Lal* v. *Mahomed Raza*, (1891) 13 All 119 (124): 1891 All W N 16.

(4) *Bhagwan Das* v. *Ahmad Jan*, (1916) 36 Ind Cas 732 (737): 3 Oudh L J 422.

(5) *Ganga Din* v. *Khushali*, (1885) 7 All 702 (708, 710): 1885 All W N 179; *Gumani* v. *Hardwar*, (1881) 3 All 698 (701): 1881 All W N 59.

(6) *Lalji* v. *Ganga Prasad*, (1915) 26 Ind Cas 204 (206): 1 Oudh L J 549; *Simrick Lal Bhakat* v. *Radharaman Kalidaha* (1916) 32 Ind Cas 276 (278) Cal; *Rameshwar* v. *Ramtanu*, (1870) 1 Beng L R (A C) 24: 12 Suth W R 491; *Indro Chunder* v. *Hamilton Grant Dunlop*, (1868) 10 Suth W R 264 (266): 1 Beng L R S N 20 (a); *Satya Charan Mukerji* v. *Madhub Chunder Kurmokar*, (1905) 9 Cal W N 693 (694) [Order not affixed in Court house—Transfer held valid]; *Nur Ahmad* v. *Altaf Ali*, (1878-80) 2 All 58 (60) [Copy not affixed in conspicuous part of the property]; *Sahoo Chund* v. *Geetum Singh*, (1867) 2 Agra 206.

O.21, R.54, Note 12. An attachment which is *prima facie invalid as*, for instance, where the decree is set aside on appeal at the time of attachment, cannot confer any jurisdiction on the Court to sell, and the sale, if held in pursuance of such attachment is *void*.[7]

O.21, R.55. **Removal of attachment after satisfaction of decree.**

R. **55.** [S. 275.] *Where*—

(*a*) the amount decreed with costs and all charges and expenses resulting from the attachment of any property *are* paid into Court, or

(*b*) satisfaction of the decree is otherwise made through the Court *or certified to the Court*, or

(*c*) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

[1877—S. 275; 1859—S. 245. *See* R. 57 below and O. 38, R. 9.]

Local Amendments.

ALLAHABAD.

Substitute the following for Rule 55:—

55. (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under S. 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

(2) Where—

(*a*) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-S. (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(*b*) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-S. (1)], is otherwise made through the Court or certified to the Court, or

(*c*) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-S. (1)] is set aside or reversed, the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

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(7) *Chettiattil Muhamed* v. *Kunhi Karu*, (1906)29 Mad 175 (176).

OUDH.

O.21, R.55, Notes 1—2.

Substituted by Oudh Chief Court:—

(1) Where an application has been made to the Court under S. 73, sub-S. (1), for rateable distribution of assets in respect of the property of a judgment-debtor by a person other than the holder of the decree for the execution of which the original order of attachment was passed, notice shall be sent to the sale officer executing the decree.

(2) Where—

(*a*) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-Rule (1),] with costs . . . . and all charges and expenses resulting from the attachment of any property are paid into Court; or

(*b*) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-Rule (1),] is otherwise made through the Court or certified to the Court, or

(*c*) the decree [including any decree, passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-Rule (1),] is set aside, or reversed, the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3 "Attachment shall be deemed to be withdrawn."
4 Revival of attachment.

Part satisfaction—Inapplicability of the rule. See Note 2, Pt. (1).
Whether money paid under this rule is available for rateable distribution. See Notes 3 and 4 to S. 73.

1. Legislative changes.—

1. The words "or certified to the Court" are new.
2. The words "the attachment shall be deemed to be withdrawn, etc.", have been substituted for the words "an *order* shall be issued . . . . for the withdrawal of attachment".

2. Scope of the rule.—On any of the three things mentioned in Cls. (*a*), (*b*) and (*c*) happening, the attachment is automatically deemed to be withdrawn. No express *order* is now necessary, as it was, under the old Code.[1]

The rule applies only where the decree is fully and entirely satisfied.[1-a] An attachment cannot be partially raised by consent of parties without an express order of the Court.[2]

Order 21, Rule 55—Note 2.

(1) In re, *Arakkal Ahmad Ali Rajah*, (1909) 4 Ind Cas 97 (97): 6 Mad L Tim 376.

(1-a) *Khub Chand* v. *Niadar Mal*, (1912) 15 Ind Cas 677 (678): 10 All L J 165.

(2) *Subbayya* v. *Kandi Subba Reddi*, 1927 Mad 648 (649): 38 Mad L Tim 310: 101 Ind Cas 591.

O.21, R.55, Notes 2—4.

The words "amount decreed" mean, in the case of an instalment decree, the instalment which has become due and in respect of which the attachment has been made.[3]

A mere tender of money before the Judge is not sufficient to entitle the judgment-debtor to have the sale of properties stayed; the law contemplates that payment should be made in accordance with the rules and forms of the Court.[4]

It is the duty of the judgment-debtor to apprise the Court of the fact of satisfaction of the decree; otherwise, if the Court executes the decree in ignorance of the satisfaction thereof, the sale will not be held to be invalid on that ground alone.[5]

This rule applies to proceedings in respect of immoveables under the Chota Nagpur Tenancy Act, *see* S. 210 (3) (*b*). [Bengal Act, VI of 1908, as amended by Bihar and Orissa Act, VI of 1920, S. 50 (1).]

3. "**Attachment shall be deemed to be withdrawn**".—As has been seen already, an attachment will automatically cease on a payment made under Cl. (*a*). Where, therefore, by reason of such payment an attachment ceases, another decree-holder who has applied for execution against the same judgment-debtor, but who has not attached the properties, cannot have the property sold under the attachment that has ceased.[1]

Even under the old Code it was held that, on payment of the decree-amount into Court, the attachment became inoperative even though it was not formally withdrawn,[2] and that a private alienation after the attaching creditor had been satisfied would prevail against subsequent attachments.[3]

As to whether money paid under this rule is liable to rateable distribution, *see* Note 4 to S. 73, *ante*.

4. **Revival of attachment.**—The rule provides that the attachment shall be deemed to be withdrawn when the decree is set aside or reversed. But, if on second appeal, the reversal of the first appellate Court is, in turn, reversed and the original decree restored, the attachment will be revived and a sale can be ordered on the strength thereof.[1] *See also* Note 9 to S. 64.

O.21, R.56.

Order for payment of **coin or currency notes to party entitled** *under decree.*

R. **56**. [S. 277.] *Where* the property attached is *current* coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof

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(3) *Bhola Sunar* v. *Madho Prasadsao*, 1928 Nag 65 (66): 105 Ind Cas 799.

(4) *Huronanth Roy* v. *Indoobooshun Deb Roy*, 2 Hay 302.

(5) *Maung Po Thet* v. *P R V Anamalay Chetty*, (1911) 9 Ind Cas 472 (474): 4 Bur L Tim 28.

Note 3.

(1) *Sorabji* v. *Kala*, (1911) 12 Ind Cas 911 (912): 36 Bom 156: 13 Bom L R 1193.

(2) *Vibudhapriya* v. *Yusuf Sahib*, (1905) 28 Mad 380 (385): 15 Mad L Jour 202.

(3) *Lahori Mal* v. *Ganga Ram*, 1908 Pun Re No 81: 148 Pun W R 1908; *Sorabji* v. *Govinda*, (1892) 16 Bom 91 (106); *Umesh Chunder* v. *Raj Ballubh*, (1882) 8 Cal 279 (281): 10 Cal L Rep 204.

Note 4.

(1) *Parameshwar Din* v. *Debi Prasad*, (1918) 48 Ind Cas 886 (889): 5 Oudh L J 647.

sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same. O.21, R.56.

[1877—S. 277, 1859—S. 242. *See* Rr. 64, 79 and 81 below. *Cf.* O. 39, R. 10 also.]

Synopsis.

1. "Current coin."

1. "**Current coin.**"—The word "current" has been newly added before the word "*coin*". If the coin is not current, it has to be dealt with as any other moveable property.

R. **57**. [New.] *Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.* O.21, R.57.

Determination of attachment.

[*See* R. 55 above Rr. 60, and 63 below. *Cf.* O. 38, Rr. 8, 9 and 11.]

Local Amendments.

NAGPUR.

For Rule 57, *substitute* the following rule:—

"57 Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to have ceased to exist."

N.-W. F. P.

Cancel the concluding sentence of Rule 57, "upon the dismissal. . . . . shall cease", and *substitute* the following:—

"In dismissing such application the Court shall direct whether the attachment shall continue or cease. In the absence of any such directions the attachment shall be deemed to cease."

OUDH.

For Rule 57, *substitute* the following:—

"57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to subsist."

RANGOON.

The following shall be inserted as Rule 57-A:—

"57-A. A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court."

O.21, R.57. Note 1.

Synopsis.

1. Scope and object of the rule.
2. "By reason of the decree-holder's default."
3. Effect of dismissal of application.
4. Dismissal of application by Collector.
5. Execution removed from file for statistical purposes.
6. Responsibility of Sapurdar of attached property after dismissal for default.
7. Revival of attachment when possible.
8. Attachment before judgment.
9. Default in executing attached decree. See Note 11 to Rule 53.

Limitation inapplicable to execution petition subsequent to "striking off" order. See Note 5, F.-N. (3).
Not Retrospective. See Note 1, Pt. (9).
Proper course on default. See Note 5, Pts. (1) and (2).
"Striking off"—Effect. See Note 5, Pts. (2) and (3).

1. Scope and object of the rule.—This rule is new. There was no corresponding provision in the Code of 1882, enabling the executing Court to *dismiss* an execution application when the decree-holder was not diligent in prosecuting the same. The Court could not act under Chapter VII (now O. 9) or under S. 157 (now O. 17, R. 2) as those provisions applied only to *suits*. Nor could the Court apply those provisions by virtue of S. 647 (now S. 141), inasmuch as the judicial committee held in *Thakur Prasad* v. *Fakirulla*, [I.L.R. 17 All. 106 (P.C.)], that that section did not apply to execution proceedings. Hence, with a view to prevent the accumulation of execution applications from encumbering the files of the Courts and in order to show a better statistical return, the Subordinate Courts resorted to the practice of disposing them off by passing such orders as "Recorded" or "struck off" on such applications. Such a practice was not authorised by the provisions of the Code and, in spite of the fact that the High Courts condemned the same,[1] and although a Full Bench of the High Court of Allahabad[2] pointed out that the Court could, under its *inherent* power, *dismiss* an application for the laches of the decree-holder, this unauthorised practice nevertheless persisted. Such disposals also led to further doubts and complications as to whether an attachment previously effected did or did not subsist after the passing of the order. It was held in several cases that the attachment was not necessarily put an end to by reason of the order "striking off" the application and that it was a question of *intention* depending on the circumstances of each case as to whether or not it subsisted.[3]

The present rule prescribes the procedure to be followed, where after attachment in execution, the application for execution cannot further be pro-

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Order 21, Rule 57—Note 1.

(1) *Biswa Sonan* v. *Binada Chunder*, (1884) 10 Cal 416 (422); *Ram Newaz* v. *Ram Charan*, (1895) 18 All 49 (51): 1895 All W N 155; *Dhonkal Singh* v. *Phakkar Singh*, (1893) 15 All 84 (90, 95): 1893 All W N 36.

(2) *Dhonkal Singh* v. *Pakkar Singh*, (1893) 15 All 84 (95): 1893 All W N 36.

(3) *Subba Chariar* v. *Muthuveeram Pillai*, (1912) 14 Ind Cas 264 (265): 36 Mad 553: 24 Mad L Jour 545; *Raghavachariar* v. *Anantha Reddi*, (1915) 31 Ind Cas 911 (911) (Mad); *Nandur Subbiah* v. *Raja Venkatramayya Apparao*, (1918) 43 Ind Cas 155 (157): 7 Mad L W 16: 1918 Mad W N 214; *Daud Ali* v. *Ram Prasad*, (1915) 30 Ind Cas 787 (787): 37 All 542: 13 All L J 750; *Imtiaz Ali* v. *Bishambhar Das*, (1911) 10 Ind Cas 245 (246): 8 All L J 619; *Bank of Upper India* v. *Sheo Prasad*, (1897) 19 All 482 (488): 1897 All W N 124; *Zahuram* v. *Taylor*, (1868) 2 Beng L R (A C) 86 (92): 10 Suth W R 380; *Puddomonee Dossee* v. *Roy Mothooranath*, (1873) 12 Beng L R 411: 20 Suth W R 133 P C; *Mohunt Bhagwan Das* v. *Khetter Moni Dassi*, (1896) 1 Cal W N 617 (621): *Gungagotti Pal* v. *Ram Sunder Dutt*, (1881) 8 Cal L Rep 157 (160); *Baroda Sundari* v. *Fergusson*, (1882) 11 Cal L Rep 17 (21). But see *Mt Binda Bibee* v. *Lalla Gopeenath*, (1874) 21 Suth W R 66 (68): 14 Beng L R 323.

ceeded with, *by reason of the decree-holder's default.*[4] The object of the rule is— O.21, R.57, Notes 1—2.

(1) to put an end to the practice of disposing off execution applications by such orders as "application struck off" or "lodged";[5] and

(2) to remove the doubt that existed under the old Code as to the effect of an order of dismissal upon attachment, by providing in explicit terms that the attachment should cease upon the dismissal, *irrespective of any question of intention.*[6]

Under the present rule, the Court should not "strike off" execution applications for default of the decree-holder.[7] If it does pass such an order it will be deemed to be one of dismissal.[8]

The provisions of this rule have been held to have no retrospective effect and do not apply to orders passed before the coming into force of the present Code.[9]

2. "By reason of the decree-holder's default."—The default referred to by the rule is not confined merely to a default in appearance or in the payment of process fees, or in production of documents. It means failure to do what one is legally bound to do that is, to go on with the application and have the property sold.[1] Thus an omission to serve notice on the judgment-debtor as required by R. 66 of this order[2] or failure to furnish any information called for by the Court[3] amounts to a default within the meaning of this rule. Similarly if the decree-holder withdraws his application,[4] or requests the Court to strike it off,[5] or consents to an application for adjournment of the sale made by the judgment-debtor,[6] he thereby

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(4) *Shib Nath Singh Ray* v. *Sheikh Saberuddin Ahmed*, 1929 Cal 465 (466): 56 Cal 416: 119 Ind Cas 113.

(5) *Diwan Chand* v. *The Firm of Bedha Ram Devi Dial*, (1919) 52 Ind Cas 294 (296): 154 Pun Re 1919: 63 Pun W R 1919; *Kamisetti* v. *Tangatoor*, (1915) 28 Ind Cas 62 (63): 1915 Mad W N 159. See also *Valiakath Puthiah* v. *Manakkal Parameswaran*, (1916) 35 Ind Cas 240 (241): 3 Mad L W 601.

(6) *Nomuna Bibi* v. *Roshun Meah*, (1911) 9 Ind Cas 558 (560): 38 Cal 482: 13 Cal L Jour 621: 15 Cal W N 428; *Fateh Din* v. *Qutab Din*, 1922 Lah 108 (109): 3 Lah 7: 67 Ind Cas 543.

(7) *Goverdhan Das* v. *Official Liquidator*, 1930 Bom 16 (20): 31 Bom L R 1209: 122 Ind Cas 836.

(8) *Dildar Hosain* v. *Sheo Narain*, (1919) 49 Ind Cas 113 (114): 41 All 157: 17 All L J 52; *Mandhyan Sheikiya* v. *Badram Dalni*, (1913) 18 Ind Cas 441 (442): 17 Cal W N 204; *Lakpat Rai* v. *Mayya Mal*, 1924 Lah 645 (645): 75 Ind Cas 824; *Kundanmal Hansraj* v. *Mt Aziz Begam*, 1929 Nag 82 (82); *Ko Kyin Sein* v. *Abas Khan*, 1930 Rang 325 (326): 128 Ind Cas 591 [Petition 'closed' owing to decree-holder's default order to be treated as one of dismissal].

(9) *Khande Subbaya* v. *Nara Subba Reddy*, (1915) 27 Ind Cas 792 (794): 2 Mad L W 4; *Vardi Parthi Ramayya* v. *Korukonda Jagannadham*, (1915) 27 Ind Cas 568 (569) (Mad); *Raghavachariar* v. *Anantha Reddi*, (1915) 31 Ind Cas 911 (911) (Mad).

Note 2.

(1) *Dildar-Ussain* v. *Sheo Narain*, (1919) 49 Ind Cas 113 (114): 41 All 157: 17 All L J 52; *Nomuna Bibi* v. *Roshan Meah*, (1911) 9 Ind Cas 558 (560): 38 Cal 482: 15 Cal W N 428: 13 Cal L Jour 621; *Lakpat Rai* v. *Mayya Mal*, 1924 Lah 645 (645): 75 Ind Cas 824; *Fateh Din* v. *Qutab Din*, 1922 Lah 108 (109): 3 Lah 7: 67 Ind Cas 543; *Narindra Bahadur* v. *Ganga Sagar*, (1920) 57 Ind Cas 509 (510): 23 Oudh Cas 166: 7 Oudh L J 837.

(2) *Nomuna Bibi* v. *Roshan Meah*, (1911) 9 Ind Cas 558 (560): 15 Cal W N 428: 38 Cal 482: 13 Cal L Jour 621; *Mandhiman Sheikiya* v. *Badram Dalni*, (1913) 18 Ind Cas 441 (442): 17 Cal W N 204.

(3) *Narayana Chetty* v. *Muthu Chetty*, 1926 Mad 980 (983): 51 Mad L Jour 219: 1926 Mad W N 890: 97 Ind Cas 1008: 50 Mad 67.

(4) *Kumara Goundan* v. *Thevaraya Reddi*, 1925 Mad 1113 (1114): 1925 Mad W N 406: 87 Ind Cas 635: 48 Mad L Jour 616.

(5) *Lakhpat Rai* v. *Mayya Mal*, 1924 Lah 645 (646): 75 Ind Cas 824; *Kundan Mal* v. *Mt Aziz Begam*, 1929 Nag 82 (82).

(6) *Jai Krishna* v. *Mt Soghra*, 1923 Pat 446 (447): 4 Pat L Tim 418: 71 Ind Cas 881.

O.21, R.57, Notes 2—3.

precludes himself from proceeding with the execution application and the Court can dismiss the same for default under this rule. But an omission to do anything which he is not under an obligation to do, such as not being present at the time of the sale or his failure to bid, at such sale, do not constitute a default and, therefore, a dismissal of the application for want of bidders at the sale will not have the effect of putting an end to the attachment under this rule.[7]

The default contemplated by this rule refers to a stage *after the attachment* and not before attachment. Applying this principle, the High Court of Madras has held in a case where, though there was an attachment, the parties as well as the Court were proceeding in ignorance of the attachment, as though there was none, the dismissal of the application at a stage when the Court thought that the attachment was yet to be effected, does not come within the scope of this rule.[8]

As to the effect of dismissal on a ground other than the default of the decree-holder, *see* Note 3.

3. **Effect of dismissal of application.**—Where an execution application is dismissed for default of the decree-holder under this rule, the attachment previously effected ceases forthwith.[1] No question of any intention arises, under the present code; a mistaken impression on the part of the decree-holder that the attachment continued notwithstanding the dismissal of the application or the fact that he prays for sale only of the attached property in a subsequent petition, will not have the effect of nullifying the imperative provisions of this rule.[2] The decree-holder can only apply for a *fresh attachment* and then to bring the property to sale, if he wants to proceed against that property.[3]

Where the Court passes an order "petition dismissed, attachment to continue" what is the legal effect of the direction regarding the continuance of the attachment? On the one hand, the High Courts of Calcutta[4] Madras[5] and the Judicial Commissioner of Nagpur[6] have held that the direction is of no legal effect or consequence and that attachment ceases forthwith. The High Court of Allahabad[7] has, on the other hand, held that the order though not a proper one, cannot be treated as a nullity, having no effect upon the parties, but that it should be treated as an order adjourning the case *sini die.*

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(7) *Venkiteswarayyan* v. *Aswatha Narayan*, 1923 Mad 703 (703): 1923 Mad W N 529: 45 Mad L Jour 315: 75 Ind Cas 491.

(8) *Venkiteswarayyan* v. *Aswatha Narayan*, 1923 Mad 703 (705): 1923 Mad W N 529: 45 Mad L Jour 315: 75 Ind Cas 491.

Note 3.

(1) *Umamaheswar Bhatta* v. *Shankaranarayan Havik*, 1923 Bom 30 (31): 46 Bom 942: 24 Bom L R 442: 76 Ind Cas 895; *Krishna Subhudhi* v. *Jankiram*, (1913) 20 Ind Cas 149 (150): 19 Cal L Jour 248; *Fateh Din* v. *Qutab Din*, 1922 Lah 108 (109): 3 Lah 7: 67 Ind Cas 543; *Jaikrishna* v. *Bibi Soghra*, 1923 Pat 446 (447): 4 Pat L Tim 418: 71 Ind Cas 881.

(2) *Veeraraghava Charyulu* v. *Mallikarjuna Prasada*, (1914) 25 Ind Cas 883 (884): 1 Mad L W 665.

(3) *Krishna Subudhi* v. *Janakiram*, (1913) 20 Ind Cas 149 (150): 19 Cal L Jour 248. See *Bavuddin Sahib* v. *Arunachala Mudali*, (1913) 22 Ind Cas 351 (351): 28 Mad L Jour 215 [Application for arrest dismissed—Attachment not put an end to].

(4) *Nomuna Bibi* v. *Roshan Meah*, (1911) 9 Ind Cas 558 (560): 38 Cal 462: 15 Cal W N 428: 13 Cal L Jour 621.

(5) *Seshayya* v. *Sathiraju*, 1930 Mad 414 (415): 120 Ind Cas 863.

(6) *Kundanmal* v. *Mt Aziz Begam*, 1929 Nag 82 (83).

(7) *Mubarak Hussain* v. *Bimal Prasad*, 1922 All 62 (63): 44 All 274: 20 All L J 113: 65 Ind Cas 91; *Mulay* v. *Balgovind*, 1925 All 456 (456): 6 L R A (Civ) 275: 87 Ind Cas 349. But see *Dildhar Hussain* v. *Sheo Narain*, (1919) 49 Ind Cas 113 (114): 41 All 157: 17 All L J 52.

O.21, R.57, Notes 3—5.

The rule applies, in terms, only to cases of dismissal by reason of the *decree holder's default*. Where the dismissal is not due to the default of the decree-holder, the question whether the attachment ceases by reason of the dismissal, depends upon the circumstances of each case.[8] It has thus been held that where the dismissal is due to a mistake of the Court[9] or in consequence of an order of stay[10] or of injunction[11] passed by a competent Court, the attachment is not put an end to by reason of the order of dismissal. But the Court has power to direct even in such cases by an *explicit order*, that the attachment should cease even though there is no default on the part of the decree-holder.[12]

4. Dismissal of application by Collector.—Where execution proceedings are transferred to the Collector he has power to dismiss the execution application for default under this rule and upon such a dismissal the attachment ceases.[1]

5. Execution removed from file for statistical purposes.—As seen in Note 1, the Court should, under this rule, either dismiss or adjourn the application and not simply "strike it off." Even in cases to which the rule does not apply there is no provision of law authorising the Court to lodge an application or record it or strike it off from the file for what is commonly called statistical purposes.[1] The proper course in such cases is to adjourn the application and not to strike it off its file. Where the Court does, however, pass such an order as "struck off" or "recorded" or "closed" or "consigned to the record room" it would only amount to an adjournment *sine die* and the application will be deemed nevertheless to be pending.[2] The removal for statistical purposes is not a judicial determination and no fresh application is necessary to continue the same.[3]

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(8) *Valiakath Puthiah* v. *Manakkal Parameswaran*, (1916) 33 Ind Cas 240 (241): 3 Mad L W 601; *Karaturi Satyanarayana* v. *Gopisetti Narayanaswami*, (1917) 38 Ind Cas 300 (301): 21 Mad L Tim 88: 5 Mad L W 204; *Mahabarat Dutta* v. *Surju Kanta*, (1918) 45 Ind Cas 589 (590, 592): 3 Pat L Jour 310: 1918 Pat H C C 343 [No default by decree-holder—Held attachment not put an end to]. See also *Mahadeo Prasad* v. *Hyder Mehdi*, (1910) 8 Ind Cas 727 (728) (Oudh).

(9) *Aziz Bakhsh* v. *Kaniz Fatima*, (1912) 15 Ind Cas 49 (50): 34 All 490: 10 All L J 48: *Kamisetti Pedda Venkatasubbiah* v. *Tangatoor Subbiah*, (1915) 28 Ind Cas 62 (63): 1915 Mad W N 159.

(10) *Diwan Dhanput Rai* v. *Alliance Bank of Simla, Ltd.*, 1930 Lah 647 (649): 31 Pun L R 321: 123 Ind Cas 113; *Valiakath Puthiah* v. *Parameswaran*, (1916) 35 Ind Cas 240 (241): 3 Mad L W 601; *Shah Mosihuddin* v. *Sheo Logan Sahu*, (1909) 2 Ind Cas 265 (266) (Cal); *Nilkantha* v. *Ghosta Behari* (1918) 44 Ind Cas 249 (249): 46 Cal 64: 27 Cal L Jour 145.

(11) *Pattamayya* v. *Pattayya*, 1926 Mad 453 (454): 50 Mad L Jour 215: 1926 Mad W N 262: 92 Ind Cas 782.

(12) *Sheikh Mahomed Muzafar Ali Khan* v. *Bhagwati Prasad Singh*, 1921 Oudh 176 (184): 8 Oudh L J 358: 66 Ind Cas 642.

Note 4.

(1) *Shanker Rao* v. *Manik Rao*, 1923 Nag 18 (19): 68 Ind Cas 643; *Harlal* v. *Narayan*, 1922 Nag 267 (270): 18 Nag L R 152: 4 Nag L J 118: 64 Ind Cas 420.

Note 5.

(1) *Pattamayya* v. *Pattayya*, 1926 Mad 453 (454): 50 Mad L Jour 215: 1926 Mad W N 262: 92 Ind Cas 782; *Ganapathi Mudali* v. *Meera Sahib*, 1930 Mad 303 (305): 121 Ind Cas 845.

(2) *Seetharama Chettiar* v. *Krishna Row*, (1912) 15 Ind Cas 406 (406): 1912 Mad W N 407 [Sale stayed by High Court—Petition struck off]; *Pattamayya* v. *Pattayya*, 1926 Mad 453 (455): 50 Mad L Jour 215: 1926 Mad W N 262: 92 Ind Cas 782 [Execution restrained by temporary injunction petition recorded]; *Ganapathi Mudali* v. *Meera Sahib*, 1930 Mad 303 (305): 121 Ind Cas 845 [Petition recorded because appeal pending. Attachment not put an end to]; *Veluswami Naicken* v. *Balasubramania Chettiar*, 1928 Mad 398 (399): 106 Ind Cas 138 [Petition closed—Must be deemed pending]; *Dhanpat Rai* v. *Alliance Bank of Simla, Ltd.*, 1930 Lah 647 (651): 123 Ind Cas 113: 31 Pun L R 321 [Sale stayed—Petition consigned to record room]. *Bijai Saran Sahi* v. *Deo Kishen Prasad Sahi*, 1926 All 734 (736): 24 All L J 901: 97 Ind Cas 102 [Petition recorded to reduce pending file]; *Khazan Singh* v. *Bikram Singh*, (1928) 107 Ind Cas 574: 1928 Notes 30 (*b*).

(3) *Subramania Pathar* v. *Appu Mudaliar* (1920) 55 Ind Cas 526 (526): 11 Mad L W 42 [Limitation inapplicable to E P after "struck off" order]; *Singaravelu Pillai* v. *Santhana Krishna Mudaliar*, (1915) 31 Ind Cas 9 (9): 1915 Mad W N 643 [Limitation inapplicable to E P after "struck off" order]; *Chamun Lall* v. *Doman Lall*, (1867) 9 Suth W R 205 (206).

O.21, R.57, Notes 6—9.

6. **Responsibility of *Sapurdar* of attached property after dismissal for default.**—A *Sapurdar* is responsible to the Court for the production of the property entrusted with him. He cannot escape liability by pleading that owing to the decree-holder's default the execution application was dismissed with the result that the attachment terminated under this rule and that therefore he handed over the property to the judgment-debtor.[1]

7. **Revival of attachment when possible.**—On the dismissal of an execution application for default, the attachment ceases. A revival of the execution proceedings, for instance, by an application for review does not operate to revive the attachment, so as to prejudice the rights of a third party in the property acquired in the meantime.[1] Thus if the judgment-debtor transfers the property after an order of dismissal under this rule, the transferee gets the property free from attachment.[2] But where there is no question of prejudice to third parties the attachment can also be revived.[3]

8. **Attachment before judgment.**—There is a conflict of judicial opinion as to the effect of an order of dismissal of an execution application under this rule upon attachment effected *before judgment*. The High Courts of Allahabad[1] and Calcutta[2] have held that the present rule applies only to cases where the property is "*attached in execution of a decree*" as the rule itself expressly states, and that consequently the dismissal of an execution application for default does not put an end to the attachment before judgment. A Full Bench of the High Court of Madras[3] and the Judicial Commissioner's Court of Nagpur[4] have, on the other hand taken a contrary view. According to them, the words "any property attached in execution of a decree" should be construed as meaning "where property has been in a state of attachment in execution" and the decree-holder by electing to take the benefit of O. 38, R. 11 of proceeding to execute the decree without a fresh attachment is, in effect, asking the Court to treat the attachment as one in execution; the attachment before judgment therefore ceases upon the dismissal of the application for the execution. The High Court of Bombay[5] has accepted the view of the Madras Full Bench but held that the dismissal of an execution application in relation to *Moveable* property has not the effect of putting an end to an attachment of *Immoveable* properties.

9. **Default in executing attached decree.**—*See* Note 11 to R. 53, *ante*.

Note 6.

(1) *Darbari Mal* v. *Kanshi*, (1919) 51 Ind Cas 653 (654): 60 P R 1919: 74 Pun L R 1919.

Note 7.

(1) *Patringa Koer* v. *Madhabanand Ram*, (1911) 12 Ind Cas 65 (67): 14 Cal L Jour 476: 16 Cal W N 332; *Kumara Goundan* v. *Thevaraya Reddi*, 1925 Mad 1113 (1114): 48 Mad L Jour 616: 1925 Mad W N 406: 87 Ind Cas 635 [A claimant is entitled to rely on a prior dismissal for default under this rule and plead that attachment has ceased].

(2) *Krishna Subhudhi* v. *Janaki Ram*, (1913) 20 Ind Cas 149 (150): 19 Cal L Jour 248.

(3) *Har Lal* v. *Narayan*, 1922 Nag 267 (270): 18 Nag L R 152: 64 Ind Cas 420: 4 Nag L J 118.

Note 8.

(1) *Bohrey Akhey Ram* v. *Basant Lal*, 1924 All 860 (861): 22 All L J 823: 5 L R A Civ 605: 80 Ind Cas 106: 46 All 894.

(2) *Shinath Singh Ray* v. *Saberuddin Ahmed*. 1929 Cal 465 (469): 56 Cal 416: 119 Ind Cas 113; *Ganesh Chandra Adak* v. *Banwari Lal Roy*, (1912) 14 Ind Cas 345 (346): 16 Cal L Jour 86: 16 Cal W N 1097.

(3) *Meyyappa Chettiar* v. *Chidambaram Chettiar*, 1924 Mad 494 (500): 46 Mad L Jour 415: 34 Mad L Tim 118: 1924 Mad W N 392: 47 Mad 483: 83 Ind Cas 91: 79 Ind Cas 144 F B [Overruling 48 Ind Cas 232]. See also *Subramania Ayyar* v. *Krishna Ayyar*, 1926 Mad 211 (213): 1925 Mad W N 887: 92 Ind Cas 833: 51 Mad L Jour 172 [Following the Full Bench].

(4) *Ganpati* v. *Mukunda*, 1921 Nag 57 (59): 17 Nag L R 121: 63 Ind Cas 712; *Amolaksao* v. *Mahipatrao*, 1922 Nag 81 (81): 66 Ind Cas 850.

(5) *Hari* v. *Shrinivas*, 1931 Bom 550 (554): 33 Bom L R 1130: 55 Bom 693: 134 Ind Cas 972 [Affirming 1929 Bom 321]; *Shrinivas Vithal Pai* v. *Hari Sabaji Kamat* 1929 Bom 321 (322, 323): 31 Bom L R 652: 53 Bom 543: 119 Ind Cas 769.

INVESTIGATION OF CLAIMS AND OBJECTIONS[1]. O.21, R.58.

R. **58**. [S. 278.] (1) *Where* any claim *is* preferred[3] to, or any objection *is* made[3] to the attachment of, any property attached[7] in execution of a decree[2] on the ground that such property is not liable to such attachment,[4] the Court shall proceed to investigate the claim[20] or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Investigation of claims to, and objections to attachment of, attached property.

Provided[21] that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) *Where* the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale.

[1877—S. 278; 1859—S. 246. *See* S. 47.]

Local Amendments.

ALLAHABAD.

Add the following words to sub-R. (2):—

"or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

LAHORE.

Add the following to proviso under sub-R. (1):—

"and that if an objection is not made within a reasonable time of the first attachment the objector shall have no further right to object to the attachment and sale of the same property in execution of the same decree, unless he can prove a title acquired subsequent to the date of the first attachment."

NAGPUR.

In sub-R. (2) of Rule 58, *after* the word "objection" where it occurs for the second time, *insert* the following words:—

"or, where the property to be sold is immoveable property, the Court may, in its discretion, direct that the sale be held, but shall not become absolute until the claim or objection is decided."

OUDH.

In R. 58, *add* the following words to sub-R. (2):—

"Or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

O.21, R.58, Note 1.

Synopsis.

1. Investigation of claims and objections.
2. Attachment before judgment. See Note 6 to R. 63.
3. "Where any claim is preferred or any objection is made."
4. "On the ground that such property is not liable to attachment."
5. Objections raised after sale.
6. Burden of proof is on claimant to establish possession in himself.
7. Any property attached.
8. Claim to debts attached in execution.
9. Claim to decree attached in execution.
10. Claim to property seized by Receiver.
11. Claims to properties ordered to be sold under a mortgage decree.
12. Claim to property attached in execution of rent decree.
13. Who can prefer claim.
14. Parties and representaives.
15. Trustees and Shebaits.
16. Claim by Official Receiver or Official Assignee.
17. Claims by third persons.
18. Claims by transferee of property from the judgment-debtor.
19. Assignee of decree from the judgment-debtor.
20. "Shall proceed to investigate the claim."
21. Proviso.
22. Dismissal for default. See Note 4 to R. 63.
23. Effect of order—Res judicata.
24. Appeal.
25. Revision.

Applicability. See Notes 4, 5, 11 and 12.
Claimant satisfying decree—Remedy. See R. 63, Note 12, Pt. (1).
Insolvency of judgment-debtor—No bar to claim. See Note 10, Pt. (4).
Nature of investigation. See Note 1, Pts. (3-a) and (4-a).
Nature of remedy. See Note 1, Pts. (3) to (4).
Scope and object of Rr. 58 to 63. See Note 1.

1. Investigation of claims and objections.—Where property is attached in execution of a decree, it is possible that third parties, or even the parties themselves, have objections to such attachment being made. Where a *party or his representative* has any such objection, the question is one falling also within S. 47 and therefore, must be decided by the Court *executing* the decree and *not by a separate suit*.[1] The enquiry under that section is a *full* enquiry and the determination of the question after such enquiry is a *decree*. The remedy of the party aggrieved by the order is by way of appeal.[2] On the other hand, where a *third party* has a claim or an objection to the attachment of property attached in execution of a decree, there are two courses open to him. He may straightaway file a *suit* claiming the appropriate relief, or he may file an *application* under this rule to the Court executing the decree.

Order 21, Rule 58—Note 1.

(1) See Notes 45 and 46 to S. 47. See also the following cases:—*Shankar Dat Dube* v. *J G Harman & Co*, (1895) 17 All 245 (250): 1895 All W N 66 [Objection by judgment-debtor that attached property is his own]; *Subramania Aiyar* v. *Manika Mudeley*, (1909) 2 Ind Cas 432 (432) Mad. (Do.); *Naduvil Edom Kelu Achan* v. *Parasu Patar*, (1917) 38 Ind Cas 360 (360): 5 Mad L W 158, (Do.); *Mt. Mushrafi Begam* v. *Mohammad Mustajabullah Khan*, 1929 Oudh 21 (21): 5 Oudh W N 990: 111 Ind Cas 837, (Do.); *Ganeshi Lal* v. *Firm, Sheo Singh Nihal*, 1927 Lah 905 (906): 9 Lah L Jour 566: 106 Ind Cas 826 [Objection by transferee from judgment-debtor —Held to fall under S. 47]; *Karnavan Ravunni Menon* v. *Kunju Nayar*, (1887) 10 Mad 117 (120): 11 Ind Jur 100: 11 Ind Jur 294; *Kamal Kutti* v. *Ibrayi*, (1901) 24 Mad 658 (659); *Marivittil* v. *Pathram*, (1907) 30 Mad 215 (216): 2 Mad L Tim 31: 17 Mad L Jour 877; *Santu Chamar* v. *Arjun Misra*, 1926 Oudh 64 (64): 88 Ind Cas 542 [Objection by *pro forma* defendant —Falls under S. 47].

(2) See Note 84 to S. 47. See also *Amarchand Kundu* v. *Nani Gopal Mukerjee*, (1908) 12 Cal W N 808 (809) [Judgment objecting as *trustee* for third persons]; *A R P L Firm* v. *Ma Gun*, 1926 Rang 73 (73): 3 Rang 515: 98 Ind Cas 91 [Summons served on a wrong person as defendant—Objection by him falls under this rule]; *Dallu Mal* v. *Hari Das*, (1901) 23 All 263 (265): 1901 All W N 75 [Transferee from judgment-debtor can also plead *jus tertii*].

O.21, R.58, Notes 1—4.

He is not *bound* to prefer a claim or an objection under this rule.[3] The reason is that the remedy provided by this rule is a *summary and concurrent* remedy provided with the object of securing a speedy settlement of title raised at execution sales,[3-a] and, as has been seen in Note 63 to S. 9, *ante*, the existence of such a remedy does not bar a regular suit or other available remedy to the party aggrieved.[4] Where such third party prefers a claim under this rule the enquiry is only a *summary investigation* and not a full trial of the issues between the parties.[4-a] The party aggrieved by an order passed after such investigation should file a suit under R. 63 within one year thereof for setting aside the order. This rule and R. 63 do not apply to the Vizagapatam Agency Tracts.[5]

2. Attachment before judgment.—*See* Note 6 to R. 63.

3. "Where any claim is preferred or any objection is made".—The rule is very wide and comprises claims of *third* parties whether put forward by themselves, or on their behalf by the parties to the suit or their representatives.[1]

4. On the ground that such property is not liable to attachment."—The rule pre-supposes the *existence of an attachment* and the ground of the application is that the property is *not liable* to attachment.[1] Where there is *no attachment* at all an objection under this rule is incompetent.[2] Nor can the objector prefer an application under this rule merely on the ground that he has not been made a party to the execution proceedings.[3] It has been held by the High Court of Allahabad that the words "on the ground that such property is not liable to attachment" have reference merely to a case where an *objection is made to an attachment* and not to a claim preferred to the pro-

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(3) *Kanhaya Lal* v. *The National Bank of India, Ltd,* (1913) 18 Ind Cas 949 (951): 40 Cal 598: 40 Ind App 56: 15 Bom L R 472: 25 Mad L Jour 104: 184 Pun L R 1913: 17 Cal L Jour 478: 11 All L J 413: 1913 Mad W N 406: 17 Cal W N 541: 13 Mad L Tim 406 P C [The remedy under this rule is merely a *permissive* one].

(3-a) *Vedalingam Pillai* v. *Veerathal,* (1920) 54 Ind Cas 530 (534): 37 Mad L Jour 547: 26 Mad L Tim 513: 1920 Mad W N 77; *Gend Lall Tewari* v. *Denonath,* (1885) 11 Cal 673 (679); *Manchharam Kalliandas* v. *Ratilal Lal Shanker,* (1869) 6 Bom H C R A C 39. See also *Misree Begam* v. *Punno Singh,* (1867) 8 Suth W R 862 (363).

(4) See also *Ran Bahadur Singh* v. *Saligram,* 1931 Oudh 1 (4): 7 Oudh W N 1173: 131 Ind Cas 77: 6 Luck 461; *The Societa Coloniale Italiane* v. *Shwe Le and Tun Byu,* (1905-06) 4 L B R 252 (253): 14 Bur L R 135; *Sundar Singh* v. *Ghasi,* (1896) 18 All 410 (412): 1896 All W N 126; *Makbul Fatima* v. *Lalta Kunwar* (1907) 4 All L J 574 (578): 1907 All W N 207; *Rani Indomati* v. *Jogeshar,* (1906) 28 All 644 (646): 1906 All W N 158: 3 All L J 565; *Raghunath* v. *Sarosh,* (1899) 23 Bom 266 (270); *Krishnabhupati* v. *Vikrama,* (1895) 18 Mad 13 (17); *Balaram Kunbi* v. *Sadoba Mali,* (1904) 17 C P L R 178 (191). See also *Md Hayat* v. *Ghulam Nabi,* 1931 Lah 598 (598): 32 Pun L R 390: 132 Ind Cas 201 [Non-objection under R. 58 is no bar to applying under R. 100]; *Govindaswami Naicker* v. *Perumal Raja,* 1927 Mad 327 (328): 25 Mad L W 106: 38 Mad L Tim 30: 1927 Mad W N 53: 99 Ind Cas 893 [Omission to take action under O. 21, R. 58 by withdrawing claim does not bar action under R. 89].

(4-a) *Vedalingam Pillai* v. *Veerathal,* (1920) 54 Ind Cas 530 (534): 37 Mad L Jour 547: 26 Mad L Tim 513: 1920 Mad W N 77; *Daulat* v. *Ramappa,* 1926 Nag 197 (198): 90 Ind Cas 196.

(5) *Maharaja of Jeypore* v. *Hari Krishna Patro,* (1916) 32 Ind Cas 226 (226): 29 Mad L Jour 730; *Rani of Tuni* v. *Maharaja of Jeypore,* 1922 Mad 271 (272): 16 Mad L W 8: 42 Mad L Jour 487: 1922 Mad W N 314: 66 Ind Cas 115: 30 Mad L Tim 339: 46 Mad 35.

Note 3.

(1) *Ramanathan* v. *Marakayar,* (1899) 23 Mad 195 (202): 10 Mad L Jour 64 F B.

Note 4.

(1) *Chunilal* v. *Kashibhai,* 1923 Bom 381 (382): 25 Bom L R 440: 73 Ind Cas 419; *Srinivasachariar* v. *Appavu Reddy,* 1924 Mad 889 (889): 47 Mad L Jour 720: 20 Mad L W 864: 1924 Mad W N 551: 84 Ind Cas 265.

(2) *Chunilal Asharam* v. *Kashibhai Nathabhai,* 1923 Bom 381 (382): 25 Bom L R 440: 73 Ind Cas 419.

(3) *Lingam Veera Raghava Rao* v. *Gurunatha Rao,* 1926 Mad 355 (356): 91 Ind Cas 414.

O.21, R.58, Notes 4—8.

perty.[4] The High Court of Madras has also held that it is open to a claimant to put forward his claim under this rule on the ground that the Court which passed the decree had no *jurisdiction* to pass it or that the Court which executes the decree has no jurisdiction to do so[5] or that the attachment made is not legal or valid.[6]

But it is not open to a claimant to attack the *validity* of the decree or the decree-holder's *right to execute* the same; it is thus not open to him to plead that the execution application is barred by limitation.[7]

5. **Objections raised after sale.**—The Court has no jurisdiction to entertain a claim under this rule after the execution sale has taken place.[1] The reason is that the attachment is *ipso facto* determined after the sale has taken place.[2] The Judicial Commissioners' Court of Nagpur has expressed the view that a claim can be preferred after Court-auction sale but before confirmation of the same.[3]

6. **Burden of proof is on claimant to establish possession in himself.**—R. 59 prescribes that the claimant must adduce evidence to show that on the date of the attachment he had some interest in, or was possessed of, the property attached. The burden of proof is therefore clearly upon the claimant or objector to establish possession in himself.[1]

7. **Any property attached.**—The rule applies to *any* property attached in execution of a decree. Thus it will include a claim to moveables,[1] or to a fractional share of the immoveable property attached,[2] or to a share of the moveables seized in execution.[3]

8. **Claim to debts attached in execution.**—The procedure laid down in this rule applies also to claims relating to the attachment of debts. A garnishee who has failed in his claim cannot, without filing a suit within one year

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(4) *Debi Das* v. *Maharaj Rup Chand*, 1927 All 593 (596): 25 All L J 609: 102 Ind Cas 792: 49 All 903.

(5) *S Kuppuswami Ayyar* v. *Secretary of State*, 1929 Mad 383 (384): 119 Ind Cas 38.

(6) *Venkatappayya* v. *Venkatachalapathi Rao*, 1927 Mad 450 (455): 99 Ind Cas 989.

(7) *Hafiz Jalaluddin* v. *Mt Maniran*, 1921 Pat 311 (311): 2 Pat L Tim 275: 60 Ind Cas 875; *Somasundaram Chettiar* v. *Ma Shwe Thit*, 1929 Rang 152 (152): 7 Rang 132: 117 Ind Cas 578.

Note 5.

(1) *Kali Charan Ghose* v. *Sarajini Debi*, 1926 Cal 468 (468): 87 Ind Cas 168; *Gopal Chandra Mukerjee* v. *Notobar Kundu*, (1912) 15 Ind Cas 58 (53): 16 Cal W N 1029; *Maharajah of Burdwan* v. *Heeralal Seal*, (1869) 11 Suth W R 54 (55): 2 Beng L R A C 217; *Mt Puhupdeo Kuer* v. *Ramcharitar Barhi*, 1924 Pat 76 (76): 4 Pat L Tim 544: 74 Ind Cas 87; *Maung Po Pe* v. *Maung Kwa*, 1928 Rang 80 (80): 5 Rang 751: 107 Ind Cas 161; *Abdul Kadir Sahib* v. *Somasundaram Chettiar*, 1928 Mad 76 (80): 45 Mad 827: 16 Mad L W 485: 43 Mad L Jour 467: 31 Mad L Tim 441: 70 Ind Cas 648. But see *Jagannadham* v. *Bura Pydayya*, 1931 Mad 782 (784): 1931 Mad W N 902: 34 Mad L W 385: 61 Mad L Jour 884: 134 Ind Cas 809: 55 Mad 251 [Obiter].

(2) *Mt Puhupdeo Kuar* v. *Ramcharitar Barhi*, 1924 Pat 76 (76): 4 Pat L Tim 544: 74 Ind Cas 87.

(3) *Bhagchand* v. *Junia*, (1905) 1 Nag L R 167 (168).

Note 6.

(1) *Nga Tha Yah* v. *Mr F N Burn*, (1869) 11 Suth W R 8 (15): 2 Beng L R F B 91 F B.

Note 7.

(1) *Rasik Chandra* v. *Jitendra Kumar*, (1910) 8 Ind Cas 77 (78): 15 Cal W N 817: 15 Cal L Jour 167; *Ma Kyin* v. *Mutu Raman Chetti*, (1907-08) 4 L B R 16 (16); *Kesherao Kunbi* v. *Muka Teli*, (1901) 14 C P L R 124 (125); *Samranduss* alias *Dhirajnam* v. *Makunddas and Garursingh*, (1894) 7 C P L R 105 (110).

(2) *Raj Koomar Roy* v. *Kadumbini*, (1870) 13 Suth W R 63 (67, 68): 4 Beng L R 175 F B; *Hurish Chunder Roy* v. *Brojo Sunder Mojoomdar*, (1866) 6 Suth W R 164 (164).

(3) *Deanuth Biswas* v. *Issur Gino*, (1870) 14 Suth W R 52 (53); *Issur Chunder Gangoli* v. *Mohinee Mohun Doss*, (1872) 17 Suth W R 74 (74).

from the date of the order against him, assert either as plaintiff or as defendant the right denied to him by that order.[1] O.21, R.58, Notes 8—11.

9. Claim to decree attached in execution.—The rule applies also to claims in respect of decrees attached in execution.

Where *A* obtains a decree against *B* for money and in execution thereof attaches a decree in favour of *B*, and *C* who had obtained before the attachment a transfer of the decree attached prefers a claim to the decree, his claim falls under this rule.[1]

10. Claim to property seized by receiver.—Where a Receiver in insolvency after adjudication of the judgment-debtor seizes properties as belonging to the insolvent, it is open to third persons to prefer their claims or objections, if any, to such property. But such claims fall under S. 4 of the Provincial Insolvency Act and are triable by the insolvency Court,[1] although the *procedure* to be followed is that prescribed by this rule.[2] The decision of the insolvency Court on such claims can however be challenged by the aggrieved party only by way of appeal or otherwise as provided by the Insolvency Act itself; and not by way of a *suit* under R. 63.[3]

Where a property has been *attached* in execution of a decree the mere fact that, subsequently thereto, the judgment-debtor becomes an insolvent and his properties became vested in the Official Receiver or the Official Assignee, will not disentitle a claimant from preferring an objection under this rule.[4]

11. Claims to properties ordered to be sold under a mortgage decree.—As has been seen in Note 4, *ante*, proceedings under this rule are applicable only when properties have been *attached* in execution. Attachment is necessary in the case of money decrees and not in the case of *mortgage decrees*. Consequently the provisions of this rule do not apply to claims or objections relating to properties ordered to be sold under a mortgage decree.[1] The

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Note 8.

(1) *Tayabali Ghulam Husain* v. *Atmaram Sakharam Vani*, (1914) 25 Ind Cas 375 (376): 38 Bom 631: 16 Bom L R 520; *Harilal* v. *Abhesang*, (1879-80) 4 Bom 323 (326): 5 Ind Jur 257; *Maruti Babaji Vadekar* v. *Ram Chandra Balwant Punekar*, 1931 Bom 288 (290): 33 Bom L R 396: 133 Ind Cas 218 [Assumed]: *Piaru Ram* v. *Ganga Ram*, 1924 Lah 367 (367): 13 Pun W R 1923: 71 Ind Cas 45; *Chidambar Patter* v. *Ramasami Patter*, (1904) 27 Mad 67 (70, 71): 13 Mad L Jour 467 [Overruling 24 Mad 20]; *Subbier* v. *Moideen Pitchai*, 1923 Mad 562 (562): 44 Mad L Jour 588: 17 Mad L W 582: 32 Mad L Tim 304: 1923 Mad W N 282: 72 Ind Cas 558; *Seshagiri Ayyar* v. *Ramachandra Ayyar*, 1931 Mad 570 (571): 1931 Mad W N 259: 135 Ind Cas 543. But see *Mt Rambutty Koer* v. *Kamessur Pershad*, (1874) 22 Suth W R 36 (37) [Not good law].

Note 9.

(1) *Peary Lal* v. *Allahabad Bank, Ltd, Meerut*, 1926 All 244 (245): 24 All L J 334: 92 Ind Cas 14.

Note 10.

(1) *Moolchand* v. *Murari Lal*, (1913) 21 Ind Cas 702 (703): 36 All 8: 11 All L J 979.

(2) In re *Rassul Haji Cassum*, (1911) 9 Ind Cas 344 (344): 13 Bom L R 13; *Hashmat Bibi* v. *Bhagwan Das*, (1914) 24 Ind Cas 752 (753): 36 All 65: 12 All L J 24.

(3) *Raj Rani Bari Singhain* v. *Jawahir Lal Madan Lal*, 1928 All 158 (159): 26 All L J 39: 108 Ind Cas 156.

(4) *Paras Ram* v. *Karam Singh*, (1887) 9 All 232 (234): 1887 All W N 20; *Raj Rani Bari Singhain* v. *Jawahir Lal Madan Lal*, 1928 All 158 (159): 26 All L J 39: 108 Ind Cas 156.

Note 11.

(1) *Hukam Singh* v. *Raqubir Saran*, (1905) 27 All 700 (701): 1905 All W N 157; *Sanaal Das* v. *Bismullah Begam*, (1897) 19 All 480 (482): 1897 All W N 115; *Muhammad Yahya* v. *Lalta*, (1906) All W N 62 (63); *Himatram* v. *Khushal Jethiram Gujyar*, (1894) 18 Bom 98 (100); *Biku Bal Patil* v. *Khemchand Kubershet*, (1890) 14 Bom 369 (369); *Dayachand* v. *Hemchand*, (1880) 4 Bom 515 (520); *Mahabir Prasad Singh* v. *Nogendra Nath Mondal*, 1921 Cal 479 (480): 26 Cal W N 50: 68 Ind Cas 271; *Deefholts* v. *Peters*, (1887) 14 Cal 631 (633); *Bakshi Ram Pergash Lal* v. *Sheo Pergash Tewari*, (1886) 12 Cal 453 (457); *Hari Mohan Dalal* v. *Lachmichand*, (1913) 18 Ind Cas 215 (216) Cal; *Joy Prokash* v. *Abhoy Kumar*, (1896) 1 Cal W N 701 (702); *Ata Mahomed Khan* v. *Rahmat Ullah*, 1929 Lah 760 (761): 116 Ind Cas 882; *Darbar Sahib, Amritsar* v. *Central Bank*

O.21, R.58, Notes 11—13.

remedy of an objector in such a case is by way of a separate suit.[2]

Where, however, a mortgagee decree-holder erroneously applies for, and gets, an attachment effected on the properties and a claim is thereupon preferred and decided, the order on the claim will be conclusive within the meaning of R. 63.[3]

12. Claim to property attached in execution of rent decree.—S. 170 of the Bengal Tenancy Act (VIII of 1885) expressly provides that the provisions of the Code, *i.e.*, Rr. 58 to 63, as to claim cases shall not apply to a tenure or holding attached in execution of a decree for arrears of rent thereof. Hence no claims or objections can be filed under this rule in respect of the same.[1]

The rule applies to proceedings in execution of rent decrees under the Madras Estates Land Act, 1908.[2] This Act, unlike Bengal Tenancy Act, contains no provision excepting the applicability of this rule to proceedings thereunder.

Rr. 58 to 63 of the Code are made applicable to proceedings under the Chota Nagpur Tenancy Act (Behar and Orissa Act VI of 1920) by S. 210, sub-S. 3, Cl. (*b*).

13. Who can prefer claim.—All persons who have some interest in, or are possessed of, the property attached can prefer a claim under this rule (*see* R. 59 below). There is a difference of opinion as to whether an application by a mortgagee praying that the sale may be subject to his mortgage is one falling under R. 66 or under this rule. *See* Note 2 to R. 62.

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of India, Ltd, Amritsar, 1929 Lah 167 (168): 117 Ind Cas 815; *Kundan Lal* v. *Allah Baksh*, 1932 Lah 618 (618): 33 Pun L R 868; *Krishnaswami Goundar* v. *Nagarathnammal*, 1930 Mad 712 (712): 125 Ind Cas 559; *Suryanarayana* v. *Ramachandradu*, 1932 Mad 716 (719): 139 Ind Cas 452; *Kumaretta* v. *Sabapathy*, (1907) 30 Mad 26 (27): 16 Mad L Jour 545; *Gangaram* v. *Kanhailal*, 1925 Nag 185 (186): 80 Ind Cas 626; *Tara Chand* v. *Raj Kishore*, (1920) 55 Ind Cas 895 (896): 2 Lah L Jour 343: 2 U P L R (Lah) 90; *Ragho Pahan* v. *Lachan Koer*, (1919) 50 Ind Cas 448 (449): 1919 Pat H C C 79; *Ratan Lal* v. *Bala Parshad*, (1918) 44 Ind Cas 986 (987): 58 Pun Re 1918: 23 Pun W R 1918: 113 Pun L R 1918; *Mussamat Kahan Devi* v. *Mussammat Nihal Devi*, (1916) 32 Ind Cas 43 (44): 101 Pun Re 1915: 191 Pun W R 1915; *Gobalu* v. *Po Hla*, (1907-1908) 4 L B R 82 (83): 14 Bur L R 201.

(2) *Deefholts* v. *Peters*, (1887) 14 Cal 631 (633).

(3) *Dorayya* v. *Govindarajulu Narasimham*, 1928 Mad 525 (527): 110 Ind Cas 567; *Mg Mra Tun* v. *Kaing*, (1915) 29 Ind Cas 941 (942): 8 L B R 215: 8 Bur L Tim 214; *Sawmy Velu Pillai* v. *O M M R M Muthiah Chetty*, (1893-1900) L B R 509; *Suryanarayana* v. *Ramachandrudu*, 1932 Mad 716 (719): 139 Ind Cas 452 [Quaere]. But see *S R M A N Muthappa Chetty* v. *S A R.M Pallathappa Chetty*, (1902-1903) 2 L B R 138 (139).

Note 12.

(1) *Rameshwar Singh* v. *Puran Chandra Mansali*, 1926 Pat 213 (214): 3 Pat L R 341: 95 Ind Cas 308: 7 Pat L Tim 717; *Rameshwar Singh* v. *Mt Rajo Chowdhrain*, 1926 Pat 210 (211): 3 Pat L R 339: 95 Ind Cas 293: 7 Pat L Tim 625; *Dwarka Singh* v. *Nema Singh*, 1929 Pat 195 (196): 10 Pat L Tim 118: 117 Ind Cas 203; *Amirta Lal Bose* v. *Nemai Chand Mukhopadhya*, (1901) 28 Cal 382 (386): 5 Cal W N 474 F B; *Nanda Lal Chowdhry* v. *Kala Chand*, (1910) 8 Ind Cas 50 (52): 15 Cal W N 820; *Khetrapal Singh Roy* v. *Kritarthamoyi Dasi*, (1906) 33 Cal 566 (569): 10 Cal W N 547: 3 Cal L Jour 470 F B; *Chandra Sekhar* v. *Rani Manjee*, (1898) 3 Cal W N 386 (387); *Makbul Ahmed* v. *Rakhal Das*, (1899) 4 Cal W N 732 (737); *Kartick Chunder Mookerjee* v. *Mookta Ram Sircar*, (1868) 10 Suth W R 21 (22); *Sarab Sundari* v. *Harendra*, (1910) 7 Ind Cas 490 (491): 12 Cal L Jour 549 [Held the Tenancy Act did not apply and therefore claim under this rule competent]; *Jotindra Mohan Pal* v. *Bhola Nath*, 1923 Cal 715 (716): 27 Cal W N 817: 80 Ind Cas 353 [Do. also that executing Court can enquire if property claimed is of the class falling under the Tenancy Act]; *Bipradas Dey* v. *Raja Ram*, (1909) 3 Ind Cas 306 (306): 36 Cal 765: 13 Cal W N 650 [Held S 170 of the B T Act did not apply to this case]; *Beni Madhub Roy* v. *Jaod Ali Sircar*, (1890) 17 Cal 390 (392) F B, (Do.). See also *Sobha Ram* v. *Ram Prasad*, 1924 All 910 (911): 78 Ind Cas 373: 5 L R A (Civ) 230.

(2) *Chinna Venkatarayudu* v. *Maharaja of Pithapuram*, 1928 Mad 360 (360): 54 Mad L Jour 138: 27 Mad L W 139: 106 Ind Cas 668: 1928 Mad W N 52: 51 Mad 774; *Rama Koti Suryanarayana* v. *Rampalli Ramachandrudu*, (1932) 139 Ind Cas 452 (453): 1932 Mad 716.

As to whether a usufructuary mortgagee can make a claim under this rule, *see* R. 62, *infra*.

14. Parties and representatives.—It has been seen in Note 46 to S. 47, that objections to attachment raised by parties or their representatives *as representing third parties or as trustees*, are really objections by third parties and do not fall within the scope of S. 47. Such objections will, therefore, have to be decided under the provisions of Rr. 58 to 63.[1] Thus a claim by the *Karnavan* of a Malabar *Tarwad* that the whole of the *tarwad* property is not liable to attachment in execution of a personal decree against him falls under this rule.[2]

15. Trustees and shebaits.—On the same principle a personal decree against a trustee or *shebait* does not estop him from asserting the claim of the beneficiary or of the charitable institution under this rule when the latter's property is attached in execution.[1] Thus where *A*, in execution of a decree for money against *B* personally, attaches and proceeds to sell property of which *B* alleges that he is in possession, not in his own right, but as *shebait* of a deity to whom the property has been dedicated, *B's* claim will fall under this rule.[2]

See also Note 46 to S. 47 and the cases cited therein.

16. Claim by Official Receiver or Official Assignee.—If the vesting order takes place before attachment, the Official Receiver can prefer a claim under this rule. But if the vesting order was subsequent to the attachment, then the claim of the Official Receiver does not fall under this rule, but is a statutory claim under S. 51 of the Provincial Insolvency Act which should be dealt with under S. 151 of the Code. Arts. 11 and 13 of the Limitation Act do not apply to the latter class of cases.[1]

Note 14.

(1) *See* the cases cited in Note 46 to S 47, foot note 8 and the following cases:—*Ram Ghulam* v. *Hazaru Kuar*, (1885) 7 All 547 (550): 1885 All W N 132; *Dallu Mal* v. *Hari Das*, (1901) 23 All 263 (265): 1901 All W N 75; *Abdul Rahman* v. *Muhammad Yar*, (1882) 4 All 190 (192): 1882 All W N 1 [Decree against firm—Claim by a partner that property attached is his private property—Falls under this rule]. See *Kanhaiya Lal* v. *Suraj Karan*, 1928 All 10 (11): 26 All L J 127: 108 Ind Cas 134 [Decree against one member of a firm and attachment—Other members' claim is one under this rule].

(2) *Rengan Patter* v. *Lakshmi*, (1904) 14 Mad L Jour 137 (138); *Abdurahiman Kutti Haji* v. *Kunhammed Koya*, (1900) 10 Mad L Jour 85 (86); *Peeti Kayllakath Mahmmad Haji* v. *Alam Ibran Haji*, (1915) 31 Ind Cas 393 (394) (Mad).

Note 15.

(1) *Bishen Chand* v. *Naddir Hossein*, (1888) 15 Cal 329 (341): 15 Ind App 1: 5 Sar 113: 12 Ind Jur 170 P C; *Beg Raj Marwari* v. *Srimuthy Kundali Debya*, (1904) 8 Cal W N 353 (354); *Benode Lal Pakrashee* v. *Gireedhur Chuckerbutty*, (1874) 22 Suth W R 392 (393); *Muthukumara Chettiar* v. *Muthu K R V Alagappa Chettiar*, (1913) 21 Ind Cas 748 (749) (Mad); *Puran Chandra* v. *Bawan Das*, 1900 All W N 196 (197); *Mahabir Pande* v. *Nasir-Ullah*, 1893 All W N 67 (68); *Dayaram Jagijivan* v. *Govardhandas Dayaram*, (1904) 28 Bom 458 (460): 6 Bom L R 462; *Gangadhar* v. *Gangadhar*, 1891 Bom P J 207 (208); *Burjorji* v. *Dhunbai*, (1892) 16 Bom 1 (13); *Bidhu Sekhar Banerjee* v. *Kuloda Prasad Deo Gharia*, (1919) 50 Ind Cas 525 (526): 46 Cal 877; *Ajo Koer* v. *Gorak Nath*, (1915) 27 Ind Cas 321 (322): 19 Cal W N 517: 20 Cal L Jour 481; *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi*, (1915) 27 Ind Cas 328 (331): 42 Cal 440: 20 Cal L Jour 485: 19 Cal W N 520; *Raghubar* v. *Umed*, (1898) 1 Oudh Cas Supp 11 (13); *Jhabban Lal* v. *Shafdri Begam*, (1915) 31 Ind Cas 722 (723): 80 Pun Re 1915: 187 Pun L R 1915: 125 Pun W R 1915. But see *Ranee Shibeshuree* v. *Mothooranath Acharjee*, (1866) 5 Suth W R 202 (202) [Decree against Shebait—Personal properties attached and claim disallowed—Suit does not lie but review directed].

(2) *Kartick Chandra Ghosh* v. *Ashutosh Dhara*, (1911) 12 Ind Cas 163 (164): 14 Cal L Jour 425: 16 Cal W N 26: 39 Cal 298 F B.

Note 16.

(1) *Official Receiver* v. *Veeraraghavan Pattar*, 1922 Mad 189 (190, 191): 45 Mad 70: 30 Mad L Tim 77: 69 Ind Cas 326: 41 Mad L Jour 334: 14 Mad L W 334: 1921 Mad W N 775. *See also* the following:—*Kashi Prasad* v. *Müller*, (1885) 7 All 752 (755): 1885 All W N 166; *Sardarmal Jagonath* v. *Aranvayal Sabhapathy*, (1896) 21 Bom 205 (210); *C A Turner* v. *Pestonji Fardunji*, (1896) 20 Bom 403 (406); *Peacock* v. *Madan Gopal*, (1901) 29 Cal 428 (432): 6 Cal W N 577 F B; *Müller* v. *Lukhimani Devi*, (1901) 28 Cal 419 (421): 5 Cal W N 761; *Annapurani* v. *Subramanian*, (1908) 31 Mad 347 (349): 4 Mad L Tim 197; *Dholan Das* v. *Rahim Baksh*, 1897 Pun Re No 57: *Mahabir Prasad* v. *Parma*, (1892) 14 All 417 (419): 1892 All W N 31.

O.21, R.58, Notes 17—20.

17. **Claims by third persons.**—The procedure under this rule applies, as has been seen in Note 1, *ante*, only to claims of *third* persons.[1] Pending suit by a creditor against his debtor's estate, the Administrator-General was authorised to collect the debts due to the deceased debtor. The creditor on obtaining decree in his suit attached a debt due to the deceased. It was held that the Administrator-General was entitled to make a claim under this rule and have the attachment raised.[2]

18. **Claims by transferee of property from the judgment-debtor.**—A transferee of property attached in execution of a decree is entitled to object under this rule to the attachment made subsequent to his transfer.[1] A simple mortgagee can also prefer a claim under this rule.[2] (*See also* Notes under R. 62.).

19. **Assignee of decree from the judgment-debtor.**—The transferee of a decree from the judgment-debtor can put in an application under this rule to remove an attachment of the decree made subsequent to the transfer.[1]

20. "**Shall proceed to investigate the claim.**"—It is the duty of the Court to investigate a claim preferred to it under this rule,[1] unless it sees reason to reject it on the ground of delay. It ought not, without investigation, simply *notify the claim* in the sale proclamation,[2] although if the Court does pass such an order, it is not invalid and will be conclusive until set aside by a suit under R. 63.[3] Similarly the Court should not reject a claim without investigation merely on the ground that the question of possession or title is doubtful or complicated.[4]

Note 17.

(1) See also *Bibhuti Bhusan Rai* v. *Chinibas Makhal*, 1927 Cal 381 (382): 45 Cal L Jour 229: 102 Ind Cas 125; *Hub Lal* v. *Kanhia Lal*, (1885) 7 All 365 (366): 1885 All W N 52; *Lachmichand Hirachand* v. *Tukaram*, (1892) 16 Bom 700 (702) [As to form of application under the old Code, see *Bindobasseemy Dabee* v. *Bissomoy Dassee*, 2 Ind Jur N S 339].

(2) *Bhaiji Bimji* v. *The Administrator-General of Bombay*, (1899) 23 Bom 428 (439): Chitty's S C C R 508.

Note 18.

(1) *Peary Lal* v. *The Allahabad Bank, Ltd, Meerut*, 1926 All 244 (245): 24 All L J 334: 92 Ind Cas 14; *Gobind Pershad* v. *Rajaram Purkash Singh*, (1867) 8 Suth W R 378 (379); *Rebala Venkata Reddi* v. *Mangadu Yellappa Chetty*, (1917) 38 Ind Cas 107 (108): 5 Mad L W 234 [Attachment of property subject to a contract of sale]; *Nihalchand* v. *Abdullah*, (1912) 13 Ind Cas 563 (564): 123 Pun L R 1912: 247 Pun W R 1912; *Jagat Narain Singh* v. *Sripathi Nath Ray*, 1930 Pat 390 (391): 129 Ind Cas 892; *Mahadeo Lal* v. *Dinkar Prasad*, (1911) 9 Ind Cas 194 (194): 15 Cal W N 542 [Purchaser after attachment cannot claim under this rule].

(2) *Ponnuswami Pillai* v. *Samu Ammal*, (1917) 38 Ind Cas 937 (938): 31 Mad L Jour 247; *Debi Das* v. *Maharaj Rup Chand*, 1927 All 593 (593): 25 All L J 609: 102 Ind Cas 792: 49 All 903.

Note 19.

(1) *Co-operative Town Bank of Padigon* v. *Raman Chettiar*, 1928 Rang 25 (26): 5 Rang 595: 6 Bur L Jour 221: 106 Ind Cas 853; *Venkatasubba Naidu* v. *W D Smith*, (1900) 10 Mad L Jour 116 (117).

Note 20.

(1) *Greesh Chunder* v. *Kashessuree*, (1867) 8 Suth W R 26 (27); *Monohur Khan* v. *Troyluckmath*, (1865) 4 Suth W R 35 (35); *Sharodo Moyee* v. *Nobin Chunder*, (1869) 11 Suth W R 255 (256): 2 Beng L R A C 333; *Sahoo Gokul* v. *Mt Zynub*, (1869) 1 N W P H C R 255; *Someshwar Rajaram* v. *Manilal Bhailal*, 1932 Bom 210 (212): 34 Bom L R 206: 137 Ind Cas 603.

(2) *Ramachandra Rao* v. *Gurraju*, 1924 Mad 147 (148): 18 Mad L W 282: 76 Ind Cas 977; *Venkataratnam* v. *Ranganayakamma*, (1918) 48 Ind Cas 270 (275, 276): 41 Mad 985: 24 Mad L Tim 197: 1918 Mad W N 599: 8 Mad L W 292: 35 Mad L Jour 335 F B [Per Seshagiri Ayyar, J]; *Muthu Raman Chettiar* v. *Seetharamayya*, 1926 Mad 216 (217): 49 Mad L Jour 706: 91 Ind Cas 985: 23 Mad L W 808; *Kachin Amthodi Parambil Saharabi* v. *Kachinamthodi Puthia Purayi Seemamutti's son Ali*, 1923 Mad 295 (296): 17 Mad L W 182: 44 Mad L Jour 141: 72 Ind Cas 857.

(3) *Venkataratnam* v. *Ranganayakamma*, (1918) 48 Ind Cas 270 (276): 41 Mad 985: 24 Mad L Tim 197: 1918 Mad W N 599: 8 Mad L W 292: 35 Mad L Jour 335 F B; *Ramalingappa* v. *Narayanappa*, 1925 Mad 368 (368): 82 Ind Cas 737.

(4) *Amir Chand* v. *Ram Saran*, (1914) 27 Ind Cas 256 (257): 248 Pun L R 1914: 162 Pun W R 1914; *Sardhari Lal* v. *Ambika Pershad*, (1888) 15 Cal 521 (526): 15 Ind App 123: 5 Sar 172: 12 Ind Jur 210 P C.

O.21, R.58, Note 20.

As pointed out by Lord Hobhouse in delivering the judgment of the Board in *Sardhari Lal* v. *Ambika Prasad* (I.L.R. 15 Cal. 521 P.C.) "the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the subordinate judge at the time, leaving the aggrieved party to bring the suit which the law allows to him." It is not possible to define the amount of enquiry which constitutes an investigation. If the order purports to deal with the merits it must be taken that there has been an investigation.[5]

What is to be investigated is indicated by the next three following rules, *viz.*, Rr. 59-61. The question to be decided is, whether on the date of the attachment, the judgment-debtor or the objector was in possession or where the Court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the judgment-debtor.[6] The sole question to be investigated is, thus, one of possession.[7] Questions of *legal right* and *title* are not relevant, except so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment-debtor or some other person.[8] To that extent the title may be part of the enquiry. But ultimate questions of trust,[9] or complicated questions like the *benami* nature of a transaction,[10] are not within the scope of the enquiry and are not intended to be gone into. As pointed out by Mr. Justice Sadasiva Ayyar in *Ramaswami Chetty* v. *Mallappa*[11] "in summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of *'emergent' disputes*, the Court may be prohibited from going into complicated questions of title or investigating complicated questions like fraud,

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(5) *Koyyana Chittemma* v. *Doosy Gavaramma*, (1906) 29 Mad 225 (230): 16 Mad L Jour 136; *Bal Makund* v. *Maqsud Ali*, (1917) 37 Ind Cas 92 (94): 19 Oudh Cas 357: 3 Oudh L J 519 [Order passed on a perfunctory investigation is an operative order].

(6) *Ganesh Lal* v. *Mahabir Sahu*, 1929 Pat 273 (274): 119 Ind Cas 909; *N N L Ramaswami Chettiar* v. *Mallappa Reddiar*, (1921) 59 Ind Cas 947 (954): 43 Mad 760: 39 Mad L Jour 350: 1920 Mad W N 572: 28 Mad L Tim 170: 12 Mad L W 475.

(7) *Imamdin* v. *Mathra Das*, (1931) 132 Ind Cas 666 (667): 1931 Lah 666: *Monmohiney Dassee* v. *Radha Krishto Dass*, (1902) 29 Cal 543 (546): *Satkari Mandal* v. *Tirtha Narain Bhattacharjee*, (1914) 24 Ind Cas 62 (62) (Cal): *Ramaswami Goundan* v. *Karuppa Mudali*, 1928 Mad 163 (163): 54 Mad L Jour 321: 27 Mad L W 536: 108 Ind Cas 67; *Sujat Ali Khan* v. *Bhao Singh*, 1927 Nag 286 (288): 10 Nag L J 155: 103 Ind Cas 12: *Sheikh Mohamed* v. *Pandurang*, 1929 Nag 66 (67): 115 Ind Cas 167; *Daulat* v. *Ramappa*, 1926 Nag 197 (198): 90 Ind Cas 196; *Ho Sgew Waing* v. *P R P L Chetty*, 1922 L B R 16 (16): 64 Ind Cas 66: 13 Bur L Tim 214 [Court should not go into the question whether possession is fraudulent or void]: *Pokya* v. *Lutchminappan Chetty*, (1907-1908) 4 L B R 289 (290): *Dheraj Mahtab Chand* v. *Hurdeo Narain*, (1871) 16 Suth W R 119 (120); *Gopee Lal Pandey* v. *Lekhraj Roy*, (1874) 21 Suth W R 56 (56); *Doorgaram* v. *Nuro Singh*, (1869) 11 Suth W R 134 (134): 2 Beng L R A C 254; *Nathoo Ram* v. *Raja Bijaya Bahadur Singh*, (1896) 9 C P L R 113 (115); *Osman Saleh Mahomed* v. *Khanoomal Satramdas*, 1927 Sind 114 (115): 98 Ind Cas 888 [To some extent title may be enquired into]. But see *Motoora Pandey* v. *Ram Ruchya Tewari*, (1869) 11 Suth W R 482 (485): 3 Beng L R A C 108.

(8) *San Tun Pru* v. *Mi Ani Me*, (1900-1902) 1 L B R 180 (181, 182); *Mohunt Bhagwan Ramanuj Das* v. *Khetter Moni Dassi*, (1897) 1 Cal W N 617 (622).

(9) *Najmunnessa Bibi* v. *Nacharaddin Sardar*, 1924 Cal 744 (748): 51 Cal 548: 39 Cal L Jour 416: 83 Ind Cas 233; *Hamid Bakhat Mozumdar* v. *Buktear Chand Mahto*, (1887) 14 Cal 617 (620).

(10) *Ram Kishun Singh* v. *Damodar Proshad*, 1924 Pat 506 (507): 5 Pat L Tim 107: 75 Ind Cas 856: 83 Ind Cas 599; *Ganesh Lal* v. *Mahabir Sahu*, 1929 Pat 273 (274): 119 Ind Cas 909. But see *Hureehur* v. *Nobin Chunder*, (1873) 20 Suth W R 202 (202) [Obiter].

(11) *N N L Ramaswami Chettiar* v. *Mallappa Reddiar*, (1921) 59 Ind Cas 947 (956): 43 Mad 760: 39 Mad L Jour 350: 1920 Mad W N 572: 28 Mad L Tim 170: 12 Mad L W 475. See also *Monmohiney* v. *Radha Kristo*, (1902) 29 Cal 543 (546) [Observations to the same effect].

O.21, R.58, Notes 20—23.

trust and so on; while giving the party defeated in the summary enquiry, the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit. . . . The Court is bound to order release of the attached property if it finds possession in the claimant on his own account, *even if there is title and disposing power remaining in the judgment-debtor.*"

The High Court of Allahabad has however held that it cannot be said that the Court acts without jurisdiction if it does not go into the question of possession but decides the claim on some other basis.[12] Similarly, where the claimant adduced no evidence as to possession,[13] or where the title of the claimant had been expressly negatived in a prior litigation to which he was a party,[14] it was held that the Court rightly decided the claim on the basis of title alone.

21. Proviso.—If the Court is of opinion that the application preferred under this rule has been designedly or unnecessarily delayed, it can refuse to investigate it. But if the Court does entertain the claim and investigate the same, it is bound to pass an order under R. 60 or 61. A dismissal on the ground of delay *after* investigation is illegal.[1]

An order rejecting a claim on the ground of delay has also to be set aside by a regular suit within one year from the date of the order. Otherwise the order is conclusive within the meaning of R. 63.[2] (*See also* Note 5 to R. 63.)

22. Dismissal for default.—*See* Note 4 to R. 63.

23. Effect of order—Res judicata.—An order passed on a claim petition disallowing the claim bars, on general principles of *res judicata*, a fresh application on the same grounds,[1] and is conclusive, between the parties, subject to the result of suit contemplated by R. 63.

But the order passed in a claim proceeding is only *quoad* the particular claimant or the particular property attached and cannot be regarded as a general decision enuring to the benefit of others who are not parties thereto.[2] Thus an order in favour of one of several decree-holders disallowing a claim cannot be availed of in favour of the other decree-holders who are not parties

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(12) *Bhagwan Das* v. *Raj Nath*, (1912) 14 Ind Cas 790 (792): 34 All 365: 9 All L J 474.

(13) *Sevugan Chetty* v. *Rungammal*, (1916) 32 Ind Cas 34 (35) Mad.

(14) *Maung Po Htut* v. *Somasundaram Chetty*, (1917) 39 Ind Cas 275 (276): 10 Bur L Tim 14.

Note 21.

(1) *Nga San Balu* v. *Mi Thaik*, (1917) 39 Ind Cas 345 (346): (1916) 2 U B R 136: 11 Bur L Tim 41; *Surendra Nath Goswami* v. *Rajanikanta Das*, (1917) 41 Ind Cas 446 (447) Cal [Proviso applies even to cases where Court has become possessed of the property attached by usurpation of authority].

(2) *Doroyya* v. *Narasimham*, 1928 Mad 525 (526): 110 Ind Cas 567.

Note 23.

(1) See S 11, Note 23, foot-note 7. See also *Khelat Chunder Ghose* v. *Bhuggobutty Churn Mookerjee*, (1870) 14 Suth W R 144 (145); *Bhola Nath Sarkar* v. *Hara Duari Agarwalla*, (1932) 36 Cal W N 1034 (1035) [Unsuccessful claimant under R. 58 not competent to apply under R 100 below without a suit under R 63].

(2) *Imam Bandee Begam* v. *Mahomed Tukee*, (1867) 8 Suth W R 27 (28); *Boolroonnissa Bibee* v. *Kureemoonnissa Khatoon*, (1874) 21 Suth W R 230 (231); *Gunga Narain* v. *Haradhun*, (1866) 6 Suth W R 157 (157); *Moideen Kutti* v. *Kunhi Kutti*, (1902) 25 Mad 721 (723): 12 Mad L Jour 411; *Gnanambal* v. *Parvathi*, (1892) 15 Mad 477 (479): 2 Mad L Jour 212.

to the claim.[3] *A* in executing a decree against *B* attaches certain properties and *C* prefers a claim thereto. *C's* claim is dismissed and he does not file a suit under R. 63. *A* purchases the property in Court auction in execution of his decree and gets delivery of possession by dispossessing *D*, who is a *bona fide* Court-auction-purchaser of *C's* interest in execution of a decree against him. *D* is not barred from applying under R. 101 for restoration of possession of which he was dispossessed, by reason of the fact *C* became concluded by the order against him in his application under this rule.[4] Where a claim is preferred by the manager of the Court of wards on behalf of a minor ward without the sanction of the Court of wards, the order disallowing the claim is not binding on the minor ward.[5]

O.21, R.58, Notes 23—24.

24. Appeal.—No appeal lies against an order allowing or rejecting a claim under this rule. The order is *conclusive* subject to the result of the suit contemplated by R. 63.[1] Under the special provisions of the Agra Tenancy Act, 1926, such an order passed by an Assistant Collector, second class, is, however, appealable to the Collector, but the party aggrieved by the appellate order of the Collector is not barred from filing a suit under O. 21, R. 63.[1-a] There is a conflict of opinion as to whether an order dismissing a claim petition is a "judgment" within the meaning of Cl. 15 of the Letters Patent and is appealable as such. According to the High Court of Madras it is a "judgment" and is appealable as such, and the period of limitation for the suit under R. 63 runs from the date of the appellate order.[2] The High Court of Rangoon has, on the other hand, held that the refusal of the summary remedy under O. 21, R. 58 leaves open the right of bringing a regular suit and have the question finally decided, and that it cannot therefore be a "judgment" within the meaning of Cl. 13 of the Letters Patent (Rangoon).[3]

Where the claim is one coming under S. 47, the order passed thereon is a decree and is appealable even though the objection was misdescribed as

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(3) *Jagannath* v. *Ganesh*, (1896) 18 All 413 (413): 1896 All W N 129.

(4) *Munni Lal Kshetry* v. *Sasi Bhusan Adhikari*, 1927 Cal 339 (340): 98 Ind Cas 541.

(5) *Ram Chandra Mookerjee* v. *Raja Ranjit Singh*, (1899) 27 Cal 242 (252): 4 Cal W N 405.

Note 24.

(1) *Bansi Dhar* v. *Shyam Lal*, 1923 All 292 (292): 71 Ind Cas 1012; *Jagannath Prasad* v. *Jamuna Bai*, 1932 All L J 125 (126): 1932 All 263; *Abdul Rahman* v. *Muhammad Yar*, (1882) 4 All 190 (192): 1882 All W N 1; *Shankar Dial* v. *Amir Haidar*, (1878-80) 2 All 752 (753); *Nasib-un-nissa* v. *Niaz-un-nissa*, 1886 All W N 39 (40); *Bachi* v. *Sheo Karan Singh*, 1888 All W N 77 (78); *Daya Ram* v. *Gocardhandas*, (1904) 28 Bom 458 (460): 6 Bom L R 462; *Sakharam Krishna* v. *Gadya*, (1900) 2 Bom L R 241 (242); *Rashbehary Mookhopadhya* v. *Maharani Surnomoyee*, (1881) 7 Cal 403 (405): 9 Cal L Rep 79: 4 Shome L R 32; *Bhajahari Pal* v. *Ram Lal*, (1902) 6 Cal W N 63 (65); In the matter of the petition of *J B Rainey*, (1871) 12 Suth W R 333 (333, 334): 6 Beng L R 725 Note; *Kali Churn Gir Gossain* v. *Bungshi Mohun Doss*, (1871) 15 Suth W R 339 (339): 6 Beng L R 727; *Narain Acharjee Chowdhry* v. *Mr E Gregory*, (1867) 8 Suth W R 304 (306); *Maharajah Dheraj Mahatab Chund Bahadur* v. *Mt Pearee Dossee*, (1866) 6 Suth W R Mis 61 (62): *Mittoo Lal* v. *Mahatab Kooeree*, (1873) 19 Suth W R 97 (98); *Urjoon Sahoy* v. *Nil Monee Singh*, (1873) 20 Suth W R 90 (90); *Nimaye Churn* v. *Jogendro Nath Bannerjee*, (1874) 21 Suth W R 365 (366); *Budree Doss* v. *Toolsee Ram*, 1866 Pun Re No 9; *Phomon Singh* v. *A J Wells*, 1923 Rang 195 (195): 1 Rang 276: 2 Bur L Jour 134: 76 Ind Cas 677; *Thangavelu Mudaliar* v. *Mahomed Ibrahim*, (1916) 34 Ind Cas 759 (759): 3 Mad L W 877; *Santlal* v. *Indian Exchange Bank, Lahore*, (1916) 35 Ind Cas 6 (6): 38 All 537: 14 All L J 722; *Gulam Kavusha* v. *Bhuvaraha Ayyangar*, (1917) 38 Ind Cas 152 (153) Mad.

(1-a) *Bikram Singh* v. *Dip Singh*, 1932 All 502 (503): 1932 All L J 514.

(2) *Sabapathi Chetty* v. *Narayanaswami Chetty*, (1902) 25 Mad 555 (560): 11 Mad L Jour 346; *Venkatasubbiah Chetty* v. *Venugopal*, (1911) 9 Ind Cas 260 (260): 9 Mad L Tim 483; *Venugopal Mudali* v. *Venkatasubbiah Chetty*, (1915) 28 Ind Cas 367 (369, 370): 39 Mad 1196: 17 Mad L Tim 208: 1915 Mad W N 211 [The corresponding clauses in the Letters Patent for the High Courts at Lahore and Patna is cl. 10 and that for Rangoon is cl. 13].

(3) *Jamal Brothers & Co, Ltd* v. *Chip Mok & Co*, 1927 Rang 287 (287): 5 Rang 381: 6 Bur L Jour 162: 104 Ind Cas 330.

O.21,R.58, Notes 24—25.

one under O. 21, R. 58 and the Court acting under a misconception dealt with it as such.[4]

25. Revision.—*See* Notes 8, 11 and 23 to S. 115 *ante* and the cases cited below.[1]

O.21, R.59, Notes 1—2.

Evidence to be adduced by claimant.

R. **59** [S. 279.] The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Synopsis.

1. The claimant or objector must adduce evidence.
2. "Some interest."
3. "Or was possessed of."
4. Limits of enquiry under Rr. 59-61. See Note 20 to R. 58.

Benami. See Note 20, Pt. (7) of R. 58, supra.
Onus of proof. See Note 1, Pts. (1) and (2).
Revision. See Note 25 to R. 58.

1. The claimant or objector must adduce evidence.—The burden is on the claimant to prove that on the date of the attachment he was in possession of the property attached.[1] If he proves that, then the burden of proving that he is not the owner or holds it in trust for the judgment-debtor is upon the decree-holder.[2]

2. "Some interest."—The claimant may raise an objection not only on the ground that he is in possession of the property attached but also on the ground that he has some interest in the property.[1] A beneficial interest is as much an interest within the meaning of the rule as a legal interest in the property attached.[2] The Chief Court of Burma[3] has held that a mortgagor without possession can prefer a claim on the ground that his interest in the property, *viz.*, the equity of redemption cannot be attached and sold in execution of a decree against the mortgagee in possession.

The rule does not mean that if the claimant establishes that he has some interest in the property he is entitled to succeed irrespective of the question of possession; nor does it imply that if he fails to establish the particular interest he sets up, his claim must be disallowed irrespective of the question

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(4) *Gopal Das* v. *Ishar Das*, 1932 Lah 376 (377): 137 Ind Cas 258: 33 Pun L R 496.

Note 25.

(1) *Paras Ram* v. *Karam Singh*, (1887) 9 All 232 (233): 1887 All W N 20 [Refusal to entertain claim—Revision lies]; *Kallar Singh* v. *Toril Mahton*, (1897) 1 Cal W N 24 (29) [Refusal to investigate claim—Revision lies]; *Hurischunder Gupto* v. *Shushi Malla Guptia*, (1871) 15 Suth W R 163 (164): 6 Beng L R 721, (Do.); *Bhoitarinee Dabee* v. *Nil Monee Singh*, (1875) 24 Suth W R 422 (423), (Do.); *Issur Chunder* v. *Mohinee Mohun*, (1872) 17 Suth W R 74 (74), (Do.); *Central Bank of India, Ltd* v. *Ramkinker Banerjee*, 1929 Pat 751 (752) [Not deciding question of possession—Revision lies].

Order 21, Rule 59—Note 1.

(1) *Nga Tha Yah* v. *Burn*, (1869) 2 Beng L Rep 91: 11 Suth W R 8 F B; *Ma Sein U* v. *A L V R R M Letchmanan Chetty*, (1905-06) 4 L B R 228 (229).

(2) *P K A C T Kadappa Chetty* v. *Maung Shwe Bo*, (1903-1904) 2 L B R 152 (155 and 158).

Note 2.

(1) *Bhagwandas* v. *Rajnath*, (1912) 14 Ind Cas 790 (792): 34 All 365: 9 All L J 474; *Sheoraj* v. *Gopal*, (1891) 18 Cal 290 (295, 296).

(2) *Sabapathy* v. *Narayanasamy*, (1902) 25 Mad 555 (560): 11 Mad L Jour 346.

(3) *Nga Tak* v. *Subramaniyan Chetty*, (1911) 10 Ind Cas 994 (995): (1910) 1 U B R 75.

of possession. In each of the cases mentioned in Rr. 60 and 61, the Court must determine the question of possession of the judgment-debtor and cannot base its decision merely on the question of validity of the claim or of title to the attached property. "Some interest" means such interest as would render the possession of the judgment-debtor, possession, not on his account, but on account of or in trust for the claimant.[4] O.21, R.59, Notes 2—4.

3. **"Or was possessed of."**—These words are not restricted merely to tangible or physical possession but include *constructive* possession and possession in law of debts and other intangible property.[1]

4. **Limits of enquiry under Rr. 59-61.**—*See* Note 20 to R. 58.

O.21, R.60, Note 1.

R. **60.** [S. 280.] *Where* upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in *the possession* of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall *make* an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

Release of property from attachment.

[1877—S. 280; 1859—S. 220. *See* S. 63.]

Synopsis.

1. Release of property from attachment—General.
2. Property in possession of third person.
3. Property in possession of judgment-debtor.
4. Partly on his own account and partly on account of some other person.
5. Effect of an order of release.
6. Appeal.
7. Revision. See Note 25 to R. 58.

1. **Release of property from attachment—General.**—A release from attachment can be made under this rule, only if the conditions prescribed in this rule are satisfied, namely:—

(1) That the property was not when attached in the possession of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant paying rent to him.

(2) That the property being in the possession of the judgment-debtor at such time, it was so, not on his own account or as his own property, but on account of, or in trust for, some other person *viz.*, the claimant.

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(4) *Satkari Mandal* v. *Tirtha Narain Bhattacharjee*, (1914) 24 Ind Cas 62 (62) Cal; *Mohunt Bhagwan Ramanuj Dass* v. *Khetter Moni Dassi*, (1897) 1 Cal W N 617 (622).

Note 3.

(1) *Chidambara Pattar* v. *Ramasamy Pattar*, (1904) 27 Mad 67 (70): 13 Mad L Jour 467; *Po Kya* v. *Lutchminappaian Chetty*, (1907-1908) 4 L B R 289 (290).

O.21, R.60, Notes 1—3.

(3) That the property was in possession of the judgment-debtor partly on his own account and partly on account of some other person.[1]

In the last case, the release is to be ordered to *the extent* to which the possession of the claimant is established[2]. In such a case the Court should define the share of the judgment-debtor and that of the claimant and sell only the former.[3]

An order of release should be unconditional.[4] It has been held by the High Court of Patna in the undermentioned case[5] that the Court has, apart from this rule, an inherent power to release property from illegal attachment in proper cases.

2. Property in possession of third person.—If it is found that the claimant was in possession and that such possession was on his own account, the claimant is entitled to an order of release under this rule,[1] notwithstanding the fact that the judgment-debtor may have some beneficial interest in, or title over, the property.[2] Thus in a case where the wife of the debtor claimed the Government securities attached by the creditor and proved that they were in her name, that she dealt with them as owner and that she had separate properties of her own, it was held that the claim should not be dismissed on the mere suspicion that she might be holding it for the benefit of her husband.[3]

3. Property in possession of judgment-debtor.—If the property is found to be in the possession of the judgment-debtor, then the attachment should continue unless it is established that such possession was on account of, or in trust for the claimant.

A advanced money to *B* under an agreement that *B* would cut and send timber to *A* who was to sell and appropriate the sale proceeds in discharge of the debt due by way of advances. *B* accordingly cut and despatched the timber to *A*. While the goods were in transit, *C.* attached them in execution of a decree against *B*. On a claim preferred by *A*, it was held that *B* was a trustee for *A*, that *B's* possession was on account of *A*, and that the timber

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Order 21, Rule 60—Note 1.

(1) *Ram Saran Das* v. *Ohhole Lal*, 1928 All 668 (669): 110 Ind Cas 365; *Chimanlal Balabhai* v. *N O Macleod*, (1906) 8 Bom L R 794 (797); *E N M K Chetty* v. *Chartered Bank of India, Australia and China*, (1918) 48 Ind Cas 182 (183): 11 Bur L Tim 118 [Extent of enquiry into *title* laid down]; *Rajcoomar* v. *Kadumbiny*, (1870) 13 Suth W R 63 (66, 67): 4 Beng L R 175 F B.

(2) *Rajcoomar* v. *Kadumbiny*, (1870) 13 Suth W R 63 (66, 67) : 4 Beng L R 175 F B; *Rajaram Pandey* v. *Raghubansman Tewary*, (1897) 24 Cal 563 (566); *Yashwant Shenvi* v. *Vithioba Sheti*, (1887) 12 Bom 231 (235).

(3) *Udit Narain Singh* v. *Murtaza Khan*, (1905) 27 All 464 (465): 1905 All W N 49: 2 All L J 178; *Dallumal* v. *Hari Das*, (1901) 23 All 263 (265): 1901 All W N 75; *Monohur Khan* v. *Troyluckhonath Ghose*, (1865) 4 Suth W R 35 (35).

(4) *Kamala Kanta Sen* v. *Durga Kumar Sen*, (1918) 44 Ind Cas 1007 (1008) Cal; *Bhyrab Lall* v. *Meer Abdul*, (1867) 8 Suth W R 93 (93).

(5) *Harnandan* v. *Pran Nath Roy*, 1921 Pat 409 (410): 1921 Pat H C C 205: 2 Pat L Tim 240: 61 Ind Cas 922.

Note 2.

(1) *Khellat Chundar* v. *Gour Churn*, (1872) 18 Suth W R 402 (403); *Jumal Ali* v. *Tirbhee Lal Doss*, (1869) 12 Suth W R 41 (42); *Miree Begum* v. *Punnoo Singh*, (1867) 8 Suth W R 362 (363) [Claimant admitting that judgment-debtor had some interest—No release can be ordered]; *Hridoy Krishna Kundu* v. *Benode Behari Bandopadhaya*, 1930 Cal 390 (391): 34 Cal W N 254: 127 Ind Cas 670 [No registered sale in favour of claimant—*Held*, possession not on his own account].

(2) In re *Sheoraj Nandan Singh* v. *Gopal Suran Narain Singh*, (1891) 18 Cal 290 (295, 296).

(3) *Monmohiny Dassee* v. *Radha Kristo Dass*, (1902) 29 Cal 543 (546).

was not liable to attachment.[1]

The words "possession in trust for" means possession as servant, or agent having no right to possession on his own account,[2] *i.e.*, possession of such a character as to be really the possession of the debtor.[3]

4. Partly on his own account and partly on account of some other person. —The High Court of Rangoon has held in the undermentioned case[1] that a mortgagee in possession is so partly on his own account, *i.e.*, to the extent of his right as a mortgagee in possession, and partly on account of the mortgagor *i.e.*, to the extent of the mortgagor's interest, and that the Court is bound to investigate into the claim of a mortgagor and order a release to the extent of his interest when the mortgaged properties are attached in execution of a decree against the mortgagee. *See also* Note 3 to R. 62.

Where in an objection preferred under this rule, the Court finds that the claimant has a *half share* in the attached moveable property, the proper course, according to the High Court of Calcutta, is to release the entire property, and to proceed by way of attachment under R. 47, *ante*.[2]

5. Effect of an order of release.—An order of release from attachment under this rule is only provisional and is subject to the result of the suit contemplated by R. 63. The attachment is merely suspended pending the result of the suit and if the decree-holder succeeds in the suit the attachment will revive. An alienation made in the interval cannot prevail against the claim of the attaching decree-holder who eventually succeeds in a suit brought by him under this rule.[1]

See also Note 16 to R. 63,
Note 4 to O. 21, R. 55 and
Note 9 to S. 64.

6. Appeal.—An order under this rule is not appealable.[1] (*See also* Note 24 to R. 58.)

7. Revision.—*See* Note 25 to R. 58.

Note 3.

(1) *Maradugula Venkataratnam* v. *Kotala Ramanna*, (1911) 9 Ind Cas 255 (258): 21 Mad L Jour 618: 9 Mad L Tim 276. See also *Velji Hirji & Co* v. *Bharmal Shripal & Co.* (1897) 21 Bom 287 (293): Chitty's S C C R 519; *Small Cause Court reference*, (1870) 2 N W P 337; *Someshwar Rajaram* v. *Mandal*, (1932) 34 Bom L R 206 (215 and 216): 1932 Bom 210: 137 Ind Cas 603 [*Held*, the Court bound to take notice of subsequent events to do substantial justice].

(2) *P K A C T Kadappa Chetty* v. *Maung Shwe Bo*, (1902-1903) 2 L B R 152 (158).

(3) *Hamid Bakhut & Co* v. *Buktearchand & Co.* (1887) 14 Cal 617 (620).

Note 4.

(1) *Nga Tok* v. *Subramanian Chetty*, (1911) 10 Ind Cas 994 (995): (1910) 1 U B R 75.

(2) *Rajendra Nath Das* v. *Chairman, Jessore Dt Board*, 1932 Cal 408 (408): 54 Cal L Jour 488: 137 Ind Cas 672: 59 Cal 808.

Note 5.

(1) *Protab Chandra* v. *Sarat Chandra*, 1921 Cal 101 (104): 34 Cal L Jour 201: 62 Ind Cas 348: 25 Cal W N 544; *Ramchandra Marwari* v. *Mudeshwar Singh*, (1906) 33 Cal 1158 (1162): 10 Cal W N 978; *Bonomali* v. *Prosunno*, (1896) 23 Cal 829 (834); *Ali Ahmed Khan* v. *Bansidhar*, (1909) 1 Ind Cas 951 (951): 31 All 367: 6 All L J 434; *Babu Khandu* v. *Baji Jivaji*, (1890) 14 Bom 372 (377): 1889 Bom P J 305; *Anthiya* v. *Manjoya*, 1922 Mad 176 (178): 45 Mad 84: 69 Ind Cas 642: 41 Mad L Jour 393: 14 Mad L W 371: 1921 Mad W N 642; *Fathula* v. *Munyappa*, (1883) 6 Mad 98 (99): 7 Ind Jur 78; *Parmeshar Din* v. *Debi Pershad*, (1918) 48 Ind Cas 386 (388): 5 Oudh L J 647; *Maung Sein* v. *Maung Maung*, 1923 Rang 237 (238): 76 Ind Cas 617: 2 Bur L Jour 113.

Note 6.

(1) *Ragunath Das* v. *Badri Prasad*, (1884) 6 All 21 (22): 1883 All W N 177; *Ragunath Das* v. *Badri Prasad*, 1883 All W N 178 (178); *Dayaram* v. *Goverdhandas*, (1904) 28 Bom 458 (460): 6 Bom L R 462; *Sukharam* v. *Gadya*, (1900) 2 Bom L R 241 (242); *Bhajahari Pal* v. *Ram Lal Das*, (1902) 6 Cal W N 63 (65); *Nimayechurn* v. *Jogendra Nath*, (1874) 21 Suth W R 365 (366); *Ganga Sahai* v. *Bapu* alias *Gambhira*, (1895) 8 C P L R 67 (68); *Achuta* v. *Mammovu*, (1887) 10 Mad 357 (361); *Lu Bein* v. *Po Sein*, 1906 L B R Vol III, p 203 (204).

O.21, R.61, Notes 1—5.

Disallowance of claim to property attached.

R. 61. [S. 281.] *Where* the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

[1877—S. 281; 1859—S. 246.]

Synopsis.

1. Disallowance of claim.
2. Order without dealing with the question of possession.
3. Effect of order under this rule.
4. Appeal.
5. Revision.

1. **Disallowance of claim.**—Where the property attached is found to be in the possession of the judgment-debtor in his own account, or if the claimant is in possession as trustee for the judgment-debtor, the Court is bound to disallow the claim under this rule.[1]

2. **Order without dealing with the question of possession.**—As already pointed out in Note 20 to R. 58, the sole question to be considered in the investigation of a claim is the question of possession. But if the Court erroneously does not consider the question of possession, but decides it on some other ground, *e.g.*, on the ground of title, the order cannot be considered to be one passed without jurisdiction and a nullity. It will be nevertheless conclusive unless set aside in a suit under R. 63.[1] But such an order can be revised by the High Court.[2].

3. **Effect of order under this rule.**—An order disallowing a claim under this rule is only *provisional* and if the defeated claimant succeeds in the suit filed under R. 63, his rights as on the date of attachment will be restored. If the Court auction sale takes place, the auction purchaser's rights will be subject to the result of the suit.[1]

See also Note 16 to R. 63.
Note 4 to O. 21, R. 55 and
Note 9 to S. 64.

4. **Appeal.**—No appeal lies from an order under this rule.[1]

5. **Revision.**—*See* Note 25 to R. 58.

Order 21, Rule 61—Note 1.

(1) *W O Macintosh* v. *Bidhu Bhusan Sen*, (1912) 17 Ind Cas 12 (12): 16 Cal W N 959; *Jawahir Lal* v. *Khillo*, (1883) 3 All W N 205 (205) [After disallowing claim Court should not stay sale]; *Sarfarz Hussain* v. *Amar Chand Pal*, (1917) 37 Ind Cas 78 (83): 3 Oudh L J 529 [Defeated claimant to pay full costs to decree-holder though claim only to portion of attached property].

Note 2.

(1) *Bhagwan Das* v. *Rajnath*, (1912) 14 Ind Cas 790 (792): 34 All 365: 9 All L J 474.

(2) *Satkari Mandal* v. *Tirath Narain Bhattacharjee*, (1914) 24 Ind Cas 62 (62); *Rangammal* v. *Sevaugan*, (1915) 29 Ind Cas 228 (228): 28 Mad L Jour 327.

Note 3.

(1) *Khub Lal* v. *Ram Lochun*, (1890) 17 Cal 260 (262).

Note 4.

(1) *Awadh Kuari* v. *Raktu Tiwari*, (1884) 6 All 109 (110): 1883 All W N 230; *U Kala* v. *Ma Hnin U*, 1927 Rang 137 (138): 5 Rang 110: 101 Ind Cas 794.

R. **62.** [S. 282.] *Where* the Court is satisfied that the property is subject to a mortgage or *charge* in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or *charge*.

Continuance of attachment subject to claim of incumbrancer.

O.21, R.62, Note 1.

[1877—S. 282.]

Synopsis.

1. Scope of the rule.
2. "Subject to mortgage."
3. Mortgage in favour of a person not in possession.
4. Notification of mortgage or charge. See Note 1 above.
5. Effect of order under this rule.
6. Appeal.
7. Revision. See Note 25 to R. 58.

1. Scope of the rule.—The rule is an enabling provision which empowers the Court to direct the continuance of the attachment subject to a mortgage or charge in favour of a person not in possession.

The question of the existence of a mortgage over the property attached, can be raised in two ways and at two stages in execution. One is, when the Court has to prepare the proclamation for sale by public auction. This is provided for in R. 66 of this order. That rule enacts, that the sale proclamation shall specify as fairly and accurately as possible, any encumbrance to which the property is subject after giving notice to the decree-holder and the judgment-debtor. The other stage is that provided for by this rule. The difference between the two provisions is very important. As pointed out by the Allahabad High Court in the case cited below[1] where properties are sold subject to a mortgage under this rule, the Court does so *after being satisfied of the existence of the mortgage* and *sells only the judgment-debtor's right of redemption* so that the purchaser does not acquire any greater rights than that of redeeming the mortgage. The order is conclusive as to the rights of the parties and if no suit is filed within the period of one year prescribed by Art. 11 of the Limitation Act, the mortgagee or the purchaser as the case may be cannot either as plaintiff or defendant assert the right denied by that order.[2] In the case of a proclamation of sale issued under R. 66, the Court does not decide the question whether the mortgage subsists or not and the purchaser buys the property subject to such risks as the notice might involve; he is not precluded from questioning the validity of the mortgage.[3] The Chief Court of Oudh has

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Order 21, Rule 62—Note 1.

(1) *Shib Kunwar Singh* v. *Sheo Prasad*, (1906) 28 All 418 (420): 3 All L J 200: 1906 All W N 58. See also *Gur Charan Prasad* v. *Bachni*, (1915) 30 Ind Cas 238 (238): 2 Oudh L J 225; *Wazir Hussain* v. *Beni Madho*, 1930 Oudh 362 (365): 7 Oudh W N 676: 126 Ind Cas 389; *Kali Das* v. *Prasanna Kumar Das*, (1920) 55 Ind Cas 189 (192): 47 Cal 446: 24 Cal W N 269: 30 Cal L Jour 496.

(2) *Chunnilal Jivanlal* v. *Pira Miyaji Ghanchi*, 1927 Bom 234 (235): 29 Bom L R 285: 101 Ind Cas 335; *Govindrao* v. *Hirchand*, 1926 Nag 446 (447): 95 Ind Cas 563; *Govind* v. *Dhaklu*, 1923 Nag 282 (283): 19 Nag L R 15: 82 Ind Cas 771; *Harbhagat* v. *Narayan Rao*, 1924 Nag 208 (209): 78 Ind Cas 338; *Gurcharan* v. *Bachni*, (1915) 30 Ind Cas 238 (238): 2 Oudh L J 225. See also *Mahabir Prasad* v. *Anjumanissa*, (1919) 50 Ind Cas 145 (146): 6 Oudh L J 67 [But can question the accuracy of the description]. But see *Lalchand Haridal Marwadi* v. *Hasto Bal*, (1894) 7 C P L R 73 (75).

(3) *Roshanlal* v. *Lallu*, 1922 All 443 (445): 20 All L J 722: 44 All 714: 68 Ind Cas 790; *Sultan* v. *Mahabbat Khan*, 1921 All 79 (79): 43 All 489: 19 All L J 400: 63 Ind Cas 395; *Jairaj* v. *Radakishen*, (1913) 20 Ind Cas 182 (182): 35 All 257: 11 All L J 357; *Narayan Sadoba Halvai* v. *Umbar Adam Memon*, (1911) 10 Ind Cas 913 (914): 35 Bom 275: 13 Bom L R

O.21, R.62, Notes 1—2.

in the undermentioned case,[4] held that there is no difference between an order passed under this rule and an order passed under R. 66 so far as the auction purchasers are concerned. It is submitted that that view is not correct.

The rule does not apply to claims arising in execution of a mortgage-decree.[5]

2. "**Subject to mortgage.**"—Has the executing Court power to decide under this rule, the question of the truth or validity of the mortgage? In other words, if the Court rejects a claim of the mortgagee on the ground, the mortgage is not true, is he bound to file a suit under Art. 11 of the Limitation Act? Upon this point there is a conflict of judicial opinion. The High Court of Bombay[1] and the High Court of Allahabad in a case decided under the old Code[2] have held that the rule is only a provision enabling the Court to continue an attachment subject to a mortgage if it finds a mortgage exists and that the Court has no power to declare the mortgage invalid. The *ratio* of these decisions is that it is only where the Court is satisfied as to the existence of the mortgage, it can act under this rule, but that where it is not so satisfied, it can do nothing under this rule, but can only notify the mortgage under R. 66. The High Court of Allahabad in a case decided under the present Code,[3] the High Courts of Madras[4] and Rangoon[5] and the Judicial Commissioner's Court of Nagpur[6] have, on the other hand, held that an order rejecting the claim of a mortgagee on the ground that the mortgage is not true or valid is an order which will be *conclusive* unless set aside in a suit under R. 63. As pointed out by Ashworth, J., of the Allahabad High Court, the expression "where the Court is satisfied" *confers jurisdiction* on the Court to come to a finding of fact as to the existence of the mortgage. Without such finding of fact it cannot be said to be satisfied about it. The rule, in effect, provides for two alternative or mutually exclusive orders. One is an order that, as the mortgage exists, the attachment shall

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307; *Shantappa Chedambaraya* v. *Subrao Ramchandra*, (1894) 18 Bom 175 (176); *Krisna Kisor De* v. *Sreemati Nagendra Bala Chowdhurani*, 1921 Cal 435 (439): 34 Cal L Jour 333: 25 Cal W N 942: 66 Ind Cas 694 [If mortgage is invalid benefit goes to the purchaser]; *Izzatunnissa* v. *Kunwar Partab*, (1909) 3 Ind Cas 793 (794): 13 Cal W N 1143: 31 All 583: 26 Ind App 203: 19 Mad L Jour 682: 11 Bom L R 1220: 6 All L J 817: 10 Cal L Jour 313: 6 Mad L Tim 277; *Ramachandra* v. *Hazi Kassim*, (1893) 16 Mad 207 (210); *Mussammat Karman* v. *Chotha Rau*, (1919) 50 Ind Cas 909 (910) [Punjab Chief Court]; *Lala Bhagwan Das* v. *Chaudhuri Ahmad Jan*, (1916) 36 Ind Cas 732 (736): 3 Oudh L J 422; *Mt. Mankaur* v. *Ishar Das*, 1930 Lah 40 (40, 41): 120 Ind Cas 162: 11 Lah 90: 31 Pun L R 358; *Ganesram* v. *Biram*, (1913) 18 Ind Cas 461 (463) Oudh; *Jag Dei* v. *Sohan Lal*, (1915) 28 Ind Cas 360 (361, 362): 2 Oudh L J 140; *Kishen Lal* v. *Rupram*, (1920) 55 Ind Cas 354 (355): 2 U P L R (All) 94.

(4) *Sant Bux* v. *Nadir Mirza*, 1925 Oudh 154 (156, 157): 81 Ind Cas 1013: 27 Oudh Cas 308.

(5) *Mathura Prasad* v. *Ghanshiam Das*, 1931 Oudh 157 (159): 8 Oudh W N 179: 132 Ind Cas 767; *J. C. Sarfarz Husain* v. *Amarchand Pal*, (1917) 37 Ind Cas 78 (82): 3 Oudh L J 529; *Kahimuddin* v. *Shafquatullah*, 1922 Lah 358 (360): 81 Ind Cas 301.

Note 2.

(1) *Krishna* v. *Damoo*, (1916) 36 Ind Cas 627 (628): 41 Bom 64: 18 Bom L R 782 [Distinguishing 22 Bom 640]; *Yeshwant Shenvi* v. *Vithoba*, (1888) 12 Bom 231 (233); *Shah Nagindas Jaychand* v. *Halalkore Nathwar Gheesla*, (1880-81) 5 Bom 470 (477) F B.

(2) *Durga Prasad* v. *Mansa Ram*, (1904) 1 All L J 531 (536).

(2-a) *Risheshwar* v. *Chandrika Prasad*, 1924 Oudh 384 (385): 11 Oudh L J 240: 83 Ind Cas 869.

(3) *Debi Dass* v. *Maharaj Rupchand*, 1927 All 593 (595, 596): 25 All L J 609: 102 Ind Cas 792: 49 All 903.

(4) *Lakshmanan Chettiar* v. *Parasivan Pillai*, (1919) 52 Ind Cas 720 (721): 37 Mad L Jour 159: 1919 Mad W N 653; *Velu Padayachi* v. *Arumugam*, (1920) 56 Ind Cas 481 (483): 36 Mad L Jour 397: 11 Mad L W 343: 27 Mad L Tim 312.

(5) *Maung Aung Myint* v. *Maung Tha Hmat*, 1931 Rang 310 (312): 9 Rang 367: 134 Ind Cas 746.

(6) *Maroti* v. *Sonbai*, 1930 Nag 116 (119): 25 Nag L R 136: 123 Ind Cas 474 (1926 Nag 423 overruled].

O.21. R.62, Notes 2—5.

be continued subject to it, and the other is that no mortgage shall be deemed to exist. The latter order, no less than the former, is contemplated by R. 63.[6-a] It may appear anamalous that an executing Court should thus be given power to decide as to the validity and existence of a mortgage in favour of a third party the value of which may exceed the pecuniary limits of the jurisdiction of the Court. But as already pointed out in R. 58, Note 11 the mortgagee is not bound to prefer a claim. If he chooses to avail himself of the advantages of the speedy and summary remedy provided for in this chapter, he must suffer its disadvantages as well.[7]

3. Mortgage in favour of a person not in possession.—The rule refers only to the case of a claim of a *mortgagee not in possession*. Can a mortgagee in *possession* ask the Court to direct the continuance of the attachment subject to his mortgage? The High Court of Bombay[1] has held that a mortgagee in possession, is not in possession as *trustee* for the judgment-debtor *but on his own account* and that, therefore, he is *entitled to a release of the attachment under* R. 60 and not merely to an order directing the sale subject to his mortgage. The High Courts of Calcutta[2] and Patna[3] and the Judicial Commissioner's Court of Oudh[4] while agreeing with the view of the Bombay High Court that he is entitled to a release under R. 60, have held that in cases where the intention of the decree-holder is to attach only the equity of redemption and not the whole property, the Court can order the continuance of the attachment of the equity of redemption alone. The High Court of Rangoon[5] has also held that the equity of redemption in a possessory mortgage can be attached and sold.

4. Notification of mortgage or charge.—*See* Note 1 above.

5. Effect of order under this rule.—The effect of an order under this rule continuing an attachment subject to a mortgage is, that the purchaser at the auction sale takes only the mortgagor's right of redemption.[1] But he is entitled to file a suit questioning the *bona fides* and validity of the mortgage within a year of the order.[2] If the Court disallows the claim of the mortgagee the order is conclusive against him unless he files a suit within one year to vacate the order.[3]

(6-a) *Debi Dass* v. *Maharaj Rupchand*, 1927 All 593 (595, 596): 25 All L J 609: 102 Ind Cas 792: 49 All 402.

(7) *Nawal Kishore* v. *Khyali Ram*, 1929 Lah 865 (866): 11 Lah L Jour 452: 120 Ind Cas 679: 11 Lah 369.

Note 3.

(1) *Ganesh* v. *Purushotham*, (1909) 1 Ind Cas 106 (107): 33 Bom 311: 5 Mad L Tim 228: 11 Bom L R 26; *Kassi Rao Saheb Holkar* v. *Vithaldas Mangalji* (1873) 10 Bom H C 109. But see *Purshotham Sidheshwar* v. *Dhondu Amrit Danwate*, (1881-1882) 6 Bom 582 (583).

(2) *Maharaj Bahadur Singh* v. *Nisharan Bibi*, 1925 Cal 296 (297): 80 Ind Cas 428.

(3) *Radhay Kishan Lal* v. *Rameshwar Prasad*, 1927 Pat 51 (52): 97 Ind Cas 255 [Distinguishing 1922 Pat 408].

(4) *Raghunandan* v. *Ajodhia Prasad*, 1924 Oudh 404 (404): 11 Oudh L J 239: 81 Ind Cas 648.

(5) *Maung So* v. *Deviggan*, 1923 Rang 119 (119): 4 U B R 132: 70 Ind Cas 530.

Note 5.

(1) *Po So* v. *Ba Zan*, (1919) 51 Ind Cas 580 (581): 12 Bur L Tim 43; *Ramcharan Misir* v. *Bhagwandas*, (1910) 5 Ind Cas 874 (875): 7 Nl L J 199; *Krishna Kumar Nandy* v. *Jeo Krishna Nandy*, (1915) 29 Ind Cas 690 (692): 21 Cal W N 401: 23 Cal L Jour 570; *Deputy Commissioner of Lucknow* v. *Sukhnandan*, (1914) 23 Ind Cas 448 (451): 17 Oudh Cas 38 [Can raise the plea that mortgage is barred by limitation]; *China Sudshic* v. *Ram Dayal Prayagadas*, (1915) 27 Ind Cas 238 (239): 16 Bom L R 648 [Case of fraud. Purchaser must be aware of fraud within one year]. See also *Ramu Iyer* v. *Palaniappa Chetty*, (1910) 8 Ind Cas 117 (118): 35 Mad 35: 1910 M W N 589: 8 Mad L Tim 381: 21 Mad L Jour 756.

(2) *Kesho Ram* v. *Chuni Singh*, 1931 All 139 (140): 1931 All L J 1: 52 All 1032: 131 Ind Cas 674; *Shahzia-Ud-Din Abdul Hossein* v. *Kailash Chandra Saha*, (1905) 2 Cal L Jour 599 (601) [He can do so even by way of defence to a suit by the mortgagee].

(3) *Nema Gauda* v. *Paresha*, (1898) 22 Bom 640 (645).

O.21, R.62, Notes 6—7.

6. **Appeal.**—An order under this rule is not appealable. *See* Note 24 to R. 58.

7. **Revision.**—*See* Note 25 to R. 58.

O.21, R.63.

R. **63.** [S. 283.] *Where a claim or an objection is preferred,* the party against whom an order is *made*[3] may institute a suit to establish the right which he claims[7] to the property in dispute,[17] but, subject to the result of such suit, if any, the order shall be conclusive.[16]

Saving of suits to establish right to attached property.

[1877—S. 283; 1859—S. 220.]

Local Amendments.

LAHORE.

The following rule shall be *added* after Rule 63:—

"63-A. (1) Where the property attached is a debt, the Court executing the decree shall investigate the claims of the judgment-debtor against the garnishee in respect thereto and may order the garnishee to pay the amount of the debt to the Court.

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of S. 47, and subject to the provisions of that section the orders passed by the Court as a result of such investigation shall be conclusive between the judgment-debtor and the garnishee and no separate suit relating thereto shall lie."

RANGOON.

The following Rules 63-A to 63-G shall be *added* after Rule 63, namely:—

"GARNISHEE ORDERS

Payment of debt into Court.

63-A. Where a debt has been attached under Rule 46, the debtor prohibited under Clause (*i*) of sub-Rule (1) of Rule 46 (hereinafter called the garnishee) may pay the amount of the debt due from him to the judgment-debtor into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

Notice calling on garnishee to show cause against payment into Court.

63-B. Where a debt has been attached under Rule 46, and the garnishee does not pay the amount of the debt into Court in accordance with the foregoing rule, the Court, on the application of the decree-holder, may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree together with the costs of execution. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

Procedure when the garnishee fails to make payment into Court or disputes liability.

63-C. (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the costs of execution, and if he does not appear in answer to the notice issued under R. 63-*B*, or does not dispute his liability to pay such debt to the judgment-debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

(2) If the garnishee appears in answer to the notice issued under R. 63-*B* and disputes his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

Procedure when third person claims an interest in the attached debt.

63-D. Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt and prove the same if necessary.

Order of Court after hearing all interested persons.

63-E. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable.

Payment by garnishee constitutes valid discharge.

63-F. Payment made by or levied by execution upon the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor, and any other person ordered to appear under these rules, for the amount paid or levied although such order or the judgment may be set aside or reversed.

Costs of garnishee proceedings.

63-G. The costs of any application for the attachment of a debt or under the foregoing rules, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree."

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. "The party against whom an order is made."
4. Order dismissing a claim for default.
5. Order refusing to investigate.
6. Attachment before judgment.
7. May institute a suit to establish the right which he claims.
8. Parties to the suit.
9. Consequential relief if and when should be asked.
10. Damages for wrongful attachment —If can be asked for under this rule.
11. Suit not necessary if property is released from attachment.
12. Claimant can pay money under protest.
13. Other remedies open to a claimant or objector.
14. Objector can plead invalidity of attachment.
15. Limitation for suits under this rule.
16. Subject to the result of the suit the order is conclusive.
17. Property in respect of which the order is conclusive.
18. Effect of decision in claim cases as to possession.
19. Burden of proof in a suit under this rule.
20. Defence of fraudulent transfer by the judgment-debtor—If can be raised in the suit.
21. Jurisdiction.
22. Valuation of suit for Court-fees.
23. Insolvency of judgment-debtor.

O.21, R.63, Notes 1—2.

24. Effect of attachment on adverse possession.
25. Costs.
26. Appeal.
27. Revision.

Auction purchaser's right to question validity of encumbrance. See Note 8, Pt. (4) and Note 16, Pt. (3).
Effect of decree in claim suit on attachment and execution proceedings. See Note 7, Pt. (10); Note 16, Pts. (6) and (7); Note 17, Pt. (3) and Note 2, Pt. (11).
Hindu Reversioner's suit. See Note 3, Pt. (8).
Inapplicability in the absence of claim order. See Note 2, F.-N. (1).
Limitation for suit by minors. See Note 15, Pt. (3).
Limitation for suit for damages for wrongful seizure of moveables. See Note 15, F.-N. (1).
Nature of trial. See Note 2, Pts. (3) and (4) and Note 7, Pts. (6) to (8).
Non-parties to claim—Petition—Limitation. See Note 3, Pts. (5) to (7).
Remedy by suit permissive or alternative. See Note 12, Pt. (1); Note 13, Pt. (5) and Note 4, Pt. (2).
Right of suit not personal. See Note 8, Pt. (7).
Sale prior to suit—Lis pendens—Vendee bound by decree. See Note 16, Pt. (9).
Shebaits of idols. See Note 15 to R. 58, supra.
Vendee from successful claimant—Unnecessary party. See Note 8, Pt. (3).
Withdrawal of claim—Effect. See Note 5, Pts. (7) to (12).

1. Legislative changes.—

The words "where a claim or an objection is preferred the party against whom an order is made" have been substituted for the words "The party against whom an order under Sections 280, 281 or 282 is passed". The result of the change is to widen the scope of the rule so as to include *any order* passed on an investigation of a claim.[1] *See also* Notes 4 and 5, *infra*.

2. Scope of the rule.—The rule gives a statutory right of suit to the party against whom an order is passed in the claim proceedings.[1] Such a suit has to be filed within one year from the date of the order as prescribed by Art. 11 of the Limitation Act. If no suit is filed the order becomes *conclusive*, as to the rights asserted, in the objection proceedings.[2] The policy of the legislature is to secure a speedy settlement of questions of title raised in execution sales and the finding of the Court in the claim proceedings is a summary decision from which the suit allowed under this rule is *in the nature of an appeal*. The object of the legislature in prescribing a suit by way of appeal is to give the parties an opportunity of placing their respective cases *fully* before the Court because a summary investigation might not furnish sufficient material for a decision by an appellate Court.[3] In a suit filed under this rule,

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Order 21, Rule 63—Note 1.

(1) *Narasimha Chetty* v. *Vijiapala Nainar*, (1915) 27 Ind Cas 944 (945): 2 Mad L W 206.

Note 2.

(1) *Venkateswara Ayyar* v. *Somasundaram Chettiar*, (1918) 44 Ind Cas 551 (552): 7 Mad L W 280: 1918 Mad W N 244; *Ram Dhyan Koonwar* v. *Mt. Phoolbas Kooer*, (1870) 14 Suth W R 339 (341). See also *Sitanath Koer* v. *Land Mortgage Bank of India*, (1883) 9 Cal 888 (894): 12 Cal L R 574: 8 Ind Jur 85; *Syud Abdullah* v. *Shaikh Shokoor Ali*, (1870) 14 Suth W R 192 (193); *A R P L Firm* v. *Ma Gun*, 1926 Rang 73 (73): 3 Rang 515: 93 Ind Cas 91. See *Mi San Ma Khaing* v. *Shwe Ba*, 1923 Rang 82 (83, 84): 1 Bur L Jour 106: 74 Ind Cas 164 [No cause of action for suit under this rule before attachment and claim order].

(2) *Venkatachela Reddi* v. *Muthialu Reddi*, (1920) 54 Ind Cas 536 (538): 37 Mad L Jour 624; *Nogendra Lal Chowdhury* v. *Fani Bhusan Das*, (1918) 44 Ind Cas 265 (265): 45 Cal 785: 23 Cal W N 375.

(3) *Daulat* v. *Ramappa*, 1926 Nag 197 (198): 90 Ind Cas 196.

the Court is not restricted only to the question of possession and questions of title can be fully gone into.[4] O.21, R.63, Notes 2—3.

The object of the suit is to establish the right which has been negatived by the claim order[5] and is in substance to set it aside.[6] But there is no other restriction prescribed as regards the *nature* of such a suit, though the defeated party is placed at a disadvantage as regards the period of limitation for filing the suit.[7] Thus his right of suit under this rule is not, in any way, governed or qualified by the Proviso to S. 42 of the Specific Relief Act and a suit cannot be dismissed on the ground that a *further relief* than a mere declaration has not been asked for.[8] Similarly a suit under this rule by a defeated creditor impeaching, on the ground of fraud, a transfer by the judgment-debtor, need not be framed as a *representative* suit on behalf of all the creditors.[9] On the other hand, a plaintiff in a suit under this rule is not precluded from asking for *other reliefs* than a mere declaration of the right denied to him by the claim order.[9-a]

The order passed in the claim proceedings, as the rule itself says, is *subject to the result of the suit.*[10] The right restored to the parties on the termination of the suit is the right which they asked the Court to give a decision upon *on the date of attachment*, and the decision places the parties in *status quo ante* either by vacating or confirming the order.[11]

3. "The party against whom an order is made".—The rule does not speak of any party but only the party against whom the order is made[1] and the right of suit and the conclusiveness of the order in the absence of such suit is only with reference to such a party. A person who is not a party to the claim proceedings and against whom there is no order, is not affected by the order, although he may be interested in the property attached; nor is he *bound* to file a suit under this rule. Thus a judgment-debtor who is not, in fact, a party to the claim proceedings does not, in the eye of law, become such by

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(4) *Ramaswami Chettiar* v. *Mallappa Reddiar*, (1921) 59 Ind Cas 947 (954): 43 Mad 760: 39 Mad L Jour 350: 1920 Mad W N 572: 28 Mad L Tim 170: 12 Mad L W 475 F B; *Mothoora Pandey* v. *Ram Ruchya Tewaree*, (1869) 11 Suth W R 482 (485): 3 Beng L R A C 108; *Swamirao* v. *Bhimabhai*, 1921 Bom 368 (369): 45 Bom 1020: 23 Bom L R 416: 62 Ind Cas 101; *Venkatasubbiah* v. *Venugopal*, (1911) 9 Ind Cas 260 (260): 9 Mad L Tim 483; *Lekraj Roy* v. *Mutty Madhub Sen*, (1870) 14 Suth W R 95 (98).

(5) *Amjad Ali* v. *Kunkoo*, (1872) 17 Suth W R 304 (305): 9 Beng L R App 28; *Ganesh* v. *Ramachandra*, (1873) Bom P J 505 (506).

(6) *Alexander Mitchell* v. *Mathura Das*, (1886) 8 All 6 (9): 12 Ind App 150: 4 Sar 663: 9 Ind Jur 442 P C.

(7) *Din Muhammad* v. *Uma Datta Hans Raj*, 1931 Lah 430 (431): 32 Pun L R 201: 133 Ind Cas 118.

(8) *See* Note 9, *infra*.

(9) *Kottarathil Puthiyapurayil Pokker* v. *Balathil Parkum Chandran Kandi*, (1919) 51 Ind Cas 714 (716, 718): 42 Mad 143: 36 Mad L Jour 231: 25 Mad L Tim 47: 1919 Mad W N 39: 9 Mad L W 138; *Surendra Nath Sarkar* v. *Kiran Moyi Dasi*, (1909) 1 Ind Cas 428 (429, 430) Cal; *R R O O Chettiar Firm* v. *Ma Sein Yin*, 1928 Rang 1 (3): 5 Rang 588: 105 Ind Cas 582. *Din Muhammad* v. *Uma Datta Hansraj*, 1931 Lah 430 (431): 32 Pun L R 201: 133 Ind Cas 118: *Mathura Das* v. *Ramraj Singh*, 1925 All 240 (240): 5 L R A (Civ) 755: 86 Ind Cas 323. See also *Lok Nath* v. *Thakur Das*, (1923) 71 Ind Cas 20 (22) (Pesh). See however *Lakshmana Chettiar* v. *Govindarajulu Naidu*, (1910) 8 Ind Cas 131 (132): 1910 Mad W N 565: 8 Mad L Tim 319.

(9-a) *See* Note 9, *infra*.

(10) *O. K. Abdula Brothers & Co.* v. *Chotalal Sunderji & Co.*, (1892-1896) 2 U B R 255.

(11) *Pandyan Pillai* v. *Vellayappa Rowther*, (1917) 42 Ind Cas 438 (439): 33 Mad L Jour 316: 6 Mad L W 586; *Hari Shanker* v. *Naran*, (1894) 18 Bom 260 (263).

Note 3.

(1) *Venkataratnam* v. *Rangayanayakkama*, (1918) 48 Ind Cas 270 (275): 41 Mad 985: 24 Mad L Tim 197: 1918 Mad W N 599: 8 Mad L W 292: 35 Mad L Jour 335 F B.

O.21, R.63, Notes 3—4.

reason solely of his being the judgment-debtor.[2] He cannot be regarded as a necessary party to the claim enquiry and it depends on the facts and circumstances of each case whether he was in fact a party.[3] In objection proceedings the contest is really between the decree-holder who asserts that the property is liable to attachment and the claimant who alleges that it is not in the actual or constructive possession of the judgment-debtor and therefore not liable to attachment. The order made in such a case is either that the property is released from attachment as not being in the possession of the judgment-debtor or the claim be disallowed. But such an order does not affect the right or title of the judgment-debtor to the property. The order is only conclusive between the claimant and the decree-holder who is proceeding against the property.[4] Hence a suit by the judgment-debtor against the successful claimant[5] or a suit by the defeated claimant against the judgment-debtor,[6] in cases where the judgment-debtor is not a party to the claim enquiry is not affected by the provisions of this rule and is not governed by the period of limitation prescribed by Art. 11 of the Limitation Act. But if the judgment-debtor was in fact a party to the claim, he is bound by the order passed therein and he can also file a suit under this rule in case the order is against him.[7]

A Hindu reversioner, whose right to the estate is contingent and accrues only after the death of the limited owner, is not bound to sue within one year by reason of his having preferred a claim unsuccessfully in execution of a decree against the widow. He is not debarred by reason of the claim order from filing a suit after the death of the widow.[8]

4. Order dismissing a claim for default.—Unlike the old S. 283 of the Code of 1882, the present rule applies to any order passed in the claim pro-

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(2) *Rati Ram* v. *Burhmajit*, 1924 All 302 (303): 46 All 45: 21 All L J 770: 5 L R A (Civ) 28: 77 Ind Cas 82; *Jethu* v. *Godawari Dutt*, 1922 All 411 (412): 20 All L J 619: 77 Ind Cas 107; *Mannu Lal* v. *Harsukh Das*, (1881) 3 All 233 (235); *Krishnasami* v. *Somasundaram*, (1907) 30 Mad 335 (339): 17 Mad L Jour 95: 2 Mad L Tim 116 F B; *Karsan* v. *Ganpatram*, (1898) 22 Bom 875 (879 and 884) F B.

(3) *Shivapa* v. *Dod Nagaya*, (1887) 11 Bom 114 (119); *Ajibal Narasinha Hegde* v. *Shirekoli Timapa Hegde*, (1893) 17 Bom 629 (631); *Shrinivas* v. *Shiddika*, 1925 Bom 413 (413): 27 Bom L R 931: 89 Ind Cas 990; *Durgaram Roy* v. *Raja Narsing Deb*, (1869) 2 Beng L R A C 254: 11 Suth W R 134; *Vedalinga Pillai* v. *Veerathal*, (1920) 54 Ind Cas 530 (534): 37 Mad L Jour 547: 26 Mad L Tim 513: 1920 Mad W N 77; *Kurriyil Parkun Putthakargi Kattayi* v. *Varanakat Illath Ganapati Nambudri*, (1911) 10 Ind Cas 424 (428): 35 Mad 168: 21 Mad L Jour 550: 9 Mad L Tim 423: (1911) 2 Mad W N 315; *Muthuswami Mudali* v. *Appalu Bathadu*, (1903) 13 Mad L Jour 367 (368, 369); *Gurura* v. *Subbarayudu*, (1890) 13 Mad 366 (369); *Moidin Kutti* v. *Kunhi Kutti Ah*, (1902) 25 Mad 721 (723): 12 Mad L Jour 411; *Narasimham* v. *Seetharama Murthi*, (1908) 31 Mad 163 (168): 18 Mad L Jour 26: 3 Mad L Tim 256; *Pethu Ayyar* v. *M Sankaranarayana Pillai*, (1917) 38 Ind Cas 778 (781): 40 Mad 955: 32 Mad L Jour 374: 1917 Mad W N 284: 5 Mad L W 519: 21 Mad L Tim 377; *Lingama Naidu* v. *Official Receiver, Madura*, (1928) 110 Ind Cas 511: 1928 Notes 40 (e); *Imbichikoya* v. *Kakkunnat Upakki*, (1876-78) 1 Mad 391 (393): 2 Ind Jur 709; *Arakel Kunhi Kuttiyali* v. *Imbichi Ammah*, (1870-71) 6 Mad H C R 416 (418); *Anant Ram* v. *Damodar Das*, (1914) 22 Ind Cas 797 (798): 84 Pun Re 1914: 102 Pun L R 1914: 59 Pun W R 1914. But see *Netietom Perengary Prom* v. *T P Damodren Nambudry*, (1868-69) 4 Mad H C 472 (475, 477); *Babaji Vithal Savant* v. *Kaji Abdul Rahman*, (1878) Bom P J 159 (159); *Sohnun* v. *Mast Ram*, 1929 Lah 657 (658): 118 Ind Cas 889.

(4) *Chet Singh* v. *Gujar Singh*, 1931 Lah 74 (76): 131 Ind Cas 225.

(5) *Kedar Nath* v. *Rakhal*, (1888) 15 Cal 674 (679): 13 Ind Jur 104; *Nitta-ko-lita* v. *Bishnuram Kolita*, (1868) 2 Beng L R App 49; *Munshi Lal* v. *Bishun Prasad*, 1929 Pat 604 (605): 10 Pat L Tim 581: 120 Ind Cas 762.

(6) *Sadaya Pillai* v. *Amurthachari*, (1910) 8 Ind Cas 157 (158): 34 Mad 533: 1910 Mad W N 741: 8 Mad L Tim 417.

(7) *Sabella Appanna* v. *Malidi Appanna*, (1914) 25 Ind Cas 700 (701): 1 Mad L W 772: 16 Mad L Tim 300: 1914 Mad W N 833.

(8) *Tai* v. *Ladhu*, (1896) 20 Bom 801 (803); *Shib Deo Singh* v. *Uttam Singh*, 1925 Lah 84 (85): 78 Ind Cas 926; *Natha* v. *Ganesha Singh*, 1932 Lah 179 (180): 33 Pun L R 46: 136 Ind Cas 265: 13 Lah 524; *Bansidhar* v. *Sham Lal*, 1923 All 292 (292): 71 Ind Cas 1012 [Reversioner's claim allowed—Decree-holder has a right of suit].

ceedings whether with or without investigation. An order dismissing a claim for default is an order which comes within the purview of this rule.[1] But the rule does not take away the right of the claimant to have the order of dismissal for default set aside either under O. 9, R. 9 or under S. 151 of the Code.[2] *See also* Note 1 to O. 9, R 1. **O.21, R.63, Notes 4—5.**

5. **Order refusing to investigate.**—S. 283 of the old Code applied only to orders *passed under* Ss. 280, 281 *and* 282, and consequently it was held that an order passed without investigation rejecting a claim on the ground of delay was not an order contemplated by the section and hence the one year's rule of limitation would not apply to such a case.[1] Under the present rule, orders passed whether with, or without, investigation are placed on the same footing, with the result that, if the party against whom the order of rejection is made under the proviso to R. 58 does not file a suit within one year, the order becomes conclusive against him.[2] Thus an order passed on a claim, that the allegation

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Note 4.

(1) *Debi Das* v. *Maharaj Rupchand*, 1927 All 593 (595): 25 All L J 609: 102 Ind Cas 792: 49 All 903; *Damodar Das* v. *Pearey Lal*, (1931) 130 Ind Cas 200 (201): 1930 Notes 5 (a): 1930 All L J 1322; *Gulab* v. *Mutassadi Lal*, (1919) 50 Ind Cas 748 (749): 41 All 623: 17 All L J 674; *Gokul* v. *Mohri Bibi*, (1918) 44 Ind Cas 1005 (1006): 40 All 325: 16 All L J 256; *Himayat Ali* v. *Mansukh*, 1883 All W N 19 (19); *Satindra Nath* v. *Shiva Prasad*, 1922 Cal 166 (167): 64 Ind Cas 713: 26 Cal W N 126; *Haripada (Berman)* v. *Surendra Nath Samantha*, 1922 Cal 164 (164); *Rahim Bux* v. *Abdul Kader*, (1904) 32 Cal 537 (540); *Bibi Aliman* v. *Dhakeshwer Pershad Narain Singh*, (1905) 1 Cal L Jour 296 (299); *Rash Behary* v. *Buddun Chunder*, (1883) 12 Cal L Rep 550 (554); *Sadut Ali* v. *Ram Dhone Misser*, (1883) 12 Cal L Rep 43 (44); *Tripoora Soonduree* v. *Ijjutoonnissa*, (1875) 24 Suth W R 411 (412); *Kaminee Debia* v. *Issur Chunder Roy*, (1874) 22 Suth W R 39 (39); *Sreemunto Hajrah* v. *Syud Tajooddeen*, (1874) 21 Suth W R 409 (409); *Gooroo Doss Roy* v. *Sona Mon Dossia*, (1873) 20 Suth W R 345 (345); *Lala Gundur Lal* v. *Habee Banissa*, (1871) 15 Suth W R 311 (311): 7 Beng L R 235; *Dhunput Singh* v. *Indur Chunder Doogur*, (1870) 13 Suth W R 121 (122); *Shaik Khoda Buksh* v. *Purmonund Dutt*, (1866) 5 Suth W R 213 (214); *Kishen Parshad* v. *Punjab National Bank*, 1927 Lah 872 (872): 26 Pun L R 151: 105 Ind Cas 693; *Lakshumanan Chettiar* v. *Parasivan Pillai*, (1919) 52 Ind Cas 720 (721): 37 Mad L Jour 159: 1919 Mad W N 653; *Ponnuswami Pillai* v. *Samu Ammal*, (1917) 38 Ind Cas 937 (938): 31 Mad L Jour 247; *Kurada Venkatachalapathi Rao* v. *Gudirada Pedavirasami*, (1915) 28 Ind Cas 244 (241): 1915 Mad W N 188: 17 Mad L Tim 223; *Kedar Nath* v. *Sukh Nath Singh*, 1921 Oudh 54 (55): 24 Oudh Cas 213: 64 Ind Cas 209; *Dharma* v. *Madar Singh*, (1911) 12 Ind Cas 345 (347) (Oudh); *Gayadin* v. *Musammat Baij Nathi*, (1908) 11 Oudh Cas 180 (182); *Jiwani* v. *Nathu Mal*, (1910) 5 Ind Cas 890 (891): 28 Pun Re 1910: 19 Pun W R 1910: 63 Pun L R 1910; *Ma Thein Tin* v. *Ma Htoo*, 1923 Rang 156 (156): 2 Bur L Jour 60: 75 Ind Cas 322; *Dorab Ally* v. *Ma Thit*, (1897-1901) U B R Vol. 2, p. 267; *Subedar Singh* v. *Ramprit Pande*, 1929 Pat 116 (117): 115 Ind Cas 703: 11 Pat L Tim 28 [Dismissal on preliminary ground as to maintainability falls under this rule]; *Gangadhara Rao* v. *Abdul Majid*, 1923 Nag 69 (69): 69 Ind Cas 522. But see *Nanhu* v. *Malloo*, (1918) 44 Ind Cas 528 (529) (Nag).

For cases under the old Code which held that an order dismissing for default is not an order under S 283. See the following cases:—*Kallu Mal* v. *Brown*, (1881) 3 All 504 (505): 1881 All W N 14; *Ganesh Singh* v. *Surat Singh*, 1881 All W N 126 (126); *Bhola Dutt* v. *Shah Ahmed*, (1868) 8 Agra 897; *Karsan* v. *Ganpatrum*, (1898) 22 Bom 875 (884); *Umacharan Chatterjee* v. *Hironmoyee Debi*, (1915) 26 Ind Cas 943 (943): 18 Cal W N 770; *Mohadeb Mundul* v. *Modhu*, (1871) 16 Suth W R 59 (60); *Sheo Ratan Rai* v. *Sarab Rai*, 1894 All W N 14 (14); *Rura Mal* v. *Kuria*, 1894 Pun R. No. 62; *Sarala Subba Rau* v. *Kamsala Timmappa*, (1908) 31 Mad 5 (6): 17 Mad L Jour 554: 3 Mad L Tim 106; *Sajan Ram* v. *Ram Rattan*, 1904 Pun Re No. 87: 119 Pun L R 1904; *Kallar Singh* v. *Toril Mohton*, (1897) 1 Cal W N 24 (29).

(2) *Ramappa Chettiar* v. *Ekambara Padayachi*, 1924 Mad 715 (715): 47 Mad 651: 47 Mad L Jour 13: 34 Mad L Tim 309: 19 Mad L W 685: 1924 Mad W N 479: 79 Ind Cas 818. But see *Coates* v. *Kashiram*, 1903 Pun Re No. 76; 170 Pun L R 1903.

Note 5.

(1) *Mussamat Kamran* v. *Neit Ram*, (1874) 6 N W P 185; *Venkapa* v. *Chenbasapa*, (1879-80): 4 Bom 21 (28): 4 Ind Jur 458; *Sankar Nath Pandit* v. *Madan Mohun Das*, (1910) 5 Ind Cas 298 (300): 14 Cal W N 298: 11 Cal L Jour 61; *Chandra Bhusan* v. *Ramkanth*, (1886) 12 Cal 108 (109); *Sah Mukhun Lal Panday* v. *Sah Koondun Lal*, (1875) 15 Beng L R P C 228: 2 Ind App 210: 24 Suth W R 75 P C; *Jugabandhu Bose* v. *Srimati Sachya Bibi*, (1872) 8 Beng L R App 39: 16 Suth W R 22; *Lakhi Prya Debi* v. *Khyrulla Kazi*, (1871) 7 Beng L R 238, Note; *Radhanath Banerjee* v. *Jodoonath Singh*, (1867) 7 Suth W R 441 (445); *Banee Madhub*, In the matter of, (1870) 13 Suth W R 131 (431); *Syed Mahomed* v. *Kanhya Lal*, (1865) 2 Suth W R 263 (263); *Raghoo Nath* v. *Bydo Nath*, (1870) 14 Suth W R 364 (364); *Sarala Subbarao* v. *Kamsala Timmayya*, (1908) 31 Mad 5 (6): 17 Mad L Jour 554: 3 Mad L Tim 106; *Munisami Reddi* v. *Arunachala Reddi*, (1895) 18 Mad 265 (266).

(2) *Durga Das* v. *Gori Mal*, 1928 All 327 (328): 26 All L J 794; *Goberdhan Das* v. *Mahundi Lal*, 1923 All 435 (436): 21 All L J 342: 45 All 438: 4 L R A (Civ) 185: 74 Ind Cas 1024; *Ramalingayya* v. *Narayanappa*, 1926 Mad 593 (594): 93 Ind Cas 335; *Arsamma* v. *Moidin*

O.21, R.63, Note 5.

of the claimant will be notified to the bidders as the petition was put in too late, has been held by a Full Bench of the High Court of Madras[3] to be a conclusive order against the claimant within the meaning of this rule.

But an order refusing to entertain a claim on the ground that the Court has no *jurisdiction* to entertain it, has, however, been held, not to amount to an order under this rule.[4] Thus an order saying "whatever right the defendant has will pass by the sale. The petition *does not require any investigation.* The claim put forward by the petitioner will be noted in the sale proclamation"[5] or an order "sale stopped. The claim cannot be investigated by this Court. Petition dismissed"[6] has been held not to amount to an order against the claimant under this rule. Similarly an order merely recording the objections by reason of the claimant withdrawing or not pressing his claim is not, according to the High Courts of Madras,[7] Bombay[8] and Rangoon[9] and the Judicial Commissioner's Court of Nagpur,[10] an order negativing the claim and, therefore, is not an order *against* the claimant within the meaning of this rule. The proper order to be passed in such a case is to record on the petition "withdrawn" and not "dismissed" and even if the Court has stated that it is dismissed, the claimant is not affected by the order and is not bound to sue within one year from the date of the order.[11] A Full Bench of the Chief Court of Oudh[12] has, however, held that an order passed on a claim which is not pressed, and therefore dismissed, is conclusive against the claimant until set aside in a suit under this rule.

Where, after the filing of a claim, the execution petition itself is struck off for default and the claim petition is thereupon ordered to be closed, there is no order against the claimant so as to compel him to file a suit.[13]

Kunhi Beari, 1924 Mad 111 (112): 45 Mad L Jour 690: 18 Mad L W 520: 1923 Mad W N 633: 33 Mad L Tim 1: 47 Mad 160: 77 Ind Cas 264; *Wamandhar* v. *Kamta Prasad*, 1926 Nag 423 (425): 22 Nag L R 94: 97 Ind Cas 178; *Narasayya* v. *Laxmi Narayan*, 1923 Nag 187 (188): 19 Nag L R 34: 6 Nag L J 66: 71 Ind Cas 404; *Maung Pya* v. *Ma Hla Kyu*, 1924 Rang 42 (44): 1 Rang 481: 2 Bur L Jour 173: 76 Ind Cas 841.

(3) *Machi Raju Venkataratnam* v. *Sri Rajah Rangayanayakamma*, (1918) 48 Ind Cas 270 (276): 41 Mad 985: 24 Mad L Tim 197: 1918 Mad W N 599: 8 Mad L W 292: 35 Mad L Jour 335 F B. See also *P Ramalingappa* v. *A Narayanappa*, 1925 Mad 368 (368): 82 Ind Cas 737.

(4) *Abdul Kadir Saheb* v. *Somasundaram Chettiar*, 1923 Mad 76 (80): 45 Mad 827: 16 Mad L W 485: 43 Mad L Jour 467: 31 Mad L Tim 441: 70 Ind Cas 648.

(5) *Kachinamthodi Parambil Saharbi* v. *Kachinamthodi Puthia Purail Sreemamutti son Ali*, 1923 Mad 295 (295, 296): 17 Mad L W 182: 44 Mad L Jour 141: 72 Ind Cas 857. See also *Kumara Goundan* v. *Thevaraya Reddi*, 1925 Mad 1113 (1114): 48 Mad L Jour 616: 1925 Mad W N 406: 87 Ind Cas 635; *Adhicari Rash Behari Dass* v. *Gopinath Barapanda Mohapatu*, (1882) 11 Cal L Rep 352 (354).

(6) *Lakshmi Ammal* v. *Kadiresan Chettiar*, 1921 Mad 488 (488, 489): 41 Mad L Jour 198: 14 Mad L W 12: 1921 Mad W N 495: 63 Ind Cas 431.

(7) *Kenath Puthan Veetil Sivasankara Menon* v. *Chalakattil Natuville Purakkal Kuppen*, 1928 Mad 878 (879): 112 Ind Cas 619; *Lingama Naidu* v. *Official Receiver, Madura*, (1928) 110 Ind Cas 511: 1928 Notes 40 (e); *P R Ayya Pattar* v. *Attupurath Manakkal*, (1919) 52 Ind Cas 938 (939): 1919 Mad W N 805; *Munisami Reddi* v. *Arunachala Reddi*, (1895) 18 Mad 265 (266); *Kumarasami Reddi* v. *Ponna Soona Mooroogappa Chetty*, (1871-74) 7 Mad H C R 359 (361).

(8) *Maruti Babaji* v. *Ramachandra Balvant*, 1931 Bom 288 (290): 33 Bom L R 396: 133 Ind Cas 248.

(9) *Maung Tun Hlaing* v. *U Tha Kha*, 1929 Rang 123 (125): 118 Ind Cas 634; *Supal Panday* v. *Sukkhu Koiri*, (1907-1908) 4 L B R 75 (75).

(10) *Chitnavis* v. *Nath Sao*, 1925 Nag 2 (6): 20 Nag L R 106: 7 Nag L J 170: 79 Ind Cas 1002. See also *Gooroo Das Kaut Roy* v. *Kamala Kant Sen*, (1873) 20 Suth W R 456 (456) [Case under the old Code].

(11) *Gade Laxminarasamma* v. *Navagotla Pydanna*, 1925 Mad 265 (266): 80 Ind Cas 239.

(12) *Ran Bahadur Singh* v. *Saligram*, 1931 Oudh 1 (4): 7 Oudh W N 1178: 131 Ind Cas 77: 6 Luck 461 F B.

(13) *Maung Tun Hlaing* v. *U Tha Kha*, 1929 Rang 123 (125): 118 Ind Cas 634.

The High Court of Calcutta[14] has held that the present rule and Art. 11 of the Limitation Act have no application to a consent order. The High Court of Madras[15] has, on the other hand, held that an order passed by consent, without objection, is an 'order against' the claimant or the decree-holder as the case may be, within the meaning of this rule. O.21, R.63, Notes 5—6.

6. Attachment before judgment.—The rule applies also to orders on claims preferred to property attached before judgment.[1] Hence a party aggrieved by reason of the dismissal of his claim in respect of an attachment before judgment is bound to file a suit under this rule, and the suit, if instituted, cannot abate by reason of the dismissal of the suit in which the attachment was effected.[2] But with regard to the period of limitation for such suits the question arises whether Art. 11 of the Limitation Act would apply to such a case. That article, in terms, applies only to an order on a claim preferred to, or objection made to the attachment of, property attached *in execution of a decree*. Therefore, if the claim is preferred and decided *before decree*, Art. 11 would not apply and the period of limitation to set aside the order would be governed by the residuary Art. 120. But where, after decree, the decree-holder applies for execution and a claim to the attachment is thereafter *raised and decided in the course of execution*, it has been held by a Full Bench of the High Court of Madras that Art. 11 would apply.[3] The reason is that an attachment before judgment becomes one in execution by virtue of the decree-holder's application for execution, and a claim preferred thereafter may be considered to be one preferred to property attached *in execution* of a decree.

Under O. 38, R. 9, the Court is bound to withdraw the attachment upon the dismissal of the suit. The reversal of the dismissal does not operate so as to revive the attachment. A fresh attachment is necessary and the objector is entitled to prefer a *fresh* claim in respect of such attachment and the period of one year should be counted from the date when such claim is rejected.[4] Under R. 13 of O. 38, a Provincial Small Cause Court has no jurisdiction to attach immoveable property before judgment or to determine any claim or objection in respect of such an attachment.[5]

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(14) *Panchu Muchi* v. *Bhato Muchi*, (1919) 50 Ind Cas 649 (650) (Cal).

(15) *Venkatarama Ayyar* v. *Narayan Ayyar*, (1915) 28 Ind Cas 536 (537): 1915 Mad W N 237.

effect of O. 38, R. 8 is to make O. 21, R. 63 applicable to orders passed on objections to attachment before judgment].

(2) *Ramaswami Chetty* v. *Migiri Chetty*, (1915) 27 Ind Cas 800 (800) (Mad).

(3) *Arunachalam Chetty* v. *Periasami Servai*, 1921 Mad 163 (166, 167): 44 Mad 902: 41 Mad L Jour 252: 14 Mad L W 645: 1921 Mad W N 563: 70 Ind Cas 439 F B. See also *Basiram Mato* v. *Kalyani Debi*, (1911) 10 Ind Cas 805 (807): 38 Cal 418: 15 Cal W N 795 [Attachment before judgment—No objection—Decree—Execution—Objection to attachment can be raised].

(4) *Sailesh Chandra* v. *Joy Chandra*, 1925 Cal 1147 (1148): 87 Ind Cas 756. See also *Sanirama* v. *Meherban*, (1911) 9 Ind Cas 918 (920): 13 Cal L Jour 243.

(5) *Sadek Ali* v. *Samed Ali*, 1924 Cal 193 (196): 28 Cal W N 16: 80 Ind Cas 300.

Note 6.

(1) *Malli Karjuna Prasad Naidu* v. *Mallapalli Virayya*, (1918) 47 Ind Cas 1000 (1002): 41 Mad 849: 1918 Mad W N 699: 24 Mad L Tim 134: 35 Mad L Jour 231: 8 Mad L W 197 F B; *Muthu Kumara Chettiar* v. *Alagappa Chettiar*, (1917) 42 Ind Cas 554 (554): 6 Mad L W 518; *Jaca Ramji* v. *Jadavji*, (1862-65) 1 Bom H C R 142; *Rajkishore Gope* v. *Bhabatosh Chakravarthy*, 1929 Cal 225 (226): 49 Cal L Jour 51: 115 Ind Cas 362; *Sashi Dulal Pyne* v. *Nanda Lal Das*, 1929 Cal 162 (162): 48 Cal L Jour 594: 115 Ind Cas 268; *Kartick Chunder Mookerjee* v. *Mookta Ram Sircar*, (1868) 10 Suth W R 21 (22): *M S M M Chettiar Firm* v. *Maung Sein*, 1931 Rang 279 (280): 9 Rang 561: 135 Ind Cas 326 [The

O.21, R.63, Notes 7—8.

7. **May institute a suit to establish the right which he claims.**—An order in a claim proceeding is not conclusive; a suit may be brought to contest it within the period prescribed by Art. 11 of the Limitation Act.[1] This right of suit cannot be defeated or affected by reason of the fact that the property has been sold away in Court auction.[2]

The suit contemplated by the rule is a suit *to establish the right claimed in the enquiry*,[3] that is, the liability or non-liability of the property attached to satisfy the decree under execution, and not the liability of third persons to satisfy the decree by the sale of their right, title and interest in the property.[4] The suit is in essence a continuation of the execution proceedings[5], though the scope of the enquiry is much wider. What is decided in the suit is the question of *title* and not merely the question of possession.[6] Suits brought under this rule are substantive suits and must be tried like any other suit, subject to the ordinary rules of procedure and evidence.[7] They are not limited by any special standard of evidence or law. The claimant may, if necessary, thrash out his title in the fullest and most ultimate sense.[8]

In a suit by the decree-holder under this rule he must establish that on the date of the attachment the judgment-debtor had a subsisting right to the property and the suit must be tried as if it were a suit by the judgment-debtor himself for possession.[9] In a suit by a defeated claimant the discharge of the *attachment order* cannot properly be asked for. The claimant's remedy is to establish his title by a declaratory decree and to then carry the decree to the Court by which the order of attachment was issued and such Court is bound to recognise the adjudication and govern itself accordingly.[10]

8. **Parties to the suit.**—As already pointed out in the previous note, an attaching decree-holder, whose attachment has been raised at the instance of a claimant, is not bound to file a *representative* suit on behalf of all the

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Note 7.

(1) *Sardhari Lal* v. *Ambika Pershad*, (1888) 15 Cal 521 (526): 15 Ind App 123: 5 Sar 172: 12 Ind Jur 210 P C; *Mathura Prasad* v. *Ramchandra Rao*, (1903) 25 All 57 (59): 1902 All W N 190.

(2) *Mt Manik* v. *Ranjas Agarwalla*, 1923 Pat 152 (152): 3 Pat L Tim 832: 1 Pat L R 51: 70 Ind Cas 332.

(3) *Venkatasubba Rao* v. *Goteti Vigneswaradu*, 1928 Mad 840 (841): 1928 Mad W N 336: 28 Mad L W 82: 56 Mad L Jour 52: 110 Ind Cas 554; *Govin Colaie* v. *Mrs Barbara Ovan Julian Flux*, (1868) 2 Beng L R A C 212: 11 Suth W R 40; *Ramkrishna* v. *Namasivaya*, (1884) 7 Mad 295 (297) F B.

(4) *Radha Pershad* v. *Ram Khelawvan Singh*, (1896) 23 Cal 302 (308); *Jagat Chandra* v. *Radha Nath*, (1915) 28 Ind Cas 576 (577): 21 Cal L Jour 302: *Bibi Atiman* v. *Dhakeswar Pershad Narain Singh*, (1905) 1 Cal L Jour 296 (300, 301).

(5) *Rajamier* v. *Subramaniam Chettiar*, 1928 Mad 1201 (1207); *Khairulla* v. *Seth Dhanrupmal*, 1925 Nag 82 (85): 80 Ind Cas 905: 22 Nag L R 67. But see *Bhawani Shanker* v. *The Industrial Bank of India, L'd., Ludhiana*, (1919) 50 Ind Cas 645 (646): 70 Pun Re No. 1919: 4 Pun W R 1919: 31 Pun L R 1919.

(6) *Ramaswami Chettiar* v. *Mallappa Reddiar*, (1921) 59 Ind Cas 947 (954): 43 Mad 760: 39 Mad L Jour 350: 1920 Mad W N 572: 28 Mad L Tim 170: 12 Mad L W 475; *Raja Bishen Perkash Narain Singh* v. *Babooa Misser*, (1867) 8 Suth W R 73 (75); *Mothoora Pandey* v. *Ram Ruchya*, (1869) 11 Suth W R 482 (485): 3 Beng L R A C 108.

(7) *Kishori Mohan Rai* v. *Harsook Das*, (1886) 12 Cal 696 (701); *Nga Seik* v. *Nga Pu*, (1914) 22 Ind Cas 676 (677): (1913) U B R 181 [Evidence taken in claim not *per se* evidence in the suit. Admissible for limited purpose]; *Molar* v. *Kanahaiya Lal*, 1922 Lah 58 (59): 4 Lah L Jour 188: 77 Ind Cas 116 [Defeated claimant filing suit—Cannot after dismissal of suit ask for stay of sale from the Appellate Court]; *Doorga Churn Chatterjee* v. *Ashootosh Dutt*, (1875) 24 Suth W R 70 (71) [Sale ought to be stayed by executing Court].

(8) *Najimunnessa Bibi* v. *Nacharaddin Sardar*, 1924 Cal 744 (748): 51 Cal 548: 39 Cal L Jour 418: 83 Ind Cas 233.

(9) *Vasudeo* v. *Eknath*, (1910) 8 Ind Cas 639 (642): 35 Bom 79: 12 Bom L R 956.

(10) *Kolalsherri Illath* v. *Kolasherri Iylath*, (1881) 4 Mad 131 (133).

creditors if he wants to impeach the transfer in favour of the claimant as fraudulent, under S. 53 of the Transfer of Property Act. Nor is he bound to implead the other creditors as party defendants.[1] Nor is the judgment-debtor a necessary party to such a suit.[2] It is enough if he impleads the successful claimant. It is not necessary even to implead any transferee from the successful claimant, as he is an alienee *pendente lite*.[3] O.21, R.63, Notes 8—9.

The right of suit of the decree-holder enures also to the benefit of the auction-purchaser. He can thus file a suit to declare the mortgage subject to which the attachment and sale took place is not true and valid.[4]

Where a defeated claimant files a suit under this rule the judgment-debtor is a necessary party, especially, if the objector seeks to establish his title both against the judgment-debtor and the decree-holder.[5] If the properties are sold away in Court auction, it is not necessary to implead the decree-holder. It is enough if the auction purchaser alone is impleaded.[6] The right of suit under this rule is not personal to the claimant; a transferee from the defeated claimant can also sue under this rule.[7]

9. Consequential relief if and when should be asked.—As has been seen in Note 2 above, this rule does not contain any limitation as regards the nature of the suit to be filed and does not exclude any particular prayer out of its scope.[1] The suit is of a comprehensive nature and the words "to establish the right" are wide enough to cover not only a mere declaratory suit but also one for consequential reliefs such as the recovery of the value of the property if it had been already sold[2] or for possession.[3] But the plaintiff is not *bound* to ask for a consequential relief. He may ask for a mere declaration and the suit cannot be dismissed as offending the proviso to S. 42 of the Specific Relief Act 1877.[4] If the defeated claimant asks for a bare

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Note 8.

(1) See the cases cited in Foot-note (9) to Note 2, *ante*.

(2) *Ghasi Ram* v. *Mangal Chand*, (1906) 28 All 41 (43): 1905 All W N 172: 2 All L J 491. But see *Jit Bhagat* v. *Sheik Hussaini*, 1901 All W N 14 (11) (Obiter).

(3) *Krishnappa Chetty* v. *Abdul Khader Sahib*, (1914) 25 Ind Cas 11 (15, 16): 38 Mad 535. 26 Mad L Jour 449.

(4) *Kesho Ram* v. *Chunni Singh*, 1931 All 139 (140): 1931 All L J 1: 52 All 1032: 131 Ind Cas 674. See also *Ghanoyamdas* v. *Bhairaobix*, (1922) 4 Nag L J 149 (158) [Auction purchaser can resist suit on mortgage as nothing is due despite order under O. 21, R. 63].

(5) *Ghasi Ram* v. *Mangal Chand*, (1906) 28 All 41 (43): 1905 All W N 172: 2 All L J 491: *Rahaland* v. *Chanaji*, 1891 Bom P J 656 (656). *Gopal Jogichand* v. *Hargobind*, (1868) 5 Bom H C R 83; *Gobind Prasad Tewari* v. *Udaichand Rana*, (1871) 6 Beng L R 320; *Jhaman Lal* v. *Sant Lal*, (1897) Pun Re No. 43 [Held suit bad for misjoinder].

(6) *Subbaraya Mudaliar* v. *Kandaswami Mudali*, 1923 Mad 58 (59): 16 Mad L W 330: 1922 Mad W N 674: 32 Mad L Tim 124: 70 Ind Cas 168; *Doraisami Pillai* v. *Muthusami Moopan*, (1904) 27 Mad 94 (98): 13 Mad L Jour 479; *Bhola Kunar* v. *Madho Prasadsao*, 1928 Nag 65 (66): 105 Ind Cas 799; *Tulsi Das* v. *Shiv Dat*, 1927 Lah 631 (634): 103 Ind Cas 763; *Gur Narain* v. *Ram Narain*, (1898) 1 Oudh Cas 83 (84). But see *Syud Abdool Huq* v. *Syud Ambur Ali*, (1867) 8 Suth W R 422 (422).

(7) *Ganesh Prasad* v. *Kashi Nath Tiwari*, (1904) 26 All 89 (91): 1903 All W N 209.

Note 9.

(1) *Dhandiram Mangniram* v. *Ramgopal Kanisam*, (1918) 43 Ind Cas 960 (961) (Nag); *Kottarathil* v. *Balathil*, (1919) 51 Ind Cas 714 (720): 42 Mad 143: 36 Mad L Jour 231: 25 Mad L Tim 47: 1919 Mad W N 39: 9 Mad L W 138; *U Po Thein* v. *O A O K R M Firm*, 1928 Rang 31 (35): 5 Rang 699: 106 Ind Cas 368.

(2) *Kovouri Bassivireddi* v. *Nidumoori Ramayya*, (1916) 36 Ind Cas 445 (447): 40 Mad 733: 31 Mad L Jour 394: (1916) 2 Mad W N 207: 4 Mad L W 300: 20 Mad L Tim 353; *Abdul Aziz* v. *Alliance Bank of Simla*, 1931 Lah 483 (484): 132 Ind Cas 215: 13 Lah 143; *Naranayyan* v. *Nageswarangan*, (1894) 17 Mad 389 (390).

(3) *Rango Vithal* v. *Rikhivadas*, (1874) 11 Bom H C R 174; *Sadu Bin Raghu* v. *Ram Bin Govind*, (1892) 16 Bom 608 (617).

(4) *Kristnam Sooraya* v. *Pathma Bee*, (1906) 29 Mad 151 (152) F B [Overruling 16 Mad 140]; *Ambu* v. *Kettiamma*, (1891) 14 Mad 23 (25): 1 Mad L Jour 28; *Veera Pannadi* v. *Karuppa Pannadi*, (1909) 2 Ind Cas 980 (980): 6 Mad L

O.21, R.63, Notes 9—11.

declaration and succeeds, a subsequent suit for possession is not barred under O. 2, R. 2.[5]

10. Damages for wrongful attachment—If can be asked for under this rule.—A defeated claimant can, in a suit under this rule, claim damages for wrongful attachment,[1] or the value of the property if it had been already sold.[2] In order to sustain a claim for damages, it is not necessary for the claimant to allege and prove malice, or want of reasonable and probable cause, on the part of the decree-holder in resisting the claim.[3]

11. Suit not necessary if property is released from attachment.—When the attachment is withdrawn by the decree-holder himself subsequent to the claim order, the object of a suit is gained and the defeated claimant is not obliged to bring a suit.[1] As pointed out by Sir Charles Sargent, C. J., in *Gopal Purushottam* v. *Bai Divali*[2] "when the plaintiff withdrew his attachment, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was, as contemplated by S. 278, Civil Procedure Code, to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act....., there was no longer an attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant and, therefore, no necessity for bringing a suit to set aside the order."

On the same principle where the decree is *satisfied* or *set aside* or *reversed* or the decretal amount is paid into Court under R. 55 or where the attachment is voluntarily withdrawn by the decree-holder himself,[3] or the

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Tim 154; *Mt Chito* v. *Jhunni Lal*, 1930 All 395 (397): 124 Ind Cas 713; *Narayanrao* v. *Balkrishna*, (1879-80) 4 Bom 529 (535); *Tulsi Das* v. *Shiv Dat*, 1927 Lah 631 (633): 103 Ind Cas 763; *Waryam Singh* v. *Narain Das*, (1919) 52 Ind Cas 157 (158): 65 Pun W R 1919; *Miran Baksh* v. *Atra*, 1900 Pun Re. No. 111; *Ganpat Rai* v. *Hira Singh*, (1891) Pun Re No. 29; *Bhagwan Lal* v. *Rajendra Prasad*, 1923 Pat 564 (572): 4 Pat L Tim 409: 77 Ind Cas 1; *Hari Lal Sahu* v. *Ranchi Ministerial Offices, Urban Co-operative Credit Society*, (1918) 43 Ind Cas 396 (397): 3 Pat L Jour 182: 4 Pat L W 138: 1918 Pat H C C 141; *Musst Tulaha* v. *Mahadeo Pershad*, (1898) 1 Oudh Cas 272 (279); *Sahib Dial* v. *Lajpat Rai*, (1912) 14 Ind Cas 510 (511): 10 Pun Re 1912: 74 Pun L R 1912: 267 Pun W R 1912; *K Y K M Chetty Firm* v. *S N V R Chetty Firm*, (1916) 34 Ind Cas 125 (126): 9 Bur L Tim 199; *Maung Aung Myat* v. *Maung Tha Hmat*, 1931 Rang 310 (311): 9 Rang 367: 134 Ind Cas 746; *Pitche Pillai* v. *Maung Pet*, (1910) 8 Ind Cas 608 (609): 3 Bur L Tim 34; *O S R M Sabapathi Chetty* v. *Maung Ju*, (1893-1900) L B R 481; *P L A N Alagappa Chetty* v. *Nazamat Ali Chowdhry*, (1905-1906) 4 L B R 263 (264); *Kya Get* v. *Bu Nwe*, (1904-1905) 4 L B R 88 (88); *Ma Than Yin* v. *Sena Mahomed*, 1929 Rang 104 (104): 115 Ind Cas 912 [Held a defeated claimant is not entitled to file a suit under S. 42 of the Specific Relief Act]; *K R M A Firm* v. *Maung Po Thein*, 1926 Rang 124 (125): 4 Rang 22: 95 Ind Cas 98, (Do.).

(5) *Venkatasubba Rao* v. *Goteti Vigneswaradu*, 1928 Mad 840 (844): 1928 Mad W N 336: 28 Mad L W 82: 56 Mad L Jour 52: 110 Ind Cas 554.

Note 10.

(1) *Latchmi Narain* v. *H C Martindell*, (1897) 19 All 253 (254): 1897 All W N 60 F B; *Kishori Mohun Rai* v. *Harrook Das*, (1886) 12 Cal 696 (705).

(2) *Shiboo Narain* v. *Mudden Ally*, (1881) 7 Cal 608 (612): 9 Cal L Rep 8; *Kovouri Basivi Reddi* v. *Nidumoori Ramayya*, (1916) 36 Ind Cas 445 (447): 40 Mad 733: 31 Mad L Jour 594: (1916) 2 Mad W N 207: 4 Mad L W 300: 20 Mad L Tim 353 F B.

(3) *Kissori Mohun Roy* v. *Harsukh Das*, (1890) 17 Cal 436 (442): 17 Ind App 17: 5 Sar 472: 13 Ind Jur 452 P C.

Note 11.

(1) *Najimunnissa Bibi* v. *Nacharaddin Sardar*, 1924 Cal 744 (749): 51 Cal 548: 39 Cal L Jour 418: 83 Ind Cas 233; *Onkar Prasad* v. *Dhani Ram*, 1930 All 177 (178, 179): 1930 All L J 594: 122 Ind Cas 865; *Mulk Raj* v. *Ralla Ram Rao Mal*, 1926 Lah 348 (348): 7 Lah 235: 27 Pun L R 408: 8 Lah L Jour 350: 93 Ind Cas 997; *Golanapalli Subbayya* v. *Sankara Venkataraman*, (1917) 42 Ind Cas 683 (684): 1917 Mad W N 851: 22 Mad L Tim 496; *Chan Tat Thai* v. *Ma Lat*, (1916) 33 Ind Cas 124 (124): 9 Bur L Tim 89 [Attaching creditor withdrawing attachment cannot file a suit under this rule]; *V S Iyer* v. *Maung Nyun*, 1929 Rang 228 (228) [But claimant's right of suit not taken away by withdrawal of attachment].

(2) (1894) 18 Bom 241 (244).

(3) *Najimunnissa* v. *Nacharaddin*, 1924 Cal 744 (750): 51 Cal 548: 39 Cal L Jour 418: 83 Ind Cas 233; *Krishna Prosad* v. *Bepin Behari*, (1904) 31 Cal 228 (231); *Marshia Barayal* v. *Elahi Bux Khan*, (1906) 3 Cal L Jour 381 (384);

attachment is raised owing to the default of the decree-holder under R. 57 of this order[4], the same result follows namely that the parties are put back in the same position as they were in, before execution proceedings were lodged, and the claimant is not compelled to institute a suit within a year from the date of the claim order. When the attachment is raised the cause of action for the claim petition or for any suit founded upon an order in that claim also falls to the ground.[5] **O.21, R.63, Notes 11—13.**

But the withdrawal or raising of the attachment or the satisfaction of the decree should, according to the High Courts of Calcutta[6], Madras[7] and the Judicial Commissioner's Court of Nagpur[8], have taken place within the period of one year prescribed by Art. 11 of the Limitation Act. The High Court of Lahore[9] has, on the other hand, held that it makes no difference whether the attachment is raised within or beyond a year after the order. It is submitted that the former view is correct. As pointed by their Lordships of the Madras High Court in *Koyanna* v. *Dossy*, I.L.R. 29 Mad 225 "to hold that the right of an unsuccessful claimant to bring a suit remains in a state of suspended animation for an indefinite period after the expiration of a year from the date of the order against him liable to be revived at any moment by the payment off of the amount of the decree, would lead to great inconvenience."

12. Claimant can pay money under protest.—If an objector fails in his claim, he is not obliged to file a suit. He may prevent the sale of the property attached by paying the decree-amount under protest and then sue the decree-holder for the recovery of the money so paid under compulsion.[1]

13. Other remedies open to a claimant or objector.—No appeal or review[1] lies from an order passed in a claim proceeding. The only remedy of

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Sreepathy Mardha v. *Kattick Singha*, (1883) 9 Cal 10 (13): 11 Cal L Rep 181; *Umash Chunder* v. *Raj Ballab*, (1882) 8 Cal 279 (282): 10 Cal L Rep 204; *Manilal Girdhar* v. *Nathalal*, 1921 Bom 35 (36): 45 Bom 561: 59 Ind Cas 774: 22 Bom L R 1446; *Ibrahimbhai* v. *Kabulabhai*, (1889) 13 Bom 72 (74); *Balaji* v. *Moroba*, (1897) 21 Bom 58 (60); *Vedalingam Pillai* v. *Veerathal*, (1920) 54 Ind Cas 530 (533): 1920 Mad W N 77: 37 Mad L Jour 547: 26 Mad L Tim 513; *Sadaya Pillai* v. *Amirthachari*, (1910) 8 Ind Cas 157 (158): 34 Mad 533: 8 Mad L Tim 417: 1910 Mad W N 741. But see *Jeoni* v. *Bhagwan*, (1875-78) 1 All 541 (543): 2 Ind Jur 680.

(4) *Mt Basanti Devi* v. *Chotte Lal Durga Prasad*, 1931 All 608 (608): 1931 All L J 856: 133 Ind Cas 318; *Partringa Koer* v. *Madhavanand Ram*, (1911) 12 Ind Cas 65 (67): 14 Cal L Jour 476: 16 Cal W N 332; *Luckhee Prea* v. *Khucoolah*, (1870) 14 Suth W R 367 (368): 7 Beng L R 238 Note; *Kumara Goundan* v. *Thevaraya Reddi*, 1925 Mad 1113 (1114): 1925 Mad W N 406: 87 Ind Cas 635: 48 Mad L Jour 616; *Pamuku Balarama Reddi* v. *Hari Mahomed Abdul*, (1915) 26 Ind Cas 532 (536): 26 Mad L Jour 499; *Satish Chandra Ray* v. *Joy Chandra Roy*, 1926 Jour 101 (2): 94 Ind Cas 120; *Fateh Din* v. *Qutab Din*, 1922 Lah 108 (111): 3 Lah 7: 67 Ind Cas 543.

(5) *Hanumiah* v. *Hanumiah*, 1927 Mad 893 (893): 39 Mad L Tim 108: 104 Ind Cas 424.

(6) *Najimunnessa* v. *Nacharuddin*, 1924 Cal 744 (751): 51 Cal 548: 39 Cal L Jour 418: 83 Ind Cas 233.

(7) *Koyyana* v. *Doosy*, (1906) 29 Mad 225 (230): 16 Mad L Jour 136.

(8) *Wamandhar* v. *Kampta Prasad*, 1926 Nag 423 (425): 22 Nag L R 94: 97 Ind Cas 178.

(9) *Chet Singh* v. *Gujar Singh*, 1931 Lah 74 (76): 131 Ind Cas 225.

Note 12.

(1) *Kanhaya Lal* v. *National Bank of India, Ltd.*, (1913) 18 Ind Cas 949 (951): 40 Cal 598: 25 Mad L Jour 104: 17 Cal W N 541: 1913 Mad W N 406: 13 Mad L Tim 406: 11 All L J 413: 17 Cal L Jour 479: 15 Bom L R 472: 184 Pun L R 1913: 40 Ind App 56 P C; *Dulichand* v *Ram Kishen Singh*, (1881) 7 Cal 648 (653): 8 Ind App 93: 4 Sar 245: 6 Ind Jur 493 P C; *Jagdeo* v. *Rajah Singh*, (1888) 15 Cal 656 (666): 13 Ind Jur 217; *Jan Mahomed* v. *Manthar*, (1916) 34 Ind Cas 492 (493): 9 Sind L R 213 [Payment to avert attachment—Money cannot be recovered]; *Varaj Lal Motichand* v. *Kachia Garbad*, (1896) 22 Bom 473 (475) [But executing Court cannot order re-payment].

Note 13.

(1) In re *Banwari Lal*, 1879 Pun Re No. 148 F B. But see *Cochrane* v. *Heera Lal*, (1867) 7 Suth W R 79 (80).

O.21, R.63, Notes 13—14.

the defeated party is to file a suit under this rule within the period of limitation provided by Art. 11 of the Limitation Act.[1-a] In the absence of such a suit he cannot either as plaintiff or as defendant, challenge the validity of the order in any matter or proceeding.[2] The mere fact that a suit has been filed against him within one year or that he has filed his defence within one year of the claim order does not affect the conclusiveness of the order.[3] It has been held in the undermentioned case[4] that a defeated claimant cannot also obstruct the auction-purchaser in delivery proceedings under R. 99 of this order.

The dismissal of a claim is however no bar to the claimant applying to set aside the Court-auction-sale after making the necessary deposit under R. 89 of this order as a person interested in the property sold.[5]

14. Objector can plead invalidity of attachment.—A defeated claimant or an objector suing under this rule is entitled to plead that there was no attachment or that the attachment effected was not legal. For instance, he can show that the executing Court had no jurisdiction to attach and therefore his rights are not affected in any way by the claim order.[1] In *Muthia Chetty* v. *Palaniappa Chetty*[2] their Lordships of the Judicial Committee held that, for purposes of Art. 11 of the Limitation Act, the property to which a claim is made must be property which has been *de facto attached* "un-

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(1-a) *Phul Kumari* v. *Ghanshyam Misra*, (1908) 35 Cal 202 (206, 207): 12 Cal W N 169: 35 Ind App 22: 7 Cal L Jour 36: 10 Bom L R 1: 14 Bur L R 41: 5 All L J 10: 17 Mad L Jour 618: 2 Mad L Tim 506 P C.

(2) *Durag Das* v. *Gori Mal*, 1928 All 327 (329): 26 All L J 794; *Badri Prasad* v. *Muhammad Yusuf*, (1875-78) 1 All 381 (386); *Ram Dayal* v. *Durga Dai*, 1884 All W N 25 (25); *Nemagauda* v. *Paresha*, (1898) 22 Bom 640 (644, 645); *Tayabali* v. *Atmaram*, (1914) 25 Ind Cas 375 (376): 38 Bom 631: 16 Bom L R 520; *Krishnaji Vithal* v. *Bhaskar Ranganath*, (1879-80) 4 Bom 611 (617); *Yashvant Shervi* v. *Vithoba Sheti*, (1888) 12 Bom 231 (235); *Haripada (Berman)* v. *Surendranath Samantha*, 1922 Cal 164 (164); *Suniti Sundari Devi* v. *Sri Krishna Chakkravarti*, 1928 Cal 514 (516): 112 Ind Cas 649; *Surnamoyi Dasi* v. *Ashutosh*, (1900) 27 Cal 714 (722); *Rajaram* v. *Raghubanseman*, (1897) 24 Cal 563 (566); *Gend Lal Tewari* v. *Denonath Ram Tewari*, (1885) 11 Cal 673 (678); *Covin, Colvie* v. *Mrs Barbara Oven Julia Elias*, (1869) 2 Ben L R A C 212: 11 Suth W R 40; *Lalla Beharee Lal* v. *Lalla Modho Pershad*, (1866) 6 Suth W R 69 (70) [Suit on a different cause of action not barred after one year]; *Piara Ram* v. *Ganga Ram*, 1924 Lah 367 (367): 13 Pun W R 1923: 71 Ind Cas 45; *Niwal Kishore* v. *Khyali Ram*, 1929 Lah 865 (866): 11 Lah L Jour 452: 120 Ind Cas 679; *Mt Kahan Devi* v. *Mt Nihal Devi*, (1916) 32 Ind Cas 43 (44): 101 Pun Re 1915; *Ram Das* v. *Mul Chand*, (1909) 4 Ind Cas 970 (972): 89 Pun L R 1909: 122 Pun W R 1909; *Gopal Singh* v. *Ganpat Rai*, (1916) 35 Ind Cas 321 (322): 66 Pun Re 1916: 117 Pun W R 1916: 130 Pun L R 1916; *Singariah Chetty* v. *Chinnabbi*, 1921 Mad 105 (106): 44 Mad 268: 40 Mad L Jour 7: 1921 Mad W N 33: 60 Ind Cas 780: 12 Mad L W 725: 28 Mad L Tim 420; *Krishna* v. *Chadayan Kutti*, (1894) 17 Mad 17 (19); *Achuta* v. *Mammavu*, (1887) 10 Mad 357 (361); *Sevu* v. *Muttusami*, (1887) 10 Mad 53 (54): 11 Ind Jur 19; *Bailur Krishna* v. *Lakshmana*, (1882) 4 Mad 302 (308); *Lobo* v. *Babulal*, 1925 Nag 390 (391): 8 Nag L J 170: 94 Ind Cas 573; *Pestonji* v. *Ganpat*, 1925 Nag 288 (289): 8 Nag L J 73: 89 Ind Cas 888; *Mussammat Niamat-un-nissa* v. *Raza Ali*, (1905) 8 Oudh Cas 306 (312); *Ma Thein Tin* v. *Ma Htoo*, 1923 Rang 156 (156): 2 Bur L Jour 60: 75 Ind Cas 322. But see *Shahzia-uddin Abdul Hossein* v. *Kailash Chandra Shaha*, (1905) 2 Cal L Jour 599 (601) [Purchase subject to a declaration of mortgage lien under O 21, R 62. Subsequent attack on mortgage in suit by mortgagee *within a year—No estoppel*].

(3) *Peela Yarakayya* v. *Kanumuri Venkatakrishnamraju*, (1917) 41 Ind Cas 684 (684): 6 Mad L W 281: 22 Mad L Tim 232: 1917 Mad W N 721; *P Ramalingappa* v. *A Narayanappa*, 1925 Mad 368 (369): 82 Ind Cas 737.

(4) *Jugal Kishore Marwari* v. *Ambika Debi*, (1912) 15 Ind Cas 683 (684): 16 Cal W N 882; *Nilo Pandurang* v. *Ram Patloji*, (1885) 9 Bom 35 (38); In the matter of *Banee Madhub Roy*, (1870) 13 Suth W R 431 (431).

(5) *Dhanammal* v. *Veeraraghavalu Naidu*, 1923 Mad 487 (2) (489): 44 Mad L Jour 325: 32 Mad L Tim 175: 1923 Mad W N 162: 72 Ind Cas 335: 18 Mad L W 296; *Onkar* v. *Dhan Singh*, 1926 Nag 10 (13): 21 Nag L R 102: 90 Ind Cas 963.

Note 14.

(1) *Venkatappayya* v. *Venkatachalapathi Rao*, 1927 Mad 450 (455): 99 Ind Cas 989; *Pullamma* v. *Pradosham*, (1895) 18 Mad 316 (319): 5 Mad L Jour 148; *Angan Lal* v. *Gudar Mal*, (1888) 10 All 479 (484): 1888 All W N 189. But see *Hurrish Chunder* v. *Bhoobun Moye*, (1865) 4 Suth W R 99 (99).

(2) 1928 P C 139 (141): 51 Mad 849: 26 All L J 616: 48 Cal L Jour 11: 32 Cal W N 821: 5 Oudh W N 579: 55 Ind App 256: 55 Mad L Jour 122: 28 Mad L W 1: 109 Ind Cas 626: 30 Bom L R 1358 P C [Reversing 1922 Mad 447].

less there has been attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached; and without such an order, there is no *terminus a quo* for the running of limitation, and with this the limitation itself is non-existent".

But an objector cannot question the legality or validity of the decree against the judgment-debtor on the ground that it is colourable or collusive.[3]

15. Limitation for suits under this rule.—Art. 11, Sch. 1 of the Limitation Act, IX of 1908, prescribes the period of one year from the date of the order as the time within which a suit has to be brought under this rule. "The policy of the Act is to secure speedy settlement of questions of title raised in execution sales and for that reason a year is fixed at the time within which the suit is to be brought".[1] The article applies to orders passed whether with or without investigation.[2] In the case of a minor, however, the period of limitation is subject to be modified by virtue of S. 6 of the Limitation Act and he can file a suit within one year after he attains majority.[3] As to whether this article applies to orders on claims preferred in respect of attachments before judgment, *see* Note 6, *ante*.

16. Subject to the result of the suit the order is conclusive.—As has been seen in Note 13 *ante*, an order passed in a claim proceeding is conclusive against the defeated party unless he brings a suit within one year from the date of the order. It is conclusive not only between the parties to the order[1]

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(3) *Bhimaji* v. *Rama*, 1885 Bom P J 212 (212); *Gulibai* v. *Jagannath*, (1886) 10 Bom 659 (661); *Tofail Ahmud* v. *Banee Madhub Mookerjee*, (1875) 24 Suth W R 394 (395); *Ramananda Butt* v. *Bithee*, (1868-69) 4 Mad H C R 263 (264). But see *Mahamed Ali Khan* v. *Kalunder Ali Khan*, (1872) 4 N W P 81.

Note 15.

(1) *Sandhari Lal* v. *Ambika Pershad*, (1888) 15 Cal 521 (526): 15 Ind App 123: 5 Sar 172: 12 Ind Jur 210 P C. See also *Busivireddi* v. *Ramayya*, (1916) 36 Ind Cas 445 (447): 40 Mad 733: 31 Mad L Jour 394: (1916) 2 Mad W N 207: 4 Mad L W 300: 20 Mad L Tim 353 [Limitation runs from date of the order]; *Jugon Lal Upadhya* v. *Mt Ekbaloonissa*, (1867) 7 Suth W R 456 (456), (Do.); *Bapu Binishwar* v. *Lakshuman Baja*, (1873) 10 Bom H C R 19, (Do.); *Kasheenath Shaha* v. *Jogendra Nath Baboo*, (1874) 22 Suth W R 68 (68), (Do.); *Settiappan* v. *Sarat Singh*, (1866-68) 3 Mad H C R 220 (221), (Do.); *Adjoodhya Prasad* v. *Shee Das Madan Gopal*, (1888) 1 C P L R 3 (4), (Do.); *Tilock Chand* v. *Sada Ram*, (1875) 7 N W P 113, (Do.); *Beneswar Bhgut* v. *Murli Sahu*, (1883) 9 Cal 163 (165): 11 Cal L Rep 409, (Do.); *Gopal Chunder* v. *Mohesh Chunder*, (1883) 9 Cal 230 (233): 11 Cal L Rep 363: 5 Shome L R 19, (Do.); *Dwarkanath Roy* v. *Sreenath Roy*, 1864 Suth W R (Gap) 237 (238), (Do.); *Gokul Ram Deb* v. *Ram Soondur Surma*, (1868) 9 Suth W R 292 (292), (Do.); *Ma Pyaw Gyi* v. *Letchman Chettiar*, 1931 Rang 183 (185): 131 Ind Cas 727, (Do.); *Suryanarayana* v. *Nilamani*, (1906) 1 Mad L Jour 478 (479) [Order not dated—Extrinsic evidence can be adduced as to date]; *Piyara* v. *Mazhar*, 1922 Lah 78 (79): 64 Ind Cas 359: 16 Pun L R 1922 [Legal representative not impleaded in time—Held claim against him barred]; *Luchmi Narain* v. *Anrup Koer*, (1883) 9 Cal 43 (47): 5 Shome L R 87 [Case under Act IX of 1871]; *Joyram Loot* v. *Pani Ram Dhoba*, (1881) 8 Cal L Rep 54 (55), (Do.); *Amir Hossain* v. *Imambandi Begum*, (1882) 11 Cal L Rep 443 (448), (Do.); *Koylash Chander* v. *Preonath*, (1879) 4 Cal 610 (611): 3 Cal L Rep 25, (Do.); *Wuzeer Jemadar* v. *Noor Ali*, (1869) 12 Suth W R 33 (34) [Held, article does not apply]; *Brojo Kishore Nag* v. *Ram Dial Bhudra*, (1874) 21 Suth W R 133 (134), (Do.); *Venkatanaru* v. *Akkamma*, (1866-67) 3 Mad H C R 139 (140), (Do.) [Case under the old Code]; *Narasimma* v. *Appalacharlu*, (1889) 12 Mad 294 (296), (Do.); *Ramdass Baboo* v. *Messrs R Watson & Co*, 1864 Suth W R (Gap) 371 (372) [Held Section 14 does not apply]; *Damaraju Narasimha Rao* v. *Thadinanda Gangaraju*, (1908) 31 Mad 431 (434): 18 Mad L Jour 590: 4 Mad L Tim 271 [Limitation for wrongful seizure of movables].

(2) *Ponnuswami Pillai* v. *Samu Ammal*, (1917) 38 Ind Cas 937 (938): 31 Mad L Jour 247; *Dial Chand* v. *Lachman Singh*, 1927 Lah 680 (681): 104 Ind Cas 289.

(3) *Phoolbas Konwar* v. *Jogeshur*, (1876) 1 Cal 226 (242): 3 Ind App 7: 25 Suth W R 285: 3 Sar 573: 3 Suth 236 P C; *Huro Sundaree Chowdhrain* v. *Anundnath Roy Chowdhry*, (1865) 3 Suth W R 8 (9); *Payapa* v. *Padmapa*, (1887) 11 Bom 45 (47); *Khoda Bux* v. *Budri Narain* (1881) 7 Cal 137 (139): 8 Cal L Rep 306: 5 Ind Jur 644; *Ramchandra* v *Ranjit Singh*, (1900) 27 Cal 242 (253): 4 Cal W N 405; *Subbiah Pandaram* v. *Arunachala Pandaram*, 1925 Mad 379 (380): 80 Ind Cas 992.

Note 16.

(1) *Durgaram Roy* v. *Raja Nursing Deb*, (1869) 2 Beng L R A C 254: 11 S W R Cr 134; *Khub Lal* v. *Ram Lochun*, (1889) 17 Cal 260 (262); *Peari Mohan Shaha* v. *Durlave Dassya*, (1913) 20 Ind Cas 815 (816): 18 Cal W N 954: 19 Cal L Jour 441; *Thiagarana Mudaliar* v. *Saba-*

O 21. R.63, Note 16.

but binds also their representatives in interest.[2] Thus the auction-purchaser is bound by an order against the decree-holder made under R. 62.[3] Conversely, the auction-purchaser is also entitled to plead in bar to a suit by the defeated claimant that the order rejecting his claim has become conclusive against him.[4]

But the conclusiveness of the order is *subject to the result of the suit.* In other words, the order is only a *provisional* one and is liable to be set aside by the decision given in the suit filed under this rule.[5] The effect of such a suit is to keep the execution proceedings pending till the decision of the suit. If the suit succeeds the proceedings continue. If the suit fails the proceedings fail simultaneously.[6] If after a claim order the successful claimant transfers the property in dispute to a third person, such transferee also takes it subject to the result of the suit by the decree-holder. If the decree-holder succeeds in the suit the attachment is revived, and the transferee cannot assert his rights against him.[7] In other words the transfer is affected by the doctrine of *lis pendens.*[8] The same principle will apply where after the claim is rejected, the properties are sold in Court-auction; the auction-purchaser's right in such a case is subject to be defeated by the claimant succeeding in the suit.[9]

It has been seen in Note 23 to R. 58 that where one of several decree-holder obtains an order in his favour disallowing a claim, it cannot be availed of by the other decree-holders who are not parties to the claim. But where the same property is attached by different decree-holders in execution, and on objection by a third party, the attachment under all the decrees are raised, it has been held, that the success obtained by a single decree-holder in a suit under this rule enures also to the benefit of the other decree-holders who have not filed suits.[10]

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pathi Mudaliar, (1912) 16 Ind Cas 529 (529): 1913 Mad W N 54 [Third persons cannot take advantage of the order]; *Asna Bibi* v. *Jaigunnissa Bibi,* (1917) 37 Ind Cas 887 (888): 44 Cal 698: 21 Cal W N 222.

(2) *Azizallah Khan* v. *Ghulam Hussein,* 1924 Sind 97 (99): 17 Sind L R 63: 80 Ind Cas 994.

(3) *Mussammat Jeswani* v. *Mussammat Misri,* (1919) 51 Ind Cas 100 (101): 45 Pun L R 1919; *Ramu Ayyar* v. *Palaniappa Chetty,* (1910) 8 Ind Cas 117 (118): 35 Mad 35: 1910 Mad W N 589: 8 Mad L Tim 381: 21 Mad L Jour 756; *Narayan* v. *Umbar Adam,* (1911) 10 Ind Cas 913 (913): 35 Bom 275: 13 Bom L R 307.

(4) *Velu Padayachi* v. *Arumugam Pillai,* (1920) 56 Ind Cas 481 (483): 38 Mad L Jour 397: 11 Mad L W 343: 27 Mad L Tim 312; *Ram Chandra Marwari* v. *Mudeshwar Singh,* (1906) 33 Cal 1158 (1162): 10 Cal W N 978.

(5) *Kali Prosanna Gosh* v. *Golam Rahman,* (1913) 20 Ind Cas 790 (792): 18 Cal W N 910; *Singariah* v. *Chinnabbi,* 1921 Mad 105 (106): 44 Mad 268: 40 Mad L Jour 7: 1921 Mad W N 33: 60 Ind Cas 780.

(6) *Husan Shah* v. *Mahomed Amir Mirza,* 1930 Oudh 468 (471): 7 Oudh W N 887: 128 Ind Cas 728; *Mahomed Warris* v. *Pitambur Sen,* (1874) 21 Suth W R 435 (435); *Pyaroo* v. *Nazir Hossein,* (1875) 23 Suth W R 183 (184). See also *Lakshmana* v. *Narasimhasami,* (1884) 7 Mad 167 (170): 7 Ind Jur 648 [Money in Court in *A* suit —Decree-holder in *B* suit attaching it—Claim by plaintiff in *A* suit disallowed and money drawn out—Claim suit decreed—Refund of money and fresh execution by decree-holder in *B* suit ordered].

(7) *Protap Chandra Gope* v. *Sarat Chandra,* 1921 Cal 101 (104): 33 Cal L Jour 201: 25 Cal W N 544: 62 Ind Cas 348; *Bonomali Rai* v. *Prosunno Narain Chowdhry,* (1896) 23 Cal 829 (834); *Anthaya Hegade* v. *Manjayya Shetty,* 1922 Mad 176 (178): 45 Mad 84: 69 Ind Cas 642: 41 Mad L Jour 393: 14 Mad L W 371: 1921 Mad W N 642; *Parmeshar Din* v. *Debi Prasad,* (1918) 48 Ind Cas 886 (388): 5 Oudh L J 647; *Ram Kishan* v. *Kundan Lal,* 1930 Oudh 265 (266): 7 Oudh W N 213: 121 Ind Cas 902: 5 Luck 680: 7 Oudh W N 475; *Haran Chandra Chakravarti* v. *Joychand,* 1929 Cal 524 (525); *Paras Ram* v. *Gardner,* (1876) 1 All 355 (357, 359); *Lakhmichand Srinivasa* v. *M E V R M Chettiar,* 1930 Rang 247 (248): 126 Ind Cas 223: 8 Rang 491 [But in the case of movables fresh seizure is necessary].

(8) *Sukhdeo Prasad* v. *Jamna,* (1901) 23 All 60 (65): 1900 All W N 199; *Nisar Husain* v. *Sundar Lal,* 1927 All 657 (657): 104 Ind Cas 292: 25 All L J 1025: 8 L R A Rev 264; *Ali Ahmad Khan* v. *Bansidhar,* (1909) 1 Ind Cas 951 (951): 31 All 367: 6 All L J 434; *Krishnappa* v. *Abdul Khader,* (1915) 38 Mad 535 (545, 547): 26 Mad L Jour 449: 25 Ind Cas 11. But see *Lalu Mulji* v. *Kashibai,* (1886) 10 Bom 400 (407); *Fathula* v. *Munyappa,* (1882) 6 Mad 98 (99): 7 Ind Jur 78.

(9) *Atta Ullah Khan* v. *Bala Mal,* 1927 Lah 190 (190): 100 Ind Cas 298; *Tulsi Das* v. *Shiv Dat,* 1927 Lah 631 (633): 103 Ind Cas 763.

(10) *Chintamani* v. *Iswar Chandra,* (1869) 8 Beng L R App 122: 12 Suth W R 221.

O.21, R.63. Notes 17—19.

17. Property in respect of which the order is conclusive.—The claim order is conclusive between the parties to the proceedings only as regards the *particular property* in dispute.[1] Thus where a claim was allowed and the decree-holder filed a suit under this rule and after the dismissal thereof applied for the *arrest* of the judgment-debtor or for the attachment of *other properties of* the judgment-debtor more than 3 years after his original application for attachment, it was held that the application for arrest was barred by limitation as it could not be considered to be a continuance or revival of the previous proceedings for attachment.[2] Where, however, the decree-holder succeeds in the suit and applies thereafter for proceeding with the execution originally started by him *against the property*, the application must be deemed to be a continuation of the previous proceedings and is not barred.[3]

18. Effect of decision in claim cases as to possession.—The claim order is conclusive as to the successful party's *right to possession.*[1] But the effect of the decision as to possession in other proceedings in which the question may again arise is not the matter to which the words "shall be conclusive" are directly addressed. Thus, if attachment is removed subsequent to the claim order and later another attachment is made the question of possession is a question of possession at a different date.[2]

19. Burden of proof in a suit under this rule.—In a suit brought under this rule the burden of establishing the right claimed is upon the plaintiff. In *Jamahar* v. *Askaran*[1] it was observed by Sir Lawrence Jenkins, C.J., that where the suit is by the defeated claimant he must show affirmatively that not only the ostensible but the real title also is in him. The burden is not discharged by merely pointing to the innocent appearance of the instrument under which he claims. He must show that they are as good as they look and this principle has been accepted by the various High Courts and applied in a number of decisions.[2] But in *V. E. A. R. M. Firm* v. *Maung Ba Kyin*, I.L.R. 5 Rang. 852 their Lordships of the Judicial Committee made the following obser-

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Note 17.

(1) *Asha Bibi* v. *Jaigunnissa Bibi*, (1917) 37 Ind Cas 887 (888): 44 Cal 698: 21 Cal W N 222; *Radha Prasad Singh* v. *Lal Saheb Rai*, (1890) 13 All 53 (62): 17 Ind App 150: 5 Sar 600 P C; *Dinkar Ballal Chakradeo* v. *Hari Shridhar Apte*, (1890) 14 Bom 206 (209, 213); *Bakshi Ram* v. *Sheo Pergash*, (1886) 12 Cal 453 (457); *Mt Imam Bandee Begum* v. *Mirza Mahomed Tukee Khan*, (1867) 8 Suth W R 27 (28); *Badiroonissa* v. *Kureemonnissa*, (1874) 21 Suth W R 230 (231); *Bhagwanti* v. *Goman*, (1909) 1 Ind Cas 742 (743): 42 Pun Re 1909: 58 Pun L R 1909: 52 Pun W R 1909.

(2) *Krishnaji* v. *Anandrao*, (1883) 7 Bom 293 (296); *Raghunandan* v. *Bhugoo Lal*, (1890) 17 Cal 268 (271) [Other property]; *Ram Soonder* v. *Gopeenur*, (1878) 3 Cal 716 (720): 2 Cal L Rep 220 [Other property].

(3) *Rudra Narayan* v. *Pachu Maity*, (1896) 23 Cal 137 (140). But see *Narayana* v. *Pappi Brahmani*, (1887) 10 Mad 22 (25).

Note 18.

(1) *Bapu Khandu* v. *Baji Jivaji*, (1879) 14 Bom 372 (377). 1889 Bom P J 305; *Brijo Kishore* v. *Ram Dyal*, (1874) 21 Suth W R 133 (134).

(2) *Najimunnessa Bibi, wife of Subid Sheikh* v. *Nacharaddin Sardar*, 1924 Cal 744 (748): 51 Cal 548: 39 Cal L Jour 418: 83 Ind Cas 233.

Note 19.

(1) (1915) 30 Ind Cas 855 (860): 22 Cal L Jour 27.

(2) *Mt Saraswati Kuar* v. *Mahabir Prasad*, 1928 All 476 (480), 109 Ind Cas 272; *Nannhi Jan* v. *Bhuri*, (1908) 30 All 321 (323): 1908 All W N 125: 5 All L J 601; *Ramnath* v. *Rindraban*, (1896) 18 All 369 (370): 1896 All W N 106; *Nannhijan* v. *Bhuri*, (1908) 5 All L J 358 (360); *Tulsi Rai* v. *Ram Das*, 1887 All W N 71; *Afzal Begum* v. *Md Obaidatullah Khan*, 1899 All W N 220 (221); *Babu Madho Parshad* v. *Durga Parshad*, (1875) 7 N W P H C R 85; *Sheikh Adam Isufbhai* v. *Jamnadas Ranchordas*, (1893) 17 Bom 94 (99); *Vasudeo* v. *Eknath*, (1910) 8 Ind Cas 639 (640): 35 Bom 79: 12 Bom L R 956; *Govind Atmaram* v. *Santai*, (1888) 12 Bom 270 (272); *Peeraj* v. *Narayan*, (1882) 6 Bom 215 (223, 224): 6 Ind Jur 416 F B; *Narak Lal* v. *Thagoo Lal*, (1912) 13 Ind Cas 455 (456): 22 Cal L Jour 380; *Mahima Chunder Koondoo* v. *Nooroodeen*, (1869) 3 Beng L R A C 70: 11 Suth W R 422; *Lala Rudra Prasad* v. *Binode Ram Sin*, (1869) 3 Beng L R A C 71 Note: 10 Suth W R 321; *Ram Kishore Singh* v. *Ram Surbo Chatterjee*, (1869) 11 Suth W R 454 (454); *Nufur Dass* v. *Nil Madhub*, (1876) 11 Suth W R

O.21, R.63, Note 19.

vation: "They" (the defeated claimants-plaintiffs) "being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach the property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case by showing utter inadequacy of consideration". Their Lordships then proceeded to examine the various items of consideration and upheld the transaction in favour of the plaintiffs. Does this observation change the law as regards the onus of proof? As pointed out by their Lordships of the High Courts of Madras[3] and Patna[4] the Judicial Committee did not consider the question of the burden of proof as such in the above case and the observation should be understood as applying only to the particular facts of the case before it. In *Appadurai* v. *Vellayan Chettiar*[5] it was observed that in cases under this rule the burden of proving the validity of the alienation is on the plaintiff. "The defendant however cannot escape the burden at some stage or other. If the plaintiff produces his deed and swears that it is genuine and for full consideration, and the defendants have nothing to say to the contrary, the plaintiff will succeed, and where the burden of the plaintiff is so light, it is scarcely worth arguing whether it is more correct to say that the burden is originally upon the defendants or upon the plaintiff. But where the defendant has something substantial to say to the contrary, the real burden must inevitably fall upon the plaintiff to establish the right which he claims".

In the case of a dismissal of a claim *without investigation* on the ground of delay, it has, however, been held that the burden is upon the *defendant* to

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167 (468): 3 Beng L R A C 145; *Sreenarain Chuckerbutty* v. *Miller*, (1871) 15 Suth W R O C 7 (15); *Wooma Churn Chowdhry* v. *Kurrater Churn Chowdhry*, 1864 Suth W R (Gap) 163 (164); *Digumburee Dossee* v. *Banee Madhub*, (1871) 15 Suth W R 155 (155); *Toofanee Doss* v. *Mun Rakhun Roy*, (1871) 15 Suth W R 202 (202); *Tulsee Monee* v. *Peary Mohun*, (1876) 25 Suth W R 79 (79); *Ralla Ram* v. *Muhammad Ayub Khan*, (1928) 107 Ind Cas 782: 1928 Notes 69-d; *Kasturi Mal* v. *Lajjaram*, (1921) 60 Ind Cas 751 (753) Lah; *Mt Jai Bai* v. *Bhai Kahan Singh*, 1921 Lah 97 (99): 3 Lah L Jour 198: 67 Ind Cas 879; *Ibrahim* v. *Jivan Das*, 1924 Lah 707 (708): 75 Ind Cas 1043; *Ram Chand* v. *Fazal Hussain*, 1929 Lah 455 (456): 30 Pun L R 389: 118 Ind Cas 897; *Janki Das* v. *Gulzar*, 1932 Lah 174 (175, 176): 32 Pun L R 350: 131 Ind Cas 383: 12 Lah 763; *Daulat Ram* v. *Ghulam Fatima*, 1926 Lah 25 (26): 89 Ind Cas 953; *Amba Parshad* v. *Piare Lal*, (1930) 31 Pun L R 394: 1930 Notes 24-c; *Gordhan Das* v. *Rukman*, (1920) 58 Ind Cas 11 (12): 1 Lah 292: 2 Lah L Jour 198; *Modadagu Perayya* v. *Peroli Vaikayamma*, 1924 Mad 770 (771): 34 Mad L Tim 201: 47 Mad L Jour 14: 19 Mad L W 627: 79 Ind Cas 899; *Rama Shenoi* v. *Hallagna*, (1918) 45 Ind Cas 703 (704): 41 Mad 205: 34 Mad L Jour 295; *Kulasambi* v. *Bilankhan*, 1929 Nag 121 (123): 117 Ind Cas 220; *Vinayak* v. *Kaniram*, 1926 Nag 293 (295): 92 Ind Cas 810; *Haji Aboo* v. *Sobhagchand*, (1920) 55 Ind Cas 752 (752) Nag; *Raghunath* v. *Nathu*, (1920) 55 Ind Cas 72 (73) Nag; *Mt Saraswatibai* v. *Yadorao*, 1924 Nag 240 (241): 78 Ind Cas 887; *Mulla Faiz Ali* v. *Harkuar*, 1923 Nag 334 (335): 77 Ind Cas 50; *Dal Jit Singh* v. *Kanhaiya Lal Singh*, 1927 Oudh 440 (440): 4 O W N 794: 105 Ind Cas 208; *Kalka Prasad* v. *Sitla Baksh*, (1916) 35 Ind Cas 427 (428): 19 Oudh Cas 67; *Bibi Sairah* v. *Gulabkuar*, (1919) 53 Ind Cas 892 (897): 1919 Pat H C C 409; *Raghubar Dayal* v. *Kaniz Husain*, (1909) 2 Ind Cas 258 (259): 12 Oudh Cas 74; *Lalk Ram* v. *Thola Singh*, (1919) 50 Ind Cas 884 (886): 47 Pun L R 1919; *Mehngi Bai* v. *Fateh Chand*, (1913) 20 Ind Cas 355 (356): 246 Pun L R 1913: 197 Pun W R 1913; *Dowlat Rao* v. *Keshao Rao*, (1888) 1 C P L R 59 (62); *Dajiba Patel* v. *Dinanath*, (1893) 6 C P L R 81; *Raja Seth Gokuldass* v. *Mt Jankee*, (1896) 9 C P L R 142 (143); *K P Nambiar* v. *Sundarabai*, (1912) 14 Ind Cas 813 (813): 5 Bur L Tim 47; *P K A C T Kadappa Chetty* v. *Maung Shwe Bo*, (1908) 2 L B R 152 (157); *Ma Sein U* v. *A L V R R M Letchmanan Chetty*, (1905-1906) 4 L B R 228; *Chokkalingam Chetty* v. *Maung Yeik*, (1897-1901) U B R Vol II, 270; *Valleappa Chetty* v. *Maung Ke*, (1902-1903) U B R Vol II, Civ Pro 15; *Muthu Caruppan Conar* v. *N S Yagappa Maistry*, (1893-1900) L B R 333; *Nathu Sadashiv* v. *Ramachandra Annaji*, (1868) 5 Bom H C R A C J 76; *V E A R M Firm* v. *Maung Ba Kyin*, 1927 P C 237 (238): 5 Rang 852: 29 Bom L R 1481: 46 Cal L Jour 349: 32 Cal W N 28: 105 Ind Cas 788: 4 Oudh W N 926: 53 Mad L Jour 388.

(3) *Govindasami Pillai*, In re, 1928 Mad 1259 (1260): 113 Ind Cas 358; *Appadurai Chettiar* v. *Vellayan Chettiar*, 1932 Mad 302 (303): 1932 Mad W N 97: 62 Mad L Jour 236: 35 Mad L W 276: 137 Ind Cas 879.

(4) *Mahadeo Missir* v. *Ram Prasad*, 1929 Pat 579 (581): 10 Pat L Tim 339: 8 Pat 890: 119 Ind Cas 74.

(5) 1932 Mad 302 (303): 1932 Mad W N 97: 62 Mad L Jour 236: 35 Mad L W 276: 137 Ind Cas 879.

show that the registered deed of transfer in favour of the plaintiff (defeated claimant) is fraudulent.[6]

20. Defence of fraudulent transfer by the judgment-debtor if can be raised in the suit.—In a suit by a defeated claimant under this rule, the decree-holder defendant can set up in defence that the transfer in favour of the claimant is voidable under S. 53 of the Transfer of Property Act. There is no bar to the setting up of such a plea in defence.[1]

21. Jurisdiction.—*In a suit* brought under this rule, where the sole question between the parties is whether the property attached is or is not liable to be attached and sold, the value of the suit for purposes of jurisdiction is the *amount of the decree*, where the value of the property *exceeds* that amount. If, however, the value of the property is *less* than the decree amount, then the value for purposes of jurisdiction is the *value of the property*.[1]

But if the judgment-debtor is added as a party and a declaration of title as against him also is prayed for, then the suit should be valued as on the value of the property attached.[2]

The rule says nothing of the nature of the suit or the Court in which the suit is to be brought; this therefore depends on the nature of the claim and the right sought to be enforced. Art. 20 of the Sch. II of the Provincial Small Causes Courts Act excludes a suit under this rule from the cognisance of the Court of Small Causes. Under Art. 23 of that Act suits under Art. 11 of

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(6) *Elayaperumal Thalaivar* v. *Vellaikannu Thevar*, 1931 Mad 40 (41): 32 Mad L W 57: 128 Ind Cas 453; *Gillu Mal* v. *Firm of Manohar Das Jai Narain*, 1928 Pat 434 (436): 9 Pat L Tim 461: 7 Pat 777: 112 Ind Cas 371; *Awadhut* v. *Punjaji*, (1919) 53 Ind Cas 205 (207) Nag; *Nandlal Brahmin* v. *Krishnaji*, (1900) 13 C P L R 69 (70); *Maung Po Hnin* v. *Ma Hnpein*, (1917) 37 Ind Cas 767 (768): 10 Bur L Tim 238.

Note 20.

(1) *Ramchand* v. *Mathurachand*, 1921 All 298 (301): 19 All L J 299: 60 Ind Cas 896; *Ramasami Chettiar* v. *Mallappa Reddiar*, (1921) 59 Ind Cas 947 (954): 43 Mad 760: 39 Mad L Jour 350: 1920 Mad W N 572: 28 Mad L Tim 170: 12 Mad L W 475; *Palaniandi Chettiar* v. *Appavu Chettiar*, (1916) 34 Ind Cas 778 (780): 30 Mad L Jour 565: 19 Mad L Tim 390; *Subramania Ayyar* v. *A L V R R M Muthia Chettiar*, (1918) 43 Ind Cas 651 (652): 41 Mad 612: 6 Mad L W 750: 33 Mad L Jour 705 F B; *Abdul Kader* v. *Ali Meah*, (1912) 14 Ind Cas 715 (716): 16 Cal W N 717: 15 Cal L Jour 649; *Bama Charan Bhattacharya* v. *Bogala Charan Kundu*, (1914) 23 Ind Cas 755 (757) Cal; *Bhimraj Ganpat* v. *Laxman Ramachandra*, (1920) 57 Ind Cas 430 (430): 22 Bom L R 743; *Haji Aboo* v. *Sobhagchand*, (1920) 55 Ind Cas 752 (753) Nag; *Dhanukhdas Marvadi* v. *Zangoo*, (1920) 54 Ind Cas 798 (799): 16 Nag L R 3.

Note 21.

(1) *Krishnasami Naidu* v. *Somasundaram Chettiar*, (1907) 30 Mad 335 (338): 17 Mad L Jour 95: 2 Mad L Tim 116 F B; *Dhan Devi* v. *Zamurrad Begam*, (1905) 27 All 440 (442, 443): 2 All L J 115: 1905 All W N 37; *Mahomed Ameen Khan* v. *Abu Zafer Khoraishi*, (1909) 2 Ind Cas 621 (621): 5 L B R 23; *Khetra Pal* v. *Mumtaz Begam*, (1915) 31 Ind Cas 879 (880): 38 All 72: 13 All L J 1104; *Anandi Kunwar* v. *Ram Niranjan Das*, (1918) 45 Ind Cas 494 (494): 40 All 505: 16 All L J 374; *Durga Prasad* v. *Rachla Kuar*, (1887) 9 All 140 (141): 1886 All W N 328; *Gulzari Lal* v. *Jadaun Rai*, (1878) 2 All 799 (800); *Motichand* v. *Dadabhai*, (1874) 11 Bom H C R 186; *Modhu Sudan Kocr* v. *Rakhal Chunder Roy*, (1888) 15 Cal 104 (106); *Bhai Harnam Singh* v. *Bhagwan Devi*, 1890 Pun Re No 50; *Maya Mal* v. *Bela Singh*, 1890 Pun Re No 121; *Bishan* v. *Lal Singh*, 1906 Pun Re No 55: 1906 Pun L R 71: 1906 Pun W R 67; *Zorawar Singh* v. *Dewa*, 1906 Pun Re No 142: 1907 Pun W R 11: 1907 Pun L R 63; *Sher Ali Shah* v. *Lachman Das*, 1908 Pun Re No 94: 1908 Pun W R 74: 1908 Pun L R 212 F B; *Subramaniam* v. *Narasimham*, 1929 Mad 323 (324) 29 Mad L W 349: 56 Mad L Jour 489: 119 Ind Cas 46; *Fisher* v. *Arunachalam Chettiar*, (1909) 2 Ind Cas 522 (522): 19 Mad L Jour 236: 5 Mad L Tim 70; *Annaji Rao* v. *Rama*, (1887) 10 Mad 152 (154); *Krishnamachariar* v. *Srinivasa*, (1882) 4 Mad 339 (341); *Muthammal* v. *Chinnanna*, (1882) 4 Mad 220 (225, 226); *Narayan Ganesh Ghatate* v. *Bhioraj*, (1906) 2 Nag L R 87 (89); *Bhagwan Das* v. *Lala Kanshi Ram*, (1914) 25 Ind Cas 180 (181): 1914 Pun L R 253: 1914 Pun W R 145; *Bhagwanti* v. *McDonald & Co*, (1909) 4 Ind Cas 1013 (1014): 1909 Pun L R 150: 1909 Pun W R 152; *Sevaraman Chetty* v. *Maung Po Yin*, (1900-1902) 1 L B R 1 (3); *Maung San Dun* v. *Pichai*, 1893-1900 L B R 293; *Ram Chandra* v. *Sheudut Roy*, (1902-1903) 2 U B R 19.

(2) *Dwarka Das* v. *Kameshar Prasad*, (1895) 17 All 69 (74): 1895 All W N 3; *Narayan Singh* v. *Ayyaswami Reddi*, (1915) 31 Ind Cas 188 (189): 29 Mad L Jour 728; *Sardar Begam* v. *Mehr Chand*, (1913) 18 Ind Cas 820 (822): 1913 Pun Re No 82: 1913 Pun W R 38: 1913 Pun L R 89; *Callu Mal* v. *Shamsuddin*, (1912) 17 Ind Cas 196 (197): 1913 Pun Re No 41: 1913 Pun L R 14: 1912 Pun W R 269; *Daw Dut* v. *Daw Kwi*, 1932 Rang 20 (21): 137 Ind Cas 54.

O.21, R.63, Notes 21—23.

the Limitation Act are also excepted from the cognisance of Courts of Small Causes. Hence a suit under this rule cannot be filed in a Provincial Small Cause Court.[3] An order passed in a claim petition in the Presidency Small Cause Court is however final under S. 37 of the Presidency Small Cause Courts Act XV of 1882 subject to the right of a new trial.[4]

22. Valuation of suit for Court-fees.—A suit for a declaration as to the liability or non-liability of the property to be attached is a suit to set aside a summary order and is chargeable with a fixed Court-fee under Schedule II, Art. 17, Cl. (1) of the Court-Fees Act.[1] But if the defeated claimant also asks for consequential reliefs then such reliefs have also to be valued and Court-fee paid thereon.[2] The test is what is the quantum of interest which the plaintiff wants to establish.[3]

23. Insolvency of judgment-debtor.—A suit under this rule by a decree-holder to set aside an order allowing a claim to an attachment effected before the insolvency of the judgment-debtor does not require the leave of the insolvency Court under S. 28 of the Provincial Insolvency Act.[1]

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(3) *Shiboo Narain Singh* v. *Mudden Ally*, (1881) 7 Cal 608 (611): 9 Cal L Rep 8; *Balmokund* v. *Lekraj*, (1871) 3 N W P 156 (Note) [No jurisdiction to entertain a suit to establish the title of the judgment debtor]; *Sheik Punju* v. *Sheikh Oodoy*, (1872) 18 Suth W R 337 (339) [Or the title of the claimant]; *Moozdean Gazee* v. *Dinobundhoo Gossamee*, (1870) 13 Suth W R 99 (100), (Do.); *Ram Dhun Biswas* v. *Kefal Biswas*, (1868) 10 Suth W R 141 (142): 1 Beng L R (S N) 10 (*a*), (Do.); *Dyal* v. *Sundar Singh*, 1890 Pun Re No 51, (Do.); *Devi Ditta* v. *Miran Buksh*, (1889) Pun Re No 63, (Do.); *Ram Saran Singh* v. *Rajah Partab Bahadur Singh*, (1905) 8 Oudh Cas 281 (282), (Do.); *Rup Kishen* v. *Sobhi*, (1911) 9 Ind Cas 537 (538): 8 All L J 187, (Do.); *Dildar Ali* v. *Hiru*, (1902) 5 Oudh Cas 190 (192), (Do.). But see *Rajammal* v. *Narayanaswami*, (1915) 29 Ind Cas 908 (916): 39 Mad 219: 1915 Mad W N 376: 28 Mad L Jour 600; *Jeewa* v. *Kulloo*, (1870) Pun Re No 84 [Suit to recover personal property or its value cognisable]; *Woomesh Chunder Bose* v. *Muddon Mohun Sircar*, (1865) 2 Suth W R 43 (44), (Do.); *Godha* v. *Naik Ram*, (1885) 7 All 152 (159): 1884 All W N 349 [Suit for moveable property or its value held not cognisable]; *Illahi Baksh* v. *Sita*, (1883) 5 All 462 (463): 1883 All W N 115, (Do.); *Makund* v. *Nasiruddin*, (1882) 4 All 416 (417): 1882 All W N 93, (Do.); *Pagi Partab* v. *Varaj Lal*, (1885) 8 Bom 259 (259), (Do.); *Chhaganlal* v. *Jeshan Rav*, (1879-80) 4 Bom 503 (505), (Do.); Small Cause Court Ref No. 1365: (1865) 2 Suth W R S C C Ref 5 (5), (Do.); *Mohomed Koya* v. *Kasmi*, (1886) 9 Mad 206 (208), (Do.). But see the following: *Akbar Ali* v. *Jezuddin*, (1882) 8 Cal. 399 (400): 6 Ind Jur 530; *Radha Kishen* v. *Choley Lal*, (1871) 3 N W P 155; *Nathu Ganesh* v. *Kalidas Umed*, (1877-78) 2 Bom 365 (370); *Empress* v. *Umsadbaksh*, (1877-78) 3 Bom 179 (181); *Jethabhai Bhaichand* v. *Bai Lakhu*, (1869) 6 Bom H C A C 27; *Davud Beg* v. *Kidlappa*, (1888) 11 Mad 264 (265); *Janakiammal* v. *Vithenadien*, (1869-70) 5 M H C 191 (192).

(4) *Deno Nath Batabyal* v. *Nuffer Chunder Nundy*, (1899) 26 Cal 778 (784): 3 Cal W N 590; *Ismail Solomon* v. *Mahomed Khan*, (1891) 18 Cal 296 (301); *Deo Nath Batabyal* v. *Adhor Chunder Sett*, (1900) 4 Cal W N 470 (472, 473); *Gunputhy* v. *Thakurdye*, (1907) 34 Cal 823 (826); *Padamchand* v. *Bhicumchand*, 1932 Cal 661 (663): 36 Cal W N 397: 59 Cal 827: 139 Ind Cas 183. See also *Bhicumchand* v. *Deepchand*, (1931) 134 Ind Cas 903 (906) Cal: 58 Cal 1251: 1932 Cal 67 [Decree amount and value of property exceeding Rs. 2,000—Presidency Small Cause Courts Act, Ss. 18 and 37—No jurisdiction for claim suit].

Note 22.

(1) *Phul Kumari* v. *Ghanshyam Misra*, (1905) 35 Cal 202 (206): 35 Ind App 22: 7 Cal L Jour 36: 12 Cal W N 169: 10 Bom L R 1: 14 Bur L R 41: 5 All L J 10: 17 Mad L Jour 618: 2 Mad L Tim 506; *Nga Seik* v. *Nga Pu*, (1913) 22 Ind Cas 676 (676): (1913) 1 U B R 181; *Satindra Nath Banerji* v. *Shiva Prosad Bhakat*, 1922 Cal 166 (167): 64 Ind Cas 713: 26 Cal W N 126; *Golsmater Khatun* v. *Habibulla*, (1921) 64 Ind Cas 49 (49) (Cal); *Karam-ud-Din* v. *Jaswant Singh*, (1886) Pun Re No 80; *Sardar Dial Singh* v. *Beli Ram*, (1897) Pun Re No 51; *Lachmi Narain* v. *Gulab Chand*, (1884) 4 All W N 114 (114); *Chunia* v. *Ram Dial*, (1875-78) 1 All 360 (362): 1 Ind Jur N S 851; *Gulzarimal* v. *Jadaun Rai*, (1878-80) 2 All 63 (64); *Fatima Begam* v. *Sukh Ram*, (1884) 6 All 341 (343): 1884 All W N 113: 8 Ind Jur 638; *Manraj Kuari* v. *Radha Prasad*, (1884) 6 All 466 (468): 1884 All W N 175; *Dildar* v. *Narain*, (1889) 11 All 365 (367): 1889 All W N 131; *Gobind Nath* v. *Gajraj Mati*, (1891) 13 All 389 (391): 1891 All W N 139; *Dondo Sakharam Kulkarni* v. *Govind Babaji Kulkarani*, (1885) 9 Bom 20 (22); *Daya Chand* v. *Hem Chand*, (1879-80) 4 Bom 515 (528); *Sadashiv Yeshvant* v. *Atmaram Sakharam*, (1879-80) 4 Bom 535 (536) Note; *Vithal Krishna* v. *Balkrishna*, (1886) 10 Bom 610 (616); *Ahmed Mirza Saheb* v. *A Thomas*, (1886) 13 Cal 162 (164); *Maung Po Khan* v. *Maung Aung Dun*, (1893-1900) L B R 139. But see *Jelaluddin* v. *Shaha*, (1874) 22 Suth W R 422 (422): 15 Beng L R App 1 [Not correct law].

(2) *Chandradhari* v. *Tipan Prasad*, (1918) 43 Ind Cas 971 (972) (Pat); *Moti Singh* v. *Kaunsilla*, (1894) 16 All 308 (313): 1894 All W N 109; *Ram Prasad* v. *Sukh Dei*, (1878-80) 2 All 720 (722); *Fulkumari* v. *Ghanshyam Misra*, (1904) 31 Cal 511 (515); *Bohurnonissa Bibi* v. *Kureemonnissa Khatoon*, (1873) 19 Suth W R 17 (18).

(3) *Narayana Singh* v. *Ayyasami Reddi*, (1915) 27 Ind Cas 265 (265): 1914 Mad W N 910.

Note 23.

(1) *Subramaniam* v. *Narasimham*, 1929 Mad 323 (326, 328): 29 Mad L W 849: 56 Mad L Jour 489: 119 Ind Cas 46; *Annapurani Ammal* v. *Subramanian Chettiar*, (1908) 31 Mad 347

O.21, R.63, Notes 24—27.

24. Effect of attachment on adverse possession.—The High Court of Madras[1] has held that an attachment does not arrest the running of limitation in favour of a person holding adversely to the judgment-debtor. The fact that such person prefers a claim under R. 58 before the expiry of the statutory period of 12 years, does not prevent him from pleading successfully that on the *date of the suit*, he has acquired a right by prescription. In the undermentioned case,[2] however, an opinion to the contrary was expressed by Mr. Justice Rankin. He observed "Attachment is not merely to take property into the custody of the Court, its main point is to crystalise the rights of the parties as at a given point of time. Until attachment, a judgment-creditor cannot litigate in his debtor's place to assert his debtor's rights while the attachment lasts no new interest can be created to defeat it." The observation is, however, *obiter* and the effect of attachment as such, on adverse possession, was not considered.

25. Costs.—According to the High Courts of Calcutta,[1] and Madras,[2] the Court cannot in a suit under this rule order the payment of costs incurred in the claim proceedings in favour of the successful party. The High Court of Rangoon[3] has, on the other hand, held that the successful party in the suit is entitled to the costs incurred in the claim proceedings. The reason given is that the defeated party has no right of appeal against the order and the suit under this rule being in the nature of an appeal, success in the suit will entitle him also to the costs of the miscellaneous proceedings under R. 58.

26. Appeal.—No appeal lies from an order on a claim or an objection preferred under R. 58. *See* Note 24 to R. 58. A decree passed in a suit under this rule is, however, appealable under S. 96.

27. Revision.—*See* Note 25 to R. 58.

SALE GENERALLY.

O.21, R.64.

R. **64**. [S. 284.] Any Court *executing a decree* may order that any property *attached by it and liable to sale*, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient

Power to order property attached to be sold and proceeds to be paid to person entitled.

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(349): 4 Mad L Tim 197. See also *Raj Rani Bari Singhain* v. *Jawahir Lal*, 1928 All 158 (159): 26 All L J 39: 108 Ind Cas 156; *Trimbak* v. *Sheoram*, 1922 Nag 108 (109): 5 Nag L Jour 141: 65 Ind Cas 941: 19 Nag L R 126 [Held, leave of Insolvency Court necessary].

Note 24.

(1) *Renganatha* v. *Srinivasa*, 1926 Mad 42 (43): 49 Mad L Jour 656: 22 Mad L W 274: 90 Ind Cas 1037; *Seetharami* v. *Venku*, (1901) 11 Mad L Jour 344 (345). But see *Velayuthan* v. *Lakshmana*, (1885) 8 Mad 506 (510).

(2) *Najimunnessa Bibi* v. *Nacharaddin Sardar*, 1924 Cal 744 (747): 51 Cal 548: 39 Cal L Jour 418: 83 Ind Cas 233.

Note 25.

(1) *Surendra Nath Sarkar* v. *Kiran Moyi Dassi*, (1909) 1 Ind Cas 428 (430) (Cal).

(2) *Nambi Veettil Tarward Tavazhi Karnavan and Manger Raman Nair* v. *Athikarath Valappil Tarwad Karnavan*, 1925 Mad 233 (233): 20 Mad L W 557: 35 Mad L Tim 106: 1924 Mad W N 757: 83 Ind Cas 89; Referred case No. V of 1867 (1866-68) 3 Mad H C 341 (342). See also *Raghunath* v. *Badri Prasad*, (1884) 6 All 21 (22): 1883 All W N 177 [No relief asked for as to cost, in the suit].

(3) *V E R M Firm* v. *Maung Po Kyone*, 1928 Rang 248 (249): 6 Rang 408: 112 Ind Cas 285; *Maung Tha Dun* v. *Ma Mai Ein*, 1929 Rang 128 (128): 119 Ind Cas 213. But see *Rugheer Mirser* v. *Mareappa Pillai*, (1911) 11 Ind Cas 828 (830): 4 Bur L Tim 178.

O.21, R.64, Notes 1—3.

portion thereof, shall be paid to the party entitled under the decree to receive the same.

[*Cf.* R. S. C., O. 43, R. 2.]

Synopsis.

1 "Any Court executing a decree."
2. "May order."
3. "Attached by it."
4. Sale without attachment.
5. "Liable to sale."
6. Sale of property not belonging to the judgment-debtor.
7. "Such portion thereof as may be found necessary."
8. "Party entitled under the decree."

1. "**Any Court executing a decree.**"—As to the power of an executing Court to order the sale of property situated outside the local limits of its jurisdiction, *see* S. 38, Note 6 and the undermentioned case.[1]

Where the same property is under attachment in execution of decrees of several Courts, the sale thereof must be ordered by the Court of the *highest grade*. But a sale by a Court of inferior grade is not a nullity. *See* S. 63 and the notes thereunder.

Rr. 64 to 73 are applicable to the Chota Nagpur Tenancy Act. *See* S. 210, sub-S. (3), Cl. (*b*) of the Act.

2. "**May order.**"—The term "may" in this rule does not confer a *discretion* on the Court to order or refuse to order a sale; it is obligatory on it to do so when a valid application for such order and a valid attachment have been made.[1]

Where a sale in execution is set aside (for instance on the ground of fraud) and the purchaser who is not a party to the decree is dispossessed, he is entitled to compensation for the improvements made by him on the property. It is not necessary in such a case to inquire whether the auction purchaser believed in good faith that he was entitled to the property, the order of the Court under which the sale was held being itself a sufficient protection. At any rate the "good faith" required does not go beyond an honest belief (though it may be negligent), on the purchaser's part in the validity of his title. *See* General Clauses Act, S. 3(20).[2]

As to the effect of a reversal, or the setting aside of a decree, on the title of the auction purchaser at a sale in execution of such decree, *see* Note 13 to S. 144.

3. "**Attached by it.**"—The rule contemplates that the property should be under attachment before its sale is ordered. Where a property has been attached, the attachment cannot be said to have come to an end by the mere fact that an order is passed releasing the property from the attachment, so long

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Order 21, Rule 64—Note 1.

(1) *Velayutha Muppan* v. *Subramaniyam Chetty*, (1913) 18 Ind Cas 498 (499): 24 Mad L Jour 70: 13 Mad L Tim 207: 1913 Mad W N 136 [Sale of properties outside jurisdiction—Judgment-debtor failing to take objection in time—Estoppel].

Note 2.

(1) *Kamisetti Pedda Venkatasubbiah* v. *Tangatoor Subbiah*, (1915) 28 Ind Cas 62 (64): 1915 Mad W N 159; *Kashy Nath* v. *Surbanand*, (1886) 12 Cal 317 (322).

(2) *Mathunsa Rowthen* v. *Apsa Bin*, (1911) 12 Ind Cas 444 (447, 448, 449): 36 Mad 194: 21 Mad L Jour 969: 10 Mad L Tim 373: (1911) 2 Mad W N 425. See also *E O Morgan* v. *Moudvie Abdull Hye*, (1895) 23 Suth W R 393 (394).

as the order is liable to be set aside in appeal or otherwise. *See* S. 64, Note 9 and the undermentioned cases.[1]

O 21, R. 64, Notes 3—5.

Though the rule contains the words "attached *by it*" it has been held by the Madras High Court that it does not forbid a sale where the attachment has been made by *another Court*.[2]

4. Sale without attachment.—A property must be *attached* before it can be ordered to be sold under this rule.[1] If, however, it is sold in execution without there being a prior attachment what is the effect? There is a conflict of decisions as to whether the sale in such a case is one without jurisdiction or whether the absence of attachment amounts only to an irregularity. As to this, *see* S. 51, Note 4 and the undermentioned cases.[2]

5. "Liable to sale."—A Court has no jurisdiction under this rule to order a sale unless the property is "liable to sale". The Court is therefore bound to hear objections to the saleability of a property before it orders its sale.[1] A decree for money though capable of being attached is not liable to sale.[2] (*See* O. 21, R. 53.) But a *debt* can be sold under this rule.[3]

Suppose, in execution of a decree held by *A* against *B*, certain property belonging to *B* is sold and subsequently, *C*, the holder of another money decree against *B* seeks to attach and sell the same property. *C* is not entitled to do so, because, when the property is sold under *A's* decree, the title to the property passes to the auction purchaser and it ceases to be liable to sale under any other decree against *B*.[4] Suppose in the above illustration *C* had already attached the property at the time of its sale under *A's* decree and that this attachment was even prior to that under *A's* decree; still *C* cannot sell the property but can only claim a rateable distribution of the sale proceeds under S. 73 of the Code.[5]

Note 3.

(1) *Parmeshar Din* v. *Debi Prasad*, (1918) 48 Ind Cas 386 (388): 5 Oudh L J 617 [Order raising attachment set aside by suit under O 21, R 63—Attachment is revived]. See *Fathula* v. *Munyappa*, (1883) 6 Mad 98 (99): 7 Ind Jur 78 [Sale pending appeal from decision which set aside the order raising attachment is valid].

(2) *Manilla Goundan* v. *Loganatha Mudaliar*, 1929 Mad 852 (853, 856): 30 Mad L W 649.

Note 4.

(1) *Seshayya* v. *Satti Raju*, 1930 Mad 411 (417): 120 Ind Cas 863.

(2) Case of Calcutta High Court that want of attachment affects jurisdiction to sell—*Abdul Rahiman* v. *Amir Sheriff*, (1918) 44 Ind Cas 229 (331): 45 Cal 780: 22 Cal W N 927.

Cases of Calcutta High Court that absence of attachment is only irregularity)—*Tarak Nath* v. *Shyama Charan*, (1916) 36 Ind Cas 292 (295) Cal; *Samiruddin* v. *Abdul Syed*, (1918) 44 Ind Cas 734 (736) Cal. See also *Naresh-chandra Mitra* v. *Molla Ataul Haq*, 1931 Cal 35 (36): 57 Cal 1206: 129 Ind Cas 779.

Nagpur View: (Want of attachment is only irregularity).—*Harlal* v. *Narayan*, 1922 Nag 267 (271): 18 Nag L R 152: 64 Ind Cas 420: 4 Nag L J 118.

Madras View: (Absence of attachment is only irregularity).—*Sirakolundu* v. *Ganapathy*, (1917) 37 Ind Cas 964 (965): 1917 Mad W N 89; *Velayutha Muppan* v. *Subramaniyam Chetty*, (1913) 18 Ind Cas 498 (499): 24 Mad L Jour 70: 13 Mad L Tim 207: 1913 Mad W N 136; *Dononath* v. *Mutty Lal*, 1 Hyde 158 (158): 1 Ind Jur O S 125. See also *Dosibai* v. *Iswardas*, (1891) 15 Bom 222 (228) 18 Ind App 22: 6 Sar 10: 15 Ind Jur 154 and 281 P C.

Note 5.

(1) *Lukenatulla* v. *Asmatulla Sarkar*, (1915) 29 Ind Cas 616 (617) Cal. See also *Gaya Prasad* v. *Beni Madho*, 1931 Oudh 352 (353): 8 Oudh W N 785: 134 Ind Cas 472 [Occupancy rights under S 5 Oudh Rent Act—Based on compromise decree—Saleable in absence of objection by superior proprietor since transferable].

(2) *Subbaraya Rowthar Minda Naicar* v. *Kuppusamy Iyengar*, (1909) 1 Ind Cas 535 (537): 34 Mad 442: 5 Mad L Tim 278; *Gopal Nanashet* v. *Joharimal*, (1891) 16 Bom 522 (524): *Jotindra Nath* v. *Duarka Nath*, (1891) 20 Cal 111 (115): *Sultan Kuer* v. *Gulzari Lal*, (1879) 2 All 290 (291): 4 Ind Jur 359; *Tiruvengadachari* v. *Vaithyalinga Pillai*, (1883) 6 Mad 418 (419); *Domi Lal* v. *Bijoy Prasad*, 1932 Pat 349 (350): 13 Pat L Tim 612.

(3) *M R R M Firm* v. *Uzan*, (1916) 35 Ind Cas 469 (470): 10 Bur L Tim 6.

(4) *Motilal* v. *Karra Buldin*, (1898) 25 Cal 179 (186): 24 Ind App 170: 1 Cal W N 639: 7 Sar 222 P C.

(5) *Kushy Nath* v. *Surbanand*, (1886) 12 Cal 317 (321).

O.21, R.64, Notes 6—8.

6. **Sale of property not belonging to the judgment-debtor.**—In England the execution of a decree for money is entrusted to the sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested, for the illegal seizure of goods which do not belong to the judgment-debtor. But in India warrants for attachment are issued on the application of the creditor *who is bound to specify the property which he desires to attach* and its estimated value. Hence the English doctrine that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt,[1] does not apply in India. Where the decree-holder is liable to pay damages to the third party whose *goods* he has illegally brought to sale in execution of his decree,[2] these damages will include not only the price realised at the sale but also the amount by which such price falls short of the market value of the property on the date of the attachment.[3] Where on the application of a decree-holder and through his mistake his own property is sold in execution of his decree, as that of the judgment-debtor, it has been held by the High Court of Madras that the decree-holder will be estopped from claiming back the property from the auction-purchaser unless it is found that the latter was not in fact misled by such mistake.[4] The High Court of Calcutta has held a contrary view.[5]

7. "**Such portion thereof as may be found necessary.**"—It is permissible under this rule to order the sale of a *portion* of the attached property.[1] Compare proviso to R. 17, *ante*.

8. "**Party entitled under the decree.**"—**Under this rule, the sale proceeds** should be paid to the "party entitled under the decree to receive the same." The decree-holder is such a person. But the Court is not *bound* to order the payment of the purchase money to the decree-holder *before the confirmation of the sale*, though it may order such payment if it considers fit to do so. (*See* R. 92 post).

Where the Government has a claim against the judgment-debtor for Court-fees under a decree in a pauper suit, it is entitled to be paid the amount of the Court-fee out of the sale proceeds in preference to the decree-holder. The reason is that the claim for the Court-fees is a Crown debt and is entitled to precedence over all other creditors. The Government in such a case is "a party entitled under the decree to receive" the money within the meaning of R. 64; it need not attach the money before it can receive it.[2] (*Cf.* O. 33, R. 10.)

Note 6.

(1) *Walker* v. *Olding*, 32 L J (N S) Exch 142: 1 H & C 621 Dist 17 Cal 436 (443): 11 B H C R 46: 12 Cal 696: 3 Bom 74 Ref 9 B H C R 92: 12 W R 329.

(2) *Kissorimohan* v. *Harsukhdas*, (1890) 17 Cal 436 (443) P C: 13 Ind Jur 452: 17 Ind App 17: 5 Sar 472. See also Note 23 to S 60; Note 4 to S 62; Note 3 to S 95 and see also *Gomu Mahad Patil* v. *Gokuldas*, (1878) 3 Bom 74 (78) [Not a case of actual sale—But goods belonging to third party lost through theft while under illegal attachment—Decree-holder is liable to make good the loss—Measure of damages]; *Cf Dorab Ally* v. *Abdul Azeez*, (1881) 3 Cal 806 (814) P C: 5 Ind App 116: 2 Cal L Rep 529: 3 Suth 519: 3 Sar 818: 2 Ind Jur 426 [Sale by Sheriff under writ of *fieri facias*—Liability of Sheriff].

(3) *Kissori Mohun* v. *Harsukhdas*, (1890) 17 Cal 436 (443): 17 Ind App 17: 5 Sar 472: 13 Ind Jur 452 P C.

(4) *Ramasamy* v. *Kulandaivelu*, 1922 Mad 63 (63): 1922 Mad W N 121: 15 Mad L W 272: 70 Ind Cas 569.

(5) *Hafez Uzir Ali* v. *Nasimannessa Bibi*, 1928 Cal 865 (867). See also Note 71 to S 47, *ante*.

Note 7.

(1) *Thittar Jha* v. *Ramdhari Chowdhury*, (1909) 3 Ind Cas 81 (81) Cal; *Abdool Hye* v. *Macrae*, (1875) 23 Suth W R 1 (4).

Note 8.

(1) *Jogendro Nath Sircar* v. *Gobind Chunder Addi*, (1886) 12 Cal 252 (255).

(2) *Gayanoda Balad Assee* v. *Butto Kristo*, (1906) 33 Cal 1040 (1046): 10 Cal W N 857.

R. **65.** [S. 286.] *Save as otherwise prescribed, every* sale in execution of *a* decree shall be conducted by an officer of the Court or by *such* other person *as* the Court may appoint *in this behalf*, and shall be made by public auction in manner *prescribed*. **O.21, R.65.**

Sales by whom conducted and how made.

[1877—S. 286; 1859—S. 248. *See* R. 76 below.]

Local Amendment.

RANGOON.

In Order 21, the following shall be substituted for Rule 65:—

65. (1) Sales shall be conducted by the Bailiff or Deputy Bailiff but the duty may be entrusted to a process-server when the property is moveable property not exceeding Rs. 50 in value, and when, in the opinion of the Court, for reasons recorded in the diary of the case, the Bailiff or Deputy Bailiff cannot personally conduct the sale.

(2) Subject to the terms of the proviso to Rule 43 and of Rule 74, some one day in each week shall be set apart and regularly observed for holding sales in execution of decrees; and some well-known place in the vicinity of the Court-house or the public bazaar shall be selected for the purpose.

(3) Subject as aforesaid, and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment-debtor, all property whether moveable or immoveable attached in execution of the decree, shall be sold at the time and place selected. The day to be set apart, and the place selected for holding the sales, and any changes therein, shall be reported for the information of the High Court.

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorised commission. When the proceeds of sale do not exceed Rs. 500—5 per cent. Where they exceed Rs. 500 and do not exceed Rs. 5,000—5 per cent. on the first Rs. 500 and 2 per cent. on the remainder. Where they exceed Rs. 5,000—at the above rate on the first Rs. 5,000 and one per cent. on the remainder.

The calculation of the commission shall be on the whole amount realized in pursuance of one application for execution.

(5) Subject to the provisions of sub-Rule (13) of Rule 43-B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of sale shall be deducted from the sale-proceeds.

Note:—As regards the travelling allowance of Bailiffs going out to sell property on the spot, *see* Rule 43 of the Burma Travelling Allowance Rules.

(6) When a sale of immoveable property is set aside under the provisions of Rule 92 (2) below, no commission shall be paid to the Bailiff for selling the property.

(7) No officer of a subordinate Court shall receive any larger commission or fee in respect of any sale of property (mortgaged or otherwise) held in execution or in pursuance of any decree or order of the Court directing or authorizing such sale than that allowed by sub-Rule (4) above.

(8) The gross proceeds of sales shall be entered in Register II and in Bailiff's Register I, and shall be paid into the treasury.

O.21; R.65, Notes 1—4.

Synopsis.

1. "Save as otherwise prescribed." R. 76 below.
2. Sales by whom to be conducted.
3. Sale to be by public auction.
4. Acceptance of bid. See O. 21, R. 84.

Adjournment of sale—Not communicated—Effect. See R. 69, Note 3, Pts. (3) to (5).

1. "Save as otherwise prescribed."—*See* R. 76 below.

2. **Sales by whom to be conducted.**—Sales in execution are to be conducted by—

(*a*) an officer of the Court, or

(*b*) any other person whom the Court may appoint.

It is not, however, every officer that can conduct an execution-sale; but only an officer that has been appointed for the purpose.[1] The rule enables the Court to appoint a person who is not an officer of the Court (*e.g.*, an auctioneer) to conduct an execution-sale.[2] Where the Court has directed a Bailiff to hold a sale, the mere fact that the bids were recorded by another person does not show that the sale was not conducted by the Bailiff.[3]

3. **Sale to be by public auction.**—*See* R. 76 below. It has been held by the Bombay High Court that the Court, may for good reason order that the bidders shall be confined to a particular class or classes of persons.[1]

4. **Acceptance of bid.**—*See* O. 21, R. 84.

O.21, R.66.

R. 66. [S. 287.] (1) *Where* any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

Proclamation of sales by public auction.

(2) Such proclamation shall *be drawn up after notice to the decree-holder and the judgment-debtor and shall* state the time and place of sale, and specify as fairly and accurately as possible—

(*a*) the property to be sold ;

(*b*) the revenue assessed upon the estate or part of the estate, *where* the property to be sold is an interest in an estate or *in* part of an estate paying revenue to *the* Government ;

Order 21, Rule 65—Note 2.

(1) See *Judoonath Roy* v. *Ram Buksh Chatterjee*, (1869) 12 Suth W R 238 (238) [This case was decided under the Code of 1859 when the words in the corresponding section were different, *viz.*, "any other person *whom* the Court may appoint". The words "whom the Court may appoint" were construed as applicable also to officers of the Court. It is conceived that the law is the same even under the present rule though the words are different].

(2) *Galstaun* v. *Woomesh*, (1916) 35 Ind Cas 850 (852, 853): 44 Cal 789: 25 Cal L Jour 303.

(3) *Baldeo Das Birla* v. *Lal Nilmani Nathsahi*, 1928 Pat 615 (621): 8 Pat 122: 9 Pat L Tim 627.

Note 3.

(1) *Digambar Tatya Utpat* v. *Hari Damodar Utpat*, 1927 Bom 143 (145): 29 Bom L R 102: 100 Ind Cas 1008.

(*c*) any incumbrance to which the property is liable ; O.21, R.66.

(*d*) the amount for the recovery of which the sale is ordered ; and

(*e*) every other thing which the Court considers material for *a* purchaser to know in order to judge of the nature and value of the property.

(3) *Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule* (2) *to be specified in the proclamation.*

(4) *For the purpose* of ascertaining the matters to be specified *in the proclamation*, the Court may summon any person whom it thinks necessary *to summon* and *may* examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

[1877—S. 287; 1859—S. 249.]

Local Amendments.

LAHORE.

Add the following words to Clause (*c*) of Sub-Rule (2):—

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property; but the proclamation shall include the estimate, if any, given by either or both of the parties."

NAGPUR.

In Clause (*c*) of sub-Rule (2) of R. 66, *after* the word "Property" *insert* the words:—

", including the decree holder's estimate of the approximate market price."

N.-W. F. P.

Add the following words to Clause (*c*) of sub-Rule (2) of R. 66:—

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property; but the proclamation shall include the estimate, if any, given by either or both of the parties."

RANGOON.

In Rule 66, the following shall be added at the end of sub-Rule (2):—

"Provided that no such notice shall be necessary in the case of moveable property not exceeding Rs. 250 in value."

Synopsis.

1. Legislative changes.
2. Object of proclamation.
3. Nature of proceedings under this rule.
4. Delegation of the power to settle proclamation.
5. "Such proclamation shall be drawn up

O.21, R.66, Notes 1—3.

after notice."
6. "Such proclamation shall state the time and place of sale."
7. "As fairly and accurately as possible."
8. Contents of sale proclamation. See Notes 9-14, infra.
9. Specification of property.
10. Specification of revenue.
11. Encumbrances to which property is liable.
12. Amount to be recovered.
13. Everything which the Court considers material, etc., Cl. (e).
14. Value of the property.
15. Effect of an order under this rule.
16. Non-compliance with the provisions of this rule.
17. Verified statement to accompany application for order for sale—Sub-Rule (3).
18. "Court may summon any person, etc."—Sub-Rule (4).
19. Form of proclamation of sale. See Appendix E, Form No. 29.
20. Appeal.
21. Revision.
22. Applicability of the rule of res judicata to proceedings under this rule.
23. Judgment-debtor dying pending execution.
24. Limitation—Step-in-aid of execution.

Court sales—Duty of sale officer. See Note 11, Pt. (11).
Failure to notify encumbrance—Whether irregularity. See Note 11, Pt. (9).
Income—Specification whether necessary. See Note 13, Pt. (2).
Judgment-debtor with notice of proclamation—Subsequent objection by. See Note 16, Pt. (4).
Mortgage decree-holder not mentioning his mortgage—Effect. See Note 11, Pt. (15).

1. Legislative changes.—

1. The provision as to notice to the decree-holder and judgment-debtor in sub-Rule (2) is new.

2. Sub-Rule (3) is new.

2. Object of proclamation.—A proclamation of sale is meant for the information of intending purchasers and not of the judgment-debtor.[1]

3. Nature of proceedings under this rule.—Are proceedings under this rule administrative or judicial in character? On this question, there is a conflict of decisions. Three views have been expressed on the matter:—

(*a*) The proceedings under this rule are of an administrative and not of a judicial character. The leading case which lays down this view is *Sivagami Achi* v. *Subramania Ayyar*,[1] a decision under the old Code. The cases under the present Code which belong to this group have held that the view laid down in the above case is good law even under the present Code notwithstanding the changes therein.[2]

Order 21, Rule 66—Note 2.

(1) *Lack Ram* v. *Mohesh Doss*, (1869) 12 Suth W R 488 (489); *Shaik Abdul* v. *Syud Ali*, (1867) 18 Suth W R 55 (56).

Note 3.

(1) (1904) 27 Mad 259 (261): 14 Mad L J 57 (F B) [Order regarding estimated value of property, place of sale, the lots in which it is to be sold, and the amount for the recovery of which it is to be sold].

(2) *Rama Naidu* v. *Ramakrishna Naidu*, 1924 Mad 527 (528): 46 Mad L Jour 192: 19 Mad L W 235: 33 Mad L Tim 275: 1924 Mad W N 220: 78 Ind Cas 829 [Order settling one of the terms of the sale proclamation, *viz.*, the order on which the properties were to be sold]; *Krishna Rao Ambadas* v. *Krishnarao Raghunath Palekar*, 1928 Bom 245 (246): 30 Bom L R 679: 52 Bom 444: 111 Ind Cas 892 [Order refusing to alter valuation of property to be sold entered in sale proclamation is administrative and not judicial]; *Ajodhya Prasad* v. *Gopinath*, (1917) 39 Ind Cas 578 (579): 39 All 415: 15 All L J 337 [Order estimating the value of a property]; *Avudainayagappa Pillai* v. *Sundaranandam Pillai*, 1924 Mad 767 (768): 19 Mad L W 585: 76 Ind Cas 173 [Incorrect valuation in sale proclamation]; *Alimuddin* v. *Gobind Prosad*, 1927 All 208 (209): 99 Ind Cas 455 [Estimate of the value].

(*b*) The proceedings under this rule are of a judicial and not an administrative character.[3] These cases proceed on the view that the alterations in the rule under the new Code have the effect of making the action of the Court under the present rule, a judicial one. **O.21, R.66, Note 3.**

(*c*) So far as R. 66 requires a decision as to matters which are purely administrative in nature such as fixing the upset price and details of the sale proclamation the matter is administrative. In other words, where the order does not affect the rights, liabilities or equities of the parties to the decree, it is not a judicial order.[4] But where the order affects the rights, liabilities or equities of the parties it is a judicial and not an administrative order.[5]

Although, apparently, there is a conflict of decisions as set forth above, if the views expressed in the various cases are taken into consideration, there does not seem to be any real conflict if the actual decisions are taken into account. The great majority of them fall within the principles stated in paragraph (*c*) above. Thus, in all the cases cited as holding that proceedings under this rule are administrative and not judicial (para. (*a*) above) the orders in question did not affect the rights of the parties.[6] Similarly, in *Narasimha Rao* v. *Subbarayudu*,[7] which held that orders under this rule are judicial, the order in question was one affecting the rights of the parties.

It must also be noted that the opinion expressed in *Kaveri Bai Ammal* v. *B. Mehta and Sons*[8] suggesting that under the new Code proceedings under R. 66 are judicial and not administrative was *obiter*.

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(3) *Raghunath* v. *Hazari*, (1917) 37 Ind Cas 872 (873): 2 Pat L Jour 130: 1 Pat L W 111: 1917 Pat H C C 105 [Order refusing to hold enquiry as to value but merely giving value given by the parties]; *Kanhia Lal* v. *The Bank of Upper India, Ltd. Delhi*, (1919) 49 Ind Cas 539 (540): 38 Pun W R 1919 [Order refusing fresh proclamation after correcting valuation—Appeal lies]; *Arukapalli Narasimha Rao* v. *Arumilli Subbarayudu*, 1926 Mad 834 (835): 51 Mad L Jour 135: 23 Mad L W 765: 1926 Mad W N 566: 96 Ind Cas 492; *Kaveri Bai Ammal* v. *B. Mehta and Sons*, 1924 Mad 234 (235): 46 Mad L Jour 71: 18 Mad L W 615: 1923 Mad W N 894: 75 Ind Cas 901 [*Obiter*].

(4) *Rukmani Ammal* v. *T S P L Palaniappa Chettiar*, 1928 Mad 1169 (1170): 1928 Mad W N 569 [Order fixing upset price is administrative]: *Meenakshisundaram Pillai* v. *Chokkalinga Pathan*, 1929 Mad 506 (508): 56 Mad L Jour 624: 1929 Mad W N 283: 1929 Mad W N 290: 29 Mad L W 855: 120 Ind Cas 849 [Property ordered to be sold in certain lots fixing market value of each lot and upset price—Does not affect rights of parties and is not a judicial order]; *Deoki Nandan Singh* v. *Bansi Singh*, (1911) 10 Ind Cas 371 (372): 16 Cal W N 124: 14 Cal L Jour 85 [Order fixing value does not involve a *judicial adjudication*]; *Sukhichand* v. *Raja Kalanand Singh*, (1911) 11 Ind Cas 759 (760): 14 Cal L Jour 607 [Order entering both valuations by decreeholder and judgment-debtor. No enquiry as to correct valuation order does not determine any question judicially and no appeal lies]. See also *Nain Das* v. *Punjab National Bank, Ltd*, 1929 Lah 815 (816): 30 Pun L R 417: 115 Ind Cas 533 [Objections (1) that sale should not have been ordered to be carried out by collector, (2) that property should have been sold in lots, (3) that certain property should have been ordered to be sold first, (4) that Court should have ordered publication of proclamation in newspapers. *Held*, questions merely relate to procedure and do not in themselves affect rights or liabilities of parties].

(5) See *Rukmani Ammal* v. *T S P L Palaniappa Chettiar*, 1928 Mad 1169 (1170): 1928 Mad W N 569; *Meenakshisundaram Pillai* v. *Chokkalinga Pathan*, 1929 Mad 506 (508): 56 Mad L J 624: 1929 Mad W N 290: 1929 Mad W N 283: 29 Mad L W 855: 120 Ind Cas 849. See also *Devendra Nath Basu* v. *Kailash Chandra Kalu*, 1925 Cal 318 (319): 80 Ind Cas 861: 29 Cal W N 556 [Determination of question arising upon application under R 66 may also be ordered under S. 47—The test in each case would be whether there had been a *judicial* administration binding on the parties in subsequent proceedings].

(6) For cases and details of each case, *see* Footnotes (1) and (2) above.

(7) 1926 Mad 834 (835): 51 Mad L Jour 135: 23 Mad L W 765: 1926 Mad W N 566: 96 Ind Cas 492.

(8) 1924 Mad 234 (235): 46 Mad L Jour 71: 18 Mad L W 615: 1923 Mad W N 894: 75 Ind Cas 901.

O.21, R.66, Notes 4—5.

4. **Delegation of the owner to settle proclamation.**—It is the duty of the Court to settle the proclamation of sale itself. It cannot depute a Commissioner to do it and if it does so the sale will be invalid.[1]

5. **"Such proclamation shall be drawn up after notice."**—The sale proclamation should be settled only after notice to the judgment-debtor.[1] It is the duty of the decree-holder to apply for issue of notice under this rule and to take the necessary steps to have it served on the judgment-debtor.[2] But such notice is required only where a proclamation of sale has to be *drawn up*. It need not be given where a fresh proclamation is ordered under R. 69 (2) on an adjournment of sale.[3]

The absence of a notice under this rule does not by itself vitiate an execution-sale. The defect is only an *irregularity* which may entitle the judgment-debtor to have the sale set aside on satisfying the Court that he has sustained substantial injury by reason of the defect.[4] But where the Court has fixed a certain date for hearing the parties as to the valuation to be entered in a sale proclamation but fixes the valuation before such date the Court acts without jurisdiction.[5]

It has been held by the Lahore High Court that where notice has been given under R. 66 and the execution-proceedings are thus brought to the knowledge of the judgment-debtor, they are not vitiated by the absence of a notice under R. 22.[6]

A notice under this rule is to be served in the same manner as a summons. (O. 48, R. 2.)[7]

No notice is necessary before drawing up a sale proclamation in proceedings in execution of a rent decree under the Bengal Tenancy Act.[8]

Note 4.

(1) *K M Appu* v. *Achutha Menon*, 1926 Mad 755 (755): 49 Mad 333: 23 Mad L W 652: 94 Ind Cas 8: 51 Mad L Jour 165: 1926 Mad W N 936.

Note 5.

(1) *Ram Prasad* v. *Shiva Kumar*, 1932 All 55 (57): 1931 All L J 849: 133 Ind Cas 529 [Date fixed for appearance of judgment-debtor should be date when all necessary materials are before Court so that judgment-debtor could inspect them and gain necessary information].

(2) *Nomuna Bibi* v. *Roshun Meah*, (1911) 9 Ind Cas 558 (560, 561): 38 Cal 482: 13 Cal L Jour 621: 15 Cal W N 428 [His failure to do so amounts to "default" within R 57].

(3) *Ahamad Hasan* v. *Kodi Lal*, 1926 Oudh 76 (77): 90 Ind Cas 351. See also *Basant Lal* v. *Sajjad Husain*, 1921 Oudh 222 (223): 24 Oudh Cas 391: 65 Ind Cas 988 [Necessary particulars ascertained in previous execution proceedings—Fresh notice not necessary before preparing proclamation again].

(4) *Kanhya Lal* v. *Megh Raj*, 1927 Lah 84 (84): 99 Ind Cas 515; *Bipin Behary Bejali* v. *Kanti Chandra Mandal*, (1913) 18 Ind Cas 715 (716) (Cal); *Tukaram* v. *Sakharamsa*, 1929 Nag 130 (131): 25 Nag L R 58: 118 Ind Cas 49; *Jaggan Nath* v. *Daud*, 1923 Lah 592 (593): 4 Lah 243; 75 Ind Cas 103; *T Neelu* v. *Subramania*, (1930) 53 Ind Cas 809 (813): 11 Mad L W 59: 1919 Mad W N 897; *Krishnaji* v. *Balliram*, (1918) 44 Ind Cas 252 (254) (Nag); *Basant Lal* v. *Sajjad Husain*, 1921 Oudh 222 (223): 24 Oudh Cas 391: 65 Ind Cas 988; Contra *Ramaswami* v. *Ma U Tha*, (1917) 38 Ind Cas 98 (98): 4 Bur L Tim 40. See also *Chandi Prasad* v. *Mt Jamna*, 1928 All 74 (76): 49 All 830: 25 All L J 507: 102 Ind Cas 239.

(5) *Sukhraj Bahadur* v. *Debi Buksh*, 1923 Pat 102 (102): 3 Pat L Tim 342: 65 Ind Cas 860.

(6) *Kora Lal* v. *Punjab National Bank, Ltd*, 1921 Lah 384 (385): 5 Lah L Jour 67. *Cf. Satish Chandra Bhaduri* v. *Pabna Dhana Bhandar Co, Ltd*, 1930 Cal 348 (349): 51 Cal L Jour 197: 125 Ind Cas 655 [Proceedings under R 66 without notice to the judgment-debtor cannot be taken advantage of for purposes of evading *notice under R 22*].

(7) See *Debi Prosad* v. *Nagendra Kumar*, 1925 Cal 552 (554): 78 Ind Cas 727 [Personal service not possible—Affixture to house door or notice by registered post is enough]; *Inamullah Khan* v. *Shambhu Dayal*, 1931 All 159 (160): 1931 All L J 62: 130 Ind Cas 485 [Affixture to judgment-debtor's house held sufficient].

(8) *Mt Lila Kuer* v. *Mir Ali Karim*, 1931 Pat 267 (268): 10 Pat 138: 12 Pat L Tim 736: 133 Ind Cas 686.

O.21, R.66, Notes 6—7.

6. "Such proclamation shall state the time and place of sale": Time of sale.—The omission to state in the proclamation, the time of sale, is a material irregularity within the meaning of R. 90.[1] It is not merely enough to mention the *day* of sale; the *hour* of sale should also be stated.[2] Where a sale has been advertised to take place at a particular hour, but is actually held at an *earlier* hour, though on the same day, it has been held by the High Courts of Allahabad and Calcutta that no sale could be deemed to have taken place at all within the meaning of the Code.[3] According to the Chief Courts of the Punjab and Burma, however, such a sale is not a nullity but only an irregularity which, if material, would entitle the party interested to set aside the sale.[4] Where a sale has been advertised to take place at a particular hour but is held at a few hours *later*, it has been held by the High Court of Rangoon that the delay of a few hours is not a material irregularity within the meaning of R. 90.[5]

In the absence of any rules to the contrary, a sale held on a public holiday is not illegal or irregular.[6]

Place of sale.—The omission to state the place of sale in the proclamation[7] or the holding of a sale at a place different from that stated in the proclamation[8] is a material irregularity. The Code intends that a sale should ordinarily be held at some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons ought to be shown for directing otherwise.[9]

7. "As fairly and accurately as possible."—It is the duty of the Court to use all possible materials before it in drawing up a proclamation of sale which will give such information about the property to be sold as may be given and as fairly and as accurately as possible. Where the presiding Judge has not availed himself of the materials b fore him, they being such as would have enabled him to avoid the trouble afterwards occasioned, the purchaser who has, in fact, been misled would have a remedy either for a proportionate refund of the purchase money or for a cancellation of the sale.[1]

Note 6.

(1) *Narhar* v. *G M Bati*, (1919) 51 Ind Cas 864: 15 Nag L R 125; *Mahomed Ali* v. *Gobind Prasad*, (1915) 28 Ind Cas 184 (185): 18 Oudh Cas 1.

(2) *Surno Mouee Debi* v. *Dakhina Ranjan Sanyal*, (1897) 24 Cal 291 (293). See also *Maung Po Tha* v. *S R M M A Nauappa Chettiar*, 1927 Rang 84 (85): 5 Bur L Jour 183: 100 Ind Cas 74.

(3) *Chedami Lal* v. *Amir Bea*, (1885) 7 All 676 (677): 1885 All W N 178; *Basharulla* v. *Uma Churn*, (1889) 16 Cal 794 (798). But see *Khodeja Bibi* v. *Ram Narain Dan*, (1869) 12 Suth W R 511 (512) [Held to be an irregularity].

(4) *Safdar Ali* v. *Fazal*, (1915) 30 Ind Cas 524 (525): 156 Pun L R 1915: 143 Pun W R 1915: *Karathan Chettu* v *Palaniappa*, 1907 Upper Bur C P C 9.

(5) *Maung Po Tha* v. *S R Chettiar*, 1927 Rang 84 (85): 5 Bur L Jour 183: 100 Ind Cas 74. Cf. *Pokhraj Singh* v. *Gossain Munraj Pooree*, (1869) 12 Suth W R 281 (282) [Change in specified order of sale or other sudden alteration of programme is irregularity].

(6) *Biram* v. *Sahibunnissa*, (1881) 3 All 333 (334). But see *Haro Jemadar* v. *Jadub Chunder Holdar*, (1865) 3 Suth W R Mis 24.

(7) *Jasoda* v. *Mathura Das*, (1887) 9 All 511 (511, 512): 1887 All W N 145; *Maung Po* v. *S R Chettiar*, 1927 Rang 84 (85): 5 Bur L Jour 183: 100 Ind Cas 74. See *Showers* v. *Seth Gobind Dass*, (1875-78) 1 All 400 (402): 2 Ind Jur 66 [Place of sale not stated with sufficient distinctness, material irregularity] See *Tuljaram* v. *Ramachandra*, 1921 Mad 481 (486): 44 Mad L Jour 465: 14 Mad L W 515: 1921 Mad W N 736: 68 Ind Cas 916 [Sale not to be set aside unless judgment-debtor is proved to have sustained substantial injury by reason of the omission].

(8) *Dani Chand* v. *Atma Singh*, 1906 Pun Re No 132: 11 P L R 1907: 149 P W R 1906. Cf. *Govind Hari Vatekar* v *Bank of India*, (1866-67) 4 Bom H C A C 161 [Uncertainty in the place—In this case it was held that the uncertainty was not such as to entitle the judgment-debtor to have sale set aside].

(9) *Lakshmibai* v. *Santapa Revapa*, (1880) 13 Bom 22 (25).

Note 7.

(1) *A M Hashin Ispham* v. *N A P K Chetty*, (1916) 33 Ind Cas 1003 (1005, 1006): 8 Low Bur R 427: 9 Bur L Tim 169. See also *Din Dayal* v. *Nazir-uddin Ahmad*, 1901 All W N 167.

O. 21, R. 66, Notes 8—9.

8. Contents of sale proclamation.—*See* Notes 9—14, *infra*.

Under the Bengal Tenancy Act (VIII of 1885) and the Orissa Tenancy Act (II of 1913), a sale proclamation should contain certain particulars in addition to those specified in this rule. *See* Ss. 163 and 217 of the said Acts respectively.

9. Specification of property.—The Court is under a duty to ascertain definitely the property to be sold before entering it in the sale proclamation.[1] Where it erroneously directs the sale of the property of a stranger to the decree behind his back, he is entitled to sue to have the sale set aside.[2]

The rule requires that the property to be sold should be described in the sale proclamation as fairly and accurately as possible.[2-a] The description should be sufficient to identify the property.[3] The proclamation should also specify the *judgment-debtor's interest* in the property.[4] (*See* O. 21, R. 13.) Where owing to the Court's failure to make use of the materials before it, the area actually sold is less than that mentioned in the sale proclamation, the auction purchaser is entitled to sue to have the sale set aside or to claim a refund of a proportionate part of the purchase money.[5] Where, subsequent to the issue of a sale proclamation, a portion of the property is released from attachment, and, consequently, only a portion of the property mentioned in the sale proclamation is to be actually sold, it is necessary to issue a fresh proclamation.[6]

Note 9.

(1) *Po Thien* v. *Maung Tu*, (1909) 2 Ind Cas 362 (363): 5 Low Bur R 18 [If the property sought to be sold is a debt and the alleged debtor notifies to the Court that no debt exists, the Court is bound to satisfy itself under R 66 that the alleged debt exists before proceeding to its sale]. See the following cases *Haridal* v. *Abhenang*, (1880) 4 Bom 323 (326): 5 Ind Jur 257; *Sirlah* v. *Muckanachary*, (1887) 10 Mad 194 (196). See also *Abdul Rauf* v. *Rahim Bakhsh*, 1928 Oudh 491 (492): 110 Ind Cas 860 [Property not liable to sale not to be included in sale proclamation]: *Bhiku Bal Patil* v. *Khemchand*, (1890) 14 Bom 369 (370) [Under S 287 and the rules of the High Court made thereunder, a Court cannot refuse to execute its own decree ordering the sale of immoveable property].

(2) *Assamathem* v. *Luchmeeput*, (1879) 4 Cal 142 (154): 2 Cal L Rep 223: 1 Shom L R 219 F B.

(2-a) See *Rameswar Prosad* v. *Sha Krissen*, (1882) 8 Cal W N 257 (262) [Judgment-debtor is *entitled* to have an accurate description of his property].

(3) *Lack Ram* v. *Mohesh Das*, (1869) 12 Suth W R 488 (489).

Cases where description was held sufficient:—*Ananda Chandra Nandy* v. *Jhulon Singh*, 1929 Cal 409 (412): 33 Cal W N 305: 56 Cal 902: 120 Ind Cas 151 [Misdescription cannot be ground for holding that property did not pass under it if it can be gathered from the surrounding facts and circumstances that there could not be any doubt as to what was actually sold]: *Palaniappa Thevan* v. *Shadagopa Mudaliar*, (1911) 9 Ind Cas 729 (729): (1911) 1 Mad W N 133: 9 Mad L Tim 319 [Auction sale of the interest secured by a bond—No mistake as to what was sold—Fact that the date of the bond was incorrectly given would not affect validity of title acquired under the sale]: *Baldeo Das Birla* v. *Lal NUamani Nath Sahi Deo*, 1928 Pat 615 (624): 8 Pat 122: 9 Pat L Tim 627 [It is not necessary for a decree-holder to particularise by name all the villages which appertain to the main village or holding —It is enough if the description is sufficient to identify the holding]: *Luchmeeput* v. *Lekhraj Roy*, (1867) 8 Suth W R 415 (419) [Sale of Government promissory notes—Numbers, values, etc., to be specified—*Held*, however in this case, no material injury was caused by the failure to specify them]: *Ganga Baksh Singh* v. *Sheo Bakhsh Singh*, 1929 Oudh 263 (264, 265): 117 Ind Cas 764 [Property described as share of mortgagor in bhaiyachara village]: *Nooral Hossein* v. *Ram Coomar Sahee*, (1876) 25 Suth W R 326 (327) [Wrong pargana mentioned—Property identified—Sale not vitiated].

Cases in which description was held insufficient:—*Peachey* v. *Jamna Das*, 1905 Pun Re No 47: 175 Pun L R 1905: 50 Pun W R 1905 [Khasra numbers stated—No indication as to what the properties were—Material irregularity]: *Nibaran Chandra* v. *Chiranjib Prasad*, (1905) 32 Cal 542 (546, 547): 9 Cal W N 487; *Ganesh Singh* v. *Banno Bibi*, 1887 All W N 50 (51) [Several shares in—Different parties sold—Number of sharers in each patti to be specified].

(4) See *Venkata Suryanaraina Jagath Pathiraju* v. *Goluguri Bapiraju*, (1910) 7 Ind Cas 60 (62): 34 Mad 143: 8 Mad L Tim 154: 1910 Mad W N 286 [Fraudulent misrepresentation of judgment-debtor's interest—Auction-purchaser held entitled to sue for setting aside sale].

(5) *A M Hashim Isphany* v. *N A P K Chetty Firm*, (1916) 33 Ind Cas 1003 (1005, 1006): 8 L B R 427: 9 Bur L Tim 169.

(6) *Shib Prokash Singh* v. *Sardar Doyal Singh*, (1878) 3 Cal 544 (546): 2 Cal L Rep 260. But cf. *Mohd Said Khan* v. *Mohd Abdus Sami Khan*, (1932) 138 Ind Cas 612 (612) All [In the case

Where a question arises as to what was sold to the purchaser at a Court sale, the order of attachment, the sale proclamation and the sale certificate should be looked at.[7] In a case of discrepancy between the sale proclamation and the certificate of sale, the former will prevail.[8] At a sale in execution of a mortgage, decree, the mortgagee's interest also passes to the purchaser, though the sale proclamation may *expressly* refer only to the right, title and interest of the mortgagor.[9]

O.21, R.66, Notes 9—11.

10. Specification of revenue.—Where the property to be sold is an interest in an estate or part of an estate paying revenue to the Government, the revenue assessed upon the estate or part of the estate should be specified in the sale proclamation.[1]

An omission to state it[2] or an incorrect statement thereof[3] in the proclamation is a material irregularity within the meaning of R. 90.

The term "part of an estate" in the rule means an *aliquot* part of an estate.[4]

11. Encumbrances to which property is liable.—The proclamation of sale should specify, as fairly and accurately as possible, the encumbrances to

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of zamindari property though the whole property has been proclaimed for sale, a share in it may be sold without issuing a fresh proclamation].

(7) See *Fida Husain* v. *Kutub Husain*, (1885) 7 All 38 (40, 41): 1884 All W N 257 [Property not mentioned in any of these does not pass]

Cases bearing on the purchaser's rights under Court sale.—*Jatindra Nath Bhaduri* v. *Chandra Nath Pramanik*, 1925 Cal 1247 (1247): 87 Ind Cas 742 (Sale of estate with all moneys due from tenants in respect of arrears of rent—Arrears of rent include rent decrees]: *Grishchunder* v. *Jabanewari*, (1881) 6 Cal 243 (246): 3 Shome L R 240: 4 Sar 170: 3 Suth 776: 7 Cal L Rep 420: 4 Ind Jur 470 P C [Sale of decree partly executed only enables purchaser to execute the unexecuted portion]: *Loki Mehlo* v. *Ajait Lal*, (1878) 5 Cal 144 (146): 4 Cal L Rep 465: 2 Shome L R 258 [Only in cases where it is manifest that judgment-debtor must have been sued as a representative, a sale in terms of the interest of the judgment-debtor can be held to convey the interests of others apparently not parties to the suit]: *Ganesh Lal Tewari* v. *Ramnarain*, (1880) 6 Cal 213 (218): 6 Cal L Rep 533: 4 Ind Jur 419: 3 Shome L R 215: 3 Suth 773: 4 Sar 161 P C [*A* obtaining a decree for possession and mesne profits, of land comprised in a certain lease—*B* selling in execution of decree against *A*, *A's* interest in the lease—Purchaser does not get right to mesne profits]: *Afatoolla* v. *Dwarka Nath*, (1879) 4 Cal 814 (815): 4 Cal L Rep 95 [Sale of under-tenure for arrears of rent under S. 66 of Landlords and Tenant Act of 1869—Growing crops pass to the purchaser, except where it has been specifically excepted by sale notification].

Sale of property in hands of legal representative, for decree debt due by judgment-debtor—Latter's interest in the property passes to the purchaser:—*Manager of Durbhanga* v. *Ramanut Singh*, (1872) 10 Beng L R 294: 14 Moo Ind App 605: 17 Suth W R 459: 2 Suth 575: 3 Sar 117: *Ishan Chunder* v. *Buksh Ali*, 1863 Marsh 614 (614): *Lalla Seetha Ram* v. *Ram Buksh*, (1875) 24 Suth W R 383 (384): *Hulkhoru Lal* v. *Sheo Churn*, (1875) 24 Suth W R 109 (109): *Nuzeeran* v. *Ameeroodeen*, (1875) 24 Suth W R 3 (4): *Gannati* v. *Krishnamachari*, 1917 P C 121 (123): 41 Mad 403: 45 Ind App 54: 16 All L J 353: 20 Bom L R 580: 27 Cal L Jour 367: 22 Cal W N 553: 34 Mad L Jour 463: 23 Mad L Tim 198: 8 Mad L W 427: 1918 Mad W N 310: 4 Pat L W 310: 44 Ind Cas 855 P C: *Ram Onoograho* v. *Monteran*, (1866) 6 Suth W R 223 (224): *Piarey Lal* v. *Ram Chandra*, 1926 All 730 (732): 96 Ind Cas 771 [In case of ambiguity in case of sale under mortgage decree, the decree may be seen]: *Shaik Abdool* v. *Syud Jaun Ali*, (1872) 18 Suth W R 55 (56): *Dwarkanath* v. *Aloka Chunder Seal*, (1883) 9 Cal 641 (643): *Fida Husain* v. *Kutub*, (1885) 7 All 38 (40, 41): 1884 All W N 257: *Raja Thakur* v. *Jiban Ram*, (1913) 21 Ind Cas 936 (937, 938): 41 Cal 590: 41 Ind App 38: 1914 Mad W N 118: 18 Cal W N 313: 12 All L J 156: 19 Cal L Jour 161: 26 Mad L Jour 80: 16 Bom L R 156: 15 Mad L Tim 137 P C.

(8) *Uma Churn Sen* v. *Gobind Chunder Mozumdar*, (1877) 1 Cal L Rep 460 (463): *Gouree* v. *Surut Chunder*, (1874) 22 Suth W R 408 (408).

(9) *Seshagiri Shanbhog* v. *Solvador Das*, (1880-81) 5 Bom 5 (7): *Khiraj* v. *Lingappa*, (1880-81) 5 Bom 2 (5). See also *Hari* v. *Lakshman*, 5 Bom 614 (618) [Sale under money decree for mortgage debt].

Note 10.

(1) *Luck Ram* v. *Mohesh Doss*, (1869) 12 Suth W R 488 (488, 489).

(2) *Bali Ram Singh* v. *Narsingdas*, 1923 P C 93 (93): 18 Mad L W 137: 45 Mad L Jour 403: 28 Cal W N 593: 33 Mad L Tim 275: 1923 Mad W N 714: 4 L R P C 197: 75 Ind Cas 546 P C: *Macnaughten* v. *Mahabir*, (1883) 9 Cal 656 (661): 10 Ind App 25: 11 Cal L Rep 494: 4 Sar 417: 4 Shome L R 285: 7 Ind Jur 164 P C: *Madarsah Maracayar* v. *Palaniappa Chetty*, (1900) 23 Mad 628 (629): *Athappa Chetty* v. *Ramakrishna*, (1898) 21 Mad 51 (52).

(3) *Girdhari* v. *Hurdeo Narain*, (1877) 3 Ind App 230 (240): 26 Suth W R P C 44: 3 Sar 637: 3 Suther 294 P C: *Raja of Kalahasti* v. *Maharaja of Venkatagiri*, (1913) 21 Ind Cas 389 (391): 38 Mad 387: 25 Mad L Jour 198: 14 Mad L Tim 320, *Ambi Ayyar* v. *Sundaresa Ayyar*, 1928 Mad 823 (824): 110 Ind Cas 779 [Error was so small in this case that it was held that no serious injury could have been caused to the judgment-debtor].

(4) *Kalee Prosunno Bose* v. *Dinonath Bose Mullick*, (1873) 19 Suth W R 434 (436): 11 Beng L R 56.

O.21, R.66, Note 11.

which the property to be sold is liable.[1] The amount due on the encumbrances notified should also be mentioned.[2] The fact that any of the alleged mortgages is admitted or disputed may also be stated.[3] But the decree-holder is not required to inspect and peruse all the mortgage documents mentioned in the encumbrance certificate and notify any specially onerous conditions that may be included therein, such as, that the property cannot be redeemed without paying off mortgages on *other* properties of the debtor.[4]

It is competent to the encumbrancer himself to apply to the Court under this rule praying that his encumbrance should be notified in the sale proclamation.[5] A prior mortgagee who has been impleaded as a party to the suit on the puisne mortgage, in which his priority was not questioned, is not precluded from claiming under this rule that his mortgage should be notified in the sale proclamation.[6]

The rule authorises the Court to notify the *existence* of encumbrances on the property. It does not empower it to order that the sale should be subject to the encumbrances.[7] The notification of an encumbrance under this rule must be distinguished from an order under R. 62, *ante*, that the property be sold subject to a certain encumbrance. In the former case there is no adjudication as to the binding nature of the alleged encumbrance, while in the latter case there is such an adjudication. *See* notes 1 and 2 to R. 62. Where the *decree* itself directs the sale of the property subject to a certain encumbrance, the purchaser cannot challenge the validity of the encumbrance afterwards.[8]

The failure to notify encumbrances under this rule is a material irregularity which will vitiate the sale[9] though a person who has *waived* the irregularity cannot subsequently object to it.[10] Even though the fact that the sale is subject to a mortgage is mentioned in the sale proclamation, the sale will still be vitiated, if through the conduct of the officers conducting the sale, the

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Note 11.

(1) *Debendra Narain* v. *Ramtaran*, (1903) 30 Cal 599 (606): 7 Cal W N 766 F B; *Chimabai* v. *Dhula Kuppa*, (1919) 50 Ind Cas 384 (390): 21 Bom L R 281 [Fact that property is to be sold subject to mortgage should be distinctly stated]; *Kalekhan* v. *Mt Hura*, 1932 Nag 18 (20): 27 Nag L R 389: 136 Ind Cas 239 [Fact that the property is in possession of a Mahomedan widow for her dower right and is sold subject to it should be mentioned in the sale-proclamation]; *Hari Kishen* v. *Gisborne & Co*, (1905) 9 Cal W N 300 (300) Notes [Cl (c) of this section covers cases of puisne as well as prior incumbrances].

(2) *Mohendra* v. *Bepin Behari*, (1916) 33 Ind Cas 946 (947) Cal. See also *Shwe Seik* v. *M A R Somasundaram Chetty*, (1906) 3 L B R 258 (260) [Sale subject to mortgage—Amount to be carefully stated]; *Megh Lal* v. *Shib Pershad*, (1881) 7 Cal 34 (41, 42): 8 Cal L Rep 369: 5 Ind Jur 476: 4 Shome L R 169.

(3) *Ovanna Perumal* v. *Maung Myin*, (1919) 51 Ind Cas 750 (751): 3 U B R 139; *Hla Baw* v. *S K R Muthia Chetty*, (1903-1904) 3 L B R 275 (277).

(4) *Ponnuswami* v. *Abdul Hafiz*, 1921 Mad 209 (210): 13 Mad L W 444: 1921 Mad W N 258: 62 Ind Cas 735.

(5) *Mahomed Zakaria* v. *Kishun Narain*, 1926 All 268 (269): 92 Ind Cas 644: 48 All 260.

(6) *Bansi Dhar* v. *Jagmohan*, 1929 Oudh 88 (89): 3 Luck 472: 5 Oudh W N 210: 110 Ind Cas 79.

(7) *Mathura Prasad* v. *Ghansiam Das*, 1931 Oudh 157 (159): 8 Oudh W N 179: 132 Ind Cas 767.

(8) *Majidunnissa* v. *Janki*, 1888 All W N 151 (152); *Basawan Singh* v. *Ganga Phal Rai*, (1918) 47 Ind Cas 224 (225) Pat.

(9) *Moti Lal Roy* v. *Bhawani Kumari Debi*, (1902) 6 Cal W N 836 (837, 838); *Sitapat Ram* v. *Mahabir Prasad*, 1925 Oudh 424 (424): 12 Oudh L J 331: 2 Oudh W N 315: 88 Ind Cas 532 [Announcement by sale officer is not enough]; *Lakshmi* v. *Kutluni*, (1887) 10 Mad 57 (60); *Kanjimal* v. *Bibi Sallo*, (1886) 8 All 116 (116, 117): 1886 All W N 33; *Gur Baksh Lal* v. *Jawahir Singh*, (1893) 20 Cal 599 (604) [Mention of incumbrance which does not exist is a material irregularity].

(10) *Punjab National Bank* v. *Sundar Singh*, 1929 Lah 673 (674): 118 Ind Cas 901 [Person bidding at sale knowing that proclamation did not specify mortgage in his own favour is estopped from objecting to irregularity].

purchaser is misled into believing that the sale is free from encumbrances.[11] As to the remedies of a party when an encumbrance is wrongly mentioned in a sale proclamation, *see* notes to Rr. 90 to 92, *infra*, and the undermentioned case.[12] O.21, R.66. Note 11.

The fact that a mortgage is not notified in the sale proclamation does not affect the binding nature of the mortgage as regards the property in the purchaser's hands.[13] Its enforceability does not depend upon the purchaser having notice of the mortgage. In the case of a *charge* however, it will not as a general rule be binding on the purchaser if he has no notice of such charge.[14] *See* S. 100 of the Transfer of Property Act. But a mortgagee may be *estopped* by his conduct from setting up the mortgage against a *bona fide* purchaser. Thus a decree-holder on whom a duty is cast by this rule to give full and true information, so far as it is known to him, will be estopped from setting up, as against the auction-purchaser, any mortgage *in his own favour*, which he has not mentioned in his application under this rule, and which does not appear in the sale proclamation,[15] provided the auction-purchaser has actually bought without notice of the mortgage.[16]

As to whether registration constitutes notice for the purpose of such estoppel, *see* the undermentioned cases.[17] (*See also* Transfer of Property Act, S. 3.) There is, however, no estoppel where the decree-holder has mentioned the mortgage in his application for an order for sale but through some mistake of the Court officers, it is not inserted in the sale proclamation.[18] The above rule of estoppel also applies to a *judgment-debtor*, as, for instance, where in a suit

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(11) *Mahomed Kala Mia* v. *Harperink*, (1909) 1 Ind Cas 122 (123): 36 Ind App 32: 36 Cal 328: 19 Mad L Jour 115: 11 Bom L R 227: 9 Cal L Jour 165: 5 Mad L Tim 126: 6 All L J 34: 13 Cal W N 249 P C.

(12) *Parshotam* v. *Ganesh*, (1899) 23 Bom 759 (760): 1 Bom L R 220 [Suit for setting aside sale not maintainable—Suit for damages for slander of title or suit for declaration and injunction staying sale maintainable].

(13) *Kifayat Ullah* v. *Mahabir Prasad*, (1914) 24 Ind Cas 2 (5): 1 Oudh L J 175; *Rahas Behari Lal* v. *Bachchu Singh*, (1914) 23 Ind Cas 871 (874): 1 Oudh L J 50; *Bhairon Prasad* v. *Sheo Darshan*, (1918) 45 Ind Cas 877 (878): 5 Oudh L J 114; *Ma Baw* v. *S K R Muthiah Chetty*, (1905-06) 3 L B R 275 (278).

(14) *Maung Lon Gyi* v. *Rahman Chetty*, (1911) 12 Ind Cas 855 (857): 4 Bur L Tim 142 [Charge not mentioned in sale *proclamation* but announced by charge holder at sale—Purchaser is bound].

(15) *Md Hamiduddin* v. *Shib Sahai*, (1899) 21 All 309 (310): 1899 All W N 87; *Sheo Ratan* v. *Choley Lal*, (1881) 3 All 647 (652): 1881 All W N 43 F B; *Hussein* v. *Shankargiri*, (1899) 23 Bom 119 (121); *Ramchandra Vithuram* v. *Jairam*, (1898) 22 Bom 686 (692); *Agarchand Gumanchand* v. *Rakhma Hanmant*, (1898) 12 Bom 678 (682, 683); *Hari* v. *Lakshman*, (1880-81) 5 Bom 614 (618); *Tukaram* v. *Ramchandra*, (1875-77) 1 Bom 314 (318); *Kalidas* v. *Prasanna Kumar*, (1920) 55 Ind Cas 189 (192): 47 Cal 446: 24 Cal W N 269: 30 Cal L Jour 496; *Giribala* v. *Mina Kumari*, (1900-01) 5 Cal W N 497 (502); *Nursing Narain Singh* v. *Bouhoobur Singh*, (1884) 10 Cal 609 (611); *Bhuggobutty Dossee* v. *Shama Churn Bose*, (1875-76) 1 Cal 337 (353); *Jagannatha* v. *Ganga Reddi*, (1892) 15 Mad 303 (304); *Baldeo* v. *Ausan Singh*, (1908) 11 Oudh Cas 206 (208); *Maung Kyin Pein* v. *Ma Pwa Me*, 1922 U B 1 (3): 64 Ind Cas 953: 4 U B R 62; *Dullub Sirkar* v. *Krishna Kumar*, (1869) 3 Beng L R 407: 12 Suth W R 303 P C. See also *Kasturi* v. *Venkatachalapathi*, (1892) 15 Mad 412 (414) [Decree-holder not proclaiming mortgage in favour of third party but within his knowledge—Mortgage subsequently assigned to him—He is estopped from enforcing it against purchaser]. But see *Dwarka Prasad* v. *Ulfat Rai*, 1931 All 549 (549): 1931 All L J 398: 132 Ind Cas 803: 53 All 631.

(16) *Tulloo* v. *Indar Kunwar*, 1926 Oudh 330 (331): 3 Oudh W N 346: 13 Oudh L J 154: 93 Ind Cas 873: *Gurdit* v. *Hakumat*, 1932 Lah 56 (57): 135 Ind Cas 201: 32 Pun L R 759; *Dhondo* v. *Raoji*, (1896) 20 Bom 290 (292).

(17) **Cases saying that registration is notice and therefore there is no estoppel where the mortgage is registered**:—*Dhondo* v. *Raoji*, (1896) 20 Bom 290 (292): *Motiram* v. *Hari*, 1877 Bom P J 4 (4): *Nanabhat* v. *Lakshman*, 1877 Bom P J 83 (83): *Banwari Das* v. *Md Mashiat*, (1887) 9 All 690 (702): 1887 All W N 254: 12 Ind Jur 192.

Cases saying that decree holder is estopped though the mortgage was a registered one: *Md Hamid-uddin* v. *Shib Sahai*, (1899) 21 All 309 (310): 1899 All W N 87; *Jagannatha* v. *Ganga Reddi*, (1892) 15 Mad 303 (304); *Dullub Sirkar* v. *Krishna Kumar Bukshee*, (1869) 3 Beng L R 407 A C: 12 Suth W R 303.

(18) *Gurdit Singh* v. *Hakumat Rai*, 1932 Lah 56 (57): 135 Ind Cas 201: 32 Pun L R 759; *Ramsarup* v. *Bharat*, 1921 All 113 (116): 43 All 703: 19 All L J 744: 64 Ind Cas 763; *Tulloo* v. *Indar Kunwar*, 1926 Oudh 330 (331): 3 Oudh W N 346: 13 Oudh L J 154: 93 Ind Cas 873. See also *Banwari Das* v. *Muhammad Mashiat*, (1887) 9 All 690 (702): 1887 All W N 254: 12 Ind Jur 192.

O. 21, R. 66, Notes 11—12.

for rent, the mortgagee of the holding has also been impleaded as a defendant and he does not take steps to have his mortgage announced in the sale proclamation.[19]

Estoppel arises not only by failure of a party in his duty to have his mortgage entered in the sale proclamation, but also by any other conduct on the part of the person putting forward the mortgage which has misled the purchaser into believing that the alleged mortgage did not exist.[20] The rule of estoppel applies not only to setting up a mortgage against the auction-purchaser but also to *other* claims against him.[21]

12. Amount to be recovered.—The amount for the recovery of which the sale is ordered should be entered in the proclamation of sale. The amount so entered should not be one exceeding that granted by the decree. Thus where the decree does not grant interest, the proclamation of sale should not include it.[1] Where the decree awards future interest, the interest should be calculated up to the date fixed for the sale.[2] The fact that in the application for execution under O. 21, R. 11 (2) *ante*, interest is calculated only up to the date of *application* is no bar to the interest being calculated in the sale proclamation up to the date fixed for sale.[3]

Where, at an execution sale, the decree-holder himself purchases the property and is placed in possession, and the sale is subsequently set aside and a fresh proclamation of sale ordered, it has been held that the mesne profits which the judgment-debtor is entitled to recover from the decree-holder for the period of his possession may be deducted from the decretal amount entered in the sale proclamation and that the matter is one to be decided in execution proceedings.[4] (*Vide* S. 144, Note 34, *ante*.)

When a sale is adjourned under R. 69 below and a fresh proclamation of sale is waived by the judgment-debtor, the sale on the adjourned date for the amount entered in the original proclamation is not irregular although the decree was partly satisfied when the adjournment was obtained. The reason is that where a sale is adjourned and the judgment-debtor waives a fresh proclamation the amount due on the date to which the sale is adjourned is never shown in the proclamation.[5]

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(19) *Manik Ram* v. *Ram Autar*, (1915) 27 Ind Cas 611 (613): 2 Oudh L J 22.

(20) *McConnell* v. *Mayer*, (1872) 2 N W P H C R 315 (319) [Giving evasive answer to intending purchaser]; *Manjiram* v. *Mohan*, (1907) 4 All L J 709 (711): 1907 All W N 278 [Bidding at sale without notifying his own lien—But cf. *Gheran* v. *Kunj Behari*, 9 All 413 (419)]. Cf. *Ranwari Das* v. *Md Mashiat*, (1887) 9 All 690 (702): 1887 All W N 254: 12 Ind Jur 192 [Encumbrance mentioned in sale proclamation—Decree-holder not estopped merely because he does not personally announce the encumbrance at the sale]. See also *Basvantappa* v. *Ranu*, (1885) 9 Bom 86 (91, 93) [Mere acquiescence on the part of a stranger whose property is attached and sold does not estop him from claiming the property as his own, for though the law gives him the opportunity, he is not bound to object].

(21) *Tinnappa Chetty* v. *Murugappa Chetty*, (1884) 7 Mad 107 (110) [Setting up prior title to the property]; *Khirode Chandra* v. *Janki Das*, (1913) 20 Ind Cas 753 (754) Cal [Rent decree—Execution—Sale of holding—Advertisement as mokaravi (permanent)—Landlords cannot subsequently deny it].

Note 12.

(1) *Seth Gokul Dass* v. *Murli*, (1878) 3 Cal 602 (610): 5 Ind App 78: 2 Cal L Rep 156: 3 Sar 802: 3 Suther 515: 2 Ind Jur 329 P C.

(2) *Basanta Kumar* v. *Baikuntha Nath*, 1932 Cal 555 (557): 36 Cal W N 404: 138 Ind Cas 718.

(3) *Basanta Kumar* v. *Baikuntha Nath*, 1932 Cal 555 (557): 36 Cal W N 404: 138 Ind Cas 718.

(4) *Maung Maung* v. *Wightman & Co*, (1914) 24 Ind Cas 468 (469): 7 Bur L Tim 64.

(5) *Baldeo Das Birla* v. *Lal Nimani Nath*, 1928 Pat 615 (621): 8 Pat 122: 9 Pat L Tim 627.

O.21, R.66, Notes 12—14.

An incorrect statement in the sale proclamation as to the amount due under the decree does not affect the *jurisdiction* of the Court to sell the property and the sale held under a proclamation containing such incorrect statement is not *illegal*.[6]

But when objection is taken to the correctness of the amount entered in the sale proclamation the sale should not be held before the objection is disposed of.[7]

13. Everything which the Court considers material, etc.—Cl. (c).—This clause does not mean that the Court is to give a detailed account of *all* matters connected with the property.[1] Thus it has been held that it is not necessary to specify the income from the property ordered to be sold.[2] But it is a material circumstance for the bidders to know that the property to be sold is the subject-matter of a pending suit by a defeated claimant.[3] For other instances, *see* the undermentioned cases.[4] Where a landlord brings to sale the holding of his tenant in execution of his decree against the tenant, his failure to specify the *ordinary* incidents of the tenure will not estop him from claiming to enforce them against the auction purchaser but he will be estopped from enforcing any *unusual incidents* of the tenure, unless he has notified them in the sale proclamation.[5] The reason is that, in the former case the auction purchaser may be presumed to have notice of the incidents while in the latter case he cannot be held to have such notice. *See* Note 11 above.

14. Value of the property.—There is a conflict of decisions as to whether a Court is under a duty to state its own estimate of the value of the property to be sold in the sale proclamation. The High Courts of Madras[1]

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(6) *Pramatha* v. *Bhuban*, 1922 Cal 321 (327): 49 Cal 45: 64 Ind Cas 980: 33 Cal L Jour 421: 25 Cal W N 585. See also *Baldeo* v. *Nilmani Nath*, 1928 Pat 615 (621): 8 Pat 122: 9 Pat L Tim 627. See also *Srinivasa Rao* v. *Sama Rao*, (1911) 12 Ind Cas 97 (97): 10 Mad L Tim 94 [Such incorrect statement creates no estoppel against the judgment-creditor unless the judgment-debtor is prejudiced].

(7) See *Dutt Prasad Singh* v. *Sri Narain*, 1923 All 503 (504): 21 All L J 340: 4 L R A Cv 195: 74 Ind Cas 557.

Note 13.

(1) *Mt Sarasuti* v. *Ishri Parshad* 1899 Pun Re No 30.

(2) *Manna Singh* v. *Nalig Ram*, 1928 Lah 918 (918): 110 Ind Cas 339: *Mani Ram* v. *Lachman Das*, (1917) 39 Ind Cas 59 (60): 1917 Pun L R 11: *Md Mukarram Ali* v. *Nanak Chand*, 1930 Lah 692 (694): 122 Ind Cas 234: *Velusami Naicken* v. *Balasubramania Chettiar*, 1928 Mad 398 (398): 106 Ind Cas 138. Cf *Kazi Saiyad Mohammad Akbar* v. *Pandit Manohar Nath*, (1901) 4 Oudh Cas 329 (332) [Profits of land to be stated].

(3) *Venkataraghavamma* v. *Singarayya Setty*, 1932 Mad 119 (119): 61 Mad L Jour 683: 1931 Mad W N 1162: 34 Mad L W 708: 136 Ind Cas 47: 55 Mad 205. See also *Ma Kyi* v. *U Maung Gyi*, (1910) 8 Ind Cas 610 (610): 3 Bur L Tim 36 [Pendency of suit attacking validity of decree under which sale is ordered, may be notified].

(4) *Material particulars.*— *Bandeo Persad* v. *Juthan Ram*, (1905) 27 All 684 (687): 1905 All W N 138: 2 All L J 401 F B [Fact that the property is held by occupancy tenure]: *Giribala Debia* v. *Rani Mina Kumari*, (1900) 5 Cal W N 497 (502) [Sale of tenure—Arrears of rent]: *Ramchandra* v. *Bhagwant*, 1929 Bom 465 (466): 53 Bom 777: 31 Bom L R 1115: 121 Ind Cas 435 [Sale of joint family property in decree against father for debt binding on filing—Fact that son's interest was also intended to be sold may be notified]. *Unnecessary particulars.*—*Thakur Narindar Bikramjit Singh* v. *Seth Sukhekhan Lal*, 1925 Oudh 150 (150): 80 Ind Cas 667 [Plan of property not necessary]: *Kaseenath Roy* v. *Hollodhur Roy*, (1865) 2 Suth W R 60 (61) [Sale of decree—Omission to mention amount decreed]: *Phulchand Ram* v. *Narsingh Pershad Misser*, (1901) 28 Cal 73 (77) [Upset price not necessary]: *Mohendra Kumar Dutt* v. *Heera Mohun Coondoo*, (1881) 7 Cal 723 (725) [Sale of tenure—Amount of rent ought to be stated—But omission is not material irregularity]: *Bolakee Lal* v. *Khuruckdharee*, (1869) 12 Suth W R 79 (79) [The fact that the property is under another attachment may be mentioned].

(5) *Raj Narain Mitter* v. *Panna Chand Singh*, (1903) 30 Cal 213 (215, 217): 7 Cal W N 203.

Note 14.

(1) *Thiruvengadasami Ayyangar* v. *Govindasami Udayar*, 1928 Mad 503 (504): 27 Mad L W 577: 51 Mad 655: 109 Ind Cas 698: 55 Mad L Jour 363: *Veerasami Pillai* v. *Kalyanasundaram Mudaliar*, 1927 Mad 1009 (1): 106 Ind Cas 201: *Thiruvenkatasami Iyengar* v. *Govindasami Udayar*, 1927 Mad 943 (943): 105 Ind Cas 212.

O.21, R.66, Note 14.

and Allahabad[1-a] have held that the Court is under no such obligation. On the other hand, it has been held by the High Courts of Patna[2] and Calcutta[3] and the Chief Court of Lower Burma[4] that it is the duty of the Court to enter in the sale proclamation its own estimate of the value of the property. Opinion in the Nagpur Judicial Commissioner's Court is divided.[5]

Though, as seen above, the Calcutta High Court holds that it is the duty of the Court to enter in the sale proclamation its own valuation of the property to be sold, it has also been held by that Court that in *exceptional cases*, the Court will be justified in not attempting to give a valuation of its own and in confining itself to stating the values given by the parties.[6]

In any view the omission of the Court to give an estimate of value is a mere irregularity and does not by itself vitiate the sale.[7]

An undervaluation in a sale proclamation which is calculated to mislead possible bidders and prevent them from offering adequate prices or from bidding at all is a material irregularity within the meaning of R. 90 below.[8]

(1-a) *Mohammad Said Khan* v. *Mohamed Abdussami Khan*, 1932 All 664 (664): 138 Ind Cas 612 (612) All.

See also *Basanta Kumar Chowdhry* v. *Baikunta Nath Chakravarthy*, 1926 Cal 610 (611): 91 Ind Cas 819.

(2) *Raghunath Singh* v. *Hazari Sahu*, (1917) 37 Ind Cas 872 (874): 2 Pat L Jour 130: 1 Pat L W 111: 1917 Pat H C C 105; *Beni Prasad* v. *Edal Singh*, (1919) 49 Ind Cas 195 (195): 4 Pat L Jour 37 [No estimate other than that by the Court to be given in addition to Court's valuation]; *Damrupat Singh* v. *Rameshwar Singh*, 1923 Pat 445 (446): 1923 Pat H C C 208: 73 Ind Cas 317, (Do.). See also *Jagarnath Prasad* v. *Chitraguptha Narain Singh*, (1918) 48 Ind Cas 141 (141): 3 Pat L Jour 580.

(3) *Pasupathi Nath* v. *Bank of Bihar*, 1932 Cal 141 (142): 35 Cal W N 907: 136 Ind Cas 468; *Lachiram* v. *Rameshwar Singh*, 1930 Cal 781 (782): 52 Cal L Jour 145: 127 Ind Cas 237; *Jashimuddin* v. *Manmohini*, 1922 Cal 93 (94): 70 Ind Cas 308; *Bijoy* v. *Ashutosh*, 1924 Cal 589 (592): 28 Cal W N 552: 83 Ind Cas 430; *Debendra Nath Sadhukhan* v. *Radha Kissen*, 1931 Cal 520 (520): 35 Cal W N 142: 58 Cal 577: 132 Ind Cas 687. See also *Basanta Kumar* v. *Sylhet Loan Co, Ltd*, 1932 Cal 576 (578, 579): 36 Cal W N 347: 139 Ind Cas 225. See also *Sourendro Mohun Tagore* v. *Haruk Chand*, (1908) 12 Cal W N 542 (545). See also *Raja Rameswur Prosad* v. *Rai Sha Krissen*, (1904) 8 Cal W N 257 (262). See also *Lachman Pershad* v. *Ganga Pershad*, (1910) 6 Ind Cas 180 (181): 15 Cal W N 713. But see *Kushi Pershad Singh* v. *Jamuna Pershad Sahu*, (1904) 31 Cal 922 (926): 8 Cal W N 264.

(4) *Maung Maung* v. *Wightman*, (1914) 24 Ind Cas 468 (469): 7 Bur L Tim 64.

(5) *Madanlal* v. *Ripusudan Prasad*, 1930 Nag 191 (192, 193): 124 Ind Cas 250 [Court should state its valuation]; *Ripsudan Pershad* v. *Nanku Pershad*, 1928 Nag 281 (282): 109 Ind Cas 443 [Court's valuation not necessary].

(6) *Basanta Kumar* v. *Sylhet Loan Co*, 1932 Cal 576 (578, 579): 36 Cal W N 347: 139 Ind Cas 225; *Debendra Nath Sadhu Khan* v. *Radha Kissen Chamaria*, 1931 Cal 520 (520): 35 Cal W N 142: 58 Cal 577: 132 Ind Cas 687; *Bejoy Singh Dudhulia* v. *Ashotosh Gossami*, 1924 Cal 589 (592): 28 Cal W N 552: 83 Ind Cas 430.

(7) *Daulat Bhuiya* v. *Rahisa Banu*, 1931 Cal 490 (491): 35 Cal W N 75: 131 Ind Cas 853: 58 Cal 813: 53 Cal L Jour 575; *Mahomed Abdulla* v. *Jamiat Rai*, 1930 Lah 685 (686, 687): 121 Ind Cas 369; *Jashimuddin* v. *Manmohini*, 1922 Cal 93 (94): 70 Ind Cas 308; *Mohendra Nath Jana* v. *Bepin Behary Ghose*, (1916) 33 Ind Cas 946 (947) Cal.

(8) *Sadatmand* v. *Phul Kuar*, (1898) 20 All 412 (417): 25 Ind App 146: 7 Sar 880: 2 Cal W N 550 P C; *Ambika Ranjan* v. *Manicganj Loan Office*, 1929 Cal 818 (819): 33 Cal W N 848: 57 Cal 67; *Sakhi Chand* v. *Kalanand*, (1917) 42 Ind Cas 394 (396): 4 Pat L W 88: 1917 Pat H C C 353; *Paresh Nath* v. *Hari Charan*, (1919) 52 Ind Cas 23 (24) Cal; *Chattarpatt* v. *Surendra Nath*, (1918) 44 Ind Cas 412 (413): 1918 Pat H C C 33; *Mohendra Nath* v. *Bepin Behary*, (1916) 33 Ind Cas 945 (947) Cal; *Avudaimayagappa* v. *Sundarnandam*, 1924 Mad 767 (768): 19 Mad L W 585: 76 Ind Cas 173; *Sivasami Naicker* v. *Ratnasami Naicker*, (1900) 23 Mad 568 (570): 10 Mad L Jour 314; *Tokait Krishna* v. *Moti Chand*, (1913) 19 Ind Cas 296 (298): 40 Cal 635: 40 Ind App 140: 11 All L J 517: 25 Mad L Jour 140: 15 Bom L R 515: 17 Cal L Jour 573: 1913 Mad W N 487: 17 Cal W N 637: 14 Mad L Tim 37 P C; *Pran Singh* v. *Janardhan Singh*, (1912) 13 Ind Cas 337 (341): 14 Cal L Jour 541; *Sivadurga* v. *Rajmohan*, (1911) 10 Ind Cas 475 (476): 15 Cal W N 577; *Basanta Kumari* v. *Ram Kanai Sen*, (1911) 9 Ind Cas 698 (701): 13 Cal L Jour 192; *Maharaj Bahadur Singh* v. *Sachindra Nath Roy*, 1928 Cal 828 (831): 32 Cal W N 809 [But sale will not be set aside unless substantial loss is shown to have been caused by the undervaluation]; *Haladhar Mitra* v. *Prafulla Nath*, (1920) 57 Ind Cas 892 (894) Cal, (Do.); *Moulvi Abdul Kashem* v. *Benode Lal Dhone*, (1907-1908) 12 Cal W N 757 (758, 759), (Do). See also *Nanda Kumar Sah* v. *Gobind Mohan Das*, (1910) 6 Ind Cas 135 (136): 13 Cal L Jour 812 [*Held*, that the decreeholder was guilty of fraud]. Cf *Rai Kishori Dasi* v. *Mukundalal Dutt*, (1911) 11 Ind Cas 295 (297): 15 Cal W N 965 [Mere undervaluation does not prove fraud].

O.21, R.66, Notes 14—16.

The Court need not make an elaborate enquiry before fixing the value of the property.[9] The fact that the highest bid offered at the auction is far below the value stated in the proclamation is no evidence of fraud or material irregularity in publishing or conducting the sale.[10] Where the highest bid offered at the auction falls below the value stated in the proclamation, the Court has no power to dismiss the execution petition.[11] In fixing the value of the property, *abwabs* (illegal cesses) should not be taken into consideration.[12]

15. Effect of an order under this rule.—There is a material difference between an order under R. 63 and an order under the present rule. In the former case, if the party affected does not sue within 12 months to set it aside, it becomes conclusive against the person against whom it is made. In the latter case, it has no such effect.[1]

Where property is sold to a *bona fide* third party purchaser in execution of a decree in force at the time, a subsequent reversal, variation or amendment of the decree does not affect the validity of the sale.[2]

Where the property of a stranger is attached and sold, his failure to object thereto does not affect his rights inasmuch as, though the Code enables third parties to come in and object, they are not *bound* to do so.[3] *See also* Note 11 above.

16. Non-compliance with the provisions of this rule.—Non-compliance with the provisions of this rule renders a Court sale liable to be set aside on the ground of material irregularity.[1] If objection is raised by the judgment-debtor to anything stated in the sale proclamation, it is irregular for the Court to order the sale to be held pending disposal of the objection.[2] But the irregularity due to the non-compliance with the provisions of this rule can be waived and the person who has waived the irregularity is estopped from subsequently raising any objection in respect thereof.[3] Thus, a judgment-debtor, who in spite of a notice under this rule, or in spite of knowledge of the contents of a

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(9) *Raj Bans Sahay* v. *Askaran Baid*, 1922 Pat 550 (551): 1 Pat 214: 75 Ind Cas 185; *Pasupati Nath* v. *Bank of Behar*, 1932 Cal 111 (142): 35 Cal W N 907: 136 Ind Cas 468; *Raghunath* v. *Hazari*, (1917) 37 Ind Cas 872 (874): 2 Pat L Jour 130: 1 Pat L W 111: 1917 Pat H C C 105.

(10) *Raj Bans Sahay* v. *Askaran Baid*, 1922 Pat 550 (551, 552): 1 Pat 214: 75 Ind Cas 185.

(11) *Badri Sahu* v. *Pandit Peare Lal Misra*, 1926 Pat 140 (141): 6 Pat L Tim 860: 92 Ind Cas 350: 1926 Pat H C C 137; *Sheo Charan Singh* v. *Kishoo Kuer*, 1926 Pat 116 (116): 6 Pat L Tim 860: 92 Ind Cas 2.

(12) *Shosi Bhusan* v. *Ahmed Hossain*, (1902) 7 Cal W N 439 (439, 440).

Note 15.

(1) *Chunilal Jivanlal* v. *Pira Miyaji*, 1927 Bom 234 (235, 236): 29 Bom L R 285: 101 Ind Cas 335.

(2) *Chiranji Lal* v. *Ishaar Das*, 1930 All 578 (579): 123 Ind Cas 755.

(3) *Baswantappa* v. *Ranu*, (1885) 9 Bom 86 (91, 93).

Note 16.

(1) *Asmutoonissa* v. *Khudemoonnissa*, (1872) 17 Suth W R 278 (278) [Absence of sale proclamation is only *irregularity*]; *Ram Prasad* v. *Shiva Kumar*, 1932 All 55 (57): 1931 All L J 849: 133 Ind Cas 529 [Want of verified statement, etc]; *Hla Bwa* v. *Muthia Chetty*, (1905-06) 3 L B R 275 (277); *Lack Ram* v. *Mohesh Doss*, (1869) 12 Suth W R 488 (489) [Proof of substantial injury necessary]; *Noor Muhammad* v. *Noor Muhammad*, 1923 Lah 213 (216): 5 Lah L Jour 30: 71 Ind Cas 730 [Omission to state time and place]; *Ram Taruk* v. *Dilwar Ali*, (1902) 29 Cal 73 (99): 5 Cal W N 521 F B [Misdescription of property is material irregularity]; *Ravi Nandan Prasad* v. *Jagar Nath*, 1925 All 459 (462, 464): 23 All L J 233: 6 L R A Civ 229: 87 Ind Cas 278: 47 All 479, (Do.). See *Sukhraj Bahadur* v. *Debi Baksh*, 1923 Pat 102 (102): 3 Pat L Tim 342: 65 Ind Cas 360 [No *jurisdiction* to fix valuation for entering in sale proclamation, before day fixed for hearing parties as to proper valuation]. See also Note 14 to O 21, R 90.

(2) *Dutt Prasad* v. *Sri Narayan*, 1923 All 503 (504): 21 All L J 340: 4 L R A Civ 195: 74 Ind Cas 557. Cf *Harendra Nath Banerjee* v. *Hari Charan Dutt*, (1918) 43 Ind Cas 450 (451) Cal [The *proclamation may be issued* before disposing of objections filed by judgment-debtor].

(3) *Arunachalam* v. *Arunachalam*, (1889) 12 Mad 19 (25): 15 Ind App 171: 5 Sar 265: 12 Ind Jur 871 P C.

O.21, R.66, Notes 16—20.

sale proclamation does not object at the proper time, cannot subsequently raise the objection.[4] But the judgment-debtor is not estopped where he was not aware of the facts to which he was bound to object, and where his failure to do so was due to a mistake for which he could not be held to blame.[5] A person may be held to waive irregularities in the sale proclamation by bidding at the sale.[6] But where the objection is to the *want of jurisdiction* to sell, there can be no estoppel by waiver.[7]

17. Verified statement to accompany application for order for sale.—Sub-R. (3).—The omission to file a verified statement amounts only to an irregularity and does not by itself vitiate the sale.[1] The verification need not be made by the decree-holder himself, but may be made by a person acquainted with the facts of the case.[2] (*See also* O. 6, R. 15.)

18. "Court may summon any person, etc."—Sub-R. (4).—A claim preferred in the course of an investigation under R. 66 in relation to immoveable property *ordered by the decree to be sold* cannot be treated as a claim under R. 58, because the latter rule applies only in cases where the property is attached.[1]

19. Form of proclamation of sale.—*See* Appendix E, Form No. 29.

20. Appeal.—An order under this rule is not one of the appealable orders under S. 104 or O. 43, R. 1.[1] Hence, the question arises whether orders

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(4) *Arunachalam* v. *Arunachalam*, (1889) 12 Mad 19 (25): 15 Ind App 171: 5 Sar 265: 12 Ind Jur 371 P C [Objection to description of property. Following 9 Cal 656 P C]; *Kishen Lal* v. *Pearey Lal*, 1930 All 865 (866): 125 Ind Cas 765: 1931 All L J 49, (Do.); *Subbaraya* v. *Muthammal*, (1914) 22 Ind Cas 780 (784) Mad, (Do.); *Rajah of Kalahasti* v. *Maharaja of Venkatagiri*, (1913) 21 Ind Cas 389 (391): 38 Mad 387: 25 Mad L Jour 198: 14 Mad L Tim 320 [Valuation and statement of peishcush]; *Maharaj Bahadur Singh of Baluchar* v. *Sachindra Nath Roy*, 1928 Cal 328 (331): 32 Cal W N 309 [Objection as to valuation]; *Debi Prosad Bhakat* v. *Nagendra Kumar Nag*, 1925 Cal 552 (555): 78 Ind Cas 727, (Do.); *Mahadeo Singh* v. *Dhobi Singh*, 1924 Pat 111 (112): 2 Pat 916: 4 Pat L Tim 721: 1923 Pat H C C 283: 74 Ind Cas 838, (Do.); *Grant* v. *Suraj Mal*, 1923 Pat 134 (135): 1923 Pat H C C 76: 1 Pat L R 53: 72 Ind Cas 860 [Objection to notification of encumbrances]; *Mahomed* v. *Jamiat*, 1930 Lah 685 (686): 121 Ind Cas 369 [Want of application under R 66 (3)]; *Manasaram Paria* v. *Nagendra Nath Sahu Roy*, (1912) 16 Ind Cas 235 (236): 16 Cal L Jour 557; *Hardani Lal* v. *Ram Nath*, 1929 All 704 (704): 1929 All L J 619: 116 Ind Cas 448. See also *Girdhari* v. *Hardeo*, (1877) 3 Ind App 230 (240): 26 Suth W R P C 44: 3 Sar 637: 3 Suther 294 P C [Petition for postponement of sale with a statement that the order of attachment and sale proclamation may be maintained is waiver]. Contra *Madanlal* v. *Ripusudan Prasad*, 1930 Nag 191 (193): 124 Ind Cas 250 [No estoppel against statute—Judgment-debtor not estopped from applying under O 21, R 90 for setting aside sale simply because he did not appear in obedience to the notice served upon him under R 66 for settling the terms of the proclamation]. See also *Thakur Mahatabdeo* v. *Leelanand Singh*, (1881) 7 Cal 613 (615): 9 Cal L Rep 398 [Merely applying for postponement of sale is no waiver]. Cf also *Maung Po* v. *Nagappa*, 1927 Rang 84 (85): 5 Bur L Jour 183: 100 Ind Cas 74 [No estoppel in case of omission to state place and time of sale].

(5) *Raja of Kalahasti* v. *Maharaja of Venkatagiri*, (1913) 21 Ind Cas 389 (391): 38 Mad 387: 25 Mad L Jour 198: 14 Mad L Tim 320. See also *Rajah Rameshur Proshad* v. *Rai Sha Krissen*, (1903-04) 8 Cal W N 257 (263) [Case under old Code].

(6) *Punjab National Bank, Ltd* v. *Sundar Singh*, 1929 Lah 673 (674): 118 Ind Cas 901. See also *Bandy Ali* v. *Madhub Chunder Nag*, (1882) 8 Cal 932 (933).

(7) *Hari Saran* v. *Pyare Lal*, 1931 Oudh 398 (400): 8 Oudh W N 927: 134 Ind Cas 602 [Ancestral property—Sale of—Civil Court has no jurisdiction—Want of objection cannot operate as estoppel]. Cf. *Behari Singh* v. *Mukat Singh*, (1906) 28 All 273 (276): 3 All L J 140: 1906 All W N 3 [Court *deciding* that property is *not ancestral*—Decision cannot be questioned subsequently].

Note 17.

(1) *Mani Ram* v. *Lachman Das*, (1917) 39 Ind Cas 59 (60): 11 Pun L R 1917; *Vaidya* v. *Abdul Samad*, 1928 Nag 14 (15): 10 Nag L J 197: 105 Ind Cas 335. See also *Nasirunnissa* v. *Ghafuruddin*, (1906) 28 All 244 (245, 246): 1905 All W N 263 [Omission to verify inventory of property to be attached in application for execution]. See *Dambar* v. *Chand Mal*, 1932 All 484 (484): 1932 All L J 578: 139 Ind Cas 201 [Omission to file verified statement and encumbrance certificate with application under O 21, R 11]. But see *Sunderabai* v. *Bapuna*, 1929 Nag 305 (306): 116 Ind Cas 65.

(2) *Braja Sundar Deb* v. *Sivaranjan Dei*, (1921) 59 Ind Cas 282 (284): 1 Pat L Tim 647.

Note 18.

(1) *Bhiku Bal Patil* v. *Khemchand Kubershet*, (1890) 14 Bom 369 (370).

Note 20.

(1) *Braja Sundar Deb* v. *Sivaranjan Dei*, (1921) 59 Ind Cas 282 (285): 1 Pat L Tim 647.

under this rule are appealable as decrees under S. 47 read with S. 2.[2] This question depends on two further questions, *viz.*:— **O.21, R.66, Note 20.**

(*a*) whether proceedings under this rule are of an administrative or a judicial character, and

(*b*) whether orders under this rule amount to a determination of a question within S. 47.

The answer to these questions must depend on the particular order in question in each case. Thus, where an order under this rule does not affect the rights, liabilities or equities of the parties to the decree, it is not a *judicial* order; nor does it amount to the determination of a question within S. 47 and hence, no appeal lies from such an order.[2] On this principle *no* appeal lies from the following orders under this rule:—

(*a*) An order about the value of the property to be entered in the sale proclamation.[3]

(*b*) An order as to the sale of the properties in particular lots.[4]

(*c*) An order as to service of notice prescribed by the rule.[5]

(*d*) An order for the entry of certain encumbrances in the sale proclamation.[6]

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(2) *Rukmani Ammal* v. *Palaniappa Chettiar*, 1928 Mad 1169 (1170): 1928 Mad W N 569; *Meenakshisundaram Pillai* v. *Chokkalinga Pathan*, 1929 Mad 506 (508): 56 Mad L Jour 624: 1929 Mad W N 283: 1929 Mad W N 290: 29 Mad L W 855: 120 Ind Cas 849; *Sain Das* v. *Punjab National Bank, Ltd*, 1929 Lah 815 (816): 30 Pun L R 417: 115 Ind Cas 533; *Deoki Nandan Singh* v. *Bansi Singh*, (1911) 10 Ind Cas 371 (372): 16 Cal W N 124: 14 Cal L Jour 35; *Mahammad Eahasan Hosain* v. *Tara Prasanna Mukerjee*, (1914) 22 Ind Cas 548 (549) Cal; *Sivagami* v. *Subramania*, (1904) 27 Mad 259 (261): 14 Mad L Jour 57 F B [Overruling 23 Mad 568 (570)]; *Chatterjea* v. *R M K Karpan Chetty*, (1916) 36 Ind Cas 402 (402): 8 L B R 350: 10 Bur L Tim 115; *Braja Sundar Deb* v. *Sivaranjan Dei*, (1921) 59 Ind Cas 282 (285): 1 Pat L Tim 647; *Mohit Narain Jha* v. *Thakanjha*, 1925 Pat 500 (502): 3 Pat L R (Civ) 118: 1925 Pat H C C 189: 88 Ind Cas 332: 4 Pat 731: 6 Pat L Tim 843. *See also* the cases cited in foot-notes (3) to (9), *infra*.

(3) *Nathu Lal* v. *Yasodha*, 1932 All 136 (137): 134 Ind Cas 833: 1931 All L J 1084; *Ram Charan* v. *Jumna Prasad*, 1932 All 696 (696); *Alimuddin* v. *Gobind Prasad*, 1927 All 208 (209): 99 Ind Cas 455; *Ajodhia Prasad* v. *Gopi Nath*, (1917) 39 Ind Cas 578 (579): 39 All 415: 15 All L J 337; *Krishna Rao Ambudas* v. *Krishna Rao Raghunath*, 1928 Bom 245 (246): 30 Bom L R 679: 52 Bom 444: 111 Ind Cas 892; *Basanta Kumar* v. *Baikuntanath*, 1926 Cal 610 (611): 91 Ind Cas 819; *Devcadranath* v. *Kailash Chandra*, 1925 Cal 318 (319): 80 Ind Cas 861: 29 Cal W N 556; *Bejoy Krishna Nandy* v. *Darendra Krishna Deb Bahadur*, (1918) 47 Ind Cas 512 (512) (Cal); *Mahammad Eahasan Hosain* v. *Tara Prosanna Mukerjee*, (1914) 22 Ind Cas 548 (549) (Cal); *Deoki Nandan Singh* v. *Bansi Singh*, (1911) 10 Ind Cas 371 (371): 14 Cal L Jour 35: 16 Cal W N 124; *Sakhi Chand* v. *Kalanand Singh*, (1911) 11 Ind Cas 759 (760): 14 Cal L Jour 607; *Panch Duar Thakur* v. *Mani Raut*, (1912) 17 Ind Cas 88 (89): 16 Cal W N 970; *Sivagami* v. *Subramania*, (1904) 27 Mad 259 (261): 14 Mad L Jour 57 F B; *Meenakshisundaram* v. *Chokkalinga*, 1929 Mad 506 (508): 56 Mad L Jour 624: 1029 Mad W N 283: 1929 Mad W N 290: 29 Mad L W 855: 120 Ind Cas 849; *Avudaimayagappa Pillai* v. *Sundaranandam Pillai*, 1924 Mad 767 (768): 19 Mad L W 585: 76 Ind Cas 173; *Ramanathan Chetty* v. *Somasundaram Chettiar*, (1917) 37 Ind Cas 897 (897): 1917 Mad W N 141; *Deoki Nandan Singh* v. *Dhakeshwar Prasad Narain Singh*, (1917) 38 Ind Cas 616 (617): 2 Pat L Jour 13; *Surendra Nath Mitra* v. *Mritunjoy*, (1920) 56 Ind Cas 452 (454): 5 Pat L Jour 270: 1920 Pat H C C 227: 1 Pat L Tim 645; *Tikait Gayan Nath Sahi* v. *Pandit Mathjyi Vaidya*, 1925 Pat 588 (590): 6 Pat L Tim 507: 1925 Pat H C C 160: 90 Ind Cas 276; *Indarani* v. *Bimla Prasad*, 1930 Oudh 81 (82): 6 Oudh W N 1085: 5 Luck 481: 124 Ind Cas 422. The following decisions to the contrary are not good law. *Shiam Lal* v. *Roshan Lal*, (1916) 35 Ind Cas 230 (232): 14 All L J 363; *Lachman Pershad Singh* v. *Ganga Pershad Singh*, (1910) 6 Ind Cas 180 (181): 15 Cal W N 713; *Rajah Rameswr* v. *Rai Sha*, (1903-04) 8 Cal W N 257 (262): *Ganga Prosad* v. *Raj Kumar Singh*, (1903) 30 Cal 617 (618); *Kanhia Lal* v. *The Bank of Upper India, Limited*, (1919) 49 Ind Cas 539 (540): 36 Pun W R 1919. See also *Lakhpati Koer* v. *Harkho Singh*, (1909) 3 Ind Cas 342 (343): 6 Mad L Tim 252.

(4) *Sivagami* v. *Subramania*, (1904) 27 Mad 259 (261): 14 Mad L Jour 57 F B; *Nathu Lal* v. *Yashodha Devi*, (1931) 134 Ind Cas 833 (833): 1932 All 136: 1931 All L J 1084; *Meenakshisundaram* v. *Chokkalinga*, 1929 Mad 506 (508): 56 Mad L Jour 624: 1929 Mad W N 283: 1929 Mad W N 290: 29 Mad L W 855: 120 Ind Cas 849; *Lanka Ramakrishna Naidu* v. *Lanka Ramakrishna Naidu*, 1924 Mad 527 (529): 46 Mad L Jour 192: 19 Mad L W 235: 33 Mad L Tim 275: 1924 Mad W N 220: 78 Ind Cas 829. See also *Sain Das* v. *Punjab National Bank*, 1929 Lah 815 (816): 30 Pun L R 417: 115 Ind Cas 533.

(5) *Sashi Kanta Acharjee Bahadur* v. *Fooljan Bewa*, 1926 Cal 1184 (1184): 96 Ind Cas 567.

(6) *Ebrahimji* v. *Ramchandra*, 1894 Bom P J 48; Contra *Mohan Lal* v. *Ibu Hasan*, 1886 All W N 167 (168).

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O.21, R.66, Notes 20—21.

(*e*) An order fixing the place of sale.[7]

(*f*) An order fixing the upset price.[8]

(*g*) For other instances *see* the following cases.[9]

But, where the Court in addition to deciding matters which are purely administrative in nature, such as fixing the upset price and the details of the sale proclamation, decides questions affecting the *rights of the parties*, the order will be a judicial order and will also amount to a determination of a question within S. 47 and an appeal will lie from such an order.[10] Thus, where there are several judgment-debtors under a mortgage decree, an order that the properties of some of them should be sold first and the properties of the others should be sold only in the case of a deficiency occurring on such a sale, may be appealable as a decree as it determines the rights of the co-judgment-debtors *inter se*.[11] Similarly an order relating to the boundaries of the property to be sold comes within S. 47 and is appealable as a decree.[12] It has been held in some cases that irregularities in *drawing up* the sale proclamation are not irregularities in *publishing or conducting* the sale within O. 21, R. 90, and hence, an application by a judgment-debtor to set aside an execution sale on the ground of such irregularities comes within S. 47 and not under O. 21, R. 90, and that therefore an order determining such an application is one under S. 47 and appealable as a decree.[13]

A question of waiver of irregularities in the sale proclamation by the judgment-debtor on which the trial Court had found against him but which was not raised before the High Court on appeal cannot be raised by him before the Privy Council.[14] (*See* Notes to O. 41, Rr. 1 and 2.)

21. Revision.—It has been held by the High Court of Patna that the action of the Court under this rule is a *judicial* one and hence subject to the

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(7) *Sivagami* v. *Subramania*, (1904) 27 Mad 259 (261): 14 Mad L Jour 57 F B.

(8) *Ramanathan Chettiar* v. *Venkatachalam Chettiar*, 1923 Mad 619 (620): 17 Mad L W 635: 44 Mad L Jour 599: 32 Mad L Tim 401: 1923 Mad W N 297: 72 Ind Cas 836; *Rukmani Ammal* v. *Palaniappa Chettiar*, 1928 Mad 1169 (1170): 1928 Mad W N 569; *Ramanathan* v. *Somasundaram*, (1917) 37 Ind Cas 897 (897): 1917 Mad W N 141; *Meenakshisundaram* v. *Chokkalinga*, 1929 Mad 506 (508): 56 Mad L Jour 624: 1929 Mad W N 283: 1929 Mad W N 290: 29 Mad L W 855: 120 Ind Cas 849.

(9) *Sivagami* v. *Subramania*, (1904) 27 Mad 259 (261): 14 Mad L Jour 57 F B [Order fixing the amount for which the sale is to be held—No appeal lies]; *Jogesh Chandra* v. *Hemendra Kumar*, 1921 Cal 629 (630, 631): 35 Cal L Jour 170: 64 Ind Cas 547 [Order directing proclamation to issue pending enquiry into judgment-debtor's objections—No appeal lies]; *Giridhari Lal* v. *Altaf Ali*, (1918) 46 Ind Cas 564 (565) Cal [Refusal to enter that the appellant had acquired the interest of a prior mortgagee mentioned in the sale proclamation—No appeal lies].

(10) *William Maling Grant* v. *Suraj Mal Marwari*, 1923 Pat 134 (134): 1923 Pat H C C 76: 1 Pat L R 53: 72 Ind Cas 860 [Question if Court could sell property *subject* to encumbrances —Appeal lies]; *Rukumani Ammal* v. *Palaniappa Chettiar*, 1928 Mad 1169 (1170): 1928 Mad W N 569; *Basanta Kumar Chowdhury* v. *Baikunta Nath Chakravarthy*, 1926 Cal 610 (611): 91 Ind Cas 819. See also *Baij Nath* v. *Hari Prasad*, 1924 Pat 628 (628): 1924 Pat H C C 209: 7 Pat L Tim 353: 92 Ind Cas 326. But compare *Krishnasami Iyer* v. *Saminathier*, (1908) 18 Mad L Jour 568 (569): 4 Mad L Tim 352.

(11) *Samalapalli Mangayya* v. *Samalapalli Sriramulu*, (1918) 19 Ind Cas 448 (449): 24 Mad L Jour 477: 1913 Mad W N 382: 13 Mad L Tim 347; *Vedaviasa Ayyar* v. *The Madura Hindu Sabha Nidhi, Co, Ltd*, 1924 Mad 365 (366): 45 Mad L Jour 478: 18 Mad L W 311: 1923 Mad W N 662: 77 Ind Cas 148; *Narasimha Rao* v. *Subbarayudu*, 1926 Mad 834 (835): 51 Mad L Jour 135: 23 Mad L W 765: 1926 Mad W N 566: 96 Ind Cas 492. See also *Meenakshisundaram Pillai* v. *Chokkalinga Pathan*, 1929 Mad 506 (508): 56 Mad L Jour 624: 1929 Mad W N 283: 1929 Mad W N 290: 29 Mad L W 855: 120 Ind Cas 849. See also *Nathu Lal* v. *Yeshodha*, 1932 All 136 (137): 134 Ind Cas 833: 1931 All L J 1084.

(12) *Devendranath* v. *Kailash Chandra*, 1925 Cal 318 (319): 80 Ind Cas 861: 29 Cal W N 556.

(13) *Meyyappan* v. *Sellappa Chettiar*, 1930 Mad 489 (489): 127 Ind Cas 142 [Second appeal lies]; *Venkatasami* v. *G Nagayya*, 1925 Mad 1142 (1142): 1925 Mad W N 701: 87 Ind Cas 413, (Do.) [Following 53 Ind Cas 809 (Mad)].

(14) *Dhanukdhari Singh* v. *Mababir Pershad Singh*, (1907) 34 Cal 709 (710): 34 Ind App 164: 9 Bom L R 651: 11 Cal W N 739: 6 Cal L Jour 11: 17 Mad L Jour 353: 2 Mad L Tim 193: 14 Bur L R 1 P C.

revisional jurisdiction of the High Court.[1] It has been further held by that Court that the High Court can interfere under S. 107 of the Government of India Act, even if the action of the lower Court in such cases be held to be *administrative*.[2] But the High Court will not ordinarily interfere in revision in a discretionary matter,[3] or where the applicant for revision has not been in any way damnified by the order complained against.[4]

22. Applicability of the rule of res judicata to proceedings under this rule.—The principle of *res judicata* applies to execution proceedings.[1] (*See* S. 11, Note 23.) The question whether the principle applies to proceedings under this rule depends on whether the proceedings are administrative or judicial, for, unless they are held to be judicial, the principle of *res judicata* cannot apply to them. (*See* S. 11, Note 100). The answer to this question depends on the particular order in question in each case. In so far as an order merely settles the details to be entered in a sale proclamation the proceeding is only administrative or ministerial and such an order cannot operate as *res judicata*,[2] nor is such an order a *final* order so as to operate as *res judicata*.[3] But if in proceedings under the rule, a final order affecting the rights of the parties is passed, such an order will be a final order of a judicial character and as such will operate as *res judicata*.[4]

The principle of *constructive res judicata* (S. 11, Expln. 4) also applies to execution proceedings.[5] (*See* S. 11, N. 23.) But it must be shown that the party sought to be barred has had clear notice of the nature of the claim made against him. (*See* S. 11, Note 23.) Thus it has been held by a Full Bench of the Madras High Court[6] that where a notice is for the settlement of the terms of a sale proclamation, the judgment-debtor cannot be deemed, by absenting himself, to have attended and raised the question as to the *liability* of the property to be attached and sold in execution of the decree. Further, where the last execution case was dismissed for default, the judg-

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Note 21.

(1) *Raghunath* v. *Hazari*, (1917) 37 Ind Cas 872 (873): 2 Pat L Jour 130: 1 Pat L W 111: 1917 Pat H C C 105; *Sukhraj Bahadur* v. *Debi Baksh*, 1923 Pat 102 (102): 3 Pat L Tim 342: 65 Ind Cas 360 [Fixing valuation before day fixed for hearing parties on the question is revisable]. Compare *Hansraj* v. *Mohideen*, (1915) 29 Ind Cas 745 (746) (Mad) [Undervaluation is not material irregularity within S 115].

(2) *Raghunath Singh* v. *Hazari Sahu*, (1917) 37 Ind Cas 872 (873): 2 Pat L Jour 130: 1 Pat L W 111: 1917 Pat H C C 105.

(3) *Basanta Kumar* v. *Sylhat Loan Co, Ltd*, 1932 Cal 576 (578, 579): 36 Cal W N 347: 139 Ind Cas 225.

(4) *Hla Baw* v. *S K R Muthia*, (1905-06) 3 L B R 275 (278).

Note 22.

(1) *Dambar Singh* v. *Kallyan Singh*, 1922 All 27 (28): 20 All L J 170: 65 Ind Cas 799: 44 All 350.

(2) *Tota Ram* v. *Gouri Shankar*, 1924 All 480 (480): **5 L R A Civ 218**: 78 Ind Cas 582 [Order merely cancelling description of judgment-debtors as mortgagors—No finding as to validity of alleged mortgage—There is no *res judicata* on the question of the validity of mortgage].

(3) *Mohit Narain Jha* v. *Thakanjha*, 1925 Pat 500 (502): 3 Pat L R 118 (Civ): 1925 Pat H C C 189: 88 Ind Cas 332: 4 Pat 731: 6 Pat L Tim 843 F B [Order refusing to notify a lease —No *res judicata*].

(4) *Baijnath* v. *Hari Prasad*, 1924 Pat 628 (628): 1924 Pat H C C 209: 7 Pat L Tim 353: 92 Ind Cas 326 [Decision that applicant was *pro forma* defendant and as such was not entitled to notice under R 66 *operates as res judicata*]; *Murlidar* v. *Mt Goma*, (1910) 5 Ind Cas 210 (210): 7 All L J 401 [Mortgage decree—Order directing that a portion of the property which had been sold to a third person should be sold after the other portion is *res judicata*].

(5) *Dambar Singh* v. *Kallyan Singh*, 1922 All 27 (28): 20 All L J 170: 65 Ind Cas 799: 44 All 350 Contra; *Tikait Gayan* v. *Pandit Malhjhi*, 1925 Pat 588 (590): 6 Pat L Tim 507: 1925 Pat H C C 160: 90 Ind Cas 276 [This view is not sound—*See* Section 11, Note 23].

(6) *Chidambaram Chetty* v. *Kandasami Goundan*, 1924 Mad 1 (6): 46 Mad 768: 45 Mad L Jour 346: 1923 Mad W N 571: 74 Ind Cas 155: 18 Mad L W 757 F B; Contra *Mt Rukmabhai* v. *Ramachandra*, 1925 Nag 320 (320): 21 Nag L R 23: 88 Ind Cas 831. Compare also *Durga Charan* v. *Kali Prasanna*, (1899) 26 Cal 727 (732): 3 Cal W N 586.

O.21, R.66, Notes 22—23.

ment-debtor cannot be held to be barred by constructive *res judicata* from raising a contention which he failed to raise in such execution case.[7]

The principle of *res judicata* will not apply if the Court had *no jurisdiction* to pass the order in question, as, for instance, where the order was by a Civil Court for the sale of ancestral property of the judgment-debtor, which, under the law, could be sold only by the collector.[8] But, where, in such a case, the judgment-debtor to whom a notice is sent under R. 66 fails to appear and the Court upon the materials before it *decides that the property is non-ancestral* and orders its sale, the judgment-debtor cannot subsequently raise the objection as to jurisdiction,[9] for a decision as to jurisdiction is as much *res judicata* as a decision on any other point. (*See* S. 11, N. 73.)

A decision in the course of execution proceedings operates as *res-judicata* even in a subsequent *suit* between the parties.[10]

The principle of S. 11, Explanation 5 does not apply so as to preclude a Court executing a mortgage decree from directing that the properties should be sold in a particular order, merely because, the Court trying the suit was asked to embody an order to this effect in its decree but did not do so.[11] Because. it is conceived, in such a case, the decree does not decide that the properties should be sold in any particular order and the executing Court, has, in the exercise of its power to sell "the mortgaged property or a sufficient portion thereof" (*see* O. 34, Rr. 4 and 5) a discretion to direct the sale of the properties in any order it thinks fit. (*Cf.* also S. 11, Note 125.)

A decree-holder ought not to be allowed to take up inconsistent positions to the prejudice of the judgment-debtor. Thus, where, in execution of a mortgage decree, the decree-holder has caused to be sold properties not comprised in the mortgage and has all along been acting on the basis that the properties sold were comprised in the mortgage, he cannot be allowed to contend that they were *not* comprised in the mortgage and to bring to sale the properties that were comprised in the mortgage.[12]

23. Judgment-debtor dying pending execution.—Where a decree-holder attaches the undivided interest of his judgment-debtor in (Hindu) joint family property the latter's death before sale does not affect the decree-holder's right to proceed against his interest in the property in the hands of the surviving co-parceners.[1] (*See also* S. 64, Note 10). Where a judgment-debtor dies before the proclamation of sale is drawn up and the

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(7) *Tikait Gayan Nath Sahi* v. *Pandit Mathihi Vidya*, 1925 Pat 588 (590): 6 Pat L Tim 507: 1925 Pat H C C 160: 90 Ind Cas 276.

(8) *Hari Saran Das* v. *Pyare Lal*, 1931 Oudh 398 (400): 8 Oudh W N 927: 134 Ind Cas 602.

(9) *Behari Singh* v. *Mukat Singh*, (1906) 28 All 273 (276): 3 All L J 140: 1906 All W N 3.

(10) Section 11, Note 23, Point 4. Contra *Tota Ram* v. *Gauri Shankar*, 1924 All 480 (480): 5 L R A Civ 218: 78 Ind Cas 582 [This view is untenable].

(11) *Narasimha Rao* v. *A Subbarayudu*, 1926 Mad 834 (835): 51 Mad L Jour 135: 23 Mad L W 765: 1926 Mad W N 566: 96 Ind Cas 492 [Following 1924 Mad 509]. See also *Kommineri Appayya* v. *Mangala Rangayya*, (1908) 31 Mad 419 (424): 18 Mad L Jour 229: 3 Mad L Tim 287 F B. Compare also *Bansidhar* v. *Jagmohan*, 1929 Oudh 88 (89): 3 Luck 472: 5 Oudh W N 210: 110 Ind Cas 79 [Suit by puisne mortgagee—Prior mortgagee joined but priority not attacked—Prior mortgagee withdrawing issue as to priority is not precluded from claiming that his mortgage should be mentioned in the sale proclamation].

(12) *Jugal Kishore* v. *Ganesh Parshad*, (1909) 3 Ind Cas 22 (23) (All).

Note 23.

(1) *Balkishen* v. *Sitaram*, (1885) 7 All 731 (732): 1885 All W N 210 [Following 5 Cal 148, P C].

proclamation is drawn up without notice to his legal representatives, the sale held on the basis of such proclamation is void.[2] (*See* Notes under O. 21, R. 22.) O.21, R.66, Notes 23—24.

24. Limitation—Step-in-aid of execution.—An application for a proclamation of sale in respect of property under attachment is an application to take a step-in-aid of execution.[1] *See also* the undermentioned cases.[2]

O.21, R.67, Note 1.

Mode of making proclamation.

R. **67**. [S. 289.] (1) *Every* proclamation shall be made *and published, as nearly as may be,* in *the* manner prescribed by *rule* 54, *sub-rule* (2).

(2) *Where* the Court so directs, such proclamation shall also be published in the local official Gazette *or* in *a* local newspaper, *or in both,* and the costs of such publication shall be deemed to be costs of the sale.

(3) *Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.*

[1877—S. 289; 1859—S. 249.]

Synopsis.

1. Mode of making the proclamation.
2. Publication in the gazette or newspaper.
3. Division of property into lots—Sub-Rule (3).
4. Non-compliance with the rule.

Properties in several but close villages—Separate proclamation in every village not essential. See Notes to Rule 90 below.

1. Mode of making the proclamation.—The proclamation of sale should be made and published in the manner provided for by sub-R. 2 of R. 54. *See* Notes to R. 54 and the following cases.[1]

This rule applies to proceedings under the Orissa Tenancy Act, II of 1913. *See* Ss. 217 and 219 thereof but not to proceedings under the Bengal Tenancy

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(2) *Chandi Prasad* v. *Jamna*, 1928 All 74 (76): 49 All 830: 25 All L J 507: 102 Ind Cas 239.

Note 24.

(1) *Ambica Pershad* v. *Sardhari Lal*, (1884) 10 Cal 851 (856) F B; *Lalraddi* v. *Kalachand*, (1888) 15 Cal 363 (365).

(2) *Surajmal* v. *Sarjoog Prasad Singh*, (1917) 38 Ind Cas 540: 2 Pat L Jour 5: 1917 Pat H C C 54: 3 Pat L W 208 [Oral application to have a date fixed for settlement of terms of proclamation is application to take step-in-aid of execution]; *Parvosh Ram* v. *Kali Puddo*, (1890) 17 Cal 53 (57) [Application for sale is application to take step-in-aid of execution]; *Maneklal* v. *Nasia*, (1891) 15 Bom 405 (407), (Do.); *Narendro Nath* v. *Bhupendro Narain*, (1896) 23 Cal 374 (387) [Application paying process fees for service of a sale proclamation is step-in-aid]; *Thakur Ram* v. *Katwaru Ram*, (1900) 22 All 358 (359): 1900 All W N 108 [Mere payment of process fee for issue of notice under R 66 without any application is not a step-in-aid of execution]; *Jadu Nath Sinha* v. *Krishna Rangini*, 1926 Cal 879 (880): 94 Ind Cas 44 [Issue of notice under R 66 is not a step-in-aid of execution because it is not issued on the application of the decree-holder but by the Court itself]; *Venkatarazu* v. *Chinna Ramayya*, (1901) 24 Mad 695 (702) [Application for sale made more than three years from the last similar application is time-barred].

Order 21, Rule 67—Note 1.

(1) *Kalytara Chowdhrain* v. *Ram Coomar Goopta*, (1881) 7 Cal 466 (469): 9 Cal L Rep 114 [Proclamation to be affixed in some conspicuous part of the property]; *Mohunt Megh Lal Pooree* v. *Shib Pershad Madi*, (1881) 7 Cal 34 (41): 8 Cal L Rep 869: 5 Ind Jur 476: 4 Shome L R 169, (Do.).

O.21, R.67, Notes 1—4.

Act (VIII of 1885), *see* S. 163, sub-S. (3) as amended by Act, IV of 1928, S. 102, Cl. (*c*).

2. Publication in the gazette or newspaper.—The Court has a *discretion* under this rule to direct the publication either in the gazette or in the newspaper or in both.[1] The want of correspondence between the advertisement in the gazette, and the schedule of the attached property in the sale proclamation, constitutes an *irregularity* which might be cured if the sale was regular in other respects.[2]

3. Division of property into lots—Sub-Rule 3.—Sub-Rule 3 is new and dispenses with the necessity of making separate proclamations for each separate lot, where the property is divided into separate lots for being sold.[1] If however the Court thinks that proper notice cannot otherwise be given, as for instance, where the lots are situate at such a distance from each other that there is no certainty of communication to persons interested in one of such lots of what is publicly done in the other, the Court can direct the issue of a separate proclamation for each lot.[2]

4. Non-compliance with the rule.—As already noticed under Rule 54 and notes thereunder an omission to comply with the requirements of sub-R. 2 thereof constitutes a *material irregularity* which would be a ground for setting aside the sale under R. 90 provided substantial injury is also proved.[1] The High Court of Madras has held, in the undermentioned case,[2] that, where the proclamation of sale was not published in the village where the lands were situate and the process server intimated at the village that the sale would be held at a place and by an officer different from those fixed in the proclamation, the procedure was not merely irregular but *illegal*. (*See also* R. 90, *infra*.)

O.21, R.68. Time of sale.

R. **68**. [S. 290.] *Save* in the case of property *of the kind described* in the proviso to *rule* 43, no sale *hereunder* shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at

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Note 2.

(1) *Gopi Chand* v. *Benarsi Das*, (1919) 53 Ind Cas 794 (795): 1 Lah L Jour 197; *Rai Monindra Bahadur* v. *Luchmeshwar Singh*, (1897) 1 Cal W N civ (clvi); *Kristo Kishore* v. *Soorjonath Sircar*, (1868) 10 Suth W R 354 (354) [Case under the old Code]. See also *J O Galstaun* v. *Syed Mahomed Husain*, 1932 Cal 627 (629): 36 Cal W N 242 [No interval needed between publication in newspaper and sale as required under R 68 below].

(2) *Raja Thakur Barmha* v. *Jiban Ram*, (1913) 21 Ind Cas 936 (938): 41 Cal 590: 41 Ind App 38: 1914 Mad W N 118: 18 Cal W N 313: 12 All L J 156: 19 Cal L Jour 161: 26 Mad L Jour 89: 16 Bom L R 156: 15 Mad L Tim 137 P C.

Note 3.

(1) *Muhammad Abdu'la* v. *Jamiat Rai*, 1930 Lah 685 (687): 121 Ind Cas 369; *Pedro Antonio De Penha* v. *Jalbhoy Ardeshir Set*, (1888) 12 Bom 368 (370).

(2) *Abdul Kashem* v. *Benode Lal Dhone*, (1908) 12 Cal W N 757 (760); *Basanta Kumari Guha* v. *Ram Kanai Sen*, (1911) 9 Ind Cas 698 (701): 13 Cal L Jour 192.

Note 4.

(1) See also *Noor Mohammad* v. *Noor Mohammad*, 1923 Lah 212 (216): 5 Lah L Jour 30: 71 Ind Cas 730 [Omission to affix copy of sale proclamation]; *Wish Nath* v. *Rahmat Ullah*, 1923 Lah 671 (671): 77 Ind Cas 879, (Do.); *Jagarnath Sahai* v. *Dip Rani Koer*, (1895) 22 Cal 871 (876), (Do.); *Tripura Sundari* v. *Durga Churn Pal*, (1885) 11 Cal 74 (76), (Do.); *Gur Prasad* v. *Debi Prasad*, 1882 All W N 53 (53) [Omission to proclaim on the property]; *Lack Ram* v. *Mohesh Das*, (1869) 12 Suth W R 488 (489); *Jamini Mohun* v. *Chandra Kumar*, (1902) 6 Cal W N 44 (46) [Publication of proclamation half a mile away from the property]; *Nana Kumar Roy* v. *Golam Chunder Dey*, (1891) 18 Cal 422 (426) [Revenue paying land—Copy not affixed in Collector's office]; *Satish Chunder* v. *Thomas*, (1885) 11 Cal 658 (661), (Do.); *Bandy Ali* v. *Madhub Chunder*, (1882) 8 Cal 932 (932, 933), (Do.).

(2) *Jayaram Ayyar* v. *Vridhigiri Ayyar*, 1921 Mad 583 (585): 44 Mad 35: 59 Ind Cas 167: 39 Mad L Jour 188: 12 Mad L W 182: 1920 Mad W N 490.

least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been *affixed* on the court-house of the Judge ordering the sale. O. 21, R. 68, Notes 1—2.

[1877—S. 290.]

Local Amendments.

ALLAHABAD.

For the words "fifteen days" *read* the words "seven days".

LAHORE.

In Rule 68 *for* the word "thirty" *read* "fifteen" and *for* the word "fifteen" *read* "one week".

N.-W. F. P.

In Rule 68 *for* the word "thirty" *read* "fifteen" and *for* the word "fifteen" *read* "seven".

OUDH.

In Rule 68 for the words "fifteen days" *read* the words "seven days".

Synopsis.

1. Time of sale.
2. Non-compliance with the rule.

"Consent." See Note 1, Pt. (1).

1. **Time of sale.**—The rule provides that there should be an interval of thirty days in the case of immoveable property and fifteen days in the case of moveable property between the date of sale and the date of affixing the copy of the proclamation in the Court-house. The fifteen days rule does not however apply to a sale of moveables subject to speedy and natural decay (*see* proviso to R. 43). It is also open to the judgment-debtor to consent to have the sale before the prescribed time. But such consent should be express and in *writing*.[1]

See Ss. 68 and 69 of the Rangoon Small Cause Courts Act, VII of 1920 and S. 169 of the Bengal Tenancy Act for special provisions as to time of sale under the said Acts.

2. **Non-compliance with the rule.**—Omission to comply with the requirement of this rule does not render the execution sale a nullity. It only amounts to an irregularity and without proof of substantial injury resulting therefrom the sale will not be set aside.[1]

Order 21, Rule 68—Note 1.

(1) *Thakur Mahatabdeo* v. *Lachmanand Singh*, (1881) 7 Cal 613 (615): 9 Cal L Rep 398 [Petition asking for further time is not consent]; *Harbans Sahai* v. *Bhairo Pershad Singh*, (1880) 5 Cal 259 (263): 4 Cal L Rep 23: 5 Ind Jur 78 [Application by judgment-debtor that a portion of the property may be sold is not consent].

Note 2.

(1) *Tassaduk Rasul Khan* v. *Ahmad Husain*, (1893) 21 Cal 66 (69): 20 Ind App 176: 6 Sar 324: 17 Ind Jur 534: R & J 131 P C; *Kokil* v. *Edal Singh*, (1904) 31 Cal 385 (392) [Limitation for setting aside sale runs from date of sale]; *Abdul Nassia* v. *Doobal Das*, (1882) 11 Cal L Rep 303 (304); *Venkata* v. *Sama*, (1890) 14 Mad 227 (228); *Wasir Narain Singh* v. *Bhikari Ram*, 1923 Pat 45 (48): 3 Pat L Tim 765: 1922 Pat H C C (Supp) 321: 68 Ind Cas 363: 2 Pat 207: 4 U P L R (Pat) 100; *Ramji Patel* v. *Karkaji*, 1924 Nag 293 (294): 78 Ind Cas 746. The following cases before the decision of the Privy Council in 21 Cal 66 cannot be considered good law:—*Mobaruck Lal* v. *Secretary of State*, (1885) 11 Cal 200 (209) F B; *Bhekraj Koeri* v. *Gendh Lal Tewari*, (1880) 5 Cal 878 (881) F B; *Basharutulla* v. *Uma Churn*, (1894) 16 Cal 794 (798); *Sadhusaran Singh* v. *Panch Deo Lal*, (1887) 14 Cal 1 (8); *Mohendro Narain* v. *Gopal Mondul*, (1890) 17 Cal 769 (782); *Bandy Ali* v. *Madhub Chunder*, (1882) 8 Cal 932 (933); *Bakshi Nand* v. *Malak Chand*, (1885) 7 All 289 (289): 1885 All W N 42; *Jasoda* v. *Mathura*, (1887) 9 All 511 (512): 1887 All W N 145; *Ganga Prasad* v. *Jag Lal*, (1889) 11 All 333 (338, 343): 1889 All W N 115: 13

O.21, R.69.

R. 69. [S. 291.] (1) The Court[2] may, in its discretion, adjourn[3] any sale[4] *here*under to a specified day and hour[7], and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:

Adjournment or stoppage of sale.

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) *Where* a sale is adjourned under *sub-rule* (1) for a longer period than seven days, a fresh proclamation[8] under *rule* 67 shall be made, unless the judgment-debtor consents to waive[9] it.

(3) Every sale shall be stopped[10] if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered [11] to *the* officer *conductiug the sale*, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court *which* ordered the sale.

[*Cf.* R. 55 above and R. 89 below.]

Local Amendments.

ALLAHABAD.

For the word "seven" in 69 (2) *read* the word "fourteen" and *add* the following proviso:—

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

BOMBAY.

In sub-Rule (2) of Rule 69 "thirty days" shall be substituted for "seven days".

LAHORE.

In sub-Rule (2) of Rule 69 "thirty days" shall be substituted for "seven days."

NAGPUR.

In sub-Rule (2) of Rule 69, *for* the words "seven days" *substitute* the words "fifteen days".

N.-W. F. P.

In sub-Rule (2) of Rule 69 *for* the word "seven" *substitute* the word "thirty" and *add* the following proviso:—

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

OUDH.

In Rule 69 (2) for the words "seven" read the word "fourteen", and add the following proviso:—

"Provided that where the principal judgment-debtor or one of the principal judgment-debtors, if there are more than one, appears and gives his consent, the

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Ind Jur 471; *Lala Seva Ram* v. *Kanai Ram*, 1890 Pun Re No 76. But see *Megh Lal* v. *Shib Pershad*, (1881) 7 Cal 34 (40): 8 Cal L Rep 369: 5 Ind Jur 476: 4 Shome L R 169; *Satish Chunder* v. *Thomas*, (1885) 11 Cal 658 (661); *Rahchunder Bahadur* v. *Kamta Prasad*, (1882) 4 All 300 (301): 1882 All W N 43; *Nathu* v. *Harbhug*, 1885 All W N 304 (304).

Court may dispense with the consent of the other judgment-debtor or judgment-debtors who have failed to attend in answer to a notice issued under Rule 66."

O.21, R.69, Notes 1—3.

RANGOON.

In sub-Rule (2) of Rule 69 for the words "seven days" the words "thirty days" shall be substituted.

Synopsis.

1. Legislative changes.
2. Court—Meaning of.
3. May, in its discretion, adjourn any sale.
4. Any sale.
5. Adjournment of sale of mortgaged property. See Note 4, supra.
6. Adjournment after partial sale.
7. Omission to adjourn sale to a specified day and hour.
8. Fresh proclamation when necessary.
9. Waiver of fresh proclamation.
10. Stoppage of sale on deposit of debt and costs.
11. Who can tender the amount.
12. Sale on a date other than the one to which it is adjourned.
13. Withdrawal of bid.
14. Rateable distribution.
15. Limitation—Acknowledgment.

Appeal. See Note 3, F.-N. (1) and also S. 47, Note 86, F.-N. (1).
Proviso. See Note 3, Pt. (6).
Sale at place not advertised—Effect. See O. 21, R. 90, Notes.

1. Legislative changes.—

(1) The words "Under this chapter" have been omitted under the present Rule. The effect of the omission is to make the rule applicable also to sales under mortgage decrees. *See* Note 4.

(2) The words "other than a sale by the Collector" have also been omitted as a separate provision has been made in Rule 70, *infra*.

2. Court—Meaning of.—The Court means the Court executing the decree and not a Court to which such Court is subordinate.[1]

3. May, in its discretion, adjourn any sale.—Under this rule the Court may, in its discretion, adjourn a sale to a specified day.[1] No hard and fast rule can be laid down as to when Court should grant an adjournment. It depends upon the circumstances of each case. *See* the following cases.[2]

Order 21, Rule 69—Note 2.

(1) *Kalicharan* v. *Debendra*, (1909) 4 Ind Cas 373 (373): 10 Cal L Jour 456; *Jaishee Ram* v. *Bijai Kooer*, (1873) 5 N W P H C 177 (177); *Nobokishore* v. *Protap Chunder*, (1878) 1 Cal L Rep 534 (535); *Jamuna Prasad* v. *Magai Ram*, (1916) 35 Ind Cas 443 (443) Pat.

Note 3.

(1) *Kaveribai Ammal* v. *B Mehta & Sons*, 1924 Mad 234 (235): 46 Mad L Jour 71: 18 Mad L W 615: 1923 Mad W N 894: 75 Ind Cas 901; *Narasimha Appa Rao Naidu* v. *Venkata Krishnaiya*, (1869-70) 5 Mad H C R 410 (410); *Rahiman* v. *Muhammad Hussain*, 1888 All W N 71 (72) [Not appealable]; *Bishenmun Singh* v. *Land Mortgage Bank*, (1884) 11 Cal 244 (248): 12 Ind App 7: 4 Sar 588: 9 Ind Jur 85 P C. See also *Venkata* v. *Sama*, (1891) 14 Mad 227 (228) [Adjournment without sufficient ground irregular]; *Rup Kishore* v. *Collector of Etah*, 1929 All 948 (949): 1929 All L J 1228: 120 Ind Cas 545 [R 69 deals with adjournment on date of sale—*Per* Pullan, J].

(2) *Sidhee Nuzur Ally* v. *Oojoodhyaram*, (1863-66) 10 Moo Ind App 822 (827) [Applicant must establish satisfactory grounds for adjournment]; *Shyam Kishen* v. *Sundar Koer*, (1904) 31 Cal 373 (377) [May be adjourned to have a better sale]; *Jankeenath* v. *Radha Mohun*, (1873) 20 Suth W R 130 (131) [Or if it will benefit the judgment-debtor to satisfy the decree]; *Deb Koomaree* v. *Ram Lall Mookerjee*, (1869) 12 Suth W R 66 (67): 3 Beng L R App 107, (Do.); *Amir Dulhin* v. *Advocate-General of Bengal*, (1896) 23 Cal 351 (356) [Sale stayed on the issue of a temporary injunction by another Court]; *Gobind Chunder* v. *Baman Doss*, (1874) 22 Suth W R 481 (481) [May be adjourned by consent]; *Purshottam* v. *Purushottam*, (1884) 8 Bom 532 (533) [Stranger in possession impeaching the decree—No ground for adjournment]; *Kristo Mohiny* v. *Bhama Churn*, (1881) 7 Cal 733 (735): 9 Cal L Rep 344 [Pendency of administration suit—No ground]; *Baboo Luchmee Narain* v. *Baboo Bhyroo Pershad*, (1866) 1 Agra Rep Mis 11 (11) [Higher price available by private sale—No ground]; *Ahmed Reza* v. *Khujoorunnissa*, (1870) 13 Suth W R 281 (282) [Day fixed for sale being very near to the latest sale day for the payment of the Government revenue not sufficient]; *Fyzooddeen* v. *Giraudh Singh*, (1870) 2 N W P H C 1 (1) [Adjournment for a year unreasonable].

O.21,R.69, Notes 3—7.

When an order adjourning the execution sale is passed by the Court but is not communicated to the Nazir, who, in ignorance of it, holds the sale, it has been held by the High Court of Allahabad[3] that the sale is a *nullity*. The High Courts of Calcutta,[4] and Madras[5] have, however, held that an execution sale after it has been stayed by the appellate Court and before the order of stay is communicated to the officer holding the sale is not a nullity and that it would, at best, be an irregularity which will not *per se* invalidate the sale without proof of substantial injury.

The officer conducting the sale is also empowered under the rule to adjourn the sale except where the sale is held within the precincts of the Court-house, in which case, leave of Court is necessary.[6]

4. Any sale.—This rule applies to the adjournment of any sale including a sale under a mortgage decree.[1]

5. Adjournment of sale of mortgaged property.—*See* Note 4, *supra* and Note 11, *infra*

6. Adjournment after partial sale.—The provisions of this rule do not apply to a *continuous* sale. Thus it does not apply where the sale is ordered to be continued from day to day and the property is kept on hammer in the hope of getting higher bids than those offered on the first day; no fresh proclamation is necessary in such a case even though the sale is adjourned and continued for more than seven days.[1]

7. Omission to adjourn the sale to a specified day and hour.—Where an execution sale is adjourned, the Court must specify the *day* and the *hour* to which it is adjourned.[1] Omission to do so amounts to a material irregularity.[2]

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(3) *Brahm Singh* v. *Bhandu*, 1921 All 102 (103): 19 All L J 225: 62 Ind Cas 687; *Sant Lal* v. *Umrao Un-nissa*, (1890) 12 All 96 (98): 1889 All W N 201. See also *Mianjan* v. *Man Singh*, (1878-80) 2 All 686 (687): 5 Ind Jur 323; *Nonidh Singh* v. *Sought Kooer*, (1872) 4 N W P 135 (135); *Maijha Singh* v. *Jhow Lal*, (1874) 6 N W P 354 (354).

(4) *Bisseswari Chowdhrany* v. *Hurro Sundar Mozumdar*, (1897) 1 Cal W N 226 (228). But see *Hukam Chand Boid* v. *Kamlanand Singh*, (1906) 33 Cal 927 (935): 3 Cal L Jour 67.

(5) *Muthu Kumarasamy* v. *Kuppasamy*, (1909) 3 Ind Cas 82 (84): 33 Mad 74: 6 Mad L Tim 159.

(6) *Alaykkammal* v. *Arunachalam Chetty*, (1900) 12 Mad L Jour 97 (99); *Vaduganathan Chetty* v. *E G Foy*, (1913) 20 Ind Cas 192 (193): 6 Bur L Tim 65; *Babu Singh* v. *Gurbaksh Singh*, 1928 Lah 249 (249): 107 Ind Cas 274; *Jadhari Rai* v. *Langat Gope*, 1923 Pat 572 (573): 4 Pat L Tim 495: 75 Ind Cas 676. See also *Gulab Singh* v. *Raghubir Saran*, 1932 All 369 (369): 1932 All L J 357 [Officer must record reasons—Omission is material irregularity].

Note 4.

(1) *Shyamkishen* v. *Sunder Koer*, (1904) 31 Cal 373 (376); *Bibi Jan* v. *Sachi*, (1904) 31 Cal 863 (867, 868): 8 Cal W N 684; *Mallikarjunadu* v. *Lingamurti*, (1902) 25 Mad 244 (255, 266, 276): 12 Mad L Jour 279 F B. See *Abdul Hakiem* v. *Nga Ni Gri*, 1923 Rang 154 (154): 2 Bur L Jour 54: 75 Ind Cas 343.

Note 6.

(1) *Murlidhar Khetan* v. *Nawab Saiyid Muhammad*, 1927 Pat 312 (318): 6 Pat 432: 104 Ind Cas 215: 8 Pat L Tim 796. See also *Fateh Muhammad* v. *Chuhar Mal*, 1928 Lah 699 (700); *Pir Muhammad* v. *Mayandi*, (1910) 8 Ind Cas 564 (565): 1910 Mad W N 684: 9 Mad L Tim 148; *Lal Mohun Chowdhry* v. *Nunu Mohamed*, (1889) 17 Cal 152 (154); *Nuddea Kishore* v. *Bungshee*, (1872) 17 Suth W R 210 (210); *Govind Hari Valekar* v. *Bank of India*, (1866-67) 4 Bom H C A C 164 (164).

Note 7.

(1) *Abdul Rauf Khan* v. *Mt Qamrunnissa*, 1930 All 542 (543): 124 Ind Cas 721: 1930 All L J 1062; *Babu Ram* v. *Inamullah*, 1927 All 241 (241): 99 Ind Cas 926: 25 All L J 302: 49 All 402; *Sanwul Singh* v. *Makshun Pandey*, (1870) 2 N W P H C 143 (143); *Mahabir Pershad* v. *Dhanukdhari Singh*, (1904) 8 Cal W N 686 (688): 31 Cal 815; *Jhoomuck Chowdhry* v. *Rajah Radha Pershad*, (1876) 25 Suth W R 328 (329); *Venkata Subbaraya* v. *Zamindar of Karvetinagar*, (1896) 20 Mad 159 (161); *Ambi Ayyar* v. *Sundaresa Iyer*, 1928 Mad 823 (825): 110 Ind Cas 779 [Date fixed—Court may reasonably infer the hour to be the same as on the prior date]; *Palani* v. *Siralinga*, (1885) 8 Mad 6 (7).

(2) *Dhanukdhari Singh* v. *Mahabir Pershad*, (1907) 34 Cal 709 (710): 34 Ind App 164: 9 Bom L Rep 651: 11 Cal W N 739: 6 Cal L Jour 11: 17 Mad L Jour 853: 2 Mad L Tim 193: 14 Bur L Rep 1 P C; *Mahabir Pershad Singh* v. *Dhanuk Dhari Singh*, (1904) 31 Cal 815 (819, 820): 8 Cal W N 686; *Pran Singh* v. *Janardhan Singh*, (1912) 13 Ind Cas 937 (843): 14 Cal L Jour 541; *Bhikari* v. *Surjamoni*, (1902) 6 Cal W N 48 (51); *Surno Moyee Debi* v. *Dakina Rajan Sanyal*, (1897) 24 Cal 291 (293); *Venkatasubba-*

8. Fresh proclamation when necessary.—Fresh proclamation is necessary when the sale is adjourned for a longer period than seven days.[1] It is, however, open to the judgment-debtor, to *waive* a fresh proclamation. *See* Note 9, *infra.* O.21,R.69, Notes 8—9.

The omission to issue a fresh proclamation as required by the rule amounts to a mere *irregularity* and the sale will not be set aside in the absence of proof of substantial injury.[2]

9. Waiver of proclamation.—The judgment-debtor can waive the benefit of a fresh proclamation under this rule and, if he does so, he cannot, later on, object to the sale being irregular on that ground.[1] Such waiver does not, however, estop him from objecting to *other* irregularities.[2] As, for instance, the omission to specify the day and the hour of the sale,[3] or the omission to proclaim properly.[4]

A waiver of proclamation by *one* of several judgment-debtors does not bind the other judgment-debtors.[5] Nor does it prevent another attaching decree-holder from objecting to the sale on that ground.[6]

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raya v. *Zamindar of Karvetinagar*, (1897) 20 Mad 159 (161); *Ramiah Thevan* v. *Athmanatha Iyer*, 1929 Mad 624 (624): 117 Ind Cas 727; *Gulab Singh* v. *Raghubir Saran*, 1932 All 369 (369): 1932 All L J 357 [Exact time not specified].

Note 8.

(1) *Abdul Hakim* v. *Nga Nigri*, 1923 Rang 154 (154): 2 Bur L Jour 54: 75 Ind Cas 343; *Gajrajmati* v. *Akbar Husain*, (1907) 29 All 196 (202): 11 Cal W N 393: 34 Ind App 37: 9 Bom L R 83: 5 Cal L Jour 138: 17 Mad L Jour 112: 2 Mad L Tim 47 P C; *Jhoomuck Chowdhry* v. *Radha Pershad*, (1876) 25 Suth W R 328 (329); *Okhoy Chunder* v. *Erskine & Co.* (1865) 3 Suth W R Mis 11 (11); *Bonomali Mozumdar* v. *Woomesh Chunder*, (1881) 7 Cal 730 (732): 9 Cal L Rep 341: 4 Shome L R 191; *Gopee Nath Dobey* v. *Roy Luchmeeput*, (1877-78) 3 Cal 542 (543): 1 Cal L Rep 349; *Satish Chander Rai Chowdhuri* v. *Thomas*, (1885) 11 Cal 658 (660) [Series of short adjournments amounting in the aggregate to more than seven days—Fresh proclamation necessary]; *Jamini Mohan* v. *Chandra Kumar*, (1901) 6 Cal W N 44 (46), (Do.); *Roy Gowree* v. *Shah Fukeer*, (1872) 18 Suth W R 347 (347) [Adjournment for a day—No fresh proclamation necessary]; *Asmutoonnissa Bibee* v. *Khudemoonnissa Bibee*, (1872) 17 Suth W R 278 (278); *Shoshee Mookhee* v. *Dwarkanath*, (1866) 6 Suth W R Mis 84 (84); *Kamakhya Dutt Ram* v. *Shyam Lal*, 1929 Oudh 235 (237, 238): 6 Oudh W N 226: 117 Ind Cas 471: 4 Luck 635 [Sale adjourned *sine die*]; *Kirpal Singh* v. *Kedar Nath Bose*, (1917) 41 Ind Cas 68 (69): 3 Pat L W 357, (Do.); *Vaduganathan Chetty* v. *E G Fox*, (1913) 20 Ind Cas 192 (193): 6 Bur L Tim 65 [Adjournment for *two days*—No fresh proclamation required]. See also *Shib Prokash Singh* v. *Sardar Daud Singh*, (1877-78) 3 Cal 544 (546): 2 Cal L Rep 260 [Fresh proclamation necessary if portion of property released after issue of proclamation].

(2) *Rang Lal Singh* v. *Ravaneshwar Pershad Singh*, (1911) 12 Ind Cas 174 (175): 38 Ind App 200: 39 Cal 26: (1911) 2 Mad W N 108: 10 Mad L Tim 161: 13 Bom L R 823: 14 Cal L Jour 334: 8 All L J 1173: 16 Cal W N 1 P C; *Official Liquidator, Kayastha Trading and Banking Corporation* v. *Sat Narain Singh*, 1921 All 149 (151): 43 All 433: 60 Ind Cas 763: 19 All L J 262; *Mohini Mohun* v. *Bhoohunjoy*, (1880) 6 Cal L Rep 237 (238); *Kishen Prosunno Mojoomdar* v. *Nurduma Dossee*, (1872) 17 Suth W R 339 (339); *Bhaiya Moti Singh* v. *Bhaiya Prithipal Singh*, (1914) 25 Ind Cas 17 (17) Oudh; *Kashif Husain* v. *Ganga Baksh Singh*, 1928 Oudh 98 (99): 2 Luck 490: 100 Ind Cas 787: 4 Oudh W N 273; *Baldeo* v. *Lal Nilmani*, 1928 Pat 615 (621): 8 Pat 122: 9 Pat L Tim 627; *Naranjan Das* v. *Ramrakha*, 1886 Pun Re No 45 (45).

Note 9.

(1) *Baboo Hurdeo Narain Sahoo* v. *Girdharee Singh*, (1873) 19 Suth W R 227 (229); *Tekait Het Narain Singh* v. *Gossain Luchmee Narain Puoree*, (1875) 23 Suth W R 256 (257); *Noorul Hossein* v. *Omatool Fatima*, (1876) 25 Suth W R 34 (34); *Lakshmi* v. *Rajindra*, (1918) 47 Ind Cas 831 (832) Cal; *Thakur* v. *Anantram*, (1905) 2 Cal L J 584 (588); *Subba Reddy* v. *Marga Sastriar*, 1929 Mad 517 (520): 118 Ind Cas 818 [Waiver by judgment-debtor's pleader]; *Seshayya* v. *Sattiraju*, 1930 Mad 414 (417): 120 Ind Cas 863. See also *Enamuddin Jamadar* v. *Abdul Jabbar*, (1910) 5 Ind Cas 489 (490) Cal [Petition by judgment-debtor for adjournment with agreement to waive—Not granted—And sale held—The agreement cannot operate as waiver of objection to sale]; *Raman* v. *Kunhayan*, (1894) 17 Mad 304 (305); *Nripathi* v. *Jatindra*, 1926 Cal 577 (577, 578): 91 Ind Cas 407.

(2) *Rudranand Thakur* v. *Pathi Chand*, (1911) 11 Ind Cas 438 (439): 16 Cal W N 704: 14 Cal L Jour 346 See also *Anukla Prasad Singh* v. *Whitwell*, (1909) 6 Cal L Jour 111 (113) [Fraud].

(3) *Bhikari Misra* v. *Rani Surja Moni Pat Maha Dai*, (1902) 6 Cal W N 18 (51, 54); *Dhanukdhari* v. *Nathuni Sahu*, (1907) 6 Cal L Jour 62 (69, 70): 11 Cal W N 818.

(4) *Preo Lall Paul Choudhury* v. *Radhika Prasad Paul Chowdhry*, (1902) 6 Cal W N 42 (41).

(5) *Bagal Chunder* v. *Ramchan*, (1891) 18 Cal 496 (499).

(6) *Chakrapani* v. *Dhanji Setta* (1901) 24 Mad 311 (315).

O.21, R.69, Notes 9—13.

The guardian *ad litem* of a minor judgment-debtor can waive a fresh proclamation on behalf of the minor under this rule.[7]

10. Stoppage of sale on deposit of debt and costs.—Any sale including a sale under a mortgage-decree can be stopped by the deposit of the decretal amount and the costs before the property is *actually knocked down* to the bidder.[1] But the words "debts and costs" mean the *entire amount* and not "the balance of the decree-debt and costs which would remain if, by a legal fiction, the sales of previous lots (not yet completed by the payment of the whole of the purchase-money) were taken as completed by treating the whole of the purchase-money as being actually paid up".[2]

11. Who can tender the amount.—The judgment-debtor or a transferee of the property from the judgment-debtor is entitled to tender the amount under this rule.[1] Where the sale is in execution of a mortgage-decree any person holding the equity of redemption[2] such as, a purchaser in execution of a decree on a puisne mortgage,[3] can tender the amount and have the sale stopped.

A payment made to prevent a sale in execution of a decree is not a *voluntary* payment whether made by the debtor or by a third person claiming the property.[4]

12. Sale on a date other than the one to which it is adjourned.—The High Court of Calcutta has held in the undermentioned case[1] that if the execution-sale does not take place on the adjourned date but is held on a subsequent date to which the sale has not been adjourned, it amounts to a material *irregularity*. But in a later decision[2] it has held that if the sale takes place on a day never fixed for it and of which the judgment-debtor has no notice, the sale is a *nullity*.

13. Withdrawal of bid.—A bid may be withdrawn before the property is actually knocked down to the bidder.[1] The death of the bidder revokes the bid.[2]

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(7) *Bepin Behari Mitter* v. *Jotindra Nath Ghosh*, (1910) 6 Ind Cas 813 (815): 37 Cal 897: 14 Cal W N 1019; *Phulchand Ram* v. *Nareing Pershad Misser*, (1901) 28 Cal 73 (77).

Note 10.

(1) *Shah Mehdi Hasan* v. *Ismail Hasan*, (1920) 56 Ind Cas 172 (172): 42 All 517: 18 All L J 622; *Raja Ram* v. *Ohunni Lal*, (1897) 19 All 205 (208): 1897 All W N 47; *Shashtidas Dutt* v. *Ujir Ali*, (1913) 18 Ind Cas 357 (358) Cal; *Bibijan* v. *Sachi*, (1904) 31 Cal 863 (869, 870): 8 Cal W N 684 F B; *Shyam Kishen* v. *Sunder Koer*, (1904) 31 Cal 373; *Adipuranam* v. *Gopalasami*, (1908) 31 Mad 354 (358): 3 Mad L Tim 281: 18 Mad L Jour 259. But see *Kedar Nath Raut* v. *Kaly Churn Ram*, (1898) 25 Cal 703 (710): 2 Cal W N 353 F B; *Harjas Rai* v. *Rameshar*, (1898) 20 All 354 (356): 1898 All W N 70.

(2) *Rajah of Kalahasti* v. *Venkataramiah Row Bahadur*, (1915) 26 Ind Cas 273 (273): 1914 Mad W N 873.

Note 11.

(1) *Behari Lal* v. *Ganapat Rai*, (1888) 10 All 1 (4): 1887 All W N 238.

(2) *Misri Lal* v. *Mithu Lal*, (1906) 28 All 28 (29): 1905 All W N 168.

(3) *Radha Kishun Marwari* v. *Hem Chandra Bose*, (1907) 11 Cal W N 495 (497): 5 Cal L Jour 45 Note.

(4) *Fatima Khatoon* v. *Muhammad Jan*, (1867-69) 12 Moo Ind App 65 (79, 80): 1 Beng L R P C 21: 10 Suth W R P C 29: 2 Suther 145: 2 Sar 380; *Omrita Lal* v. *Ramdhun*, (1872) 18 Suth W R 503 (504).

Note 12.

(1) *Hari Sadhan* v. *Shib Gopal*, 1921 Cal 597 (598): 35 Cal L Jour 140: 65 Ind Cas 746. See also *Kishen Prosunno* v. *Nurduma Dossee*, (1872) 17 Suth W R 339 (339).

(2) *Motahar Hossain* v. *Md Yakub*, 1925 Cal 201 (202): 40 Cal L Jour 311: 84 Ind Cas 700.

Note 13.

(1) *Agra Bank* v. *Hamlin*, (1890) 14 Mad 235 (236); *Rajendra Prasad* v. *Upendranath*, (1915) 27 Ind Cas 805 (805): 19 Cal W N 633: 21 Cal L Jour 174; *Kenaram* v. *Kailash Chandra*, (1913) 19 Ind Cas 904 (905): 18 Cal L Jour 53; *Rajah Mohesh Narain* v. *Kishnanand Misser*, (1866) 5 Suth W R P C 7 (10): 9 Moo Ind App 324: Marsh 592: 2 Ind Jur O S 1: 1 Suther 488: 1 Sar 862 P C.

(2) *Rajah of Bobilli* v. *Akkella Suryanarayana*, (1919) 51 Ind Cas 805 (807): 42 Mad 776: 1919 Mad W N 784: 37 Mad L Jour 274.

14. Rateable distribution.—Moneys paid into Court to stop a sale are assets available for rateable distribution.[1] **O.21, R.69, Notes 14—15.**

15. Limitation—Acknowledgment.—A petition for adjournment of sale asking for time to pay the decretal amount signed by the judgment-debtor's pleader constitutes an acknowledgment of the decree-debt within the meaning of S. 19 of the Limitation Act.[1]

R. **70.** [S. 287, last para.] Nothing in *rules* 66 *to* 69 shall *be deemed* to apply to *any* case in which the execution of *a* decree has been transferred to the Collector. **O.21, R.70, Note 1.**

Saving of certain sales.

[1877—S. 287, last para. *See* Ss. 54, 68 to 72, and Third Schedule.]

Synopsis.

1. **Execution of decrees by the Collector.**

Revenue Courts—Are Civil Courts under the Code. See Preamble Note 18, Pt. (2); S. 71, Note 1, Pts. (1) and (2); S. 70, Note 2, and Sch. III, Para. 13.

1. **Execution of decrees by the Collector.**—The execution of decrees by the Collector is provided for by Ss. 68 to 72 and Sch. III. This rule makes the provisions of Rr. 66 to 69 inapplicable to a sale held by the Collector to whom the execution of a decree has been transferred.[1]

R. **71.** [S. 293.] *Any* deficiency of price which may happen on a re-sale[3] by reason of the purchaser's default[7], and all expenses attending such re-sale, shall be certified[4] to the Court[10] *or to the Collector or subordinate of the Collector, as the case may be*, by the officer *or other person* holding the sale, and shall, at the instance of either the *decree-holder or the judgment-debtor*[6], be recoverable from the *defaulting purchaser*[8] under *the provisions*[5] *relating to* the execution of a decree for *the payment of* money. **O.21, R.71.**

Defaulting purchaser answerable for loss on re sale.

[1877—S. 293; 1859—S. 254, last para. *See* Rr. 77, 84 and 86 and Ss. 68 to 71.]

Note 14.

(1) *Purushothamdas* v. *Surajbharthi*, (1881-82) 6 Bom 588 (589) [Decision under the Code of 1882].

Note 15.

(1) *Narendro Nath* v. *Bhupendra Narain*, (1896) 23 Cal 874 (887); *Trimbak* v. *Kashi Nath*, (1898) 22 Bom 722 (727); *Ram Coomar* v. *Jakur Ali*, (1882) 8 Cal 716 (718): 10 Cal L Rep 613.

Order 21, Rule 70—Note 1.

(1) *Kamakhya Dutt Ram* v. *Shyam Lal*, 1929 Oudh 235 (237, 238): 6 Oudh W N 226: 117 Ind Cas 471: 4 Luck 635.

O.21, R.71, Notes 1—2.

Synopsis.

1. Application of the rule.
2. Failure of execution-sale due to auction-purchaser's default—Rights of decree-holder and judgment-debtor.
3. Re-sale.
4. Power to order recovery of deficiency.
5. Procedure under the rule.
6. Who may apply under this rule.
7. By reason of the purchaser's default.
8. Where defaulting purchaser is merely an agent.
9. Liability for interest on deficiency.
10. Certificate.
11. Rateable distribution.
12. Nature of defaulting purchaser's liability for deficiency. See Note 13, below.
13. Suit for deficiency on resale—Whether maintainable.
14. Insolvency proceedings.
15. Suit if lies to set aside order under this rule.
16. Appeal.

Rights of decree-holder and judgment-debtor on purchaser's default. See Notes 2 and 5, Pt. (5) and Note 6.

1. **Application of the rule.**—The rule extends to all auction sales in execution, whether of moveable or immoveable property.[1] It is a salutary provision intended to minimise the hardship resulting from the purchaser's default, and Courts should give effect to it unless the defaulting purchaser would be substantially prejudiced.[2] The rule applies to sales by the Collector under the Public Demands Recovery Act, (1 B. C. of 1895)[3] (*see* S. 8 of the Act); and to sales under the Agra Tenancy Act, III of 1926 (*see* S. 169 thereof); and to sales of immoveables under The Chota Nagpur Tenancy Act (*see* R. 54, Notes above).

2. **Failure of execution sale due to auction-purchaser's default—Rights of decree-holder and judgment-debtor.**—Where an execution sale fails owing to the auction purchaser's default, the decree-holder is entitled to a re-sale of the property.[1] *See* O. 21, Rr. 77, 84 and 86. Where the price bid at the second sale is less than that bid at the first sale, the purchaser at the first sale is liable to make good the difference, and the present rule entitles the decree-holder or the judgment-debtor to apply to the Court to enforce such liability. But the decree-holder is not *bound* to proceed against the defaulting purchaser. He may recover from the *judgment-debtor* the judgment-debt or the balance of it that may be due, and leave him to pursue his remedies against the auction-purchaser under this rule.[2] The judgment-debtor, may also, instead of proceeding against the auction-purchaser to recover the deficiency in price, apply under rule 90 to set aside the second sale if he can make out a case under that rule.[3] *See also* Note 13, *infra*.

Order 21, Rule 71—Note 1.

(1) *Ramdhani Sahai* v. *Rajrani Kooer*, (1881) 7 Cal 337 (339): 9 Cal L Rep 23.

(2) *Venkatachalamayya* v. *Nilakanta*, (1918) 43 Ind Cas 685 (691): 41 Mad 474: 23 Mad L Tim 9: 34 Mad L Jour 156: 7 Mad L W 159: 1918 Mad W N 121 F B [Per Wallis, C J]; *Sankaranarayana* v. *Gangammal*, 1925 Mad 631 (633): 21 Mad L W 232: 87 Ind Cas 1 [Compare observations in 14 Ind Cas 777 (779) (Bom) and of Walsh, J in 1922 All 200].

(3) *Kameshwar Narain Singh* v. *Mt Harbans Baui*, (1919) 50 Ind Cas 59 (61, 63): 1919 Pat H C C 210 [1 B C 1885 has been repealed by Act III of 1913 and Act IV of 1914, Bihar and Orissa].

Note 2.

(1) *Madhu Sudandas* v. *Purna Chandra*, (1909) 3 Ind Cas 286 (287): 9 Cal L Jour 115.

(2) *Kheroda Mayi* v. *Golam Abardari*, (1874) 13 Beng L R 114 (114): 21 Suth W R 149 [Distinguishing *Joobraj* v. *Gour Buksh*, 7 Suth W R 110 (112)]; *Anandarav Bapuji* v. *Sheikh Baba*, (1877-78) 2 Bom 562 (563, 564); *Gour Chunder* v. *Chunder Coomar*, (1882) 8 Cal 291 (297): 10 Cal L Rep 236. But see *Joy Chunder* v. *Kali Kishore*, (1881) 8 Cal L Rep 41 (42).

(3) *Beepin Chunder* v. *Purreshnath*, (1888) 9 Cal 98 (99): 12 Cal L Rep 316: 5 Shome L R 91.

O.21, R.71, Note 3.

3. **Re-sale.**—The rule applies to all re-sales made in consequence of the default of the auction purchaser, not only in the payment of the 25 per cent. of the purchase money under R. 84 or in the payment of the balance under R. 85,[1] but also in the payment of the poundage fee.[2] But the re-sale must be of the *same property*[3] and under the *same decree*.[4] The property must also be sold under the *same description*, and any substantial difference of description will disentitle the decree-holder or the judgment-debtor to recover the deficiency under this rule.[5] Thus no deficiency can be recovered where

(1) encumbrances, not notified at the first sale were mentioned in the sale proclamation at the re-sale.[6]

(2) property, described as that of *A* at the first sale was described as that of *B* at the re-sale.[7]

But the rule that the re-sale must be of the same property as that put up for sale at the first sale, does not apply where the property has changed during the interval owing to natural causes or the change in the wording of the sale proclamation has been due to the purchaser's own default and conduct.[8]

Will a difference in the sale proclamations of the two sales which does not *substantially prejudice* the purchaser at the first sale absolve him from liability under R. 71? As to this question, it was observed by Wallis, C. J. in *Venkatachalamayya* v. *Nilakanta*[9] that R. 71 is a salutary provision which should be given effect to unless the defaulting purchaser would be substantially *prejudiced*.

The remarks of Kumaraswamy Sastry, J. in his judgment in the same case lend support to the same view. From the trend of the remarks made in the undermentioned cases the High Courts of Calcutta[10] and Bombay[11]

Note 3.

(1) *Sita Ram* v. *Janki Ram*, 1922 All 200 (201): 44 All 266: 20 All L J 105: 65 Ind Cas 813 F B; *Jaxherbai* v. *Haribhai*, (1880-81) 5 Bom 575 (577): 6 Ind Jur 98; *Sooruj Buksh* v. *Sreekishen Doss*, (1866) 6 Suth W R Mis. 126 (127); *Rajendra Nath Roy* v. *Ram Charan Sinha*, (1898) 2 Cal W N 411 (412): *Ramdhani* v. *Rajrani Koer*, (1881) 7 Cal 337 (339): 9 Cal L Rep 23; *Beepin Chunder* v. *Purreshnath*, (1883) 9 Cal 98 (99): 12 Cal L Rep 316: 5 Shom L R 91; *Vallabhan* v. *Pangunni*, (1889) 12 Mad 454 (458); *Kuppuyan* v. *Ramasami Ayyar*, (1883) 6 Mad 197 (198): 7 Ind Jur 246. *Kameshwar Narain* v. *Harbans*, (1919) 50 Ind Cas 59 (61): 1919 Pat H C C 210. But see *Amir Begam* v. *The Bank of Upper India, Ltd.* (1908) 30 All 273 (278): 1908 All W N 107: 5 All L J 336 [*Held*, in 1922 All 200 not to be good law under the new Code].

(2) *Madhu Sudan* v. *Purna Chandra*, (1909) 3 Ind Cas 286 (287): 9 Cal L Jour 115.

(3) *Baij Nath Sahai* v. *Mohcep Narain Singh*, (1889) 16 Cal 535 (538): 13 Ind Jur 458; *Kali Kishore* v. *Guru Prosad*, (1898) 25 Cal 99 (102): 2 Cal W N 408.

(4) *Bisokha Moyee* v. *Sonatum Doss*, (1871) 16 Suth W R 14 (15).

(5) *Baijnath* v. *Moheep Narain*, (1889) 16 Cal 535 (538): 13 Ind Jur 458; *Kalikishore* v. *Guru Prosad*, (1898) 25 Cal 99 (102): 2 Cal W N 408; *Gangadas Dayabhai* v. *Bai Suraj*, (1912) 14 Ind Cas 777 (779): 36 Bom 329: 14 Bom L R 250.

(6) *Baijnath* v. *Moheep Narain*, (1889) 16 Cal 535 (538): 13 Ind Jur 458.

(7) *Gangadas* v. *Bai Suraj*, (1912) 14 Ind Cas 777 (778, 779): 36 Bom 329: 14 Bom L R 250.

(8) *Venkatachalamappa* v. *Nilakanta*, (1918) 43 Ind Cas 685 (694): 41 Mad 474: 23 Mad L Tim 9: 34 Mad L Jour 156: 7 Mad L W 159: 1918 Mad W N 121 [Affirmed on appeal to the Privy Council in 1925 P C 61 (63). But see *Baijnath* v. *Moheep Narain*, (1889) 16 Cal 535 (538, 539): 13 Ind Jur 458 [Obiter].

(9) *Venkatachalamayya* v. *Nilakanta*, (1918) 43 Ind Cas 685 (694): 23 Mad L Tim 9: 34 Mad L Jour 156: 7 Mad L W 159: 1918 Mad W N 121: 41 Mad 474. See also *Sankara Narayana Pillai* v. *Gangammal*, 1925 Mad 631 (633): 21 Mad L W 232: 87 Ind Cas 1.

(10) *Baijnath* v. *Moheep Narain*, (1889) 16 Cal 535 (538): 13 Ind Jur 458; *Kalikishore* v. *Guru Prasad*, (1898) 25 Cal 99 (102): 2 Cal W N 408.

(11) *Gangadas Dayabhai* v. *Bai Suraj*, (1912) 14 Ind Cas 777 (779): 36 Bom 329: 14 Bom L R 250. But see *Venkataraman* v. *Mahabaleswar*, 1931 Bom 367 (368): 33 Bom L R 750: 134 Ind Cas 602.

O.21,R.71, Notes 3—5.

seem to take a contrary view and to hold that substantial differences of descriptions in the proclamations of the two sales will entitle the defaulting purchaser to exemption under this rule, though he may *not* have been substantially prejudiced by the differences.

It has also been held by the Calcutta High Court that where a property was misdescribed in the proclamation of the first sale and the decree-holder was aware of the misdescription, he ought not to have had the property again proclaimed for sale under a description which he knew to be wrong and having done that, he could not make the defaulting purchaser answerable for the deficiency.[12]

The re-sale contemplated by this rule is a re-sale held according to law. Hence an auction purchaser who fails to pay the deposit required by R. 84 is not liable for the deficiency on re-sale unless the re-sale is held "forthwith" within the meaning of that rule.[13] But it has been held that R. 84 does not apply to a re-sale on the purchaser's default in paying the poundage fee and that such re-sale need not be held "forthwith".[14]

Suppose at a re-sale held on the purchaser's default, no bidders are forthcoming, is there a re-sale within the meaning of the rule and can the purchaser at the first sale be proceeded against for the price bid by him at that sale? On this question it has been held by the Madras High Court that there is a "re-sale" when the property is put up again for sale and that the defaulting purchaser should not be absolved from liability for want of bidders at the re-sale.[15] The Bombay High Court has, however, held that there is no re-sale of property if it is not knocked down to any bidder at the second sale and that R. 71 cannot apply to such a case.[16]

4. Power to order recovery of deficiency.—The power of ordering the recovery of deficiency is vested in the Court. The officer conducting the sale has no power to order the recovery of the deficiency.[1] Even in cases where the execution of a decree has been transferred to a Collector and the property has been sold by him, the Civil Court has jurisdiction to order the recovery of deficiency under this rule.[2] *See* S. 70, Note 2.

5. Procedure under the rule.—The Court may pass an order that the defaulting purchaser is liable for the deficiency but there is nothing in the rule which compels the decree-holder or the judgment-debtor to obtain such an order before asking for execution against the auction-purchaser. The opinion

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(12) *Kali Kishore* v. *Guru Prosad*, (1898) 25 Cal 99 (102): 2 Cal W N 408.

(13) *Babu Singh* v. *Gurbaksh Singh*, 1928 Lah 249 (249): 107 Ind Cas 274; *Beli Ram* v. *Sohan Singh*, (1916) 32 Ind Cas 907 (908): 45 Pun W R 1916; *Angnu* v. *Mirza Mohomed Sajjad Ali Khan*, 1925 Oudh 397 (398): 12 Oudh L J 261: 2 Oudh W N 212: 88 Ind Cas 131: 28 Oudh Cas 327; *Hari Singh* v. *Sanwan Mal Gopi Chand*, 1929 Lah 744 (745): 121 Ind Cas 189. See *Venkatasubbiah* v. *Akkamma*, 1930 Mad 761 (762): 32 Mad L W 154: 1930 Mad W N 714: 59 Mad L Jour 267: 53 Mad 900: 127 Ind Cas 303 F B.

(14) *Madhusudan* v. *Purna Chandra*, (1909) 3 Ind Cas 286 (287): 9 Cal L Jour 115.

(15) *Hajee Batcha Saheb* v. *Mahomed Ebrahim Saheb*, 1926 Mad 739 (740): 23 Mad L W 724: 95 Ind Cas 865: 51 Mad L Jour 658.

(16) *Hiralal* v. *Gangi*, (1886) Bom P J 263.

Note 4.

(1) *Venkataraman* v. *Mahabaleshwar*, 1931 Bom 367 (368): 33 Bom L R 750: 134 Ind Cas 692 F B.

(2) *Venkataraman* v. *Mahabaleshwar*, 1931 Bom 367 (368): 33 Bom L R 750: 134 Ind Cas 692 F B.

expressed in the undermentioned case[1] that, without such an order, execution cannot issue against the auction-purchaser seems to be not warranted by the terms of the rule. The rule does not expressly provide for *notice* to the defaulting purchaser; but it is the duty of the Court, under general principles of law, to give him notice and hear and decide on his objections before it orders execution to issue against him.[2] O.21, R.71, Notes 5—7.

The proceedings under the rule are not more summary than proceedings to set aside an execution-sale.[3]

An order against the auction-purchaser under this rule can be passed only when re-sale *has taken place*. The Court has no power to order that a property should be re-sold and that the defaulting purchaser should pay the deficiency in price which may occur.[4] An order under this rule to the effect that the defaulting purchaser is liable for the deficiency, passed in favour of the decree-holder can be executed by the judgment-debtor, because the rule enables either of them to apply under it.[5]

6. Who may apply under this rule.—This rule entitles either the judgment-debtor or the decree-holder to apply for the recovery of deficiency from the auction-purchaser. By the term "decree-holder" is meant the decree-holder by whom the property was brought to sale. Other decree-holders are not included in the term although they may be entitled to rateable distribution under S. 73.[1] The decree-holder is entitled to enforce the defaulting purchaser's liability for the *whole* amount of the deficiency and is not bound to confine his application merely to the decretal amount that may remain outstanding.[2] Where an order has been passed in favour of the decree-holder to the effect that the auction-purchaser was liable for the deficiency but the decree-holder realises the balance of the decretal amount from the judgment-debtor and does not enforce the order passed in his favour, the judgment-debtor can execute the same against the auction-purchaser.[3] *See also* N. 10, Pt. (3).

7. By reason of the purchaser's default.—The "default" referred to in this rule includes default in paying the purchase-money, the deposit required by R. 84 or the poundage fee, *see* Note 3. The default must be that of a *purchaser*. Thus a bid lapses on a higher bid being made and where the highest bidder dies before the acceptance of his bid, the next highest bidder cannot be treated as the highest bidder for the purposes of this rule.[1] Similarly a bid can be withdrawn at any time before the property is knocked down to the

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Note 5.

(1) *Huree Ram* v. *Hur Pershad*. (1873) 20 Suth W R 80 (83) [*Per* Phear, J].

(2) *Venkatachalamayya Garu* v. *Ndakanta*, (1918) 43 Ind Cas 685 (695): 41 Mad 474: 23 Mad L Tim 9: 34 Mad L Jour 156: 7 Mad L W 159: 1918 Mad W N 121 [*Per* Kumaraswami Sastri, J]; *Huree Ram* v. *Hur Pershad*, (1873) 20 Suth W R 80 (83) [*Per* Phear, J].

(3) *Venkatachalamayya Garu* v. *Nilakanta*, (1918) 43 Ind Cas 685 (695): 23 Mad L Tim 9: 34 Mad L Jour 156: 7 Mad L W 159: 1918 Mad W N 121: 41 Mad 474 [*Per* Kumaraswami Sastry, J].

(4) *Hari Singh* v. *Sanwan Mal Gopi Chand*, 1929 Lah 744 (745): 121 Ind Cas 189.

(5) *Murli Dhar* v. *Ram Gopal*, 1931 All 667 (668): 133 Ind Cas 404: 1931 All L J 995.

Note 6.

(1) *Prayaga Doss* v. *Raja of Kalahasti*, 1926 Mad 872 (874): 49 Mad 570: 97 Ind Cas 86.

(2) *Prayaga Doss Jee Varu* v. *Raja of Kalahasti*, 1926 Mad 872 (873): 49 Mad 570: 97 Ind Cas 86.

(3) *Murli Dhar* v. *Ram Gopal*, 1931 All 667 (668): 133 Ind Cas 404: 1931 All L J 995.

Note 7.

(1) *Raja of Bobbili* v. *Suryanarayana*, (1919) 51 Ind Cas 805 (808, 811): 42 Mad 776: 1919 Mad W N 784: 37 Mad L Jour 274.

O.21, R.71, Notes 7—10.

bidder.[2] So also, it has been held that a bid lapses by too much delay in the acceptance thereof.[3] But a bid cannot be withdrawn after the property is knocked down to the bidder.[4] As to whether the Court's acceptance of the highest bid is necessary to complete the sale, *see* Notes to R. 84.

In an application under this rule, it is open to the auction-purchaser to raise any objections to the first sale which can be urged in an application to set aside a sale under O. 21,[5] because in such a case it is conceived his failure to complete the sale would be justified.

Irregularities in connection with the re-sale which are not shown to have been responsible for the comparative lowness of the price realised at the re-sale cannot be pleaded in defence to an application under this rule.[6]

8. **Where defaulting purchaser is merely an agent.**—A person who bids at a sale merely as an agent of another person is not liable under this rule.[1] *See* Contract Act, S. 230. But he will be liable if he bids without informing the officer conducting the sale that he is acting as agent of another. *See* Contract Act, S. 230. In such a case the mere fact that the *judgment-debtor* knows that the bidder is acting as agent of another will not absolve him from liability. The reason is that in Court sales, the contract is between the bidder and the *Court* which acts by virtue of a statutory authority and not as the agent of either the decree-holder or of the judgment-debtor.[2] Where a person professes to bid as agent of another without the latter's authority, the latter is not liable under this rule[3] and the alleged agent is liable for damages.[4] *See* S. 235, Contract Act.

9. **Liability for interest on deficiency.**—The defaulting purchaser is not liable to pay interest on the deficiency in price.[1]

10. **Certificate.**—*A certificate* issued under this rule has the force and effect of a decree.[1] But the deficiency may be recovered even though the certificate referred to in the rule has not been issued.[2] An order passed to the

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(2) *Tularam* v. *Purnendra*, 1925 Cal 557 (558): 78 Ind Cas 710. But cf *Babu Singh* v. *Gurbaksh Singh*, 1928 Lah 249 (249): 107 Ind Cas 274.

(3) *Tularam Bhuttunia* v. *Purnendra Narain Rai*, 1925 Cal 557 (558): 78 Ind Cas 710.

(4) *Rajendra Prasad* v. *Upendranath*, (1915) 27 Ind Cas 805 (806): 21 Cal L Jour 174: 19 Cal W N 633.

(5) *Venkatachallamayya* v. *Nilakanta*, (1918) 43 Ind Cas 685 (695): 41 Mad 474: 23 Mad L Tim 9: 34 Mad L Jour 156: 7 Mad L W 159: 1918 Mad W N 121 [*Per* Kumaraswami Sastri, J]; *Bajrangi* v. *Ram Harakh*, 1929 Oudh 294 (295): 6 Oudh W N 407: 118 Ind Cas 833: 4 Luck 684 [Fraudulent suppression of encumbrances at both the sales—Purchaser not liable under R 71]. See also *Venkataraman* v. *Mahabaleswar*, 1931 Bom 367 (368): 33 Bom L R 750: 134 Ind Cas 692.

(6) *Sankaranarayana* v. *Gangammal*, 1925 Mad 631 (633): 21 Mad L W 232: 87 Ind Cas 1.

Note 8.

(1) *Baboo Hureeram* v. *Hurpershad*, (1873) 20 Suth W R 397 (398) [Confirming judgment of Phear, J in 20 Suth W R 80 (82); *Vallabhan* v. *Pangunni*, (1889) 12 Mad 454 (457).

(2) *Kanthamma* v. *Manchiraju Reddipantulu*, 1924 Mad 476 (477): 46 Mad L Jour 134: 19 Mad L W 197: 1924 Mad W N 122: 78 Ind Cas 296: 34 Mad L Tim 358.

(3) *Joobraj Singh* v. *Gour Buksh*, (1867) 7 Suth W R 110 (111).

(4) *Baboo Huree Ram* v. *Hur Pershad*, (1873) 20 Suth W R 397 (398).

Note 9.

(1) *Sooraj Buksh* v. *Sree Kishen*, (1868) 9 Suth W R 500 (501); *Kanthamma* v. *Manchiraju Reddi Pantulu*, 1924 Mad 476 (478): 46 Mad L Jour 134: 19 Mad L W 197: 1924 Mad W N 122: 78 Ind Cas 296: 34 Mad L Tim 858 [Interest payable from date of order under this rule]; *Kameshwar Narain Singh* v. *Harbans Babui*, (1919) 50 Ind Cas 59 (65): 1919 Pat H C C 210.

Note 10.

(1) *Tapeswri Lal* v. *Deoki Nandan Rai*, (1897) 19 All 22 (25): 1896 All W N 168; *Sita Ram* v. *Janki Ram*, 1922 All 200 (201): 44 All 266: 20 All L J 105: 65 Ind Cas 813 F B.

(2) *Kameshwar Narain* v. *Harbans Babu*, (1919) 50 Ind Cas 59 (62, 64): 1919 Pat H C C 210; *Amir Baksha* v. *Venkatachala*, (1895) 18

effect that the auction-purchaser is liable for the deficiency has the effect of a decree and can be attached as such, under O. 21, R. 53.[3] *See also* Note 16, *infra*. **O.21, R.71, Notes 10—13.**

11. Rateable distribution.—Money realised from the defaulting purchaser under this rule is "assets" within the meaning of S. 73, and is liable to rateable distribution.[1]

12. Nature of defaulting purchaser's liability for deficiency.—*See* Note 13 below.

13. Suit for deficiency on re-sale—Whether maintainable.—It has been seen in Note 62 to S. 9, *ante* that where two remedies are available under the law, one must not be taken as operating in derogation of the other, but that this general rule is subject to the qualification that where a right is *created by statute* and a method of enforcing the right, or of redressing the grievance caused in the exercise or enforcement of the right, is pointed by the statute creating such right, the general remedy of suit will be impliedly barred. The question, therefore, whether the right to claim deficiency from a defaulting purchaser can be enforced by suit depends upon the question whether such right is a *common law right* or a right *created by the statute*. It was held in the undermentioned case[1] of the Bombay High Court that the right to recover the deficiency under this rule is one *created by the statute* relating to the procedure, but the question in that case did not arise as to the maintainability of a separate suit to recover such deficiency. In a later case,[2] however, the same High Court has expressed the opinion that but for this rule a suit would have to be filed to recover such deficiency and that this rule enables the party aggrieved to make an *application* for that purpose. It would seem to follow from this that the remedy under this rule is only an alternative remedy which does not bar a separate suit. In *Amir Bakhsha* v. *Venkatachala*[3] an opinion was expressed by the Madras High Court that a suit will not be maintainable in such a case. There was no discussion, however, of the principles and the question that actually arose in the case was not whether a suit would lie. But in the undermentioned case[4] Wallis, C. J., observed as follows:—"By his failure to complete his purchase the purchaser commits a breach of *contract* and is answerable in damages to the Court or the persons on whose behalf it sells, *viz.*, the decree-holder and the judgment-debtor". In *Sitaram* v. *Janaki Ram*[5] Mr. Justice Walsh of the Allahabad High Court expressed the view that the liability of the defaulting purchaser is *not a contractual liability* and that

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Mad 439 (442): 5 Mad L Jour 206; *Abdul Jabbar* v. *Sita Ram*, 1926 All 379 (381, 382): 24 All L J 385: 95 Ind Cas 1033 [*Per* Boys, J].

(3) *Abdul Jabbar* v. *Sita Ram*, 1926 All 379 (381, 382): 24 All L J 385: 95 Ind Cas 1033.

Note 11.

(1) *Sri Mahant Prayaga* v. *Raja of Kalahasti*, 1926 Mad 872 (873): 49 Mad 570: 97 Ind Cas 86.

Note 13.

(1) *Ganga Das* v. *Bai Suraj*, (1912) 14 Ind Cas 777 (779): 36 Bom 329: 14 Bom L R 250.

(2) *Rajacharya* v. *Chennamma*, 1921 Bom 229 (230): 45 Bom 223: 59 Ind Cas 192.

(3) (1895) 18 Mad 439 (442): 5 Mad L Jour 206.

(4) *Annarajhula Venkatachelamayya Garu* v. *Bangarjee Nilakanta Girjee*, (1918) 43 Ind Cas 685 (691): 41 Mad 474: 23 Mad L Tim 9: 34 Mad L Jour 156: 7 Mad L W 159: 1918 Mad W N 121.

(5) 1922 All 200 (203): 44 All 266: 20 All L J 105: 65 Ind Cas 813 F B.

O.21, R.71, Notes 13—16.

no suit would lie to enforce it. The Patna[6] and the Calcutta[7] High Courts have held that right to claim the deficiency is a common law right to recover the damages for a legal wrong done by the purchaser, that the R. 71 provides only a summary remedy for enforcing that right but that it does not bar the general remedy of suit. It is submitted that this last view is correct.

14. Insolvency proceedings.—The provisions of this rule apply to sales by the *Court* under the Provincial Insolvency Act so that where a re-sale is held owing to the first purchaser's default and a deficiency occurs on such re-sale, the deficiency is recoverable in execution.[1] But the rule does not apply to sales by the *Receiver* under that Act.[2]

15. Suit if lies to set aside order under this rule.—It has been seen that the position under this rule is, as if, a decree has been passed against the defaulting purchaser for the amount of the deficiency which the decree-holder or judgment-debtor is entitled to execute under the provisions of the Code relating to the execution of money-decrees. Hence, it follows that the remedy of a party aggrieved by an order under this rule is by way of appeal. (*See* N. 16, *infra*) and not by means of a separate suit to set aside the order.[1]

16. Appeal.—It is settled law that an appeal lies against an order deciding an application by a decree-holder or judgment-debtor under this rule against a defaulting auction-purchaser for the recovery of deficiency of price.[1] The reason is that inasmuch as this rule declares that the deficiency in price shall be recoverable from the defaulting purchaser under the provisions relating to the execution of decrees for the payment of money, the

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(6) *Kameswar Narain Singh* v. *Harbans Babu*, (1919) 50 Ind Cas 59 (64, 65): 1919 Pat H C C 210.

(7) *Raghu Ram* v. *Mohesh Chandra*, (1903) 7 Cal W N 111 (112) [Sale under Bengal Patni Regulation VIII of 1819]. See also *Baijnath Sahai* v. *Moheep Narain Singh*, (1889) 16 Cal 535 (538, 539): 13 Ind Jur 458 [Case not falling under R 71 as property had undergone changes due to natural causes—Suit maintainable].

Note 14.

(1) *Manakchand* v. *Ibrahim*, 1921 Nag 25 (26): 17 Nag L R 49: 62 Ind Cas 307.

(2) *Cheda Lal* v. *Lachman Prasad*, (1917) 37 Ind Cas 830 (831): 39 All 267: 15 All L J 253 [Walsh, J—Receiver may proceed against defaulter by way of a suit].

Note 15.

(1) *Nagappa* v. *Balkishandas*, 1927 Nag 112 (112): 23 Nag L R 14: 100 Ind Cas 691 [Dissenting from 12 Ind Cas 360 (361)]; *Sita Ram* v. *Janki Ram*, 1922 All 200 (208): 44 All 266: 20 All L J 105: 65 Ind Cas 813 F B [Walsh, J Semble]; *Mathura Pershad* v. *Kunwar Bahadur Singh*, 1925 Oudh 360 (361): 12 Oudh L J 80: 2 Oudh W N 141: 87 Ind Cas 264: 29 Oudh Cas 18; Cf *Tapeshri Lal* v. *Deoki Nandan Rai*, (1897) 19 All 22 (24): 1906 All W N 168 [This case should be deemed as overruled by 1922 All 200].

Note 16.

(1) *Sita Ram* v. *Janki Ram*, 1922 All 200 (202): 44 All 266: 20 All L J 105: 65 Ind Cas 813 F B; *Ramdial* v. *Ram Das*, (1875-78) 1 All 181 (190) F B; *Gangadas Daybhai* v. *Bai Suraj*, (1918) 14 Ind Cas 777 (778): 36 Bom 329: 14 Bom L R 250; *Rajendra* v. *Ramcharan*, (1898) 2 Cal W N 411 (412); *Kali Kishore Deb* v. *Guru Prosad Sukal*, (1898) 25 Cal 99 (100): 2 Cal W N 408; *Baijnath Sahai* v. *Moheep Narain*, (1889) 16 Cal 535 (538): 13 Ind Jur 458; *Joobraj Singh* v. *Goor Baksh Lal*, (1867) 7 W R 110 (111); *Baboo Sooruj* v. *Sreekishen Doss*, (1866) 6 Suth W R Mis 126 (127); *Sree Narain Mitter* v. *Maharaja Mahtab Chand*, (1865) 3 Suth W R 3 (3); *Babu Singh* v. *Gurbaksh Singh*, 1928 Lah 249 (249): 107 Ind Cas 274; *Amir Baksha* v. *Venkatachala*, (1895) 18 Mad 439 (442): 5 Mad L Jour 206; *Nagappa* v. *Balkisondas*, 1927 Nag 112 (112): 23 Nag L R 14: 100 Ind Cas 691; *Angnu* v. *Mahammad Sajjad Ali Khan*, 1925 Oudh 397 (397): 12 Oudh L J 261: 2 Oudh W N 212: 88 Ind Cas 151: 28 Oudh Cas 327; *Vallabhan* v. *Pangunni*, (1889) 12 Mad 454 (457) The following decisions of the Allahabad High Court must be regarded as not good law; *Illahi Baksh* v. *Baij Nath*, (1891) 13 All 569 (571): 1891 All W N 156; *Deoki Nandan* v. *Tapeshri Lal*, 1892 All W N 74 (76): 14 All 201; *Tapeshri Lal* v. *Deoki Nandan Rai*, 1890 All W N 89 (89); *Soudagarmal* v. *Abdul Rahman Khan*, 1890 All W N 85 (86): (Cf) *Rajah of Bobbili* v. *Akella Suryanarayana*, (1919) 51 Ind Cas 805 (809): 42 Mad 776: 1919 Mad W N 784: 37 Mad L Jour 274 [Order directing re-sale to be made at the risk of a certain person who denies he purchased the property at the first sale is not appealable]. Cf also *Rajendra Prosad Jha* v. *Upendra Nath Jha*, (1915) 27 Ind Cas 805 (805): 19 Cal W N 683: 21 Cal L Jour 174 [Order refusing to allow decree-holder to withdraw bid is not appealable].

rule relating to appeals must be applied *mutatis mutandis* equally with any other of those rules.[2] O.21, R.71, Note 16.

It has been held by the High Court of Bombay that no second appeal lies from an order determining an application under this rule, where the amount of deficiency does not exceed Rs. 500. The reason given is that no second appeal would have been maintainable if a decree had been actually passed for the deficiency in such a case and an order had been made determining an application for the execution of such decree.[3] But the Calcutta High Court has taken a contrary view.[4] It is submitted that the Bombay view is correct.

As to the *forum* of appeal *see* the undermentioned case.[5]

O.21, R.72

R. **72**. [S. 294.] (1) No holder of a decree in execution of which property is sold shall, without the express permission[2] of the Court, bid for or purchase the property.

Decree-holder not to bid for or buy property without permission.

(2) *Where* a decree-holder purchases with such permission[3], the purchase-money and the amount due on the decree[6] may, *subject to the provisions of section* 73, be set-off[5] against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

***Where* decree-holder purchases, amount of decree may be taken as payment.**

(3) *Where* a decree-holder purchases, by himself or through another person[8], without such permission[7], the Court may, if it thinks fit, on the application of the judgment-debtor or any other person *whose* interests *are affected by* the sale, by order set aside the sale[9]; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

[1877—S. 294. *Cf.* R. 84, O. 21.]

Local Amendments.

ALLAHABAD.

In sub-Rule (2) *for* the words "with such permission" *read* the words "property sold," and re-number this sub-Rule "72," and delete sub-Rules (1) and (3).

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(2) *Ram Dial* v. *Ram Das*, (1879-80) 1 All 181 (190) F B; *Sita Ram* v. *Janki Ram*, 1922 All 200 (202): 44 All 266: 20 All L J 105: 65 Ind Cas 813 F B. See also *Sree Mahant Prayaga Doss Varu* v. *Raja of Kalahasti*, 1926 Mad 872 (873, 874, 875): 49 Mad 570: 97 Ind Cas 86.

(3) *Rajacharya* v. *Chemanna*, 1921 Bom 229 (230): 45 Bom 223: 22 Bom L R 1193: 59 Ind Cas 192.

(4) *Rajendra Nath* v. *Ram Charan*, (1897) 2 Cal W N 411 (412).

(5) *Angnu* v. *Mohammad Sajjud Ali Khan*, 1925 Oudh 397 (397): 12 Oudh L J 261: 2 Oudh W N 212: 88 Ind Cas 131: 28 Oudh Cas 327 [Oudh Civil Courts Act, S 18—Claim under R 71 only Rs. 300 but value of suit exceeding Rs. 5,000—Appeal lies to the Judicial Commissioner and not to the District Judge].

O.21, R.72. **BOMBAY.**

After Rule 72 the following shall be inserted, namely:—

"72-A. If leave to bid is granted to the mortgagee of immoveable property, a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid."

N.-W. F. P.

For sub-Rule (1) of Rule 72 *substitute* the following:—

"72. (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for or purchase the property without express permission of the Court, provided that the Court may on application of the judgment-debtor and for sufficient cause debar him from so bidding or purchasing."

In sub-Rule (2) for the words "with such permission" substitute the words "the property."

Cancel sub-Rule (3).

OUDH.

For Rule 72 (1), *substitute* the following:—

"72 (1). The holder of a decree, in execution of which property is sold, shall be competent to bid for, or purchase, the property, provided that the judgment-debtor may, by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property; and the Court may, on such application, either debar the decree-holder from purchasing the property, or grant permission to do so on such terms as may seem just".

In sub-Rule (2) *for* the words "with such permission" *read* the words "the property sold."

Delete sub-Rule (3).

RANGOON.

In sub-Rule (2) of Rule 72 for the words "with such permission" the words "the property", shall be substituted.

Sub-Rules (1) and (3) of Rule 72 shall be cancelled, and the figure and brackets "(2)" occurring at the beginning of sub-Rule (2) shall be deleted.

Synopsis.

1. Legislative changes.
1-A. Applicability of rule.
2. Permission to bid.
3. "Where decree-holder purchases with such permission."
4. Leave obtained by misrepresentation.
5. Setting off decretal amount against purchase money.
6. Amount due on the decree.
7. Purchase without permission.
8. By himself or through another person.
9. The Court may, if it thinks fit, set aside the sale.
10. Separate suit, if lies to set aside sale without permission.
11. Judgment-debtor, if can raise the question of no permission in suit for possession, by decree-holder.
12. Interest.
13. Appeal.
14. Limitation and step-in-aid of execution.
15. Bombay rule 72-A.

Benami sales. See Note 8, Pts. (1) to (5).
Granting of leave subject to conditions. See Note 2, Pts. (5) to (9).
Persons entitled to object. See Note 7, Pt. (2); Note 9, Pt. (7) and Note 8, Pt. (1).
Persons prohibited under this rule. See Note 2, Pts. (1) to (4) and Note 8.

1. Legislative changes.—

The words "subject to the provisions of Section 73" in sub-Rule (2) did not appear in the corresponding section of the old Code. *See* Note 6 below.

(2) The words "if he so desires" which occurred in the old Code, have now been omitted.

1-A. Applicability of rule.—The holder of a decree for rent under the Bengal Tenancy Act (VIII of 1885)[1] or the Orissa Tenancy Act (II of 1913)[2] need not obtain permission of the Court under this rule. As to proceedings under Chota Nagpur Tenancy Act, *see* notes under R. 54, *ante*.

2. Permission to bid.—A decree-holder cannot, under this rule, purchase property sold in execution of his own decree, without the express permission of the executing Court.[1-a] But the prohibition under this rule applies only to the *decree-holder* and not to the judgment-debtor,[1] or to a holder of a decree other than that under which the sale is to take place.[2] An assignee of decree under an oral assignment has no *locus standi* to apply for execution and he is not the holder of a decree within the meaning of R. 72; hence, he need not obtain the permission of the Court under this rule.[2-4] The decree-holder cannot get round the condition imposed by this rule, by bidding jointly with a stranger[3] or by availing himself of the bid of another.[4]

Leave to bid should be very cautiously granted.[5] In granting such leave the Court can impose any fit and proper conditions for the purpose of safeguarding the interests of the judgment-debtor.[6] But the conditions imposed should not be too stringent,[7] and should not be construed too narrowly.[8] "The main question for the Court to consider is, whether

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Order 21, Rule 72—Note 1-A.

(1) *See* S 178 (1) of the Bengal Tenancy Act.

(2) *See* S 227 (1) of the Orissa Tenancy Act.

Note 2.

(1-a) *Bandu Roy* v. *Hanuman Singh*, (1869) 3 Beng L R A C 320 (320): 14 Suth W R 406 Note *Rukhinee* v. *Brojo Nath*, (1880) 5 Cal 308 (310). See also *Bank of Upper India* v. *Furmy Skinner*, 1927 All 681 (681, 682): 103 Ind Cas 293: 25 All L J 691 [Suit by liquidator of company—Decree in favour of liquidator—Execution—Permission to bid to be given by *executing Court* and not judge winding up].

(1) *Masudan* v. *Ram Gulam*, 1924 Pat 547 (549): 3 Pat 458: 5 Pat L Tim 447: 1924 Pat H C C 240: 78 Ind Cas 807: 3 Pat L R (Civ) 146.

(2) *Mg Chit Hlaing* v. *Firm, N A R M Chetty*, 1924 Rang 81 (82): 2 Bur L Jour 166: 79 Ind Cas 747.

(2-a) *Dakshina Mohan Roy* v. *Basumati Debi*, (1900) 4 Cal W N 474 (479).

(3) *Raj Kuer* v. *Chunnoolal*, (1912) 15 Ind Cas 888 (889): 16 Oudh Cas 86.

(4) See *Shahzadi* v. *Ahmad Ali Shah*, (1918) 47 Ind Cas 993 (993): 21 Oudh Cas 212.

(5) *Sheonath Dass* v. *Janki Prosad Singh*, (1889) 16 Cal 132 (137): 13 Ind Jur 262 [The Court must be satisfied that no purchaser at an adequate price can be found and that the sale proclamation has been duly published]; *Woopendro Nath* v. *Brojendra Nath*, (1881) 7 Cal 346 (347): 9 Cal L Rep 263: 4 Shom L R 188 [Where a decree-holder was joint in family with the manager of an infant defendant whose property was to be sold, the decree-holder should not be granted leave]. See also *Pria Nath* v. *Lakshmi*, 1925 Cal 1139 (1144): 42 Cal L Jour 100: 90 Ind Cas 835 [Decree-holder a trustee of property of judgment-debtor—His purchase of it in auction set aside in a suit as invalid].

(6) *Raj Kuer* v. *Chunnoo*, (1912) 15 Ind Cas 888 (889): 16 Oudh Cas 86 [*viz.*, that his lowest bid should be the amount of the decree]; *Jhaldhari Singh* v. *Pershad Bharti*, 1926 Pat 335 (336): 1926 Pat H C C 138: 95 Ind Cas 441 [Breach of such condition by the decree-holder in his bidding cannot invalidate sale to a third party making highest bid]. But see *Mangat Rai* v. *Babu Ram*, 1929 All 85 (85): 26 All L J 1325: 112 Ind Cas 620 [Court has no power to impose a condition as to minimum bid—A case after Allahabad High Court amendment under which no leave to bid is needed. *See* Local Amendments.

(7) *Motilal Parsharam* v. *Fulchand Baluram*, 1924 Bom 515 (516): 26 Bom L R 770: 83 Ind Cas 379 [Fixing too heavy an upset price for the decree-holder, *viz.*, at Rs. 40,000 when bid never rose above 5,000]; *Badri Sahu* v. *Peare Lal*, 1926 Pat 140 (141): 6 Pat L Tim 859: 92 Ind Cas 350: 1926 Pat H C C 137. (Do.).

(8) *Aditya* v. *Jagadish Prasad*, 1929 Oudh 26 (29): 5 Oudh W N 873: 4 Luck 93: 115 Ind Cas 105 [Sale in several lots—Leave to bid for not less than decree amount—Decree-holder not bound to bid *each lot* for such amount].

O.21. R.72, Notes 2—3.

it is to the advantage of everyone concerned, in order to obtain the highest price, that the plaintiff should be allowed to bid or not''.[9]

The principle of this rule governs also sales held by Collector under the Code.[10] But where the Collector is empowered, under rules, to grant only permission to bid, but not to order a set-off, the decree-holder desiring a set-off, should apply to the Court under this rule.[11]

Leave granted under this rule is binding on a superior Court acting under S. 63 of the Code.[12] Consequently sale proceeds validly set-off against the decretal amount cannot be ordered to be refunded and sent to the superior Court. *See* Note 8 to S. 63.

Where a decree-holder filed a petition asking for permission to bid, and no order was passed thereon, but the decree-holder was allowed to bid throughout the course of the sale, it was held by the High Court of Patna that it can be taken that the Court gave the required permission inasmuch as the failure to pass an order in writing was a mistake of the Court.[13]

Where the decree-holder is the receiver of the property sold in execution, permission obtained under O. 21, R. 72 without informing the Court that he is such receiver is not enough. A sale in his favour under such circumstances is liable to be set aside.[14]

3. **"Where decree-holder purchases with such permission.**—Leave to bid puts a decree-holder in the same position as an independent purchaser and the judgment-debtor is not entitled to demand a higher standard of fairness from the former than from the latter.[1] A decree-holder-purchaser accordingly is not bound to disclose circumstances within his knowledge and bearing on the sale any more than an independent purchaser.[2] The principle is the same with regard to the decree-holder-purchaser in a mortgage suit also. He does not stand in any fiduciary position to the mortgagor.[3] He is entitled to credit

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(9) *Rayhavachariar* v. *Murugesa Mudali*, 1923 Mad 635 (636): 44 Mad L Jour 680: 17 Mad L W 750: 32 Mad L Tim 285: 1923 Mad W N 323: 72 Ind Cas 545: 46 Mad 583 [Non-disclosure of the fact by the decree-holder that in a previous auction the property was valued at a high figure and that there was no dispute about title of judgment-debtor, held not to affect the question of *leave to bid*].

(10) *Rakmini* v. *Munni Lal*, 1887 All W N 214 (215).

(11) *Martand Trimbak Gadre* v. *Daya Apaji Phatak*, (1920) 55 Ind Cas 527 (527, 528): 44 Bom 346: 22 Bom L R 106 [Collector forbidden by Rules in Bombay from granting leave to *set-off*]. See also *Shrinivas* v. *Jagadevappa*, (1918) 46 Ind Cas 653 (654): 42 Bom 621: 20 Bom L R 708 [Where under Rules in Bombay the Collector was given power to grant leave to bid, held that the Civil Court had no such power].

(12) *Shidappa* v. *Gurusangaya*, 1931 Bom 350 (353, 354): 33 Bom L R 537: 55 Bom 473: 133 Ind Cas 817.

(13) *Murlidhar Khetan* v. *Nawab Saiyad Muhammad*, 1927 Pat 312 (312): 6 Pat 482: 104 Ind Cas 215: 8 Pat L Tim 796.

(14) *Jiteswari Dasi* v. *Sudha Krishna Mukherjee*, 1932 Cal 672 (673, 674): 36 Cal W N 125: 55 Cal L Jour 85: 59 Cal 956: 139 Ind Cas 186; Following *Nugent* v. *Nugent*, (1908) 1 Ch 546.

Note 3.

(1) *Mahomad Mira Ravuthar* v. *Savasi*, (1900) 23 Mad 227 (233): 27 Ind App 17: 4 Cal W N 228: 10 Mad L Jour 1: 2 Bom L R 640: 7 Sar 661 P C; *Dakshina Mohan* v. *Basumati*, (1900) 4 Cal W N 474 (476). But see *Woopendro Nath* v. *Brojendra Nath*, (1881) 7 Cal 346 (347): 9 Cal L Rep 263: 4 Shome L R 188 [The observation in this case that a decree-holder purchaser is bound to exercise the most scrupulous fairness has been held by the Privy Council in 23 Mad 227 to be too sweeping in its terms].

(2) *Mahomed Mira Ravuthar* v. *Savasi*, (1900) 23 Mad 227 (237): 27 Ind App 17: 4 Cal W N 228: 10 Mad L Jour 1: 2 Bom L R 640: 7 Sar 661 P C [Non-disclosure of an agreement that decree-holder on purchase will convey property to third person for a specified amount and of an arrangement to dissuade bidders held not fraud under O 21, R 90]; *Satish Chandra* v. *Porter*, (1909) 1 Ind Cas 158 (160): 36 Cal 226: 9 Cal L Jour 244: 13 Cal W N 18: 4 Mad L Tim 421, (Do.).

(3) *Mahabir Pershad* v. *Macnaughten*, (1889) 16 Cal 682 (692): 16 Ind App 107: 5 Sar 345: 13 Ind Jur 133 P C [Rents due to the mortgagor judgment-debtor out of the mortgaged property in the hands of the mortgagee cannot be claimed as

the judgment-debtor only with the purchase-money at the auction and not the real market value of the property and may proceed to execute for the balance, if any, of the decree-amount.[4] O.21, R.72, Notes 3—5.

4. Leave obtained by misrepresentation.—The Court has an inherent power to refuse to allow a sale to be confirmed if it is satisfied that the Court has been misled in granting leave to the decree-holder to bid.[1] But allegations of fraud of this character must be specific and the issue must be decided on a trial.[2]

5. Setting off decretal amount against purchase-money.—For the sake of convenience, sub-R. 2 allows the decree-holder, ordinarily, to set-off the purchase-money against his decree instead of paying the money into Court and drawing it out again. But this fact does not alter the substantial nature of the transaction, and the nominal receipt of the sale-proceeds, in cases where set-off is allowed, must be held to amount to the holding of assets by the Court, where the rights of rival decree-holders to share in such proceeds are concerned.[1] Sub-R. (2) accordingly provides that the right to set-off is subject to any claims for rateable distribution under S. 73 of the Code.[2] The claims of rateable distribution in such cases must, however, have been made before the conclusion of the sale inasmuch as on the date of the sale, the assets would be deemed to have been realised by the Court.[3] If, however, the amount of the bid exceeds the decree-amount, the claims under S. 73 may be made before the realisation of the excess amount by the Court.[4] Where the decree-holder-purchaser who is liable to share rateably with rival decree-holders in the sale proceeds fails to furnish the proportionate amount to the Court for distribution, a refund may be enforced by a summary process in execution instead of in a separate suit.[5]

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set off against the purchaser by the mortgagee in execution of his mortgage-decree]: *Sheonath Doss* v. *Janki Prosad Singh*, (1889) 16 Cal 132 (136): 13 Ind Jur 262; *Gunga Pershad* v. *Jawahir Singh*, (1892) 19 Cal 4 (7). See also *Fakiraya* v. *Gadigaya*, (1899) 26 Bom 88 (102): 3 Bom L R 628.

(4) *Muhammad Hussein Ali Khan* v. *Tukur Dharam Singh*, (1896) 18 All 31 (33): 1895 All W N 144; *Sheo Nath Doss* v. *Janki Prosad*, (1889) 16 Cal 132 (136): 13 Ind Jur 262 (11 Cal 718 Dist); *Gunga Prasad* v. *Jawahir Singh*, (1892) 19 Cal 4 (7) (11 Cal 781 Diss). But see *Hart* v. *Tara Prasanna Mukerji*, (1885) 11 Cal 718 (730).

Note 4.

(1) *Mt Janakbati* v. *Rameshwar Singh*, 1922 Pat 511 (514): 1 Pat 235: 69 Ind Cas 872: 1 Pat L R 179 [Leave obtained on mis-statement of a material fact]. See *Raghavachariar* v. *Murugesa Mudali*, 1923 Mad 635 (636): 44 Mad L Jour 680: 17 Mad L W 750: 32 Mad L Tim 285: 1923 Mad W N 823: 72 Ind Cas 545: 46 Mad 583.

(2) *Md Mira Rowther* v. *Savasi Vijaya Raghunatha Gopalar*, (1900) 23 Mad 227 (238): 27 Ind App 17: 4 Cal W N 228: 10 Mad L Jour 1: 2 Bom L R 640: 7 Sar 661 P C.

Note 5.

(1) *Navajbhavdu* v. *Totaram*, 1931 Bom 252 (254, 255): 33 Bom L R 503: 133 Ind Cas 737; *Shrinivas* v. *Radhabai*, (1881-82) 6 Bom 570 (571); *Madden* v. *Chappani*, (1888) 11 Mad 356 (358).

(2) *Bijoy Kumar* v. *Ramanath*, (1918) 43 Ind Cas 715 (717) Cal; *Toponidi Hordanund* v. *Mathura Lal*, (1886) 12 Cal 499 (504); *Arunachallam Chetty* v. *Somasundaram Chetty*, (1921) 59 Ind Cas 86 (86): 12 Mad L W 328; *Viraraghava* v. *Varada Ayyangar*, (1882) 5 Mad 123 (124): 6 Ind Jur 301. See also *Sorabji* v. *Govinda*, (1892) 16 Bom 91 (102).

(3) *Mohan Lal* v. *Amar Nath*, 1925 Oudh 287 (288): 80 Ind Cas 40: 1 Oudh W N 729 [Assets deemed to be realised on date of *sale* though order to set off made later]; *Ramaraju* v. *Lakshmiah*, 1931 Mad 103 (105): 1930 Mad W N 568: 130 Ind Cas 458 [Assets deemed to be realised on date of sale though set off ordered *before* sale]; *Naraj Bhavdu* v. *Totaram*, 1931 Bom 252 (254, 255): 33 Bom L R 503: 133 Ind Cas 787. (Do.) [Per *Broomfield*—Order for a set-off can be properly made only after sale—An order before sale futile and misleading]; *Rajani Kanta Sutradhar* v. *Surendra Mohan Ray*, 1930 Cal 761 (762): 52 Cal L Jour 19: 129 Ind Cas 776 [Application under S 73 may be in a Court of a higher grade].

(4) See *Ramaraju* v. *Lakshmiah*, 1931 Mad 103 (105): 1930 Mad W N 568: 130 Ind Cas 458.

(5) *Bijoy Kumar* v. *Rama Nath*, (1918) 43 Ind Cas 715 (717) Cal; *Madden* v. *Chappani*, (1888) 11 Mad 356 (359); *Bindeshwari Narain* v. *Kirtyanand*, 1931 Pat 359 (360): 12 Pat L Tim 177: 133 Ind Cas 166: 10 Pat 830; *Ganga Ram* v. *Muktiram*, 1931 Pat 405 (407, 408): 12 Pat L Tim 639: 134 Ind Cas 616 [32 Mad 334: 6 Bom 570 foll].

O.21, R.72, Notes 5—8.

Under this rule, no order of Court is necessary prior to sale granting permission to set-off.[6] An application for set-off may be made even after fifteen days after sale.[7]

Where permission to bid has been granted on condition that there should be no set-off, the Court cannot subsequently allow a set-off.[8]

As to the exemption from making the deposit into Court, of purchase-money by a decree-holder-purchaser, *see* O. 21, Rr. 84 and 85 and notes thereon.

6. **Amount due on the decree.**—Where a decree-holder is allowed to purchase the property ordered to be sold on condition that he would purchase it in full satisfaction of the decree, he is not entitled to recover from the judgment-debtor any money that he, as a decree-holder, has to pay by way of poundage.[1]

7. **Purchase without permission.**—Although the leave of the Court is a condition precedent to the decree-holder bidding for, or purchasing the property, a purchase by him without such permission is not *ipso facto* void. It is valid until set aside in the manner provided by sub-R. 3.[1] A stranger or a person other than such as is specified in sub-R. (3), has no right to apply to have such a sale set aside.[2]

8. **By himself or through another person.**—A purchase by the decree-holder through another person on his behalf is not void, but is only voidable at the instance of the judgment-debtor or any other person interested in the sale.[1] But where a decree-holder was *refused* permission to bid, a purchase by him *benami* in the name of another was held to be an *abuse of process of Court*, and the sale was held invalid.[2] Similarly a purchase by the decree-holder in the name of another for a price lower than that at which the decree-holder was allowed permission to bid, was held liable to be set aside for

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(6) *Firm Mathura Das* v. *Brij Rani*, 1929 Lah 492 (493): 116 Ind Cas 212.

(7) See also *Badamo* v. *Sarju Parshad*, (1900) 3 Oudh Cas 240 (241).

(8) *Hazarimal Fakirchand* v. *Namdev Rakhmaji*, (1908) 32 Bom 379 (381): 10 Bom L R 296.

Note 6.

(1) *Mt Purnama Devi* v. *Ram Persad*, 1929 All 266 (266): 1929 All L J 243: 118 Ind Cas 378.

Note 7.

(1) *Rai Radha Krishna* v. *Bisheswar Sahay*, 1922 P C 336 (338): 16 Mad L W 190: 3 Pat L Tim 529: 31 Mad L Tim 209: 67 Ind Cas 914: 49 Ind App 312: 1 Pat 733: 21 All L J 23: 27 Cal W N 294: 44 Mad L Jour 718: 37 Cal L Jour 430: 25 Bom L R 630 P C [Refusal of leave on application is on same footing as want of any application for leave]; *Surajman Debi* v. *Charan*, 1882 All W N 26 (26) [Such a sale would be valid as against a trespasser]; *Ganesh Narain* v. *Gopal Vishnu*, (1917) 39 Ind Cas 3 (5): 41 Bom 357: 19 Bom L R 75 [Want of permission only an irregularity]; *Mathura Das* v. *Nathuni Lall*, (1885) 11 Cal 731 (732), (Do.); *Hari Govind* v. *Ramachandra*, (1907) 31 Bom 61 (66): 8 Bom L R 873; *Chintamanrav* v. *Vithabhai*, (1887) 11 Bom 588 (590); *Javeherbai* v. *Haribhai*, (1881) 5 Bom 575 (577): 6 Ind Jur 98; *Moti Lal Adikhari* v. *Ramdoyal Das*, (1909) 1 Ind Cas 645 (646) Cal; In the matter of *Veerappa Chetty*, (1870) 14 Suth W R 405 (408); *Marimuthu Udayan* v. *Subbaraya Pillai*, (1909) 13 Mad L Jour 231 (235); *Paramasiva* v. *Krishna*, (1891) 14 Mad 498 (501): 1 Mad L Jour 752. See however, *Rukhinee Ballabh* v. *Brojo Nath*, (1880) 5 Cal 308 (310) [Sale without express leave is invalid].

(2) *Gadadhar Ghose* v. *Midnapur Zamindari*, (1912) 17 Ind Cas 126 (126): 16 Cal L Jour 141.

Note 8.

(1) *Ramachandra Vithal Bhat* v. *Gajanan Narayan Deshmukh*, (1920) 56 Ind Cas 349 (351): 44 Bom 352: 22 Bom L R 296; *Martand Balakrishna* v. *Dhondo Damodar*, (1898) 22 Bom 624 (628); *Lakshman* v. *Shidu*, (1888) Bom P J 99 (100); *Gopal* v. *Ram Lal*, (1894) 21 Cal 554 (561). See *Sara Dindu Chakravarthi* v. *Gosta Behari Pramanik*, 1923 Cal 302 (302): 27 Cal W N 208: 37 Cal L Jour 403: 75 Ind Cas 196. See *Thathu Naick* v. *Kondu Reddi*, (1909) 1 Ind Cas 221 (224, 225): 32 Mad 242: 5 Mad L Tim 248.

(2) *Mahomed Gazee* v. *Ram Loll Sen*, (1884) 10 Cal 757 (760): 8 Ind Jur 677 [Suit by decree-holder-purchaser for possession, successfully resisted on ground of the abuse of the process of the Court].

fraud.[3] A purchase by the decree-holder's undivided son,[4] or undivided brother,[5] is presumably with joint funds and as such the purchase is for the decree-holder. A purchase by the decree-holder's pleader for himself is not invalid.[6]

9. The Court may, if it thinks fit, set aside the sale.—A purchase by the decree-holder in contravention of this rule being only voidable, it is within the discretion of the Court to set aside the sale on an application under sub-R. 3.[1] Where the conduct of the decree-holder in purchasing the property amounts to fraud,[2] or to an abuse of the process of the Court,[3] the sale will be set aside. Where the purchase was *benami* and for an inadequate price, the burden of proving that the sale is to be upheld is clearly on the decree-holder and it will not be a valid ground of objection that the judgment-debtor did not plead fraud or substantial injury.[4] In order that a sale may be set aside under this rule on account of the decree-holder's failure to obtain permission to bid it is not necessary to find that the judgment-debtor sustained substantial loss by the sale.[5]

An application to set aside a sale, under sub-R. 3, can only be made by the judgment-debtor or any other person whose interests are affected by the sale. A decree-holder entitled to rateable distribution is a person whose interests are so affected but the sons of a judgment-debtor who were not parties to the suit and on whom the decree would not be binding are not persons interested in the sale.[6] The fact of the confirmation of the sale is no bar for setting it aside under sub-R. 3.[7]

See also Note 8 above.

10. Separate suit, if lies, to set aside sale without permission.—*See* Note 62 to S 47, *supra* and the cases cited thereunder.

11. Judgment-debtor, if can raise the question of no permission in suit for possession by decree-holder.—It has been held by the High Court of Madras that in a suit for possession by the decree-holder-purchaser who has taken the property in auction in contravention of the provisions of this rule, the judgment-debtor may raise the question of want of leave by way of answer to the plaintiff's claim under the sale; neither S. 47 nor the want of an application

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(3) *Srimati Sarat* v. *Nimai Charan*, (1901) 5 Cal W N 265 (268); *Thathu Naick* v. *Kondu Reddi*, (1909) 32 Mad 242 (258): 1 Ind Cas 221: 5 Mad L Tim 248. See *Raj Kuer* v. *Chunnu Lal*, (1912) 15 Ind Cas 888 (890): 16 Oudh Cas 86 [Decree-holder bidding jointly with stranger for lower price than allowed by Court].

(4) *Narayan* v. *Anaji*, (1880-81) 5 Bom 130 (131).

(5) *Anappa* v. *Jivai*, (1884) Bom P J 44 (45).

(6) *Kamakhya Dutt* v. *Shyam Lal*, 1929 Oudh 235 (237): 6 Oudh W N 226: 117 Ind Cas 471: 4 Luck 635 [*Semble*: Pleader so purchasing may be guilty of misconduct—Under rules].

Note 9.

(1) *Mathura Das* v. *Nathuni Lal*, (1885) 11 Cal 731 (782). See *Marimuthu Udayan* v. *Subbaraya Pillai*, (1903) 13 Mad L Jour 231 (235) [*Bona fide* purchaser from the decree-holder-purchaser—Restitution impracticable—Sale cannot be set aside].

(2) *Thathu Naick* v. *Kondu Reddy*, (1909) 32 Mad 242 (258): 1 Ind Cas 221: 5 Mad L Tim 248.

(3) *Mahomed Gazee* v. *Ram Lall*, (1884) 10 Cal 757 (760): 8 Ind Jur 677.

(4) *Thathu Naick* v. *Kondu Reddy*, (1909) 1 Ind Cas 221 (227): 32 Mad 242: 5 Mad L Tim 248.

(5) *Kondapalli Tatireddi* v. *Ramachandra Rao*, 1921 Mad 402 (402): 13 Mad L W 616: 1921 Mad W N 535: 62 Ind Cas 854.

(6) *Marimuthu Udayan* v. *Subbaraya Pillai*, (1903) 13 Mad L Jour 231 (234).

(7) *Thathu* v. *Kondu*, (1909) 1 Ind Cas 221 (227): 32 Mad 242: 5 Mad L Tim 248.

O.21, R.72, Notes 11—15.

under sub-R. 3 being a bar thereto.[1]

12. Interest.—A decree is not satisfied until the sale in execution of it is confirmed,[1] and the decree-holder is entitled to claim interest, if the decree awards it, between the date of sale and the date of its confirmation.[2]

13. Appeal.—Under O. 43, R. 1 (*j*) an appeal lies from an order setting aside or refusing to set aside a sale under this rule.[1] But there is no right of second appeal.[2] But an order granting,[3] or refusing,[4] *leave to bid* to the decree-holder is not appealable.

14. Limitation and step-in-aid of execution.—The effect of a decree-holder purchasing at an execution sale without the leave of the Court is to render the sale voidable and not void. Consequently a suit to set aside the sale under Art. 12 (*a*) of the Limitation Act must be brought within one year of confirmation of sale.[1]

On the question whether an application for leave to bid is a step-in-aid of execution, *see* Art. 182 (5) of the Limitation Act and the undermentioned cases.[2]

15. Bombay R. 72-A.—Rule 72-A passed by the Bombay High Court, as it originally stood, embodied a mandatory provision for fixing, in the case of a mortgagee decree-holder applying for leave to bid, a reserve price of not less than the amount of the principal, interest and costs due under the decree. It was, accordingly, held[1] that an execution sale to the mortgagee decree-holder without fixing the reserve price aforesaid and for less than the decree-amount was vitiated by material irregularity. The rule has since been amended giving power to the Court to dispense, if it thinks fit, with the condition relating to the reserve price.

It has been held that R. 72-A has no application to the Original Side of the High Court of Bombay and a mortgagee decree-holder purchasing for less than his decree-amount is entitled to recover the balance from the mortgagor or otherwise.[2]

Note 11.

(1) *Thathu* v. *Kondu*, (1909) 32 Mad 242 (244, 245, 252): 1 Ind Cas 221: 5 Mad L Tim 248 [*Abdul Rahim, J* dissenting].

Note 12.

(1) *Ganesh* v. *Purushotham*, (1909) 1 Ind Cas 106 (107): 33 Bom 311: 5 Mad L Tim 228: 11 Bom L R 26.

(2) *Khalil-ur-Rahman* v. *Gokul Chand*, (1919) 50 Ind Cas 772 (773): 41 All 526: 17 All L J 617.

Note 13.

(1) *Makka* v. *Sri Ram*, (1902) 24 All 108 (111): 1901 All W N 169; *Jodoonath* v. *Brojomohun*, (1886) 13 Cal 174 (174). See *Durga Sundari Devi* v. *Govinda Chandra Addy*, (1884) 10 Cal 368 (372) [*Obiter*].

(2) *Bhagbutt Lall* v. *Narku Roy*, (1894) 21 Cal 789 (791); *Mahabir Sahu* v. *Bhrigu Rai*, (1915) 28 Ind Cas 270 (270): 13 All L J 351.

(3) *Bachini Kuar* v. *Charu Chunder*, 1883 All W N 104 (104); *Ulaganatha Mudaliar* v. *Malaveldu Alagappa Mudaliar*, 1929 Mad 903 (905): 122 Ind Cas 161.

(4) *Ko Tha Hnyin* v. *Ma Hnyini*, (1911) 11 Ind Cas 545 (545): 38 Cal 717: 38 Ind App 126: 15 Cal W N 862: (1911) 2 Mad W N 449: 8 All L J 1117: 13 Bom L R 694: 14 Cal L Jour 241: 6 L B R 26: 4 Bur L Tim 257 P C; *Jodoonath* v. *Brojo Mohun*, (1886) 13 Cal 174 (174); *Mutlia* v. *Appasami*, (1890) 13 Mad 504 (507).

Note 14.

(1) *Chinnakannu Padayachi* v. *Paramasivaiya Mudaliar*, 1927 Mad 1185 (1186): 101 Ind Cas 89.

(2) *Dalel Singh* v. *Umrao Singh*, (1900) 22 All 399 (401): 1900 All W N 129 (Yes); *Bansi* v. *Sikree*, (1891) 13 All 211 (213): 1890 All W N 230 (Yes); *Vinayakarao Gopal* v. *Vinayak Krishna*, (1897) 21 Bom 331 (332, 333) (Yes); *Salig Ram* v. *Rai Chand*, (1912) 14 Ind Cas 468 (469): 60 Pun Re 1912: 55 Pun W R 1912: 62 Pun L R 1912 (Yes); *Jogendra* v. *Oshutosh*, (1917) 37 Ind Cas 738 (740): 24 Cal L Jour 462 (No); *Raghunundan* v. *Kally Dut*, (1896) 23 Cal 690 (692) (No); *Ananda Mohun* v. *Hara Sundari*, (1896) 23 Cal 196 (199) (No).

Note 15.

(1) *Mahomed Abdulla* v. *Sakharam Habajat Mistry*, 1930 Bom 290 (291): 32 Bom L R 436: 54 Bom 348: 125 Ind Cas 908.

(2) *Varajlal Jivandas* v. *Venkataswamy Lingaya*, 1928 Bom 123 (128): 30 Bom L R 402: 108 Ind Cas 794: 52 Bom 459 [Even if R. 72-A should apply to Original Side the confirmation of sale for lesser amount being unchallenged, *held*, that balance could be otherwise recovered].

R. **73.** [S. 292.] No officer *or other person* having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in *the* property sold.

Restriction on bidding or purchase by officers.

O.21, R.73, Notes 1—3.

[1877—S. 292.]

Synopsis.

1. Legislative changes.
2. "No officer or other person."
3. Transfer of Property Act, S. 136.

Pleader or his clerk—Not governed by this rule—Yet unprofessional to bid. See Note 2, Pts. (1), (1-b) and (2) to (4).

1. Legislative changes.—

The words "or other person" are new.

2. "No officer or other person."—The introduction of the words "or other person" in the present rule extends the scope of the prohibition in the rule to all those, besides officers, who have anything to do with the machinery of the sale or have, directly or indirectly, any interest in the result of the sale.[1] A pleader engaged by a party to a suit[1-a] or the pleader's clerk[1-b] cannot be said to have a duty to perform in connection with the sale and is not therefore within the prohibition, and the introduction of the words "or other person" in the new Code does not change the law in this respect.[2] Judicial opinion has, however, been uniform that the conduct of a pleader engaged in the suit, in purchasing the property for himself, is open to grave censure, especially when the purchase is detrimental to the interests of his client.[3] In fact, the pleader will be guilty of professional misconduct in such cases.[4] *See also* Note 3 below.

3. Transfer of Property Act, Section 136.—Under S. 136 of the Transfer of Property Act (IV of 1882), as it originally stood, "no judge, pleader, muktar, clerk, bailiff or other officer connected with Courts of justice can buy any *actionable claim falling under the jurisdiction of the Court in which he exercises his functions*".[1] The section as it now stands is wider in its scope

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Order 21, Rule 73—Note 2.

(1) *Shiam Lal* v. *Girraj Kishore*, 1927 All 76 (77): 99 Ind Cas 443: 25 All L J 173: 49 All 202.

(1-a) *Alagirisami* v. *Ramanathan*, (1886) 10 Mad 111 (112); *Subbarayudu* v. *Kotayya*, (1892) 15 Mad 389 (398): 2 Mad L Jour 166.

(1-b) *Shiam Lal* v. *Girraj Kishore*, 1927 All 76 (77): 99 Ind Cas 443: 25 All L J 173: 49 All 202.

(2) *Kamakhya Dutt Ram* v. *Shyam Lal*, 1929 Oudh 235 (237): 6 Oudh W N 226: 117 Ind Cas 471: 4 Luck 635. But see *Sunderabai* v. *Bapuna*, 1929 Nag 305 (309, 311): 116 Ind Cas 65 [*Obiter*].

(3) *Ghoshain* v. *Chingunlal*, (1870) 2 N W P H C R 46 (46); *Nundeeput* v. *A S Urquhart*, (1870) 13 Suth W R 209 (214): 4 Beng L R A C 181 [Judgment-debtor's pleader joining decree-holder in purchasing at Court sale]; *Wajid Hossein* v. *Hafiz Ahmed*, (1872) 17 Suth W R 480 (483). (Do.); *Aghore Nath* v. *Ram Churn*, (1896) 23 Cal 805 (817); *Har Prasad Singh*, In the matter of, (1912) 17 Ind Cas 539 (540) F B [See also cases in foot-notes (1-b) and (2)].

(4) In the matter of *Har Prasad Singh, Vakil*, (1912) 17 Ind Cas 539 (539, 540) [Allahabad High Court—R 25, Cl 15, High Court Rules and R 37, Cl 21 of Civil Courts Rules]; *Jug Roop Geer* v. *Chingun Lal*, (1870) 2 N W P H C 46 (46) [Circular orders of the N W P].

Note 3.

(1) *Singaracharlu* v. *Sivabai*, (1888) 11 Mad 498 ((499): *Rathnasami* v. *Subramania*, (1888) 11 Mad 56 (61).

O.21, R.73, Note 3. and prohibits such a purchase, whether the claim is within the jurisdiction of the Court with which the judge, pleader or other persons referred to is connected, or of any other Court.[2]

SALE OF MOVEABLE PROPERTY.

O.21, R.74, Note 1. *Sale of agricultural produce.*

R. **74**. [New.] (1) *Where the property to be sold is agricultural produce, the sale shall be held,—*

(a) if such produce is a growing crop, on or near the land on which such crop has grown, or,

(b) if such produce has been cut or gathered, at or near the threshing floor or place for treading out grain or the like or fodder-stack on or in which it is deposited:

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) *Where, on the produce being put up for sale,—*

(a) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day, the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

[*See* R. 75 below and S. 61 also.]

Synopsis.

1. Place of sale.

1. Place of sale.—This rule makes special provision for the sale of agricultural produce. In other cases of moveable properties attached in execution, sales should ordinarily be held in some place within the jurisdiction of the Court ordering the sale.[1] Where certain ornaments were attached in Belgaum and the judgment-debtor urged that they should be directed to be sold at Bombay on the ground that they would probably fetch a better price and it was found by the Court that a fair price could be had on the spot, it was held that there was no good and sufficient reason to depart from the usual practice.[2]

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(2) See *Harilal* v. *Tripura*, (1913) 19 Ind Cas 129 (129, 137): 40 Cal 650: 17 Cal W N 679: 17 Cal L Jour 438; F B.

Order 21, Rule 74—Note 1.

(1) *Lakshmibai* v. *Santapa*, (1889) 13 Bom 22 (25).

(2) *Lakshmibai* v. *Santapa*, (1889) 13 Bom 22 (25).

R. **75.** [New.] (1) *Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.* O.21, R.75.

Special provisions relating to growing crops.

(2) *Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.*

[*See* R. 74 above.]

Local Amendments.

LAHORE.

In sub-Rule (2) after the word "stored" the following words were inserted:—
"or can be sold to great advantage in an unripe state, such as green wheat or gram."

NAGPUR.

In sub-Rule (2) of Rule 75 *after* the words "being stored" *insert* the words "or, where it appears to the Court that the crop can be sold to greater advantage in an unripe state."

N-W. F. P.

In sub-Rule (2) of Rule 75 *after* the words "being stored" *add* the words "or can be sold to greater advantage in an unripe state, such as green wheat or gram."

OUDH.

In Rule 75 (2) *after* the words "being stored" *insert* the words "or where it appears to the Court that the crop can be sold to greater advantage in an unripe state".

R. **76.** [S. 296.] *Where* the property to be sold *is* a negotiable instrument or a share in *a* corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker. O.21, R.76, Note 1.

Negotiable instruments and shares in *corporations*.

[1877—S. 296; 1859—S. 248. *See* R. 80 below.]

Synopsis.

1. **May.**

1. **May.**—The rule is only permissive. A Court is not *bound* to authorise the sale of a negotiable instrument or a share in a corporation through a broker.[1]

Order 21, Rule 76—Note 1.
(1) *Luchmeput* v. *Lekraj*, (1867) 8 Suth W R 415 (419, 420).

O. 21, R. 77, Notes 1—4.

R. **77**. [S. 297.] (1) *Where* moveable property *is sold by public auction* the price of each lot shall be paid at the time of sale or as soon after as the officer *or other person* holding the sale directs, and in default of payment the property shall forthwith be *re*-sold.

Sale by public auction.

(2) On payment of the purchase-money, the officer or *other person* holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) *Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.*

[1877—S. 297; 1859—S. 251. *See* R. 71 above and R. 88 below.]

Synopsis.

1. Sale of moveable property.
2. Payment of price.
3. Re-sale and applicability of R. 71.
4. Sub-R. 3.

Default of payment—Effect. See Note 3, Pt. (1).

1. Sale of moveable property.—A sale of arms by a Nazir of the Court in execution of a decree is a sale by a public servant in the discharge of his duty and is therefore excluded from the operation of the Indian Arms Act, (XI of 1878) by S. 1, Cl. (*b*) of that Act.[1]

2. Payment of price.—Though sales should be conducted strictly according to this rule, still where, in execution of a decree for a large amount, the decree-holder purchased some moveable property of small value without the leave of the Court and filed into Court a receipt setting off the amount towards his decree, it was held in the undermentioned case that it might be treated as a cash payment.[1]

This rule gives the officer conducting the sale a discretion to allow the purchase-money to be paid at a reasonable time after the sale.[2]

3. Re-sale and applicability of R. 71.—A purchaser who has defaulted in the payment of price is liable, under R. 71, *ante*, for any loss which may happen on a re-sale.[1]

4. Sub-Rule 3.—Sub-Rule 3 is new and is framed on the analogy of R. 88, *infra* which relates to sales of immoveable properties.

Order 21, Rule 77—Note 1.

(1) *Wala Hiraji* v. *Hira*, (1885) 9 Bom 518 (519).

(2) *Shah Fareed* v. *Sheo Charun*, (1872) 4 N W P H C R 87.

Note 2.

(1) *Indro Narain Deb* v. *Gobind Chunder Dhur*, (1871) 15 Suth W R 368 (368).

Note 3.

(1) *Ramdhani* v. *Rajrani*, (1881) 7 Cal 337 (339): 9 Cal L R 23.

O.21, R.78, Note 1.

R. **78**. [S. 298.] No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

Irregularity not to vitiate sale, but any person injured may sue.

[1877—S. 298; 1859—S. 252. *See* R. 77. *Cf.* R. 90 below.]

Synopsis.

1. Irregularity in publishing and conducting sale of moveable property.
2. Person injured may, however, sue for compensation.
3. Money-decree is not moveable property.

"At the hand of any other person." See Note 1, Pt. (4) and Note 2, Pt. (1).

What are not irregularities. See Note 2. F.-N. (1).

Scope of rule. See Note 1.

1. Irregularity in publishing and conducting sale of moveable property.—R. 77, *ante* provides that on payment of the purchase-money the sale of *moveable* property shall become absolute.[1] This rule provides that a sale of *moveable* property in execution of a decree cannot be set aside on the ground of irregularity in publishing or conducting the sale.[1-a] But it does not provide that a sale of moveable property shall in no case be set aside. Thus, if there is an *express* assertion in the proclamation of sale that the goods sold are the property of the judgment-debtor then the purchaser, if he has not got that for which he paid the price, is entitled to have the sale set aside and to recover the purchase-money from the hands of the Sheriff or the execution creditor.[2] Where a judgment-debtor died after the issue of the sale proclamation and before sale and the sale was held without bringing on record his legal representatives it was held that it was not a case of mere irregularity but that the sale was void and could be set aside under S. 47.[3]

In a sale of moveable property in execution of a decree, there is no warranty of title and all that is sold is the right, title and interest of the

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Order 21, Rule 78—Note 1.

(1) *Dharm Singh* v. *Ram Bheja Mal Amar Nath*, 1930 Lah 236 (236): 30 Pun L R 421: 115 Ind Cas 70 [An order confirming a sale is not appealable as O 43, R 1 does not apply].

(1-a) *Sheo Nath* v. *Giani*, 1930 Lah 513 (513): 128 Ind Cas 529: 11 Lah 449: 12 Lah L Jour 134: 31 Pun L R 484; *Nanakchand* v. *Chheda Lal*, 1927 All 41 (43): 97 Ind Cas 467; *Ramji Lal* v. *Ram Chand Dwarka Das*, 1929 Notes 12 (a): 119 Ind Cas 285 (a); *Baijnath* v. *Benoyendra Nath*, (1902) 6 Cal W N 5 (6) [Rule 90 does not apply]; *Dharm Singh* v. *Ram Bheja Mal Amar Nath*, 1930 Lah 236 (236): 30 Pun L R 421: 115 Ind Cas 70; *Hukam Chand* v. *Ganga Ram*, (1919) 49 Ind Cas 140 (141): 12 Pun Re 1919.

(2) *Framji* v. *Hormasji*, (1878) 2 Bom 258 (266): 2 Ind Jur 643 [Though there is no provision corresponding to R 93 purchase money can be recovered back under General Principles of Law]. See *Maung Tun* v. *Ma Ngan*, (1909) 3 Ind Cas 672 (677, 679): 5 L B R 58 [In the absence of such assertion or fraud purchaser can't recover price from Decree-holder].

(3) *Graves* v. *Administrator-General of Madras*, (1899) 22 Mad 119 (128): 8 Mad L Jour 288.

O.21, R.78, Notes 1—3.

judgment-debtor. The right, title and interest of the real owner remain unaffected and he is, therefore, entitled to recover the property or damages.[4]

2. Person injured may, however, sue for compensation.—Any person sustaining any injury by reason of an irregularity in conducting or publishing the sale may sue the person by whom the injury was caused, for compensation.[1]

Though this rule would enable a judgment-debtor also to sue for compensation, it must be read with S. 47 which bars a separate suit regarding any question arising between the parties in execution.[2]

3. Money decree is not moveable property.—A money decree is not moveable property within the meaning of this rule and therefore where such a decree is sold contrary to the procedure laid down in R. 53, *ante*, the sale can be set aside on the ground of irregularities in the conduct of the sale.[1]

O.21, R.79.

R. 79. [Ss. 299, 300, 301.] (1) *Where* the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

Delivery of moveable property, *debts and shares.*

(2) *Where* the property sold is moveable property *in* the possession of some person other *than* the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) *Where* the property sold is a debt not secured by a negotiable instrument, or is a share in *a corporation*, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager,

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(4) *Sham Sunder* v. *Raheem Buksh*, (1874) 6 N W P H C R 252; *Hirdey Bibee* v. *Besheshar Pershad*, (1867) 2 Agra H C R 375; *Mohanund* v. *Akial*, (1868) 9 Suth W R 118 (119); *Kanaye Pershad* v. *Hur Chand*, (1870) 14 Suth W R 120 (120): 5 Beng L R App 71 [Suit against Decree-holder for value liable even though he had sold in good faith]; *Maung Pa* v. *Abdul Ganni*, 1926 Rang 214 (215): 4 Rang 202: 97 Ind Cas 1029. See also *Sharafat-un-Nissa* v. *Lachmi Narain*, (1875) 7 N W P H C R 288 [Need not sue within one year].

Note 2.

(1) *Narayanan Chetty* v. *A K A M Annamalee Chetty*, (1902-03) U B R Vol II, Civ Pro 9 [Lien of a third party on the moveable destroyed by sale—Decree-holder liable to him for loss]; *Tukaram* v. *Deoji*, (1920) 54 Ind Cas 315 (316) Nag [Goods sold not answering to description sent by purchaser against decree-holder for damages. Held, entitled]; *Dharam Singh* v. *Ram Bheja Mal*, 1930 Lah 236 (236): 30 Pun L R 421: 115 Ind Cas 70. See *Romesh Chunder* v. *Jadub Chunder*, (1866) 6 Suth W R Civ Ref 14 (14) [Omission to serve notification of sale is not irregularity—No damages can be awarded]; *Kasee Nath* v. *Hullodhur*, (1865) 2 Suth W R 60 (61) [Omission to mention value is not irregularity]; *Luchmeeput* v. *Lekraj Raj*, (1867) 8 Suth W R 415 (420) [Omission to mention number, value, etc, of Government Promissory Notes is not such irregularity as would affect sale].

(2) *Atma Ram* v. *Gulab*, 1886 Pun Re No 14.

Note 3.

(1) *Maung Lun Bye* v. *Maung Po Nyun*, 1924 Rang 21 (21): 1 Rang 360: 2 Bur L J 151: 76 Ind Cas 679.

secretary or other proper officer of the *corporation* from permitting any such transfer or making any such payment to any person except the purchaser. O.21, R.79, Notes 1—3.

[1877—S. 299; 1859—Ss. 261, 266. *See* Rr. 43, 51 and 80. *Cf.* R. 95 below and R. 56 above.]

Synopsis.

1. Delivery of debts.
2. Shares.
3. Forms. See appendix E, Forms 32, 33 and 34.

Auction-purchaser of shares—Rights of. See Note 2, Pt. (2).

1. Delivery of debts.—Where a debt is sold, the method of delivery is, as provided in sub-R. 3, by a *prohibitory order* of the Court resembling that made on attachment and the purchaser cannot apply for possession under R. 95, *infra*.[1]

2. Shares.—Similarly in the case of sale of shares in a company, when an order is issued under sub-R. 3 there is nothing further to be done by the transferee or by the Court and the company also cannot permit the transfer of the shares to anybody else.[1]

What passes to the purchaser of shares at a Court sale is the right to the property and not an absolute *right to have the transfers registered*. Therefore the company has still a discretion to recognise such purchasers or not, as in the case of private purchasers.[2]

3. Forms.—*See* Appendix E, Forms Nos. 32, 33 and 34.

R. **80**. [S. 302.] (1) *Where* the *execution of a document or the* endorsement of the party in whose name a negotiable instrument or a share in *a corporation* is standing is required to transfer such *negotiable* instrument or share, the Judge *or such officer as he may appoint in this behalf* may execute such document *or make such endorsement as* may be necessary, *and such execution or endorsement shall have the same effect as an execution or endorsement by the party*. O.21, R.80.

Transfer of negotiable instruments and shares

(2) *Such* execution or endorsement *may* be in the following form, *namely* :—

Order 21, Rule 79—Note 1.

(1) *Sinna Pillai* v. *Karuppali Alla Pichai*, 1932 Mad 283 (284): 35 Mad L W 257: 1932 Mad W N 282: 138 Ind Cas 819. See also *M R R M Firm* v. *Uzan*, (1916) 35 Ind Cas 469 (470): 10 Bur L Tim 6.

Note 2.

(1) *Nagabhushanam* v. *Ramachandra Rao*, 1923 Mad 241 (245): 70 Ind Cas 659: 45 Mad 537: 42 Mad L Jour 449: 30 Mad L Tim 231: 15 Mad L W 470: 1922 Mad W N 331.

(2) *Mani Lal Brij Lal* v. *Gorden Spinning and Manufacturing Co. Ltd*, (1917) 37 Ind Cas 666 (669): 41 Bom 76: 18 Bom L R 982; *Nagbhushanam* v. *Ramachandra Rao*, 1923 Mad 241 (242): 42 Mad L Jour 449: 45 Mad 537: 15 Mad L W 470: 1922 Mad W N 331: 70 Ind Cas 659: 30 Mad L Tim 231. But see *Toolsee Doss Nundy* v. *East Indian Railway Company*, (1866) 1 Ind Jur N S 258.

O.21, R.80, Note 1.

A. B. by C. D., Judge of the Court of (or as the case may *be*), in a suit by E. F. against A. B.

(3) Until the transfer of such *negotiable* instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt, for the same; and any receipt *so* signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

[1877—S. 302; 1859—S. 267. *See* Rr. 34 & 51.]

Synopsis.

1. Execution of deed of transfer.

1. Execution of deed of transfer.—This rule is only permissive and, therefore, in order to effectuate the transfer of ownership of a share or of a negotiable instrument, a deed of transfer of the share or an endorsement of the negotiable instrument is not required by law.[1]

This rule also empowers a Court to cancel a previous endorsement made by the judgment-debtor in order to enable the auction-purchaser of a promissory-note to realise the amount due under it.[2]

O.21, R.81.

R. **81**. [S. 303.] In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

Vesting order in case of other property.

[1877—S. 303. *See* Rr. 74 to 77 and 79 and 80. *Cf.* Rr. 92 and 94.]

Local Amendment.

RANGOON.

The following shall be inserted as Rule 81-A:—

81-A. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

Sale of arms.

Order 21, Rule 80—Note 1.

(1) *Mohideen Pichai* v. *Tinnevelly Mills Co, Ltd*, 1928 Mad 571 (578): 1928 Mad W N 442: 28 Mad L W 932: 111 Ind Cas 225; *Kuthala Lingam* v. *Packiyam*, (1910) 8 Ind Cas 17 (17): 21 Mad L Jour 422: 1910 Mad W N 733: 8 Mad L Tim 448.

(2) *Netram* v. *Mudaliar*, (1911) 12 Ind Cas 918 (918): 4 Bur L Tim 188.

Synopsis.

1. Rights of mortgagee against purchaser.

O.21, R.81, Note 1.

1. Rights of mortgagee against purchaser.—A mortgagee of moveable property cannot follow the property in the hands of an auction purchaser.[1]

SALE OF IMMOVEABLE PROPERTY.

O.21, R.82, Note 1.

R. **82**. [S. 304.] Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

What Courts may order sales.

[1877—S. 304. *See* Ss. 7 (*a*) (*iii*), 8 and O. 50, (*a*) (*ii*), and O. 51, R. 1.]

Synopsis.

1 What Courts may order sales.

1. What Courts may order sales.—As to sale of immoveable property in execution of small cause decrees, *see* Note 10 to S. 39 and the undermentioned cases.[1]

As to execution against property outside a Court's jurisdiction, *see* Note 8 to S. 17. Note 6 to S. 38, and Note 7 to S. 39.

O.21, R.83.

R. **83**. [S. 305.] (1) *Where* an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that *the amount of the decree may be raised* by *the* mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale[2] of *the* property comprised in the order for sale *on such terms and* for such *period* as it thinks proper,[3] to enable him to raise the amount.

Postponement of sale to enable *judgment debtor* to raise amount of decree.

(2) In such case the Court shall grant a certificate[4] to the judgment-debtor *authorizing him*[2] within a period to be mentioned therein, and *notwithstanding anything contained in section* 64,[6] to make the proposed mortgage, lease or sale.

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, *but save*

Order 21, Rule 81—Note 1.

(1) *Nachiappa Chettiar* v. *Md Sabir Khan*, 1925 Rang 303 (304): 4 Bur L Jour 135: 92 Ind Cas 870.

Order 21, Rule 82—Note 1.

(1) *Natto Meah* v. *Nund Kance*, (1872) 17 Suth W R 309 (310, 311): 8 Beng L R 508 [Purchaser of immoveable property in execution of a small cause decree acquires no title]; *Nagireddi* v. *Ramanna*, (1884) 7 Mad 592 (594, 595): 8 Ind Jur 613.

O. 21, R. 83, Notes 1—2.

in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court.[5]

Provided also that no mortgage, lease or sale under this *rule* shall become absolute until it has been confirmed by the Court[7].

(3) *Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage*[10] *of, or charge on, such property.*

[1877—S. 305; 1859—S. 243.]

Synopsis.

1. Legislative changes.
2. Postponement of sale.
3. "For such period as it thinks proper."
4. Shall grant a certificate.
5. Shall be paid into Court.
6. Effect of private sale.
7. Confirmation of sale by Court.
8. Permission under S. 29 of the Guardians and Wards Act.
9. Rateable distribution.
10. Mortgage decrees—Sub-R. (3).
11. Appeal and Revision.

"Authorising him. See Note 6, Pt. (3), Note 2, Pt. (4).
"Notwithstanding anything contained in S. 64." See Note 6, Pt. (1).
Scope of rule. See Note 2.
"The amount of the decree may be raised." See Note 2, Pt. (2).

1. Legislative changes.—

(1) The words "save in so far as a decree-holder is entitled to set-off such money under the provisions of Rule 72" in the first proviso to sub-Rule (2) have been newly added. *See also* similar saving clauses in Rules 84, sub-Rule (2) and 85, *infra*.

(2) Sub-Rule (3) is new. *See* Note 10, *infra*.

2. Postponement of sale.—A Court has to exercise its discretion in making an order for postponement of the sale to enable the judgment-debtor to raise money by private alienations.[1] It will not be exercising its discretion properly in making an order for postponement, where the judgment-debtor has had sufficient time to pay the decree-amount,[1-a] or where there is no sufficient reason to believe that the amount due under the decree could be raised by any of the methods mentioned in the rule.[2] Where the sale *has taken place* in execution of the decree, the executing Court has no power to grant an application under this rule and is bound to confirm the sale subject to the provisions of rule 92, *infra*.[3]

Order 21, Rule 83—Note 2.

(1) *N K R R M Chetty* v. *Subraya*, 1925 Rang 271 (272): 3 Rang 132: 89 Ind Cas 300; *Brojendar Narain Roy* v. *Kasaesur Roy*, (1864) 1 Suth W R Mis 15 (15).

(1-a) *Koralal* v. *Punjab National Bank, Ltd.* 1921 Lah 384 (385): 5 Lah L Jour 67: 55 Ind Cas 816: 118 Pun L R 1920: 2 U P L R (Lah) 91.

(2) *Baboo Luchime Narain* v. *Baboo Bhyroo Pershad*, (1866) 1 Agra Mis App 11; *Guruswamy* v. *Venkatasamy*, (1891) 14 Mad 277 (284): 1 Mad L Jour 220 [Cannot be postponed unless whole amount of decree can be raised]; *Chandkia Bakhsh* v. *Birj Behari Lal*, (1900) 8 Oudh Cases 42 (47); *Benarsi Das* v. *Gopi Chand*, 1924 Lah 132 (135): 5 Lah L Jour 279: 76 Ind Cas 529; *Luchmeeput* v. *Jugal Indur*, (1864) 1 Suth W R Mis 5 (5). See *Kishen Coomarie* v. *Golab Coomaree*, (1871) 15 Suth W R 477 (478).

(3) *Girdhari Lal* v. *Bhago*, (1907) Pun Re No 92: 152 Pun W R 1907; *Ghana Lal* v. *Pohlo Mal*, (1910) 7 Ind Cas 718 (719): 72 Pun Re 1910: 143 Pun L R 1910: 105 Pun W R 1910; *N K R R M Chetty Firm* v. *Subaraya Muda-*

This rule only authorises the Court to grant time to the judgment-debtor and does not give any authority to the Court to grant a lease or mortgage.[4]

This rule and Rr. 84 to 88 (inclusive) are applicable to proceedings under the Chota Nagpur Tenancy Act[5] but not to proceedings under the following Acts.[6]

3. "For such period as it thinks proper".—The postponement of the sale should be for a reasonable period and not unreasonably long.[1]

4. Shall grant a certificate.—It has been held by the High Court of Allahabad that a private sale by a judgment-debtor to whom a certificate under sub-R. 2 has not been granted does not convey such a title to the vendee as to entitle him to successfully maintain a suit for possession of the property against another similar purchaser.[1]

5. Shall be paid into Court.—Payment to the decree-holder's pleader under the orders of the Court is payment into Court, the pleader in such a case becoming the agent of the Court.[1]

6. Effect of private sale.—This rule qualifies the prohibition in S. 64 and on compliance with the conditions of this rule, a private alienation, notwithstanding S. 64 becomes absolute even against all claims enforceable under the attachment.[1] Thus, where on January 15, 1911, a Court granted a certificate to a judgment-debtor under this rule for private sale of his properties, and on January 1924 the properties were attached in execution of another decree, and on the 31st of January the Court confirmed the sale, the purchaser gets an absolute title and the subsequent attachment is of no avail.[2]

In authorising a sale under this rule, a Court cannot empower a judgment-debtor to transfer any higher interest than he has and bind the interests of others in the property.[3] A private alienation made after obtaining the sanction of the Court cannot affect a prior encumbrance already existing on the properties.[4]

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liar, 1925 Rang 271 (272): 3 Rang 132: 89 Ind Cas 300 [Executing Court refused—Appeal—Meanwhile, sale held—Appellate Court stayed confirmation of sale—Order held to be without jurisdiction].

(4) *Luchmeeput* v. *Jugut Indur*, (1864) Suth W R (Gap) Mis 5 (5).

(5) *See* S 210 (3) (*b*) of Bengal Act VI of 1908 as amended by Bihar and Orissa Act, VI of 1920 S 50 (1).

(6) Bengal Tenancy Act (VIII of 1885), *see* S. 148 (a) thereto; Orissa Tenancy Act (II of 1913), *see* S 198 (*a*) thereto; Madras Estates Land Act (I of 1908), *see* S 192 (*a*) thereto.

Note 3.

(1) *Gurusamy* v. *Venkatasamy*, (1891) 14 Mad 277 (280): 1 Mad L Jour 220; *Rednum* v. *Khaja Mahomed*, (1870) 5 Mad H C R 272; *Mohinee* v. *Ram Kant*, (1871) 15 Suth W R 322 (323) [Twenty years unreasonably long—Six months' time is reasonable]; *Ram Rattan* v. *Land Mortgage Bank*, (1872) 17 Suth W R 193 (194); *Suhaj* v. *Ram Pershad*, (1874) 21 Suth W R 146 (146).

Note 4.

(1) *Sri Lal* v. *Ballabh Shankar*, (1882) All W N 243 (244).

Note 5.

(1) *Miajan Ali* v. *Rupchandra Surma*, (1913) 21 Ind Cas 210 (211) Cal.

Note 6.

(1) *Shivlingappa* v. *Chanabasappa*, (1906) 30 Bom 337 (340): 8 Bom L R 16: 1 Mad L Tim 16.

(2) *Miajan Ali* v. *Rup Chandra Sarma*, (1913) 21 Ind Cas 210 (211) Cal.

(3) *Danappa* v. *Yamnappa*, (1902) 26 Bom 379 (383, 384): 4 Bom L R 61; *Ramayya Iyer* v. *Krishnachariar*, (1919) 52 Ind Cas 956 (956): 10 Mad L W 291: 26 Mad L Tim 151: 1919 Mad W N 611: 11 Mad L W 213.

(4) *Benarsi Das* v. *Gopi Chand*, 1924 Lah 132 (135): 5 Lah L Jour 270: 76 Ind Cas 529; *Adanki Teli* v. *Motichand*, (1912) 16 Ind Cas 102 (103): 9 All L J 759.

O.21, R.83, Notes 6—9.

An alienation effected by a judgment-debtor by virtue of a certificate granted under this rule is a private alienation, even though it does not become absolute unless it is confirmed by the Court and therefore it cannot be said that it is not liable to pre-emption under the provisions of the Punjab Pre-Emption Act (Act I of 1913).[5]

7. **Confirmation of sale by Court.**—If a sale under this rule is not confirmed and made absolute, it would not be operative against claims enforceable under the attachment, but would be defeasible to that extent.[1] Where the sanction for private sale has been granted by two Courts executing different decrees, it is enough if the sale is confirmed by one Court.[2]

It is not necessary that any formal application should be made for the purpose of obtaining the Court's confirmation of a private transfer, nor is there any provision under which a formal order declaring such confirmation should be recorded.[3] It has been held in the undermentioned case[4] that it is extremely doubtful whether a private sale under this rule comes within the purview of R. 92, *infra* and that, even if R. 92 governs this rule, there is no legal bar to the confirmation of a sale before the expiry of thirty days from the date of sale.

Where the approval of the Court has been obtained by mis-representation or by the withholding of the material information, the Court will treat such misrepresentation or withholding of information as a fraud and will refuse to give effect to the private transfer as against claims enforceable under the attachment.[5]

8. **Permission under S. 29 of the Guardians and Wards Act.**—Where the judgment-debtor is a minor for whom a guardian has been appointed under the Guardians and Wards Act 1890 the certificate of the executing Court is not sufficient to validate a transfer under this rule; it is also necessary that he should obtain the sanction of the Court that appointed him as guardian.[1] The reason is that the matter for inquiry under this rule is the protection of the execution-creditor, while under S. 29 of the Guardians and Wards Act the matter to be considered is the benefit of the Minor and therefore compliance with this rule should not render unnecessary the fulfilment of the requirements of S. 29 of the Guardians and Wards Act.

9. **Rateable distribution.**—Money paid into Court under sub-R. (2) is money-paid under a pending execution application and is therefore liable to rateable distribution under S. 73 *ante*.[1] Where property is attached at the

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(5) *Ahmed Din* v. *Kishen Chand*, (1919) 52 Ind Cas 337 (338): 93 Pun L R 1919: 73 Pun W R 1919: 1 Lah L Jour 101.

Note 7.

(1) *Shivalingappa* v. *Chenabasappa*, (1906) 30 Bom 337 (340): 8 Bom L R 16: 1 Mad L Tim 46; *Sri Lal* v. *Ballabh Shankar*, (1882) All W N 243 (244).

(2) *Andanapa* v. *Bhimrao*, (1895) 19 Bom 539 (544).

(3) *Miajan Ali* v. *Rup Chandra Sarma*, (1913) 21 Ind Cas 210 (211) Cal.

(4) *Miajan Ali* v. *Rup Chandra Sarma*, (1913) 21 Ind Cas 210 (211) (Cal).

(5) *Atma Ram* v. *Balakrishna*, (1905) 29 Bom 615 (620, 621): 7 Bom L R 653.

Note 8.

(1) *Sarju* v. *District Judge of Benares*, (1909) 31 All 378 (378): 6 All L J 491: 2 Ind Cas 356; *Dattaram* v. *Gangaram*, (1899) 23 Bom 287 (290); *Dijendra* v. *Manorama Dasi*, 1922 Cal 150 (151): 36 Cal L Jour 826: 49 Cal 911: 70 Ind Cas 990: 20 Cal W N 57.

Note 9.

(1) *Thiraviyam* v. *Lakshumana*, (1918) 47 Ind Cas 538 (539, 540): 41 Mad 616: 35 Mad L Jour 150: 1918 Mad W N 524; *Ramachandra* v. *Ramachandra*, (1883) Bom P J 82.

instance of several decree-holders, permission should not be granted under this rule to satisfy one of the decrees.[2] O.21, R.83, Notes 9—11.

10. Mortgage decree—Sub-R. 3.—This rule does not apply to cases in which property is directed to be sold in execution of decree on a mortgage.[1] The reason is that the creditor's right of sale rests on the mortgage decree, and not on the *attachment* in execution. The undermentioned cases[2] under the old Code holding that S. 305 corresponding to this rule, applied to mortgage decrees also are no longer law under this Code, in view of the specific enactment of sub-R. 3.

11. Appeal and revision.—No appeal lies against an order under this rule postponing or refusing to postpone a sale.[1] But the High Court may interfere in revision under S. 115 if the conditions of that section are satisfied.[2]

R. **84**. [S. 306.] (1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer *or other person* conducting the sale, and in default of such deposit, the property shall forthwith be re-sold. O.21, R.84.

Deposit by purchaser *and re sale on default.*

(2) *Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under rule* 72, *the Court may dispense with the requirements of this rule.*

[1877—S. 306; 1859—S. 253. *Cf.* Rule 77 ; *see* Rr. 71, 85 and 86.]

Local Amendment.

OUDH.

To Rule 84 (2), *add* the following:—

"The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets."

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(2) *Thiraviyam v. Lakshumanad*, (1918) 47 Ind Cas 538 (538): 41 Mad 616: 35 Mad L Jour 150: 1918 Mad W N 524.

Note 10.

(1) *Shyam Kishen v. Sunder Koer*, (1901) 31 Cal 373 (378); *Womda Khanum v. Raj Roop*, (1878) 3 Cal 335 (336): 1 Cal L Rep 295; *Kora Lal v. The Punjab National Bank, Ltd, Multan*, (1920) 55 Ind Cas 816 (817): 118 Pun L R 1920: 5 Lah L Jour 67: 2 U P L R (Lah) 91: 1921 Lah 384; *Kaveribhai Ammal v. Mehta & Sons*, 1924 Mad 234 (235): 46 Mad L Jour 71: 18 Mad L W 615: 1923 Mad W N 894: 75 Ind Cas 901; *Narasimmacharlu v. Pedda Ramayya*, (1896) 6 Mad L Jour 187 (188).

(2) *Krishnaji v. Mahadeb Vinayak*, (1901) 25 Bom 104 (106, 107): 2 Bom L R 635; *Chandika Bakhsh v. Brij Behari Lal*, (1900) 3 Oudh Cas 42 (47); *Udit Narain Singh v. Bagar Sajjad*, (1905) 2 All L J 853 (355) [So assumed].

Note 11.

(1) *Lachman Dass v. Sunder Das*, (1928) 109 Ind Cas 524: 1928 Notes 76 (*d*); *Kaveribai Ammal v. Mehta & Sons*, 1924 Mad 234 (235): 46 Mad L Jour 71: 18 Mad L W 615: 1923 Mad W N 894: 75 Ind Cas 901; *N K R R M Chetty v. Subraya*, 1925 Rang 271 (273): 3 Rang 132: 89 Ind Cas 300; *Bhoobun Moyee Dabea v. Mr A Mooty*, (1864) 1 Suth W R Mis 11 (11). But see *Baboo Bisram Singh v. Maharanee Inderjet Koonwar*, (1865) 2 Suth W R Mis 49 (50); *Chandika Baksh v. Brij Behari Lal*, (1900) 3 Oudh Cas 42 (43, 44) [Is a question under S 244, Now S 47].

(2) *N K R R M Chetty v. Subraya*, 1925 Rang 271 (273): 3 Rang 132: 89 Ind Cas 300.

O.21, R.84, Notes 1—2.

Synopsis.

1. "Declared to be purchaser."
2. Acceptance by Court if necessary for completion of sale.
3. Deposit, payment of.
4. Non-payment of deposit—Effect of.
5. Re-sale.
6. Sub-R. (2).
7. Interest.

Appeal. See R. 86, Note 4, Pt. (2).
Rateable distribution. See S. 73, Note 11, Pt. (13).
"Shall pay immediately." See Note 4, Pt. (1).
"The property shall forthwith be re-sold." See Note 5, Pts. (1), (2) and (4).

1. "Declared to be purchaser."—The person to be declared purchaser under this rule is the bidder whose bid has been accepted.[1] There is no sale till the bid has been accepted by the competent authority.[1-a]

A bidder can withdraw his bid at any time before the property is knocked down to him.[2] A bid lapses by a higher bid being made[3] or by extraordinary delay in accepting it.[4] As to whether the acceptance is to be by the Court or the officer conducting the sale, *see* Note 2, *infra*.

A person declared to be purchaser under this rule has, even before the confirmation of sale in his favour, sufficient interest in the property to prevent a forfeiture or preserve the title from destruction. Thus, where the property sold is the right of the judgment-debtor to obtain a re-conveyance of certain properties on paying a certain sum by a certain date, the person declared to be the purchaser under R. 84 can make a valid tender of such sum so as to prevent a forfeiture under the Clause.[5]

2. Acceptance by Court if necessary for completion of sale.—There is a conflict of opinion on this question and three different views have been expressed:—

(*a*) A Court sale is not complete till the highest bid is accepted by the *Court*, though the officer conducting the sale may have knocked down the property in favour of a particular person as being the highest bidder.[1]

Order 21, Rule 84—Note 1.

(1) See *Shah Zadi* v. *Ahmad Ali Shah*, (1918) 47 Ind Cas 993 (993): 21 Oudh Cas 212 [Bid of one cannot be treated as that of another and deposit received from latter—Sale to latter irregular and bad].

(1-a) *Munshi Lal* v. *Ram Narain*, (1912) 17 Ind Cas 783 (784): 35 All 65: 10 All L J 475; *Abdulla Khan* v. *Ganpat Rai*, 1930 Lah 41 (42): 118 Ind Cas 900; *Ronya* v. *Baliram*, 1928 Nag 111 (112): 106 Ind Cas 333.

(2) *Agra Bank* v. *Hamlin*, (1891) 14 Mad 235 (236); *Tularam* v. *Purnendra*, 1925 Cal 557 (558): 78 Ind Cas 710.

(3) *Rajah of Bobbili* v. *Akkela Suryanarayana Rao*, (1919) 51 Ind Cas 805 (808, 809, 810): 42 Mad 776: 37 Mad L Jour 274: 1919 Mad W N 784.

(4) *Tularam Bhutinia* v. *Purnendra Narain Rai Deb Varma*, 1925 Cal 557 (558): 78 Ind Cas 710.

(5) *Annavajhula Venkatachallamayya* v. *Ramagirjee Neelkantagirjee*, (1918) 43 Ind Cas 685 (696): 7 Mad L W 159: 23 Mad L Tim 9: 34 Mad L Jour 156: 1918 Mad W N 121: 41 Mad 474.

Note 2.

(1) *Rathnasamy Pillai* v. *Sabapathy Pillai*, 1925 Mad 318 (319): 82 Ind Cas 793 [Court can refuse bid of highest bidder though accepted by sale officer]; *Fazl Meah* v. *Prosanna Kumar*, 1923 Cal 316 (316): 68 Ind Cas 805 [Court can refuse bid though same has been accepted by sale officer]; *Surendra Mohan* v. *Manmathanath*, 1931 Cal 583 (584): 58 Cal 788: 134 Ind Cas 447, (Do.); *Ashutosh Chatterjee* v. *Sudhindra Chandra Moulik*, (1912) 13 Ind Cas 597 (597) Cal (Do.); *Ram Sakhi* v. *Radha Nath*, 1926 Cal 827 (828): 94 Ind Cas 46, (Do.); *Jaibhadar* v. *Matukdhari*, 1928 Pat 525 (527): 2 Pat 548: 76 Ind Cas 113: 4 Pat L Tim 498: 1923 Pat H C C 190 [Court can refuse bid of highest bidder though the same has been accepted by officer conducting sale and though deposit has been accepted by sale officer. Same rule applies whether sale is held in Court precints or outside]; *Fateh Mohammad* v. *Chuhar Mal*, 1928 Lah 699 (700) [Court may *accept* bid though refused by sale officer]; *Punjab National Bank, Ltd, Rawalpindi* v. *Sundar Singh*, 1929 Lah 673 (676): 118 Ind Cas 901 [Till acceptance by Court, purchaser not bound to pay deposit]; *Afazuddin* v. *Howell*, 1929 Rang 12 (13): 6 Rang 609: 114 Ind Cas 522 [Bid can be withdrawn at any time before acceptance by Court].

(*b*) The sale is complete as soon as the property is knocked down to the highest bidder by the officer conducting the sale.[2] O.21, R.84, Notes 2—4.

(*c*) The Court has a *quasi* revisional jurisdiction in the matter.[3] According to this view the sale is complete *as against the purchaser* as soon as the property is knocked down to him, and he cannot withdraw his bid thereafter, although the *Court* may, in its discretion, refuse to accept his bid and order a re-sale.

3. Deposit, payment of.—The payment of deposit under this rule cannot be insisted on before the property has been knocked down to the bidder.[1] But the officer conducting the sale may, if the circumstances justify such a course and in order to satisfy himself that he is a *bona fide* bidder, ask any bidder if he has the deposit money ready.[2] The deposit under this rule should be paid though no demand is made for it.[3]

4. Non-payment of deposit—Effect of.—The deposit under this rule must be made immediately after the purchaser is declared and must cover 25 per cent. of the purchase-money.[1] The officer conducting the sale has no authority to extend the time for the payment of the deposit.[2]

The failure to pay the deposit immediately as required by the rule, does not render the sale void but only amounts to irregularity within O. 21, R. 90.[3] But a Court has no power to sell a property to a purchaser who does not pay for it. Thus, where a decree-holder-purchaser does not pay the balance of the purchase-money after deducting the decretal amount, the sale to him is void even though it may be confirmed by the Court.[4]

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(2) *Nur Din* v. *Budaqi Mal & Sons*, 1931 Lah 78 (78): 131 Ind Cas 227 [Date of sale is date on which property was knocked down to the highest bidder]; *Maung Ohn Tin* v. *P R M P S R M Chettiar Firm*, 1929 Rang 311 (313): 7 Rang 425: 120 Ind Cas 142 [Bid cannot be withdrawn after sale officer has accepted the same]. See also *Jetha Mal* v. *Punjab and Sindh Bank*, 1932 Lah 525 (526): 138 Ind Cas 86: 33 Pun L R 644 [In the circumstances of the case, held that date of sale was date of acceptance by Court]. See also *Atma Singh* v. *Dunichand*, (1909) 1 Ind Cas 12 (12): 1 Pun W R 1909 [Where the sale officer *refers*, (though wrongly) the case to the Court for orders, the sale is not complete on the day of the auction].

(3) *Rajendra* v. *Upendra*, (1915) 27 Ind Cas 805 (806): 19 Cal W N 633: 21 Cal L Jour 174; *Mahommad Yacoob* v. *P L R M Firm*, 1932 Rang 17 (19): 9 Rang 608: 135 Ind Cas 651 [It will make a difference if there is a *rule of practice* that officer conducting sale shall not be entitled to accept bid].

Note 3.

(1) *Mohesh Narain* v. *Kishanund*, (1861-63) 9 Moo Ind App 324 (341): Marsh 592: 2 Ind Jur O S 1: 5 W R P C 7: 1 Suth 488: 1 Sar 862 P C; *Raman Chetty* v. *S M R M Olagappa Chetty*, (1903-04) 3 L B R 225 (226, 227).

(2) *Mohesh Narain* v. *Kishanund*, (1861-63) 9 Moo Ind App 324 (341): Marsh 592: 2 Ind Jur O S 1: 5 W R P C 7: 1 Suther 488: 1 Sar 862 P C. See also *Mohesh Chunder Mookerjee*, In re, 1864 Suth W R Mis (Gap) 3 (3) [Sham bidder would be liable for contempt of Court and also under S 228 of the Penal Code].

(3) *Raman Chetty* v. *S M R M Olagappa Chetty*, (1903-04) 3 L B R 225 (226-227).

Note 4.

(1) *Ali Muhammad* v. *Alia Khanum*, (1915) 30 Ind Cas 230 (231): 2 Oudh L J 216.

(2) *Ali Muhammad* v. *Alia Khanum*, (1915) 30 Ind Cas 230 (231): 2 Oudh L J 216; *Mahomad Ali* v. *Mahabir Prasad*, (1916) 35 Ind Cas 411 (414) All.

(3) *Ahmed Baksh* v. *Lalta Pershad*, (1906) 28 All 238 (239): 1905 All W N 263; *Bhim Singh* v. *Sarwan Singh*, (1889) 16 Cal 33 (38); *Gopal Singh* v. *Roy Bunwaree Lall Sahoo*, (1881) 5 Cal L Rep 181 (184, 187) [Irregularity may be waived]; *Mathra Das* v. *Brij Rani*, 1929 Lah 492 (493): 116 Ind Cas 212; *Parja Mal* v. *Mul Chand*, 1925 Lah 624 (625): 6 Lah 250: 94 Ind Cas 521; *Bihari Lal* v. *Ram Chand*, (1928) 110 Ind Cas 773: 1928 Notes 44 (*a*); *Fateh Mohammad* v. *Chuhar Mal*, 1928 Lah 699 (700); *Venkata* v. *Sama*, (1891) 14 Mad 227 (228); *Maung Chit Hlaing* v. *N A R M Chetty*, 1924 Rang 81 (82): 79 Ind Cas 747: 2 Bur L Jour 166; *Raman Chetty* v. *S M R M Olagappa Chetty*, (1903-1904) 3 L B R 225 (226, 227). See also *Sita Ram* v. *Janki Ram*, 1922 All 200 (201): 44 All 266: 65 Ind Cas 813: 20 All L J 105 [O 21, R 71 applies to re-sales for failure to pay deposit under R 84. This case should be held to overrule 5 All 316 (317) and 30 All 273 (278)]. See also *Javherbai* v. *Haribhai*, (1880-81) 5 Bom 575 (577): 6 Ind Jur 98 [O 21, R 71 applies to re-sales for failure to deposit under R 84].

(4) *Mahomed Ali Mia* v. *Kiberia Khatun*, (1911) 9 Ind Cas 66 (67): 15 Cal W N 350.

O.21, R.84, Notes 4—6.

An auction-purchaser who had not paid the deposit under the rule at all, professed to transfer the property to another and on the latter paying the purchase-money the Court confirmed the sale in his favour. It was held by the Judicial Commissioner's Court of Oudh that the Court had no power to recognise the transferee from an auction-purchaser who had not paid the deposit at all.[5]

It is also submitted that the remark in the undermentioned case[6] that the date of sale is the *date of deposit* is not correct. The date of sale is the date on which the bid is accepted by the proper authority. *See* Notes 1 and 2, *supra*.

5. **Re-sale.**—On the failure of a purchaser to deposit 25 per cent. of the purchase-money under this rule, the property should be re-sold.[1] The re-sale should be held "forthwith"[2] otherwise the defaulting purchaser will not be liable under R. 71, *ante* for the deficiency in price that may occur on such re-sale.[3] In a recent Full Bench case, the Madras High Court has held that "forthwith" in this rule means "as expeditiously as circumstances permit".[4] Rule 87, *infra* does not apply to a re-sale under this rule and a fresh proclamation is not necessary for such re-sale.[5] But, if in the circumstances of a particular case, the issue of a fresh sale proclamation is to the advantage of the defaulting purchaser, the fact that such proclamation was issued does not make the re-sale one not held "forthwith" within the meaning of this rule.[6]

The officer conducting the re-sale is not bound to commence it from the next highest bid below that made by the defaulter.[7] As to the procedure to be followed when objection is taken to the re-sale on the ground that the deposit was tendered but refused by the sale officer, *see* the undermentioned case.[8]

6. **Sub-R. (2).**—Sub-R. 2 is new.[1] It provides for the exemption of the decree-holder-purchaser with the Court's permission from making the deposit under this rule. The decree-holder-purchaser is not exempt in *every* case from making the deposit; the rule only gives the *Court* the power to

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(5) *Ali Muhammad* v. *Ali Khanum*, (1915) 30 Ind Cas 230 (231): 2 Oudh L J 216.

(6) *Khairan* v. *Alliance Bank of Simla*, (1919) 50 Ind Cas 914 (915) Lah.

Note 5.

(1) *Joobraj Singh* v. *Gour Buksh Lal*, (1867) 7 Suth W R 110 (111).

(2) *Bhim Singh* v. *Sarwan Singh*, (1889) 16 Cal 33 (38).

(3) *Babu Singh* v. *Gurbaksh Singh*, 1928 Lah 249 (249): 107 Ind Cas 274; *Amir Begam* v. *The Bank of Upper India, Limited*, (1908) 30 All 273 (278): 1908 A l W N 107: 5 All L J 236; *Hari Singh* v. *Chaudhri Sanwan Mal*, 1929 L h 744 (745): 121 Ind Cas 189; *Beli Ram* v. *Sohan Singh*, (1916) 32 Ind Cas 907 (908): 15 Pun W R 1916.

(4) *Venkatasubbiah* v. *Akkamma*, 1930 Mad 761 (762): 32 Mad L W 154: 1930 Mad W N 714: 59 Mad L Jour 267: 53 Mad 900: 127 Ind Cas 303 F B. See also *Kameshwar Narain* v. *Harbans*, (1919) 50 Ind Cas 59 (62): 1919 Pat H C C 210 [Sale held on the next day owing to the late hour. Held sale was held "forthwith" within the meaning of the rule].

(5) *Beli Ram* v. *Sohan Singh*, (1916) 32 Ind Cas 907 (908): 1916 Pun W R 45; *Rajendra Nath* v. *Ram Charan*, (1898) 2 Cal W N 411 (412); *Vallabhan* v. *Pangunni*, (1889) 12 Mad 454 (458).

(6) *Venkatasubbiah* v. *Akkamma*, 1930 Mad 761 (762): 32 Mad L W 154: 1930 Mad W N 714: 59 Mad L Jour 267: 53 Mad 900: 127 Ind Cas 303 F B.

(7) *Gour Mookh* v. *Lalla Gour Sunker*, (1864) 1 Suth W R Mis 11 (12).

(8) *Kuppayyan* v. *Ramasamy Ayyan*, (1883) 6 Mad 197 (199): 7 Ind Jur 246.

Note 6.

(1) Under old Code, even the decree-holder purchasing with the permission of the Court was not exempt from making the deposit—See the following cases:—*Atma Singh* v. *Duni Chand*, (1909) 1 Ind Cas 12 (12): 1 Pun W R 1909; *Gopal Singh* v. *Roy Bunwari Lal Sahoo*, (1880) 5 Cal L Rep 181 (187); *Khellat Chunder* v. *Keshub Chunder*, (1871) 16 Suth W R 46 (46). See *Chukoo Dut* v. *Leelanund*, (1864) Suth W R Mis (Gap) 30 (30).

exempt him from making the deposit. Hence the deposit *must* be made[2] unless dispensed with by the Court.[3] The dispensation may be express or implied.[4] **O.21, R.84, Notes 6—7.**

7. Interest.—Notwithstanding the deposit of 25 per cent. of the purchase-money under this rule, the decree-holder is entitled to interest on the *entire* decretal amount till the confirmation of the sale, because the decree-holder is not bound to withdraw the money before the sale is confirmed.[1]

Time for payment in full *of purchase-money.*

R. **85.** [S. 307.] The full amount of purchase-money *payable* shall *be paid* by the purchaser *into Court* before the Court closes on the fifteenth day *from* the sale of the property : **O.21 R.85, Notes 1—2.**

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

[1877—S. 307; 1859—S. 254. *See* R. 84.]

Synopsis.

1. Applicability of the rule.
2. "On the fifteenth day from the sale."
3. Where Court or office is closed on the fifteenth day.
4. Proviso.
5. Extension of time for payment—Material irregularity.

Money sent through post office by itself, not sufficient compliance. See Note 2, Pt. (3).

1. Applicability of the rule.—Where, on an execution sale being confirmed in appeal, the purchaser who had withdrawn the purchase-money on the sale being set aside in the lower Court, is ordered to re-pay it, the time limit of fifteen days provided by this rule does not apply.[1]

2. "On the fifteenth day from the sale."—In calculating the period of fifteen days, the day of sale should be excluded.[1]

Payment into Government Treasury is equivalent to payment into Court for the purposes of this rule.[2] But where the money is sent through the post

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(2) *Mathradas Prabhu Dayal* v. *Brij Rani*, 1929 Lah 492 (493): 116 Ind Cas 212. But see *Nur Din* v. *Bulaqi Mal & Sons*, 1931 Lah 78 (78): 131 Ind Cas 227 [When permission is accorded under O 21, R 72 to a decree-holder to bid for or purchase the property such permission impliedly dispenses with the deposit of the requisite 25 per cent].

(3) *Mathra Das* v. *Brij Rani*, 1929 Lah 492 (493): 116 Ind Cas 212.

(4) *Mathra Das* v. *Brij Rani*, 1929 Lah 492 (493): 116 Ind Cas 212 [Dispensation was inferred from the circumstances under which the permission to bid was granted].

Note 7.

(1) *Upendra Nath Chowdhury* v. *Bhudeb Chandra Roy Chowdhury*, (1914) 25 Ind Cas 859 (861) Cal.

Order 21, Rule 85—Note 1.

(1) *Shenbagamuthu Pillai* v. *Vaduganathan Chetty*, (1917) 42 Ind Cas 552 (553): 1917 Mad W N 861.

Note 2.

(1) *Amanee Begam* v. *Koorban Ali*, (1868) 3 Agra 204.

(2) *Srinivasa* v. *Malayachan*, (1884) 7 Mad 211 (212).

O.21, R.85, Notes 2—5.

office, it will not be sufficient compliance with this rule if it does not reach the Court in time, for the post office is not an agent of the Court.[3]

Where a purchaser tendered the balance of the purchase-money on the last day with the *chalan* to the officer of the Court for the signature of the judge and the *chalan* was returned only the next day when the amount was duly paid, it was held that it was sufficient compliance with the provisions of this rule.[4]

3. **Where Court or office is closed on the fifteenth day.**—If the Court and the office are closed on the fifteenth day from the sale on account of holiday, the purchaser can deposit the balance of purchase-money on the next re-opening day.[1]

4. **Proviso.**—Where a decree-holder is given permission to bid at the sale and set-off the amount towards his decree, then if the amount of the bid *minus* the poundage is less than the decree-amount, the whole of the amount must be deemed to have been received *co-instanti* the sale is made, and there is no necessity for the purchaser to pay into Court any amount.[1] But if the amount of the bid is greater than the decree-amount, he may be excused from depositing the twenty-five *per cent.* on the date of sale, but will have to deposit the balance within fifteen days from the sale.[2] Where a decree-holder is permitted to bid subject to certain conditions and those conditions are not fulfilled, the Court can, either under R. 86, *infra* or under its inherent powers, refuse to confirm the sale and may order a re-sale.[3]

5. **Extension of time for payment—Material irregularity.**—The time for the payment of the balance of the purchase money under this rule can be extended with the *consent* of all the parties concerned.[1] In the absence of such consent, the Court ought not to extend the time or accept a deposit made beyond time. But where the Court does so extend the time, it is only an irregularity within the meaning of R. 90, *infra* and does not render the sale a nullity.[2] And if, in such a case, the sale is confirmed and the money is drawn by the decree-holder without objection, the judgment-debtor must be taken to have waived the irregularity, and, the sale cannot be set aside by reason of such irregularity.[3]

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(3) *Ram Chandra* v. *Belya*, (1898) 22 Bom 179. 415 (416).

(4) *Bijoy Singh* v. *Kirtyanand Singh*, (1932) 13 Pat L Tim 559 (560).

Note 3.

(1) *Ari Chetty*, In re, (1903) 13 Mad L Jour 271 (272); *Sunderbai* v. *Bapuna*, 1929 Nag 305 (310): 116 Ind Cas 65 [Under S 10, General Clauses Act]; *Motiram* v. *Bhiraj*, (1896) 20 Bom 745 (746) [But if office is open on that day and money could be paid in, it must be done].

Note 4.

(1) *Ramaraju* v. *Lakshmiah*, 1931 Mad 103 (105): 1930 Mad W N 568: 130 Ind Cas 458; *Sahmun Mul* v. *Kanga Sabapathy*, (1893) 16 Mad 20 (21) [Order setting aside a sale in such cases is without jurisdiction]; *Badamo* v. *Sarju Parshad*, (1900) 3 Oudh Cas 240 (241).

(2) *Ramaraju* v. *Lakshmiah*, 1931 Mad 103 (105): 1930 Mad W N 568: 130 Ind Cas 458.

(3) *Janakbati* v. *Rameshwar*, 1922 Pat 511 (514): 1 Pat 235: 69 Ind Cas 872: 1 Pat L R

Note 5.

(1) *Radha Kishan* v. *Hari Singh*, 1927 Lah 337 (338): 100 Ind Cas 800.

(2) *Subramaniam Nambudri* v. *Vykunda Kammathi*, 1923 Mad 48 (49): 16 Mad L W 319: 43 Mad L Jour 477: 1922 Mad W N 707: 31 Mad L Tim 363: 69 Ind Cas 1001; *Nathu Mal* v. *Malawa Mal*, 1931 Lah 15 (16): 122 Ind Cas 561 [Court extended time in view of objections to sale—Court refused to set aside sale]; *Maung Ohit Hlaing* v. *N A R M Chetty*, 1924 Rang 81 (82): 2 Bur L Jour 166: 79 Ind Cas 747 [No loss caused to judgment-debtor]; *Brinda Debee* v. *Gopee Sundaree*, (1866) 6 Suth W R Mis 82 (83) [Under Code of 1859—No substantial injury —Acceptance of payment by Court after the period —Not an irregularity under S 256, now R 90].

(3) *Kalipada Mukerjee* v. *Basanta Kumar*, 1932 Cal 126 (130): 35 Cal W N 877: 59 Cal 117: 138 Ind Cas 177; *Subramanyam Nambudri* v. *Vykunda Kammathi*, 1923 Mad 48 (49): 16 Mad L W 319: 43 Mad L Jour 477: 1922 Mad W N 707: 31 Mad L Tim 363: 69 Ind Cas 1001.

0.21, R.86. Notes 1—2.

R. **86.** [S. 308.] In default of payment within the period mentioned in the last preceding *rule*, the deposit *may, if the Court thinks fit*, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

Procedure in default of payment.

[1877—S. 308; 1859—S. 254. *See* Rr. 71, 84 and 15. *Cf.* R. 77.]

Synopsis.

1. Scope of the rule.
2. Forfeiture of deposit.
3. Deficiency in re-sale.
4. Appeal.

1. Scope of the rule.—Where the auction-purchaser fails to pay into Court the balance of purchase-money as required by R. 85 it is the imperative duty of the Court to have the property re-sold.[1] Anyone who is interested in having the property re-sold may move the Court to do so; there is nothing to justify the view that the decree-holder alone can move the Court in the matter.[2]

The provisions of this rule do not apply to sales held in execution of decrees passed by the High Court of Calcutta in the exercise of its original jurisdiction, inasmuch as that Court has framed rules, under S. 129, regulating its own procedure.[3]

2. Forfeiture of deposit.—Under S. 308 of the old Code it was held that that section was imperative and that on default by the purchaser at a Court sale to deposit the purchase-money within fifteen days from the sale, the deposit made on the date of sale must be forfeited.[1] The word 'shall'' in the old section has been replaced by the words ''may, if the Court thinks fit''. Therefore, under this rule, the Court has got a discretion whether to forfeit the initial deposit or not.[2]

Where an auction-purchaser deposits a sum in excess of the twenty-five per cent. on the date of sale, the Court has got jurisdiction to forfeit only the twenty-five per cent.[3]

Order 21, Rule 86—Note 1.

(1) *Chitar Singh* v. *Lachmi Narain*, 1932 All 392 (393): 1932 All L J 501: 138 Ind Cas 103; *Ramendra Nath* v. *Hikait Kuer*, (1919) 51 Ind Cas 316 (317) Pat. But see *Bagwan Dube* v. *Anpurna Kunwar*, 1926 All 509 (509): 95 Ind Cas 46 [Submitted, it is erroneous].

(2) *Chitar Singh* v. *Lachmi Narain*, 1932 All 392 (393): 138 Ind Cas 103: 1932 All L J 501.

(3) *Gowal Das Sidany* v. *Luchmi Chand Jhawar*, 1930 Cal 324 (324, 325): 57 Cal 106: 125 Ind Cas 594. See also *Kanye Lal Das* v. *Shama Churn Dawn*, (1894) 21 Cal 566 (567) [Non-payment in time. Practice is to order interest on purchase money].

Note 2.

(1) *Sambasiva Ayyar* v. *Vydinadasami*, (1902) 25 Mad 535 (537) [Even though decree-holder and judgment-debtor do not ask for re-sale]; *Tulsigiriappa* v. *Fakirayya*, (1900) 2 Bom L R 901 (906) [Even though decree-holder purchaser and judgment-debtor adjust the matter].

(2) *Mathura Prasad* v. *Gauri Shankar Das*, (1910) 6 Ind Cas 564 (565): 32 All 380: 7 All L J 325 [Purchaser did not pay on notice of judgment-debtor's application to set aside sale—Sale set aside—Not forfeited]; *Ganpat Rao Mohitey* v. *Kesarichand*, 1921 Nag 120 (121): 17 Nag L R 15: 59 Ind Cas 705.

(3) *Mathura Prasad Pande* v. *Gauri Shanker Das*, (1910) 6 Ind Cas 564 (565): 32 All 380: 7 All L J 325.

Note 3.

(1) *Sitaram* v. *Janki Ram*, 1922 All 200 (201): 44 All 266: 20 All L J 105: 65 Ind Cas 813 F B; *Jacherbhai* v. *Haribhai*, (1881) 5 Bom 575 (577): 6 Ind Jur 98; *Ramdhani Sahai* v. *Rajrani Kooer*, (1881) 7 Cal 837 (839): 9 Cal L Rep 23;

O.21, R.86, Notes 3—4

3. Deficiency in re-sale.—Where there is any deficiency in the amount of purchase-money on a re-sale, the loss is recoverable from the defaulting purchaser under the provisions of R. 71, *ante*.[1]

4. Appeal.—No appeal lies against an order of forfeiture of the deposit of twenty-five per cent.[1] or against an order directing a re-sale.[2]

O.21, R 87, Note 1.

R. **87**. [S. 309.] Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh *proclamation* in the manner and for the period hereinbefore prescribed for the sale.

Notification on re-sale.

[1877—S. 309; 1859—S. 255. *See* Rr. 66 to 68 and 86 above.]

Synopsis.

1. Notification on re-sale.

1. Notification on re-sale.—This rule applies only to a re-sale under R. 86 and does not apply to a case where property is re-sold under R. 84, *ante*.[1]

Omission to mention the date of re-sale in its proper place in the sale proclamation is a material irregularity vitiating the sale.[2]

O.21, R.88.

R. **88**. [S. 310] *Where* the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively *bid* the same sum *for such property or for any lot, the bid* shall be deemed to be the *bid* of the co-sharer.

Bid of co sharer to have preference.

[1877—S. 310; 1861—S. 14. *Cf.* R. 77 (3), *supra*.]

Synopsis.

1. Scope and object of the rule.
2. Co-sharer.
3. Bid the same sum.
4. Duty of officer conducting the sale.
5. Suit for pre-emption.
6. Appeal.

Actual bid—Necessity of. See Note 3, Pt. (1).

"Share of undivided immoveable property." See Note 1.

Kameshwar Narain v. *Harbans*, (1919) 50 Ind Cas 59 (62): 1919 Pat H C C 210. See also *Ramagirji Neelakanta Girji* v. *Annavajihala Venkatachalam*, 1925 P C 61 (63): 48 Mad L Jour 335: 2 Oudh W N 308: 86 Ind Cas 873: 27 Bom L R 806: 22 Mad L W 1: 30 Cal W N 268 P C; [Decree-holder's application to attach deposit must be tried according to law].

Note 4.

(1) *Sawan Ram* v. *Maya Das*, 1891 Pun Re No 120.

(2) *Katori Kunjra* v. *Ajudhia Prasad*, (1920) 58 Ind Cas 597 (598): 2 U P L R (All) 81. See also *Basawan* v. *Anpurna*, 1926 All 509 (510): 95 Ind Cas 46.

Order 21, Rule 87—Note 1.

(1) *Rajendra Nath* v. *Ram Charan Sinha*, (1898) 2 Cal W N 411 (412); *Vallabhan* v. *Pangunni*, (1889) 12 Mad 454 (458).

(2) *Sankara Narayana Pillai* v. *Gangammal*, 1925 Mad 681 (683): 21 Mad L W 232: 87 Ind Cas 1.

O.21, R.88, Notes 1—4.

1. Scope and object of the rule.—The object of this rule is to enable co-sharers in undivided immoveable property to keep out strangers if they so desire.[1] The rule provides, in substance, that a co-sharer of the immoveable property of which a share is sold, is entitled to pre-empt that share when the highest bid is made by a *person who is not a co-sharer.*[2]

This rule does not apply where the property sold is not a share of undivided immoveable property, but the right and interest of a mortgagee in such a share.[3] Nor does it apply to land sold in execution of the decree of a Revenue Court.[4]

This rule is applicable to sales under the Chota Nagpur Tenancy Act, *see* R. 83. Notes, and is unaffected by the Agra Pre-emption Act (II of 1922, *see* S. 6), or by the Punjab Pre-emption Act [I of 1913, *see* S. 2 (2)].

2. Co-sharer.—There is no right of pre-emption in the case of involuntary sales except as provided in this rule and therefore a usufructuary mortgagee, not being a co-sharer, is not entitled to claim the benefit of this rule.[1] A defeasible, title to a share in immoveable property acquired by a person does not give him the right to pre-empt another share in the same property as a co-sharer.[2]

3. Bid the same sum.—In order to enable a co-sharer to claim the benefit of this rule, it is not enough if he merely asserts his claim and offers to pay, at the time the sale is knocked down, the sum equal to that bid by the stranger-purchaser: but he must make a distinct bid in the ordinary manner of offering bids.[1]

4. Duty of officer conducting the sale.—It is the duty of the officer conducting the sale to take notice of a claim of pre-emption made by a co-sharer under this rule and to receive the purchase-money, subject of course to any question which may be raised by any party interested in the sale as to the claimant's title to advance the claim.[1]

Where the claimant has deposited the purchase-money and fulfilled the conditions of sale so far as he is concerned, the sale is not defeasible by reason of the failure of the bidder to complete the deposit of the purchase-money.[2]

Order 21, Rule 88—Note 1.

(1) *Dambar Singh* v. *Murari Lal*, (1915) 26 Ind Cas 95 (96): 12 All L J 1148.

(2) *Dambar Singh* v. *Murari Lal*, (1915) 26 Ind Cas 95 (96): 12 All L J 1148 [Cannot pre-empt as against another co-sharer]; *Iqual Husain* v. *Ejaz Husain*, (1916) 36 Ind Cas 654 (655): 3 Oudh L J 405; *Ram Autar* v. *Shea Dutt*, (1874) 6 N W P H C R 243; *Gunga Ram* v. *Moolu*, (1870) 2 N W P H C R 200 [Where a co-sharer purchases in the name of a benamidar, another co-sharer is entitled to pre-empt the benamidar].

(3) *Jairam Das* v. *Beni Prasad*, (1881) 3 All 15 (17).

(4) *Narin Singh* v. *Muhammad Faruk*, (1876) 1 All 277 (278): 1 Ind Jur 269.

Note 2.

(1) *Vasudevan* v. *Ittirarichan Nair*, (1918) 45 Ind Cas 46 (49): 41 Mad 582: 34 Mad L Jour 412: 23 Mad L Tim 302: 1918 Mad W N 318: 7 Mad L W 547 F B; *Dwarka Parshad* v. *Ram Autar*, (1875) 7 N W P H C R 281.

(2) *M Abdul Ghafur* v. *Ghulam Hussain*, (1913) 18 Ind Cas 959 (960): 35 All 296: 11 All L J 297. See also *Kampta Prasad* v. *Mohan Bhagat*, (1909) 3 Ind Cas 782 (784): 32 All 45: 6 All L J 966.

Note 3.

(1) *Sri Krishen* v. *Debi Ram*, 1888 All W N 208 (209); *Hira* v. *Unas Ali Khan*, (1881) 3 All 827 (828): 1881 All W N 86; *Tej Singh* v. *Gobind Singh*, (1878-80) 2 All 850 (851); *Mahabal Singh* v. *Abdul Majid Khan*, (1898) 18 All W N 115 (115) [Bid does not include offer after the sale]; *Damodar* v. *Vishnu*, 1881 Bom P J 50. See also *Abdul Juleel* v. *Khellat Chunder*, (1868) 10 Suth W R 165 (166): 1 Beng L R A C 105; *Sheikh Nuzmoodeen* v. *Kanye Jha*, 1863 Marsh 555: 2 Hay 651.

Note 4.

(1) *Tasaduck Ali* v. *Muksud Ali*, (1874) 6 N W P H C R 272.

(2) *Tasaduck Ali* v. *Muksud Ali*, (1874) 6 N W P H C R 272; *Dabee Pershad* v. *Bisheshur*, (1874) 6 N W P H C R 289.

O.21, R.88, Notes 5—6.

5. **Suit for pre-emption.**—Where a claim to preference is made under this rule by a co-sharer as against a stranger and the Court declares one of them to be the purchaser and confirms the sale, a suit by the person against whom the order is made to set it aside will, it is conceived, be barred by general principles of *res judicata*. The High Court of Allahabad seems to be of the opinion that a confirmation of an execution sale could be made only under R. 92, that therefore, a confirmation of the sale under this rule is also one under R. 92, and that a suit would consequently be barred by sub-R. 3 of that rule.[1]

6. **Appeal.**—No appeal lies against an order under this rule confirming the sale in favour of a co-sharer.[1]

O.21, R.89.

R. **89.** [S. 310-A.] (1) Where immoveable property has been sold in execution of a decree[3] any person,[10] either owning such property or holding an interest therein[12] by virtue of a title acquired before such sale,[11] may apply [17] to have the sale set aside on his depositing[16] in Court[9]:—

Application to set aside sale on deposit.

(*a*) for payment to the purchaser, a sum equal to five per cent.[21] of the purchase-money, and

(*b*) for payment to the decree-holder[23] the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount[22] which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) *Where* a person applies under *rule* 90 to set aside the sale of his immoveable property, he shall not, *unless he withdraws his application*, be entitled to make *or prosecute* an application under this *rule*.[24]

(3) Nothing in this *rule* shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Local Amendments.

ALLAHABAD.

In sub-Rule (1) of this rule *for* the words "any person . . . . before such sale", *read* the words "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property".

Note 5.

(1) *Badri Singh* v. *Tulshi Ram*, 1923 All 186 (187): 21 All L J 53: 45 All 203: 4 L R (All) Civ 43: 79 Ind Cas 82 F B [Sale held by Collector under rules framed under S 70, exactly corresponding to R 92 of O 21]. But see *Shib Sahai* v. *Thika Ram*, (1875) 7 N W P H C R 97; *Farzand Ali* v. *Alimullah*, (1876) 1 All 272 (273, 274).

Note 6.

(1) *Muniruddin Khan* v. *Abdul Rahim*, (1881) 3 All 674 (675): 1881 All W N 45.

LAHORE. **O.21, R.89.**

In sub-Rule (1) of this rule *for* the words "any person . . . . acquired before such sale", *substitute* the words "any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person".

MADRAS.

At the end of sub-Rule (1), *insert* the following proviso:—

"Provided that where the immoveable property sold is liable to discharge only a portion of the decree-debt, the payment under Cl. (*b*) of this sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay."

NAGPUR.

In sub-Rule (1) of Rule 89, *for* the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" *substitute* the words "any person claiming any interest in the property sold at the time of the sale or at the time of the petition, or acting for, or in the interest of, such person."

N-W. F. P.

In sub-Rule (1) of Rule 89 *for* the words "either owning . . . . before such sale" *substitute* the following words:—

"either claiming any interest in such property at the time of sale or at the time of application, or acting for or in the interest of such person."

OUDH.

In Rule 89, sub-Rule (1), *for* the words "any person . . . . before such sale," *read* the words "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property".

Synopsis.

1. Legislative changes.
2. Scope and object of the rule.
3. Applicability of this rule to sales under mortgage decrees.
4. Sales under decrees on award.
5. Sales by receiver.
6. Sales under Rent Acts.
7. Applicability of O. 9 to proceedings under this rule.
8. Immoveable property; (see also S. 16, ante).
9. Court—Meaning of.
10. Who may apply under this rule.
11. "By virtue of a title acquired before such sale."
12. "Any person owning such property or holding an interest therein."
13. Transferee before Court sale.
14. Transferee after Court sale.
15. Other persons interested.
16. Deposit in Court.
17. Deposit and application.
18. Failure to deposit full amount.
19. Mistake in calculating the amount to be deposited.
20. Conditional deposit.
21. A sum equal to 5 per cent.
22. Less any amount received.
23. "For payment to the decree-holder."
24. Sub-R. (2).
25. Setting aside sale in respect of portion of property sold. See Note 22, ante.
26. Necessary parties to application. See Notes to O. 21, R. 92, infra.
27. Notice. See Notes to O. 21, R. 92, infra.
28. Limitation.
29. Appeal.
30. Revision.
31. Deposit—Suit for refund and contribution.

"A decree." See Note 3, Pt. (3).

Application dismissed for default—Appeal. See Note 29, Pt. (9).

"Apply to have the sale set aside." See Note 17, Pt. (1).

Claimant under R. 58—Whether can apply

O.21, R.89, Notes 1—2.

under this rule. See Note 12, Pts. (8) and (9).
Deposit by co-judgment-debtor—Whether the other judgment-debtor can take advantage of it. See Note 22, Pt. (4).
Persons entitled to apply. See Notes 11 to 15.
Persons not entitled to apply. See Note 15, Pts. (10) to (13).
Sale by separate lots—Application to set aside one lot only—Effect. See Note 22, Pt. (3).
"The amount specified in the proclamation of sale." See Note 18, Pts. (4) and (5).
Time for deposit. See Note 28, Pt. (5).

1. **Legislative changes.**—

(1) The words "sold in execution of a decree" in sub-Rule (1) have been substituted for the words "sold under this Chapter". *See* Note 3, *infra*.

(2) The words "any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale", in sub-Rule (1) have been substituted for the words "any person whose immoveable property has been sold under this chapter". *See* Notes 10 to 15, *infra*.

(3) The words "unless he withdraws his application" and the words "or prosecute" in sub-Rule (2) are new. *See* Note 24, *infra*.

S. 310-*A* was introduced in the old Code for the first time by Act V of 1894. It was held in the undermentioned cases[1] that S. 310-*A* was applicable to execution proceedings pending on the date the Act V of 1894 came into force.

2. **Scope and object of the rule.**—The provisions of this rule are in the nature of an indulgence to the judgment-debtor; it gives him a last chance of getting the sale set aside before confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction-purchaser for the loss of bargain.[1] The object of the rule is "not merely or not specifically to preserve the immoveable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immoveable properties shall not, at Court sales, be sold at inadequate prices".[2]

It has been already mentioned in Note 2 to O. 21, R. 2 that once a Court sale has been duly effected in favour of third person, it is not competent to the decree-holder and the judgment-debtor to get rid of it by merely asserting that the decree has been adjusted or satisfied out of Court. The only means by which the sale can be avoided is by an application under this Rule accompanied by the required deposit in Court; where no such application is made within the time limited, it is obligatory on the Court under R. 92, *infra* to pass an order confirming the sale, notwithstanding the circumstance that the decree-holder had admitted satisfaction of the decree.[3] But if the decree-holder

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Order 21, Rule 89—Note 1.

(1) *Jogodanund v. Amirta Lal*, (1895) 22 Cal 767 (783) [Overruling 21 Cal 940]; *Rangasami Naidu v. Virasami Chetty*, (1895) 18 Mad 477 (478).

Note 2.

(1) *Karunakara Menon v. Krishna Menon*, (1915) 27 Ind Cas 952 (953): 2 Mad L W 196: 28 Mad L Jour 262: 39 Mad 429; *Fatima-ul-Hasna v. Baldeo Sahai*, 1926 All 204 (207): 24 All L J 69: 48 All 188: 93 Ind Cas 24; *Chundi-charan v. B Behary Lal*, (1899) 26 Cal 449 (452): 3 Cal W N 288 [Per referring order of Maclean, C J]; *Vannisamy v. Periasamy*, (1916) 33 Ind Cas 996 (997): 19 Mad L Tim 192: 3 Mad L W 271: (1916) 1 Mad W N 179 [Provisions must be strictly complied with]; *Kalyanee Debi v. Hari Mohan Ghosh*, 1929 Cal 574 (574): 56 Cal 477: 120 Ind Cas 718, (Do.); *Fazal Rab v. Manzur Ahmad*, (1918) 45 Ind Cas 773 (774): 40 All 425: 16 All L J 433, (Do.); *Ishar Das v. Asaf Ali Khan*, (1912) 13 Ind Cas 134 (135): 9 All L J 19: 34 All 186; *Debi Prosad Pandit v. Muhamad Unis Arabi*, (1911) 9 Ind Cas 745 (746): 14 Oudh Cas 33.

(2) *Pandurang Laxman Uphade v. Govinda Dada Uphade*, (1917) 37 Ind Cas 211 (213): 40 Bom 557: 18 Bom L R 571; *Mahabir Prasad Pande v. Ganga Dehal Rai*, (1919) 52 Ind Cas 331 (332): 42 All 7: 17 All L J 878.

(3) *Seth Nanhelal v. Umrao Singh*, 1931 P C 33 (35, 36): 58 Ind App 50: 27 Nag L R 95: 14 Nag L J 28: 33 Mad L W 449: 60 Mad L Jour 428: 1931 Mad W N 281: 1931 All L J 257: 8 Oudh W N 585: 130 Ind Cas 686: 35

and the auction-purchaser agree and the decree is otherwise adjusted to the satisfaction of the decree-holder, the Court can set aside the sale under its *inherent powers* notwithstanding that the procedure prescribed by this Rule has not been followed.[4] This rule has no application to a sale under O. 21, R. 32 to compensate a decree-holder for the disobedience by the judgment-debtor of a decree against him for restitution of conjugal rights.[5]

3. Applicability of this rule to sales under mortgage decrees.—The words "sold under this chapter" in S. 310-A of the old Code gave rise to a conflict of opinion on the question whether that section was applicable to sales under mortgage decrees. The High Courts of Allahabad, Bombay and Madras and the Judicial Commissioner's Court of Oudh held that though the mortgaged properties were sold by virtue of a power given by the Transfer of Property Act, still the properties were sold under Chapter XIX (Execution of decrees) of the Code and that S. 310-A therefore applied to such sales.[1] The High Court of Calcutta, however, held a contrary view.[2] This conflict has now been set at rest by the substitution of the words "sold in execution of a decree" for the words "sold under this chapter" and by the incorporation, in the Code, of the provisions relating to mortgage decrees. It is now clear that that the rule applies to sales in execution of mortgage decrees also.[3]

The High Court of Calcutta has held that this Rule applies to sales in execution of mortgage decree passed on the original side of the High Court.[4]

4. Sales under decrees on award.—Where an award in a pending suit directs the sale of certain immoveable properties, and a decree is passed in terms of the award, this Rule applies to a sale held in pursuance of the terms of such award.[1] The reason is that the sale is one in execution of the *decree*.

Cal W N 881: 33 Bom L R 450: 53 Cal L Jour 187 P C [Approving 10 Ind Cas 148 and overruling 1922 Nag 248]; *Satia Nand* v. *Jhangi Ram*, 1932 Lah 238 (239): 33 Pun L R 146; *Ramchandra* v. *Lakshman*, 1926 Nag 298 (300): 9 Nag L J 3: 92 Ind Cas 803; *Kabiruddin* v. *Krishna Rao*, 1928 Nag 136 (143): 109 Ind Cas 449.

(4) *Ram Prasad* v. *Ram Charan*, (1915) 27 Ind Cas 601 (602) Cal; *Kuber Singh* v. *Bachuram*, 1925 Oudh 128 (129): 80 Ind Cas 444; *Shivaram Sand* v. *Manulal Khemka*, 1928 Pat 40 (43): 104 Ind Cas 753.

(5) *Gahuralli Karikar* v. *Asia Khatun*, (1932) 56 Cal L Jour 140 (143).

Note 3.

(1) *Mallikarjunadu Setti* v. *Lingamurti Pantulu*, (1902) 25 Mad 244 (257, 264, 266): 12 Mad L Jour 279 F B; *Than Chand* v. *Jagannath*, (1909) 2 Ind Cas 400 (401): 31 All 346: 6 All L J 513: 5 Mad L Tim 386; *Raja Ram* v. *Chunni Lal*, (1897) 19 All 205 (208): 1897 All W N 47; *Krishnaji* v. *Mahadev*, (1901) 25 Bom 104 (106): 2 Bom L R 635; *Chinnammal* v. *Athinatha Aiyangar*, (1900) 10 Mad L Jour 228 (229); *Tirumal Rao* v. *Syed Dastaghiri Miyah*, (1899) 22 Mad 286 (288); *Srinivasa Iyengar* v. *Ayyathorai Pillai*, (1898) 21 Mad 416: 8 Mad L Jour 54 [Assumed to apply]; *Jang Bahadur* v. *P Kuer Kishen*, (1898) 1 Oudh Cas 193 (197).

(2) *Kedar Nath Raut* v. *Kali Churn Ram*, (1898) 25 Cal 703 (708, 710): 2 Cal W N 353 F B [Overruling 23 Cal 682].

(3) *Virjibun Das Molji* v. *Bisseswar Lal Hargobind*, 1921 Cal 169 (170): 48 Cal 69: 60 Ind Cas 406: 24 Cal W N 1032. See *Musst Bibi Jai Kishori* v. *Mohamad Ali Mahomed Khan*, (1921) 60 Ind Cas 560 (563, 569): 7 Oudh L J 620.

(4) *Kalyanee Debi* v. *Hari Mohan Ghose*, 1929 Cal 574 (574): 56 Cal 477: 120 Ind Cas 718 [Applicable so far as practicable]; *Virjibun Das Moolji* v. *Bisseswar Lal Har Govind*, 1921 Cal 169 (170): 48 Cal 69: 24 Cal W N 1032: 60 Ind Cas 406. See *Ashutosh Basu* v. *Sudhangshubhushan Mukerji*, 1931 Cal 688 (690): 58 Cal 510: 133 Ind Cas 587 [In addition to the five per cent. need not deposit loss of interest and costs]; *Umesh Chandra Banerji* v. *Kunjalal Biswas*, 1930 Cal 685 (686): 57 Cal 676: 129 Ind Cas 181 [Dissented from in 1931 Cal 688]. But see *Surendra Kristo Roy* v. *Guru Prasad Ghosh*, (1921) 59 Ind Cas 432 (433): 24 Cal W N 536 [Dissented from in 1921 Cal 169].

Note 4.

(1) *Nirode Nath Banerjee* v *Anadiya Dhone*, 1923 Cal 582 (583, 584): 27 Cal W N 466: 77 Ind Cas 774.

O.21, R.89, Notes 5—7.

5. Sales by receiver.—A sale by the Official Receiver is not governed by this Rule.[1] Nor does this Rule apply to a sale, by the Official Referee in a partnership suit, for the purpose of realising the assets of the partnership.[2]

6. Sales under rent acts.—This Rule does not apply to sales under the Bengal Landlord and Tenant Procedure Act (VIII of 1869)[1] or to sales under the Public Demands Recovery Act[2] or to proceeding under the Madras Estates Land Act (I of 1908) (S. 192-A).

The Bengal Tenancy Act (VIII of 1885) contains a provision in S. 174 almost similar to this Rule prescribing the procedure for setting aside sales in cases where a tenure or holding has been sold for arrears of rent. Under that Section, as it originally stood, the judgment-debtor alone was entitled to apply. Therefore, it was held that the application of a person other than the judgment-debtor came under the scope of this rule, provided he was otherwise entitled to apply under this Rule.[3] This Act was amended by the Bengal Legislative Council by Act I of 1907, S. 54 which provided that S. 310-A of the Code of 1882 (corresponding to this section) shall not apply to sales under the Bengal Tenancy Act.[4] It has been further amended by the Bengal Council in 1928, providing that the judgment-debtor or any person whose interests are affected by the sale may apply. The Legislative Council of Eastern Bengal and Assam, to which territory also the Bengal Tenancy Act applies, has not amended this Act. Therefore, in cases arising in that province the application of a person other than the judgment-debtor is governed by this Rule.[5]

It was held that S. 310-A applied to sales under the Landlord and Tenant Act (Bengal Act X of 1859).[6]

Similar provision is made in respect of sales of a Tenure or holding for an arrear of rent under the Orissa Tenancy Act (II of 1913) (S. 228).

7. Applicability of O. 9 to proceedings under this rule.—An application to set aside a sale under this Rule is a proceeding in execution and consequently the provisions of O. 9 do not apply to it.[1] In the undermentioned

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Note 5.

(1) *Maung Tha Dun* v. *Po Ka*, 1928 Rang 60 (61): 5 Rang 768: 107 Ind Cas 172 [Not governed by O 21].

(2) *Tuljaram Rao* v. *Ramachandra Row*, 1921 Mad 484 (487): 41 Mad L Jour 465: 14 Mad L W 515: 1921 Mad W N 736: 68 Ind Cas 916.

Note 6.

(1) *Baneswar Singha* v. *Abdul Hassan*, 1927 Cal 752 (753): 31 Cal W N 1016: 104 Ind Cas 180.

(2) *Bepin Behari Bera* v. *Shashi Bhushan Datta*, (1914) 22 Ind Cas 95 (97): 18 Cal L Jour 628: 18 Cal W N 766.

(3) *Janardhan Ganguli* v. *Kali Kristo Thakur*, (1896) 23 Cal 393 (396); *Benodini Dasni* v. *Peary Mohan Haldar*, (1903) 8 Cal W N 55 (56); *Bungashidhar Haldar* v. *Kedar Nath Mandal*, (1896) 1 Cal W N 114 (117, 118); *Hamidal Huq* v. *Matangini Dassi*, (1898) 2 Cal W N cclviii. See *Moulvi Saiyid Razi-ud-din Hossein* v. *Benodeshri Prasad Singh*, (1916) 36 Ind Cas 769 (770) Pat [Not a rent decree within the meaning of S 170, Bengal Tenancy Act—Therefore R 89 applies].

(4) *Asiruddi Mondol* v. *Mukhadamoyee Dassi*, (1908) 35 Cal 543 (546): 12 Cal W N 434.

(5) *Sarat Chandra Das* v. *Mati Lal Chuckkerbutty*, (1919) 52 Ind Cas 237 (237): 23 Cal W N 597; *Ali Miah* v. *Ramjan Khan*, (1909) 4 Ind Cas 474 (474): 13 Cal W N 224: 5 Mad L Tim 348.

(6) *Chaitan Patjoshi* v. *Kunja Behari Patnaik*, (1911) 11 Ind Cas 207 (210): 38 Cal 832: 15 Cal W N 863: 14 Cal L Jour 284. But see *Harish Chandra* v. *Ananta Charan*, (1897) 2 Cal W N 127 (127).

Note 7.

(1) *Bhagvan* v. *Dattatraya*, 1926 Bom 377 (378): 28 Bom L R 686: 50 Bom 457: 96 Ind Cas 411 [Refused to restore under S 151 as there was no sufficient ground for non-appearance].

O.21, R.89, Notes 8—10.

case[2] a second application to set aside the sale after the dismissal for default of the first application, was treated as one for review.

8. Immoveable property (see also S. 16 ante).—A simple mortgage bond[1] or a decree for sale in enforcement of a mortgage[2] is not immoveable property within the meaning of this Rule. But the interest of a mortgagee in a usufructuary mortgage is immoveable property for the purposes of this Rule.[3] *See also* Notes to O. 21, R. 54, *ante*.

Where a judgment-debtor was the owner of a house and of the land on which it stood, and the superstructure alone was sold in execution of a decree, it was held that it was immoveable property and that, therefore, an application would lie under this Rule to set aside the sale.[4]

9. Court—Meaning of.—The "Court" mentioned in this Rule is the Civil Court and not the Court of the Collector or of the Mamlatdar to which execution has been transferred under S. 68, *ante*. Therefore, a deposit made in such Court is not a valid deposit.[1] But where an applicant deposits the amount required in the office of the Collector who had sold the property, and intimation is sent to the Civil Court that the money had been transferred to the Civil Court account within thirty days of the date of the sale, the deposit is good and the provisions of this Rule are complied with.[2]

The High Court of Bombay has, by virtue of its rule-making powers, framed a new R. 91-A which provides that where a decree has been sent for execution to a collector and the sale has been held by him or his subordinate, an application and a deposit made under this Rule, if made to the Collector or his subordinate must be deemed to have been made to or in the 'Court' within the meaning of this Rule, and that the sale can be set aside on the basis of such an application and deposit.[3]

10. Who may apply under this rule.—Where an application is made by a person to set aside a sale under this rule on the allegation that he is a person entitled to apply and such allegation is challenged by the opposite party, the question must be determined by the Court.[1]

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(2) *Seaminatha Naicker* v. *R D Paul*, (1911) 12 Ind Cas 351 (352): 22 Mad L Jour 148: 1912 Mad W N 547: 10 Mad L Tim 569 [Whether O 9, R 9 applies is doubtful].

Note 8.

(1) *Umrao Singh* v. *Lal Singh*, 1924 All 796 (798): 5 L R (All) Civ 674: 22 All L J 840: 80 Ind Cas 890: 46 All 917.

(2) *Subrani* v. *Puran Singh*, (1911) 12 Ind Cas 924 (924): 8 All L J 1327.

(3) *Jang Bahadur* v. *Bhagat Ram Sheo Prasad*, 1930 All 110 (111): 1930 All L J 330: 122 Ind Cas 409: 52 All 232; *Jagmohan Singh* v. *Bachcha*, 1922 Oudh 146 (147): 25 Oudh Cas 78: 66 Ind Cas 929: 9 Oudh L J 50.

(4) *Mumtaz Ali* v. *Abbas Ali*, (1900) 3 Oudh Cas 236 (237).

Note 9.

(1) *Bishwanath Singh* v. *Dasrath Dube*, 1927 All 754 (754): 100 Ind Cas 726; *Fazal* v. *Manzur*, (1918) 45 Ind Cas 773 (774): 40 All 425: 16 All L J 433.

(2) *Abdul Wahid* v. *Ram Krishna*, 1931 All 303 (304): 131 Ind Cas 596.

(3) *Mahadu Tukaram Satav* v. *Pathu Sadu Satav*, 1929 Bom 189 (190): 31 Bom L R 221: 116 Ind Cas 269. The following cases decided before framing of R 91-A that such applications are not valid are no longer law in Bombay:—*Gadigappa* v. *Shidappa*, 1924 Bom 495 (498, 499): 26 Bom L R 817: 48 Bom 638: 83 Ind Cas 155; *Tipangavda* v. *Ramangavda*, (1912) 54 Ind Cas 670 (671): 44 Bom 50: 22 Bom L R 35; *Shantmurti Devappa Kalyanpur* v. *Narayan Ramchandra Prabhu*, 1921 Bom 209 (209): 45 Bom 1132: 23 Bom L R 476: 62 Ind Cas 221.

Note 10.

(1) *Janardhan Gangali* v. *Kali Kristo Thakur*, (1896) 23 Cal 393 (396); *Kunja Singh* v. *Barhu Ray*, 1923 Pat 353 (353): 4 Pat L Tim 247: 73 Ind Cas 12.

O.21, R.89, Notes 10—12.

Under S. 310-A of the old Code "any person whose immoveable property had been sold" was entitled to apply. The amending words in this rule, "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale", have widened the scope of this rule by allowing persons who are not parties to the suit to apply to have a sale set aside.[2]

As to persons who are entitled to apply under this rule, *see* Notes 11 to 15, *infra*.

11. "By virtue of a title acquired before such sale."—The words "by virtue of a title acquired before such sale" apply to the words "owning such property" as well as to the words "holding an interest therein".[1]

12. "Any person owning such property or holding an interest therein.—A judgment-debtor who has not sold his property is clearly entitled to apply under this rule for setting aside the sale of his property. A purchaser from a mortgagor-judgment-debtor, who is bound by the decree is also entitled to apply under this rule.[1] An *Interim* Receiver appointed under S. 20 of the Provincial Insolvency Act (V of 1920) after the execution sale of the insolvent's properties has no power to apply under this rule, as he cannot be said to be the owner "*by virtue of a title acquired before such sale*".[2]

A mortgagee of the property sold in execution of a decree is a person who has an interest therein by virtue of which he is competent to apply.[3] Under the old Code it was held that he was not a person whose immoveable property has been sold, as his interest in the mortgaged property could not pass by the sale.[4] Under this rule, the word 'property' means *tangible* property (whether or not persons other than the judgment-debtor have any interest in it), and does not mean merely the right, title and interest of the judgment-debtor alone.[5] Therefore, a mortgagee or lessee whose interests are not affected by the sale is also entitled to apply.[6]

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(2) *Mt Dhanwanti Koer* v. *Sheo Shankar Lal*, (1919) 51 Ind Cas 873 (873, 874): 4 Pat L Jour 340: 121 Pat H C C 364; *Sarat Chandra* v. *Moti Lal*, (1919) 52 Ind Cas 237 (238): 23 Cal W N 597; *Basir-ud-din* v. *Faimulla*, (1911) 11 Ind Cas 196 (196): 17 Cal W N 476.

Note 11.

(1) *Sundaram* v. *Mamsa Mavuthar*, 1921 Mad 157 (160, 161, 163): 44 Mad 554: 40 Mad L Jour 497: 13 Mad L W 498: 1921 Mad W N 272: 63 Ind Cas 937 F B; *Onkar* v. *Dhansingh*, 1926 Nag 10 (13, 14): 21 Nag L R 102: 90 Ind Cas 968.

Note 12.

(1) *Vithu* v. *Damodar*, 1895 Bom P J 200; *Srinivasa* v. *Ayyathorai*, (1898) 21 Mad 416 (417): 8 Mad L Jour 54 [Subsequent mortgagee defendant]; *Aulad Ali* v. *Abdul Hamid*, 1923 Pat 490 (491): 2 Pat 715: 74 Ind Cas 102; *Kanayaram* v. *Tirrithsingh*, (1915) 31 Ind Cas 37 (38): 9 Sind L R 86 [Second mortgagee pending suit].

(2) *Ramachandra Ayyar (Official Receiver, Tanjore)* v. *Sankara Ayyar*, 1926 Mad 357 (357): 50 Mad L Jour 289: 23 Mad L W 145: 1926 Mad W N 159: 93 Ind Cas 271.

(3) *Muhammad Ahmadullah Khan* v. *Ahmad Said Khan*, (1911) 10 Ind Cas 863 (864): 33 All 481: 8 All L J 356; *Paresh Nath Singha* v. *Nacogopal Chattopadhya*, (1902) 29 Cal 1 (4, 10, 14, 24): 5 Cal W N 821 F B [Overruling (1901) 5 Cal W N 68 (64)]; *Jog Narain Singh* v. *Badri Das*, (1912) 18 Ind Cas 144 (146): 16 Cal L Jour 156; *Hamidal Haq* v. *Matangini*, (1897) 2 Cal W N cclviii; *Srinivasa* v. *Ayyathorai*, (1898) 21 Mad 416 (417): 8 Mad L Jour 54; *Thakar Singh* v. *Gurdit Singh*, (1911) 12 Ind Cas 733 (733): 1911 Pun W R 178; *Jagannath Singh* v. *Jagjiwan Das*, 1925 Oudh 429 (431): 12 Oudh L Jour 289: 28 Oudh Cas 221: 87 Ind Cas 829.

(4) *Mallikarjunadu Setti* v. *Linga Murti Pantulu*, (1903) 26 Mad 332 (338): 12 Mad L Jour 279.

(5) *Bodapati Adenna* v. *Bodapati Chinna Ramayya*, 1928 Mad 1191 (1191): 51 Mad 770: 54 Mad L Jour 445: 27 Mad L W 307: 109 Ind Cas 168: 1928 Mad W N 159.

(6) *Bodapati Adenna* v. *Bodapati Chinna Ramayya*, 1928 Mad 1191 (1192): 51 Mad 770: 54 Mad L Jour 445: 27 Mad L W 307: 109 Ind Cas 168: 1928 Mad W N 159 [Lessee—Sale

Can a person who has purchased the property from the judgment-debtor before *attachment* or a person who claims by a title paramount to that of the judgment-debtor, apply to set aside a sale? It was held under the old Code that he could not, on the ground that the property was *not sold as his*.[7] Under the present Code there is a conflict of opinion, some cases holding that he can apply,[8] while others, that he cannot.[9] It is submitted that the latter view unduly restricts the scope of this rule. O.21, R.89, Notes 12—14.

13. **Transferee before Court sale.**—A transferee from the judgment-debtor, of immoveable property sold in execution of a decree for money, after the attachment but before the Court sale, is the owner of the property and can apply to set aside the sale.[1] Though, under S. 64, *ante* the transfer may be void as against the claim under the attachment, that section does not invalidate the transfer for all purposes. Under the old Code it was held that a judgment-debtor who has sold the property after attachment was also entitled to apply to set aside the sale.[2]

14. **Transferee after Court sale.**—Where the judgment debtor transfers his property to a third person after the execution sale, but before confirmation thereof, the transferee is not a person who holds an interest in such property "*by virtue of a title acquired before such sale*". He is, therefore, not entitled to apply under this rule to set aside the sale of such property in execution of a decree.[1] But can the judgment-debtor in such cases apply under this rule? Where the transfer is by way of a *mortgage* it is, of course, clear that the judgment-debtor would still be the owner of the equity of redemption and,

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subject to it]; *Beni Madho* v. *Sanwar Dat*, 1923 All 127 (127, 128): 20 All L J 42: 64 Ind Cas 918 [Usufructuary mortgage]; *Kashmiro Bibi* v. *Hatim Ali Khan*, (1915) 27 Ind Cas 831 (832): 13 All L J 273 [Prior mortgagee]; *Kandasami Asari* v. *Swarnavelu Stapathi*, (1919) 53 Ind Cas 958 (959): 27 Mad L Tim 130: 10 Mad L W 556: 1920 Mad W N 151 [Property sold subject to mortgage].

(7) *Ramchandra* v. *Rakhmabai*, (1899) 23 Bom 450 (451, 453); *Arjan Mollah* v. *Jadunath Roy Chowdhry*, (1903) 7 Cal W N 243 (244); *Kunja Behari Singha* v. *Bhupendra Kumar Dutt*, (1908) 12 Cal W N 151 (152, 153); *Bungshidar Haldar* v. *Kedar Nath Mondal*, (1897) 1 Cal W N 114 (117); *Erode Manikoth Krishna Nair* v. *Puthirdeth Chumbakkoseri Krishnan Nair*, (1903) 26 Mad 365 (366). See *Abdul Rahman* v. *Mutiyar Rahaman*, (1903) 30 Cal 425 (427) [Mahomedan co-heir who has not been made a party is not bound by the decree and cannot apply].

(8) *Dhanammal* v. *Veerarghavalu*, 1923 Mad 487 (488, 489): 44 Mad L Jour 325: 32 Mad L Tim 175: 1923 Mad W N 162: 72 Ind Cas 335: 18 Mad L W 296 [The fact that he unsuccessfully preferred a claim under R 58 will not preclude him from applying under this rule]; *Govindaswami Naicker* v. *Perumal Raja*, 1927 Mad 327 (328): 25 Mad L W 106: 38 Mad L Tim 30: 1927 Mad W N 53: 99 Ind Cas 893.

(9) *Dulhin Mothura Koer* v. *Bansidhar Singh*, (1911) 10 Ind Cas 880 (883): 16 Cal W N 904: 15 Cal L Jour 83; *A O Subba Reddi* v. *Vasireddi Jayaramayya*, 1923 Mad 659 (660): 17 Mad L W 680: 76 Ind Cas 853.

Note 13.

(1) *Mulchand* v. *Govind*, (1906) 30 Bom 575 (577): 8 Bom L R 578; *Pandurang* v. *Gobindadada*, (1917) 37 Ind Cas 211 (212): 40 Bom 357: 18 Bom L R 571; *Gosta Behari* v. *Sankar Nath Mukerjee*, (1916) 36 Ind Cas 510 (512): 26 Cal L Jour 127; *Ali Miah* v. *Ramjan Khan*, (1909) 4 Ind Cas 474 (474): 13 Cal W N 224: 5 Mad L Tim 348; *Thakar Singh* v. *Gurdit Singh*, (1911) 12 Ind Cas 733 (733): 178 Pun W R 1911; *Viranna* v. *Satiraju*, 1927 Mad 445 (446): 52 Mad L Jour 157: 100 Ind Cas 82 [1923 Mad 659 dissented from]; *Siyaram* v. *Ram Narayan*, 1932 Nag 21 (22): 27 Nag L R 309: 135 Ind Cas 403 [1926 Nag 10 distinguished]; *Sheikh Abdul Rahim* v. *Mathura Pershad*, (1905) 8 Oudh Cas 189 (190). But see *Subba Reddi* v. *Jayaramayya*, 1923 Mad 659 (660): 17 Mad L W 680: 76 Ind Cas 853.

(2) *Magandal* v. *Doshi Mulji*, (1901) 25 Bom 631 (636): 3 Bom L R 255.

Note 14.

(1) *Saradakripa Lala* v. *Horendra Lal Das*, 1922 Cal 271 (273): 26 Cal W N 149: 49 Cal 454: 68 Ind Cas 289; *Hazari Ram* v. *Badai Ram*, (1896) 1 Cal W N 279 (280); *Fatima-ul-Husna* v. *Baldeo Sahai*, 1926 All 204 (208, 210, 211): 24 All L J 69: 48 All 188: 98 Ind Cas 24 [Overruling 13 Ind Cas 134]; *Mahabir Prasad Pande* v. *Ganga Dehal Rai*, (1919) 52 Ind Cas 331 (331): 42 All 7: 17 All L J 878; *Sundaram* v. *Mamsa Mauthar*, 1921 Mad 157 (160, 161, 163): 44 Mad 554: 40 Mad L Jour 497: 13 Mad L W 498: 1921 Mad W N 272: 63 Ind Cas 937 F B [The following cases are, in view of this decision no longer law:—18 Ind Cas 579; 54 Ind Cas 753; 30 Mad 507; 22 Ind Cas 193; 30 Mad 214]; *Gopalakrishna Naicker* v. *Viswanatha Iyer*, (1920) 58 Ind Cas 856 (859): 39 Mad L Jour 84: 12 Mad L W 165: 28 Mad L Tim 162 [Mortgagee]; *Sankara Bhatta* v. *Ayyappa Gowda*, 1927 Mad 151 (152): 24 Mad L W 759: 98 Ind Cas 739; *Venkatesa Ayyar* v. *Venkatarama Ayyar*, 1924 Mad 470 (472): 1924 Mad W N 62: 84 Ind Cas 665; *Lachmi Narain Agarwala* v. *Kali Pro-*

O.21, R.89, Notes 14—15.

therefore, will be entitled to apply.[2] Even where the transfer is by way of an *absolute sale*, it has been held by all the Courts except the Judicial Commissioner's Court of Oudh that he can apply.[3] The reason is that, in such cases, the judgment-debtor must be deemed to own the property for the purpose of the proceedings under this rule. The Judicial Commissioner's Court of Oudh has, however, held that he is not so entitled to apply.[4] It is submitted that this view is not correct. It has been held by the High Court of Allahabad in the undermentioned case[5] that where, after the Court sale, the judgment-debtor executes a mortgage of the properties and the mortgagee and the judgment-debtor apply to set aside the sale, each depositing a portion of the amount, the two applications may be treated as one made by the judgment-debtor, notwithstanding that the mortgagee was not independently entitled to apply.

15. Other persons interested.—Apart from the class of persons already mentioned in Notes 11 to 14, *ante*, the following persons are also entitled to apply under this rule:—

(1) A beneficial owner, in cases where the property has been sold in execution of a decree against his *Benamidar*.[1]

(2) A *Benamidar* transferee from the judgment-debtor.[2]

(3) A co-sharer in the property sold.[3]

(4) Where the share of a member of a joint Hindu family is sold, the other members having an interest in the properties.[4]

(5) Where property is sold in execution of a decree against a Hindu widow, the reversioner to the estate.[5] It is not necessary to have an interest *de praesenti*.

(6) An under-raiyat[6] or a *dar mokararidar*.[7]

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sonno Bhattacharji, (1919) 52 Ind Cas 344 (345) Pat; *Sham Lal of Delhi* v. *Hari Shanker*, 1922 Lah 302 (302).

(2) *Dalchand* v. *Bank of Upper India*, 1925 Oudh 349 (350): 12 Oudh L J 101: 86 Ind Cas 732.

(3) *Fatima-ul-Hasna* v. *Baldeo Sahai*, 1926 All 204 (208, 210, 211): 24 All L J 69: 48 All 188: 93 Ind Cas 24 F B; *Pandurang* v. *Govinda Dada*, (1917) 37 Ind Cas 211 (213, 214): 40 Bom 557: 18 Bom L R 571; *Sundaram* v. *Mansa Mavuthar*, 1921 Mad 157 (160, 161, 163): 44 Mad 554: 40 Mad L Jour 497: 13 Mad L W 498: 1921 Mad W N 272: 63 Ind Cas 937 F B; *Sethu Ramasami Nayani Varu* v. *Syed Mir Hussain Sahib*, (1919) 49 Ind Cas 806 (807, 808): 42 Mad 503: 1919 Mad W N 407: 25 Mad L Tim 182: 9 Mad L W 347: 36 Mad L Jour 298; *Musst Dhanwanti Kuer* v. *Sheo Shankar Lal*, (1919) 51 Ind Cas 873 (874, 875): 4 Pat L Jour 340: 1921 Pat H C C 364; *Lachmi Narain* v. *Kali Prosonno Bhattacharje*, (1919) 52 Ind Cas 344 (345) Pat.

(4) *Debi Prosod Pandit* v. *Muhammad Unis Arabi*, (1911) 9 Ind Cas 745 (746): 14 Oudh Cas 33.

(5) *Madhuri Saran* v. *Bishambar Nath*, 1927 All 561 (562): 25 All L J 576: 102 Ind Cas 471: 49 All 839.

Note 15.

(1) *Babu Ram Mandar* v. *Ram Sahai Sahoo*, (1908) 8 Cal L Jour 805 (808).

(2) *Paresh Nath Singha* v. *Nacoyopal Chattopadhya*, (1902) 29 Cal 1 (5, 15): 5 Cal W N 821 F B; *Basi Poddar* v. *Ram Krishna*, (1897) 1 Cal W N 135 (136).

(3) *Tuhi Ram* v. *Izzat Ali*, (1908) 30 All 192 (196): 1908 All W N 77: 5 All L J 253; *Bunghshidhar Haldar* v. *Kedarnath Mondal*, (1897) 1 Cal W N 114 (118). But see *Mohendra Ghoshal* v. *Bhuban Mardana*, (1911) 6 Ind Cas 810 (812): 38 Cal 1: 12 Cal L Jour 566: 14 Cal W N 945 [Per Das, J].

(4) *Ramachandra Upadya* v. *Srinivasa Tantri*, 1928 Mad 399 (400): 27 Mad L W 360: 1928 Mad W N 101: 51 Mad 246: 54 Mad L Jour 455: 109 Ind Cas 297.

(5) *Pankhabati* v. *Nonihal Singh*, (1913) 21 Ind Cas 207 (209): 19 Cal L Jour 72: 18 Cal W N 778; *Brij Kishore Lal* v. *Pratap Narain*, (1919) 51 Ind Cas 359 (360): 4 Pat L Jour 360: 1919 Pat H C C 303.

(6) *Chandra Kumar Nath* v. *Kamini Kumar Ghose*, (1907) 11 Cal W N 742 (743); *Sarat Chandra Das* v. *Mati Lal Chuckerbutty*, (1919) 52 Ind Cas 237 (238): 23 Cal W N 597. But see *Abed Molliah* v. *Diljan Mollah*, (1902) 29 Cal 459 (461) [Dissented from in 11 Cal W N 742].

(7) *Narain Mandal* v. *Sourindra Mohan Tagore*, (1905) 32 Cal 107 (110).

(7) Where the holding is sold in execution of a decree for arrears of rent due thereon a purchaser of a portion thereof.[8] Where the holding is, however, *non-transferable* there is a conflict of opinion.[9] **O.21, R.89, Notes 15—17.**

The following persons are not entitled to apply under this rule:—

(1) The holder of a money decree who has attached the property sold, is not a person who has an interest in the property by virtue of a title acquired before such sale.[10]

(2) A person having no title to the property and not in possession thereof, is not entitled to apply.[11] But a trespasser who has entered into possession before the Court sale, holds an interest therein by a virtue of a title acquired before such sale, even though his title has not been *perfected* or completed by prescription.[12]

(3) A person in whose favour there is merely an agreement to sell the property cannot apply to have the sale set aside.[13]

16. Deposit in Court.—The deposit made under this rule by an applicant must be of such a nature as to be payable at once to the parties. Therefore a deposit, in order to be valid, must be in *cash* and not by Government promissory notes or cheque.[1] A tender by a person who is neither an Attorney nor a Vakil nor a Muktear for the applicant, does not comply with the provisions of this rule and is consequently invalid.[2] But if the lodgment schedule was signed by the proper person, the fact that the actual payment into the treasury is not made by his recognised agent, is immaterial.[3]

As to time for deposit, *see* Note 28, *infra*.

17. Deposit and application.—An *application* for setting aside a sale is necessary before the Court can be called upon to act under this rule.[1] A

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(8) *Kunja Behari Mondal* v. *Sambhu Chundra Roy*, (1904) 8 Cal W N 232 (233); *Benodini Dassi* v. *Peary Mohan Haldar*, (1904) 8 Cal W N 55 (57); *Janoki Nath Chakravarti* v. *Kali Kumar Chakravarti*, (1910) 5 Ind Cas 561 (562) Cal.

(9) *Re Fazoo Mia* v. *Sultan Ahmad Choudhury*, 1927 Cal 817 (818): 31 Cal W N 1050: 55 Cal 108: 106 Ind Cas 143 [Can apply]; *Omar Ali Majhi* v. *Moonshi Basirudeen Ahmed*, (1908) 7 Cal L Jour 282 (284), (Do.); *Abdul Rahman Sarkar* v. *Promode Behari Dutta*, (1915) 28 Ind Cas 182 (184): 20 Cal W N 40: 22 Cal L Jour 108 [Has no *locus standi*]; *Bishun Dayal Singh* v. *Jagdish Narayan Singh*, 1924 Pat 513 (515): 2 Pat L R Civ 12: 80 Ind Cas 823, (Do.); *Deno Nath Dey Sarkar* v. *Kali Kumar Roy*, (1915) 29 Ind Cas 916 (916) Cal, (Do., mortgagee).

(10) *Fakhran Bibi* v. *Rajab Ali Khan*, (1915) 28 Ind Cas 948 (948): 13 All L J 401; *Purshottam* v. *Sundar*, 1931 Bom 277 (278): 55 Bom 239: 33 Bom L R 455: 132 Ind Cas 433; *Kedar Nath Sen* v. *Uma Charan*, (1902) 6 Cal W N 57 (58).

(11) *Nand Kishore Jha* v. *Paraoo Mian*, (1917) 42 Ind Cas 839 (841): 1917 Pat H C C 292: 3 Pat L W 255: 2 Pat L J 676; *Onkar* v. *Dhansingh*, 1926 Nag 10 (13, 14): 21 Nag L R 102: 90 Ind Cas 963 [Title of a third person negatived in claim proceedings and suit under O. 21, R. 63]. See *Ram Singh* v. *Salig Ram*, (1906) 28 All 84 (85, 86): 2 All L J 711: 1905 All W N 193.

(12) *Potti Nayakar* v. *Suppammal*, 1924 Mad 723 (726): 20 Mad L W 31: 79 Ind Cas 874 [Per Venkatasubba Rao, J].

(13) *Mahadeo* v. *Vasudev J Kirtikar*, (1899) 23 Bom 181 (184); *Arumalla China Subba Reddi* v. *Vasi Reddi Jayaramayya*, 1923 Mad 659 (660): 17 Mad L W 680: 76 Ind Cas 853.

Note 16.

(1) *Rahim Bux* v. *Nundo Lal*, (1887) 14 Cal 321 (323); *Ismail Ali* v. *Visvanadan Chetty*, (1915) 27 Ind Cas 656 (656): 8 Bur L Tim 80.

(2) *Syed Ibne Hasan* v. *Din Dayal*, 1931 All 449 (450): 1931 All L J 404: 132 Ind Cas 808; *Sarvai Begam* v. *Haider Shah*, (1912) 13 Ind Cas 404 (405): 9 All L J 12; *Kasturi Ayyangar* v. *Arunachalam*, (1916) 34 Ind Cas 350 (352): (1916) 1 Mad W N 195.

(3) *Venkata Kutumba Rao* v. *Venkatappayya*, 1924 Mad 483 (483): 46 Mad L Jour 119: 19 Mad L W 298: 1924 Mad W N 137: 77 Ind Cas 765.

Note 17.

(1) *Pechiayee* v. *Vallamuthu Velan*, 1925 Mad 639 (640): 48 Mad L Jour 405: 1925 Mad W N 175: 87 Ind Cas 437; *Popooru Venkatanarasimha* v. *Jayanti Lakshmi Narasimham*, (1916) 32 Ind Cas 783 (784): 3 Mad L W 174.

O.21, R.89, Notes 17—18.

mere deposit of the amount without an application in time, is not enough, and the sale cannot be set aside.[2] A mere lodgment schedule cannot be treated as an application within the meaning of this rule.[3] It has been held by the High Court of Calcutta in the undermentioned case[4] that where a judgment-debtor paid the requisite amount by a *challan* and prayed that the execution may be closed, a separate application is not essential and that the *challan* which set out the purpose was a sufficient compliance with this rule.

The application may be *oral* or *written*.[5] It will not be rendered invalid by the absence of a formal prayer for setting aside the sale.[6] Where the application does not disclose the nature of the interest of the applicant, the Court should not reject the application, but should direct the applicant to supply the necessary particulars.[7]

18. Failure to deposit full amount.—It has been already mentioned in Note 2 *ante* that this rule is in the nature of a concession shown to the judgment-debtor. The applicant must, therefore, strictly comply with the requirements thereof and a sale will not be set aside unless the *entire amount* specified in sub-Rule (1), is deposited within 30 days from the date of the sale.[1] Thus a *part payment* coupled with an undertaking to pay the balance cannot be considered as a valid deposit.[2] But if the conditions of this rule are complied with, the failure to pay an additional amount to cover the poundage fee is a mere irregularity which will not prevent the Court from entertaining the application.[3]

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(2) *Mathura Prasad* v. *Ram Lal*, (1911) 9 Ind Cas 33 (33): 38 Cal 855: 38 Ind App 13: 15 Cal W N 177: 13 Cal L Jour 72: 21 Pun L R 1911: 1 Pun W R 1911: 13 Bom L R 59: 9 Mad L Tim 115: (1911) 1 Mad W N 86: 8 All L J 123: 4 Bur L Tim 35: 21 Mad L Jour 100: 21 Pun Re 1911 P C; *Sarvi Begum* v. *Haider Shah*, (1912) 13 Ind Cas 404 (405): 9 All L J 12; *Raoji Baburao* v. *Bansi Lal*, (1919) 53 Ind Cas 135 (136): 43 Bom 735: 29 Bom L R 835; *Pachiayee* v. *Vallamuthu Velan*, 1925 Mad 639 (640): 48 Mad L Jour 405: 1925 Mad W N 175: 87 Ind Cas 437; *Rayapathy Venkatasubba Rao* v. *K Narayana Rao*, 1922 Mad 83 (83): 15 Mad L W 450: 1922 Mad W N 171: 66 Ind Cas 44; *Parat Veethil Seethi* v. *Ambalath Veettil Kolathur Ahmed*, (1916) 32 Ind Cas 45 (45) Mad; *Ram Autar* v. *Sheo Piarey Lal*, 1925 Oudh 411 (412): 12 Oudh L Jour 137: 87 Ind Cas 722. But see *Mathuji* v. *Kondaji*, (1905) 7 Bom L R 263 (264).

(3) *Chakrapanipadhi* v. *Krushno Naiko*, 1926 Mad 620 (621): 1926 Mad W N 297: 95 Ind Cas 128: 23 Mad L W 757; *R Venkata Subba Rao* v. *K Narayana Rao*, 1922 Mad 83 (83): 15 Mad L W 450: 1922 Mad W N 171: 66 Ind Cas 44.

(4) *Abdol Latif Mooneshi* v. *Jadub Chandra Mitter*, (1898) 25 Cal 216 (218, 222).

(5) *Sarvai Begum* v. *Haider Shah*, (1912) 13 Ind Cas 404 (405): 9 All L J 12; *Ramraj Singh* v. *Rabi Prosad*, (1921) 63 Ind Cas 140 All [Application must be deemed to be one for setting aside sale]; *Murugappa* v. *Shanmuga*, 1925 Mad 909 (910): 86 Ind Cas 498; *Parat Veettil Seethi* v. *Ambalath Veethil Kolathur Ahmed*, (1916) 32 Ind Cas 45 (45) Mad; *Mariappa Annam* v. *Harihara Ayyar*, (1914) 22 Ind Cas 291 (292): 14 Mad L Tim 534: 1914 Mad W N 62 [Not necessary to be signed by applicant or his pleader]; *Pachiayae* v. *Vallimuthu Velan*, 1925 Mad 639 (640): 48 Mad L Jour 405: 1925 Mad W N 175: 87 Ind Cas 437; *Popooru Venkata Narasimha* v. *Jayanti Lakshmi Narasimham*, (1916) 32 Ind Cas 788 (784): 3 Mad L W 174; *Ram Autar* v. *Sheo Piarey Lal*, 1925 Oudh 411 (412): 12 Oudh L J 137: 87 Ind Cas 722.

(6) *Parat Veethil Seethi* v. *Amabalath Veethil Kolathur Ahmad*, (1916) 32 Ind Cas 45 (45) Mad; *Ronya* v. *Baliram*, 1928 Nag 111 (111): 106 Ind Cas 333. See *Ram Sivendra Narayan Ojha* v. *Awadh Bihary Saran*, 1928 Pat 159 (161): 68 Ind Cas 629: 4 Pat L Tim 295.

(7) *Vital Singh* v. *Agarchand*, 1925 Nag 17 (18): 79 Ind Cas 903.

Note 18.

(1) *Kalinga Hebbara* v. *Narasimha Hebbara*, (1911) 9 Ind Cas 937 (938): 21 Mad L Jour 631: (1911) 2 Mad W N 143: 9 Mad L Tim 259; *Narayan* v. *Ramakrishnaji*, 1925 Nag 30 (30): 78 Ind Cas 705; *Seth Ballabhdas* v. *Sobha Singh*, 1924 Nag 216 (218): 78 Ind Cas 270 [Failure to deposit 5 per cent]; *Mahomed Qassim* v. *David*, 1928 Rang 286 (286): 6 Rang 490 [4 rupees deficit paid one day late—Though shortage did not vitiate not being substantial, delay vitiates application]; *Makru Rai* v. *Sarjug Pershad* (1918) 47 Ind Cas 654 (655): 4 Pat L Jour 55 [In a case under S 174 of Bengal Tenancy Act, whole amount of *decree* must be deposited].

(2) *Manaji Kuvarji* v. *Aramila*, 1922 Bom 193 (194): 23 Bom L R 847: 46 Bom 171: 63 Ind Cas 89; *Narayan* v. *Rasul Khan*, (1899) 23 Bom 531 (535): 1 Bom L R 33.

(3) *Abdul Wahid* v. *Tribhuwan Das*, 1931 All 756 (757): 133 Ind Cas 407: 1932 All L J 18 [Failure to affix stamps by way of poundage fees]; *Muthu Ayyar* v. *Ramasami Sastrigal*, (1897) 20 Mad 158 (159).

O.21, R.89, Notes 18—20.

An execution sale cannot be set aside under this rule on deposit of a part of the amount specified in the proclamation of sale even though the decree-holder consents not to claim any further sum so far as that execution application was concerned.[4] Where, however, the amount mentioned in the proclamation of sale is deposited, the fact that the proclamation of sale was incorrectly drawn up and did not specify the full amount for the recovery of which the sale was ordered, will not render the deposit invalid.[5]

The sub-R. (3) does not mean that the applicant should deposit also costs and interests not covered by the proclamation and a Court cannot refuse to set aside a sale merely because such costs and interest are not also deposited within time.[6]

19. Mistake in calculating the amount to be deposited.—Where the original deposit is deficient and it appears that the deficiency is due to a wrong calculation made by an officer of the Court and the applicant makes good the deficiency as soon as it is pointed out, though after thirty days have elapsed, is the deposit valid? It has been held that if the mistake is the act of the prescribed officer acting in accordance with the prescribed rules of the Court, then it will not affect the party.[1] Otherwise no relief can be given to a party even though he is misled by an officer of the Court.[2]

20. Conditional deposit.—In order that a deposit under this rule may be valid, it must be *unconditional*.[1] If the applicant prevents the money from being available to the decree-holder *forthwith and unconditionally*, the deposit is bad and will not entitle him to have the sale set aside.[2] Since this rule is inconsistent with the notion that a payment into Court may be made under protest or subject to conditions, the Court has no power to order that the decree-holder should draw out the money only on his executing a security bond.[3] If, as soon as an objection to the conditional deposit is taken, the applicant withdraws his condition, the money becomes available for payment to the decree-holder before he has made any attempt to withdraw it and therefore the deposit is not invalid.[4]

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(4) *Dattatraya Krishna Ashtaputre* v. *Jagannath Shamrao*, 1929 Bom 215 (217): 31 Bom L R 433: 117 Ind Cas 527. See also *Kabilasa Koer* v. *Raghu Nath*, (1891) 18 Cal 481 (483, 484).

(5) *Abul Nasar* v. *Lalta Prasad*, 1923 All 315 (317): 71 Ind Cas 1018: 21 All L J 162: 4 L R A (Civ) 121.

(6) *Durga Prasad* v. *Chandika Prasad*, 1930 Oudh 9 (10): 118 Ind Cas 805.

Note 19.

(1) *Abdul Gafur Mulla* v. *Kalidhan Mondal*, 1930 Cal 302 (304): 50 Cal L Jour 532: 34 Cal W N 250: 124 Ind Cas 481; *Rangini Sundari Dasya* v. *Hiralal Biswas*, 1930 Cal 249 (250): 33 Cal W N 1170: 126 Ind Cas 207; *Gholam Mohomed Mustafa* v. *Manindra Nath Bhattacharya*, (1914) 22 Ind Cas 842 (843) Cal; *Palturam Singh* v. *Kamini Mani Dasi*, (1910) 7 Ind Cas 52 (53) Cal; *Makbool Ahmed Chowdhury* v. *Bazle Sabhan Chowdhry*, (1898) 25 Cal 609(611): *Ugrah Lal* v. *Radha Pershad*, (1891) 18 Cal 255 (258); *Sheikh Fakir* v. *Beraj Mohini*, (1907) 11 Cal W N 116 (119); *Tirumal Rao* v. *Syed Dastaghir Miyah*, (1898) 22 Mad 286 (288) [Court directed that judgment-debtor need not pay five per cent—Shortage does not affect]; *Jaung Bahadur* v. *Kuer Kishun*, (1898) 1 Oudh Cas 193 (196).

(2) *Chundi Charan Mandal* v. *Banke Behary Lal*, (1899) 26 Cal 449 (457, 459, 461): 3 Cal W N 283; *Sarjoo Prasad* v. *Nanoo Rai*, (1916) 35 Ind Cas 779 (781): 1 Pat L Jour 459: 3 Pat L W 18 [26 Cal 449 relied on].

Note 20.

(1) *Narayan* v. *Amgauda*, 1921 Bom 169 (171, 172): 45 Bom 1094: 62 Ind Cas 104: 23 Bom L R 455; *Raghu Ram Pandey* v. *Deokali Panda*, 1928 Pat 193 (194): 7 Pat 30. See also *Raja Dutt Prasad Singh* v. *Sri Narain*, 1928 All 503 (504): 74 Ind Cas 557: 21 All L J 340: 4 L R (All) Civ 195. See *Madhuri Saran* v. *Bishambhar Nath*, 1927 All 561 (562): 25 All L J 576: 102 Ind Cas 471: 49 All 839 [Where applicant said that if sale not set aside money may be returned to him; it is not a conditional deposit].

(2) *Nurjahan Khatun* v. *Asia Khatun*, 1932 Cal 216 (218): 35 Cal W N 1056: 136 Ind Cas 478; *Shakoti* v. *Jotindra*, (1897) 1 Cal W N 132 (133).

(3) *Kunhutti* v. *Neelakandan Nambudri*, 1930 Mad 921 (923, 924): 1930 Mad W N 524: 32 Mad L W 357: 53 Mad 943: 128 Ind Cas 509: 59 Mad L Jour 893.

(4) *Dulhin Mathura Koer* v. *Baneidhar Singh*, (1911) 10 Ind Cas 880 (881): 16 Cal W N 904:

O.21, R.89, Notes 20—22.

Where a deposit is properly made under this rule, but subsequently an application is made that the money may be retained in Court pending the result of an application under O. 9, R. 13, the subsequent condition cannot invalidate the deposit which was originally good.[5]

21. A sum equal to 5 per cent.—Sub-R. 1, Cl. (*a*) provides that the deposit should include a sum equal to five per cent. of the purchase-money for payment to the purchaser, and a sale cannot be set aside unless the 5 per cent. is also deposited.[1] That amount is intended partly as a *solatium* to the purchaser for the loss of that which is, perhaps a good bargain.[2] A decree-holder-purchaser is as much entitled to that *solatium* as an outside purchaser.[3] To hold otherwise would be to read into the rule after the word 'purchaser' the words 'if such purchaser be not the decree-holder'.[4]

Where, out of two joint decree-holders one of them obtains permission to bid for himself alone and not on behalf of the other, and purchases the property and thereafter the sale is set aside under this rule, the compensation amount of five *per cent.* should go exclusively to him and not to the other decree-holder.[5]

22. Less any amount received.—If, after the proclamation of sale is drawn up, the decree-holder and the judgment-debtor adjust the decree in full or in part, the adjustment is tantamount to a receipt of the amount by the decree-holder and it is not necessary that that amount should be deposited when applying to set aside a sale under this rule.[1] The expression "any amount which may have been received by the decree-holder" in sub-R. 1, clause (*b*) means money actually received by the decree-holder and does not include payment of the sale proceeds into Court.[2]

Illustration.

Certain properties divided into two lots, *A* and *B* were ordered to be sold to realize a sum of Rs. 843-9-9. Properties *A* and *B* fetched Rs. 420 and Rs. 584 respectively at the sale. The judgment-debtor paid into Court Rs. 452-13-0 and applied to have the sale of lot *B* set aside. It was held that as the

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15 Cal L Jour 83; *Sham Sundar* v. *Munshi Mushaheb Lal*, 1923 Pat 418 (420): 2 Pat 534: 72 Ind Cas 907; *Ram Shivendra Narayan Ojha* v. *Awadh Bihary Saran*, 1923 Pat 159 (161): 4 Pat L Tim 295: 68 Ind Cas 629.

(5) *Hanoomansingh* v. *Luchman Sahoo*, (1904) 8 Cal W N 355 (356).

Note 21.

(1) *Sarjoo Prasad* v. *Nanoo Rai*, (1916) 35 Ind Cas 779 (781, 782): 1 Pat L Jour 459: 3 Pat L W 48; *Seth Ballabdas* v. *Sobha Singh*, 1924 Nag 216 (218): 78 Ind Cas 270.

(2) *Chundi Charan Mandal* v. *Banke Behary Mandal*, (1899) 26 Cal 449 (451, 452): 3 Cal W N 283.

(3) *Mendai Lal* v. *Bhujja Singh*, 1895 All W N 140 (140); *Chundi Charan Mandal* v. *Banke Behary Mandal*, (1899) 26 Cal 449 (451, 460): 3 Cal W N 283; *Sarvoi Begam* v. *Haidar Shah*, (1912) 13 Ind Cas 404 (405): 9 All L J 12; *Tirumal Rao* v. *Syed Dastaghiri Miyah*, (1899) 22 Mad 286 (288).

(4) *Chundi Charan Mandal* v. *Banke Behary Mandal*, (1899) 26 Cal 449 (452): 3 Cal W N 283.

(5) *Munshi Rai* v. *Rup Narain*, 1927 Pat 288 (289): 6 Pat 386: 103 Ind Cas 724.

Note 22.

(1) *Anantha Lakshmi Ammal* v. *Kunnanchankarath Shankaran Nair*, (1913) 18 Ind Cas 579 (580): 13 Mad L Tim 123: 1913 Mad W N 101: 24 Mad L Jour 205; *Vedala Lakshminarasamma* v. *Pucha Lakshmammal*, (1912) 14 Ind Cas 326 (326): 1912 Mad W N 756; *Lakshminarasimhacharyulu* v. *Lakshmamma*, (1911) 12 Ind Cas 169 (169): 11 Mad L Tim 380; *Ram Nath* v. *Murli Dhar*, (1903) 6 Oudh Cas 68 (71).

(2) *Tola Ram* v. *Chhoturam*, 1923 Bom 299 (299, 300): 25 Bom L R 446: 73 Ind Cas 454; *Trimbak* v. *Ramchandra*, (1899) 23 Bom 723 (725): 1 Bom L R 215; *Kripanath Pal* v. *Ram Lakshim Dasya*, (1897) 1 Cal W N 703 (704, 705); *Muhiuddin Rowther* v. *Rangachariar*, (1915) 31 Ind Cas 913 (913) Mad; *Rameshwar Singh* v. *Mangal Prasad Sahu*, 1930 Pat 318 (319): 9 Pat 310: 125 Ind Cas 570: 11 Pat L Tim 880. But see *Panna Lal* v. *Bhola Nath*, 1930 All 843 (845): 128 Ind Cas 818.

decree-holder had not actually received the sum of Rs. 420 the deposit was not full and the sale could not be set aside.[3]

O.21, R.89, Notes 22—23.

On the same principle a judgment-debtor is not entitled to take advantage of any deposit made by his co-judgment-debtor which was made not conjointly with him, but independently of him.[4]

Where a sale proclamation specified the entire amount due under the decree and also contained a direction that certain items were to be sold for only a part of the decree amount and after sale the persons interested in such items applied to set aside the sale on their depositing the amount for which their property was sold together with the five per cent. due to the purchaser, it was held that the deposit was valid.[5] The reason is that in such a case the words "amount specified in the sale proclamation can only mean the amount which is to be realised by the sale of the particular properties."

23. "For payment to the decree-holder".—The words 'decree-holder' in this rule means the decree-holder *for the satisfaction of whose decree the sale was ordered* and does not include other decree-holders who may be entitled to claim rateable distribution under S. 73. Therefore, it is not necessary for the applicant to deposit into Court the amounts due to the other decree-holders claiming rateable distribution.[1] As the payment under this rule is made for a *specific purpose*, *viz.*, for payment to the decree-holder, other persons who have obtained decrees against the judgment-debtor are not entitled to claim rateably in the amount deposited by an applicant under this rule.[2] *See also* Note 4 to S. 73. Where a decree is attached by two persons who are both substituted for the decree-holder-defendant and a sale held in execution of the attached decree at the instance of one of them is set aside under this rule, both of them will be regarded as the "decree-holder" and will be entitled to the amount deposited.[3] Where the property of a judgment-debtor is attached in execution of several decrees and a sale in execution of one of the decrees is set aside by a deposit, the sale does not put an end to the attachment made at the instance of the other decree-holders.[4]

Where, in a mortgage suit, a decree for sale in favour of the plaintiff was passed subject to the payment of a certain prior charge in favour of a

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(3) ***Trimbak Narayan*** v. ***Ram Chandra***, (1899) 23 Bom 723 (725): 1 Bom L R 215.

(4) ***Subbayyar*** v. ***Muthayan***, 1922 Mad 51 (54): 14 Mad L W 631: 65 Ind Cas 983: 30 Mad L Tim 83: 42 Mad L Jour 71; ***Karunakara Menon*** v. ***Krishna Menon***, (1915) 27 Ind Cas 952 (954): 28 Mad L Jour 262: 2 Mad L W 196; ***Koppaka Chandrayya*** v. ***Robertson***, (1919) 52 Ind Cas 611 (611) Mad; ***Kalinga Hebbara*** v. ***Narasima***, (1911) 9 Ind Cas 937 (938): (1911) 1 Mad W N 113: 9 Mad L Tim 259: 21 Mad L Jour 631. See ***Madhuri Saran*** v. ***Bishambhar Nath***, 1927 All 561 (562): 49 All 839: 25 All L J 576: 102 Ind Cas 471 [Where judgment-debtor and his mortgagee deposited separately it was treated as one]. But see ***Muttathil Krishna Menon*** v. ***The Collector of Malabar***, (1914) 22 Ind Cas 53 (54) Mad.

(5) ***Chinnappa Tharakan*** v. ***Itticht Amma***, 1926 Mad 765 (766, 767): 23 Mad L W 720: 96 Ind Cas 77: 50 Mad L Jour 580.

Note 23.

(1) ***Ganesh Bab Naik*** v. ***Vithal Vaman Mahalya***, (1913) 19 Ind Cas 475 (477): 15 Bom L R 211: 37 Bom 387; ***Pita*** v. ***Chunni Lal***, (1907) 1 Bom 207 (217): 9 Bom L R 15; ***Hari Sundari*** v. ***Sashi Bala***, (1896) 1 Cal W N 195 (196); ***Veera Raghavan Pattar*** v. ***Vatasseri Para Manadissee***, (1912) 17 Ind Cas 920 (921): 23 Mad L Jour 585.

(2) ***Hari Saha*** v. ***Faizlar Rahman***, (1913) 18 Ind Cas 839 (840): 40 Cal 619: 17 Cal W N 636: 18 Cal L Jour 144: 19 Cal W N 1125; ***Rohini Lal*** v. ***Ram Lal Mullick***, (1903) 30 Cal 60 (260, 261): 7 Cal W N 341; ***Bihari Lal Paul*** v. ***Gopal Lal Seal*** (1897) 1 Cal W N 695 (696); ***Murugappa*** v. ***Palaniappa***, (1917) 42 Ind Cas 507 (507) Mad.

(3) ***Upendranath Sahu*** v. ***Haridas Mukherjee***, (1908) 12 Cal W N 800 (802).

(4) ***Mahomadsha Khan Sahib*** v. ***Srinivasulu***, (1903) 13 Mad L Jour 221 (221).

O.21, R.89, Notes 23—25.

defendant out of the sale proceeds, and the sale in execution was set aside under this rule by one of the subsequent mortgagees, the decree-holder was held entitled to draw the whole amount without any deduction being made on account of the prior charge.[5] The reason is that there were no sale proceeds out of which the prior charge was to be paid, as the sale was set aside.

Upon a sale being set aside under this rule the decree-holder is not entitled to claim interest from the date of sale till the date of deposit.[6]

24. Sub-R. 2.—The object of this sub-rule is to prevent a person who intends to impeach a sale under R. 90 from, at the same time, obtaining the benefit of the concession granted by this rule.[1] Where applications under Rr. 89 and 90 made by the same person are pending, the Court ought to call upon the applicant to make his election as to which application he will prosecute.[2] The fact that an applicant makes an application under R. 90 is not a permanent disqualification and therefore he may carry on the application under this rule, if the other application has been withdrawn.[3] A person whose application under R. 90 is *dismissed* is also not disqualified from subsequently applying under this rule.[4] An application made by a person under this rule is not barred by the pendency of an application under R. 90 by *another person*.[5]

Sub-R. 2 will not apply if the application to set aside the sale does not come within the scope of R. 90 but comes within the scope of S. 47, *ante*.[6] Irregularity in the conduct of or in publishing the sale cannot be taken as a plea in an application under this rule.[7]

There is no provision converse to this sub-rule and therefore there is nothing to prevent an application being made under R. 90 where an application under this rule has been made and withdrawn or dismissed.[8]

25. Setting aside sale in respect of portion of property sold.—*See* Note 22, *ante*.

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(5) *Chidambaram Chettiar* v. *Rama Row*, (1898) 8 Mad L Jour 135 (137).

(6) *Attaides* v. *R M K Chetty*, (1914) 24 Ind Cas 479 (480): 7 Bur L Tim 68.

Note 24.

(1) *Venkatakrishnayya* v. *Narasimham*, (1898) 8 Mad L Jour 56 (58).

(2) *Mt Sarvi Begam* v. *Ram Chander*, 1925 All 778 (779): 23 All L J 760: 6 L R A (Civ) 388: 88 Ind Cas 500: 47 All 850.

(3) *Sital Rai* v. *Nandalal*, (1909) 1 Ind Cas 304 (306): 13 Cal W N 591: 11 Cal L Jour 202; *Rajendra Nath Haldar* v. *Niratan Mitter*, (1896) 23 Cal 958 (961); *Venkatakrishnayya* v. *Narasimham*, (1898) 8 Mad L Jour 56 (58); *Raja Mohammad Sardar Hussain Khan* v. *Sajjad Mirza*, (1907) 10 Oudh Cas 141 (144). See *Mangal Mandal* v. *Bijoy Chand*, (1911) 11 Ind Cas 757 (758) Cal [On the date of withdrawal 30 days elapsed—*Held*, application under S 174, Bengal Tenancy Act, could not be heard].

(4) *Mirza Altaf Beg* v. *Fazlul Haq*, 1928 All 196 (197): 26 All L J 79: 116 Ind Cas 490; *Murlidhar* v. *Baldeo Singh*, (1918) 43 Ind Cas 340 (341): 20 Oudh Cas 329. See also *Baldeo* v. *Nabi Ahmad Khan*, 1926 All 754 (755): 93 Ind Cas 953 [An application under R 90 before conclusion of sale is not an application under R 90 and will not bar one under R 89].

(5) *Tulli Ram* v. *Izzat Ali*, (1908) 30 All 192 (196): 5 All L J 253: 1908 All W N 77; *Ashraf Ali* v. *Net Lal Sahu*, (1896) 23 Cal 682 (686) [Other judgment-debtor appealing against an order under R 90].

(6) *Harihar Kant* v. *Rama Pandu*, (1909) 4 Ind Cas 253 (254): 33 Bom 698: 11 Bom L R 1113 [To set aside sale on account of fraud under S 244 of the old Code].

(7) *Phulchand Ram* v. *Narsingh Pershad*, (1901) 28 Cal 78 (76). See *Narayan* v. *Rasul Khan*, (1899) 23 Bom 531 (535): 1 Bom L R 33.

(8) *Mt Sarvi Begam* v. *Ramchander Sarup*, 1925 All 778 (779): 23 All L J 760: 6 L R A (Civ) 388: 88 Ind Cas 500; *Basir-ud-din* v. *Faimulla*, (1911) 11 Ind Cas 196 (196): 17 Cal W N 476.

26. Necessary parties to application.—*See* Notes to O. 21, R. 92, *infra*.

27. Notice.—*See* Notes to O. 21, R. 92, *infra*.

28. Limitation.—An application under this rule to set aside a sale is governed by Art. 166 of the Limitation Act and must be made on or before thirty days from the date of the sale.[1] The starting point of limitation for such an application is the date on which the sale is *completed*, that is, the day on which the highest bid is accepted and the twenty-five per cent. of the purchase money is deposited[2] and not the date on which the sale is confirmed.[3] The provisions of S. 14 of the Limitation Act are not applicable to an application under this rule.[4]

As to the effect of the failure to implead the auction purchaser and to issue notice to him within thirty days, *see* Notes to O. 21, R. 92.

Sub-R. (2) of R. 92, *infra* and the words "may apply . . . on his depositing" in this rule show that not only the application, but the deposit also must be made within 30 days from the date of the sale.[5] If the deposit is not made in time, the Court has no power to extend the time either under S. 148 of this Code or under S. 5 of the Limitation Act.[6] But, where the applicant, without any fault of his own, is not able to deposit the money into Court, on account of the fact that the *challan* was not signed by the Judge and returned to him in time or on account of some other act of the Court, the deposit made on the next day will be a valid deposit on the principle expressed by the maxim "*actus curiae neminem gravabit*" an act of Court prejudices no man.[7] Where the Court is closed on the last day for making the deposit it

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Note 28.

(1) *Mathura Prashad* v. *Ram Lal*, (1911) 9 Ind Cas 33 (33) All; *Vana* v. *Ratilal*, 1926 Bom 335 (335): 28 Bom L R 510: 95 Ind Cas 549; *Raoji* v. *Bansi Lal*, (1919) 53 Ind Cas 135 (136): 43 Bom 735: 21 Bom L R 835 [It is not enough to make deposit within 30 days]; *Mahomed Din* v. *Sharampat*, 1926 Lah 639 (640): 96 Ind Cas 377; *Kabiruddin* v. *Krishna Rao*, 1928 Nag 136 (143): 109 Ind Cas 419; *Ram Autar* v. *Shee Peary Lal*, 1925 Oudh 411 (412): 12 Oudh L J 137: 87 Ind Cas 722; *Nawab Ismail Ali* v. *E M Viswanadan Chetty*, (1915) 27 Ind Cas 656 (656): 8 Bur L Tim 80 [On the 30th day sale confirmed —Thereafter petition on the same day Petition is in time].

(2) *Munshi Lal* v. *Ram Narain*, (1912) 15 Ind Cas 783 (784): 35 All 65: 10 All L J 917: [illegible] v. *Rati Lal*, 1926 Bom 335 (335): 97 Ind Cas 549: 28 Bom L R [illegible]; *Lala Gokal Chand* v. *Ganpat Rai*, 1930 Lah 11 (12): 118 Ind Cas 900; *Khairan* v. *Aliana Bibi* [illegible] (1919) 49 Ind Cas 914 (915) Lah; *Ramji* v. *Baliram*, 1928 Nag 111 (112): 106 Ind Cas 173; *Kanwal Ram* v. *Gurdei*, 1931 Oudh 291 (293): 132 Ind Cas 263: 6 Oudh W N 613.

(3) *Chowdhry Kesri Sahay* v. *Ghani Roy*, (1902) 29 Cal 626 (628, 631, 636): 6 Cal W N 776. *Wasudeo* v. *Hiralal*, (1912) 17 Ind Cas 881 (884): 8 Nag L R 177.

(4) *Chowdhry Kesri Sahay* v. *Ghani Roy*, (1902) 29 Cal 626 (632): 6 Cal W N 776.

(5) *Mahomed Akbar* v. *Sukhdeo*, (1911) 10 Ind Cas 51 (53): 13 Cal L Jour 467; *Venkatrami Thevar* v. *Perisami Thevar*, (1916) 33 Ind Cas 996 (997): 3 Mad L W 271: 19 Mad L Tim 192: (1916) 1 Mad W N 179; *Sadashea Kartatkar* v. *Narayan*, 1929 Nag 10 (11): 106 Ind Cas 568.

(6) *Sharafan* v. *Mahomed Habibuddin*, (1911) 10 Ind Cas 148 (152): 13 Cal L Jour 535: 15 Cal W N 685; *Shashi Bhushan Banerjee* v. *Charushila Debi*, (1916) 36 Ind Cas 809 (810) Cal; *Raghubar Dayal Sukul* v. *Jadu Nandan Missir*, (1912) 13 Ind Cas 365 (367): 15 Cal L Jour 9: 16 Cal W N 736; *Vennisami Thevar* v. *Perisami*, (1916) 33 Ind Cas 996 (997): 3 Mad L W 271: 19 Mad L Tim 192: (1916) 1 Mad W N 179 [Inherent power under S 151 cannot be invoked]; *Rameshwar Misser* v. *Sureshwar Misser*, (1917) 39 Ind Cas 661 (665): 2 Pat L Jour 161. *Mohamed Kasim* v. *Daeid*, 1928 Rang 286 (286): 6 Rang 490.

(7) *Durga Prasad* v. *Hira Lal*, 1922 All 195 (196): 20 All L J 543: 67 Ind Cas 321; *Gajadhar Das* v. *Ramsumairan Dube*, (1919) 52 Ind Cas 161 (162): 17 All L J 991; *Munna Lal* v. *Radha Kishen*, (1915) 30 Ind Cas 186 (187): 37 All 591: 13 All L J 793; *Mohomed Akbar Zaman Khan* v. *Sukhdeo Pande*, (1911) 10 Ind Cas 51 (54): 13 Cal L Jour 467; *Dulhin Mothura Koer* v. *Bansidhar Singh*, (1911) 10 Ind Cas 880 (881): 16 Cal W N 904: 15 Cal L Jour 83; *R Gopala Krishna* v. *M Kunjithapatham Pillai*, 1921 Mad 321 (326): 45 Mad L Jour 849: 18 Mad L W 844: 33 Mad L Tim 106: 1923 Mad W N 811: 47 Mad 543: 79 Ind Cas 651 [Obiter]: *Kantmal* v. *Amar Singh*, 1926 Nag 331 (331): 9 N L J 57: 96 Ind Cas 376; *Ram Nath* v. *Mudi Dhar* (1903) 6 Oudh Cas 68 (71).

O.21, R.89, Notes 28—29.

may be made on the next re-opening day by virtue of the provisions of S. 10 of the General Clauses Act.[8]

The provisions of S. 7 of the Limitation Act do not apply to the period of 30 days for making a deposit under this rule, as that period is not fixed by any provision of the Limitation Act, but by a provision in this Code, namely, R. 92, *infra*. Consequently a minor is not entitled, by reason of his disability to an extension of the period under S. 7 of the Limitation Act.[9]

29. **Appeal.**—There was no provision in the old Code for an appeal against an order under S. 310-A. Being, however, a decision on a question relating to the execution, discharge or satisfaction of the decree it was held that such an order would be appealable if the *decree-holder* was the purchaser inasmuch as the question was one between the parties to the suit.[1] But where the auction purchaser was a stranger there was a conflict of opinion as to the appealability of the order.[2] *See* also Note 18 to S. 47 for a fuller discussion.

Under this Code an order setting aside a sale or refusing to set aside a sale under R. 92, *infra* is appealable *as an order* under O. 43, R. 1, Cl. (*j*).[3] An appeal will lie even in a case where the sale is in execution of a small cause decree, transferred to the original side for execution against immoveable property.[4] The *forum* of appeal depends upon the value for jurisdiction stated in the suit in which the decree has been passed.[5] No second appeal will lie from an order under this rule read with R. 92, by virtue of the provisions of S. 104.[6]

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(8) *Soshee Busan* v. *Gobind Ohunder*, (1891) 18 Cal 231 (234); *Bashir-ud-din* v. *Jhori Singh*, (1897) 19 All 140 (140): 1897 All W N 7; *Radhe Lal* v. *Sheo Prasad*, (1905) 9 Oudh Cas 214 (215); *Ram Nath* v. *Murlidhar*, (1903) 6 Oudh Cas 68 (70).

(9) *Hirasa* v. *Joderaj*, (1909) 1 Ind Cas 178 (179): 5 Nag L R 1.

Note 29.

(1) *Sital* v. *Nand Lal*, (1909) 1 Ind Cas 304 (305): 13 Cal W N 591: 11 Cal L Jour 202; *Mahomed Akbar Jaman Khan* v. *Sukhdeo Panday*, (1911) 10 Ind Cas 51 (52): 13 Cal L Jour 467; *Kedai Nath Sen* v. *Umacharan*, (1902) 6 Cal W N 57 (60); *Pulchand Ram* v. *Nursingh Pershad*, (1901) 28 Cal 73 (76); *Kripa Nath Pal* v. *Ram Lakshmi Dasya*, (1897) 1 Cal W N 703 (705); *Omar Ali Majhi* v. *Moonshi Basirudeen Ahmed*, (1908) 7 Cal L Jour 282 (283); *Harihar Kant* v. *Rama Pandu*, (1909) 4 Ind Cas 253 (254): 33 Bom 698: 11 Bom L R 1113; *Pita* v. *Ohunilal*, (1906) 31 Bom 207 (214): 9 Bom L R 15; *Pandurang Govind Purandare* v. *Krishnabai*, (1899) 1 Bom L R 74 (75); *Srinivasa Ayyangar* v. *Ayyathorai Pillai*, (1898) 21 Mad 416 (416, 417): 8 Mad L Jour 54; *Nallamuthu Pillai* v. *Subba Pillai*, (1910) 8 Ind Cas 855 (856): 9 Mad L Tim 165. But see *Kuber Singh* v. *Shib Lal*, (1905) 27 All 263 (265): 1904 All W N 237.

(2) No appeal lies:—*Anandi Kunwar* v. *Ajudhia Nath*, (1908) 30 All 379 (383): 1908 All W N 157: 5 All L J 557; *Bashir-ud-din* v. *Jhori Singh*, (1897) 19 All 140 (141): 1897 All W N 7; *Manganlal Mulji* v. *Dosh Mulji*, (1901) 25 Bom 631 (635): 3 Bom L R 255; *Amir Rai* v. *Basdeo Singh*, (1907) 5 Cal L Jour 204 (205); *Bungshidhar* v. *Kedar Nath*, (1896) 1 Cal W N 114 (117); *Chinnammal* v. *Athinatha Ayyangar*, (1900) 10 Mad L Jour 228 (229); *Maung Po That* v. *P R V Anamalay Chetty*, (1911) 9 Ind Cas 472 (473): 4 Bur L Tim 28. Appeal lies:—*Imtiazi Begam* v. *Dhuman Begam*, (1907) 29 All 275 (276): 4 All L J 135: 1907 All W N 64; *Murlidar* v. *Anandrao*, (1901) 25 Bom 418 (421): 3 Bom L R 100; *Lakshminarasimma* v. *Lakshmamma*, (1911) 12 Ind Cas 169 (169): 11 Mad L Tim 380; *Manikka Odayan* v. *Rajagopala Pillai*, (1907) 30 Mad 507 (508, 509): 2 Mad L Tim 347: 17 Mad L Jour 291.

(3) *Fazal Rab* v. *Manzur Ahmed*, (1918) 45 Ind Cas 773 (774): 40 All 425: 16 All L J 433 [Purchaser can appeal]; *Shashi Bhushan Banerjee* v. *Charushila Debi*, (1916) 36 Ind Cas 809 (810) Cal; *Bibi Sharofan* v. *Mahomed Habibuddin*, (1911) 10 Ind Cas 148 (149, 152): 15 Cal W N 685: 13 Cal L Jour 535 [Set aside without notice to purchaser—He can appeal]; *Sitanath Roy* v. *Hare Krishna Sahu*, (1910) 6 Ind Cas 573 (573) Cal; *Thakar Singh* v. *Gurdit Singh*, (1911) 12 Ind Cas 733 (733): 178 Pun W R 1911; *V Lakshminarasammah* v. *P Lakshmammal*, (1912) 14 Ind Cas 326 (326): 1912 Mad W N 756.

(4) *Kandaswami* v. *Swarnavelu Stapathi*, (1919) 53 Ind Cas 958 (959): 27 Mad L Tim 130: 10 Mad L W 556: 1920 Mad W N 151.

(5) *Thakar Singh* v. *Gurdit Singh*, (1911) 12 Ind Cas 733 (733): 178 Pun W R 1911.

(6) *Gadigappa* v. *Shidappa*, 1924 Bom 495 (497, 498): 26 Bom L R 817: 48 Bom 638: 83 Ind Cas 155; *Kachu Ravji Mindhe Vanjari* v. *Trimbak Khemchand Gujarathi*, (1920) 56 Ind Cas 597 (598): 44 Bom 472: 22 Bom L R 383; *Rangini Sundari Dasya* v. *Haralal Biswas*, 1930 Cal 249 (250): 33 Cal W N 1170: 126 Ind Cas 207; *Banshibadan Mandal* v. *Chhaunat Bibi*, 1926 Cal 400 (400): 42 Cal L Jour 176: 90 Ind Cas 228; *Asimuddi Sheikh* v. *Sundari Bibi*, (1911) 10 Ind Cas 345 (345): 38 Cal 339: 15 Cal W N 844; 14 Cal L Jour 224; *Sitanath Roy* v. *Hare*

Even though the matter may fall under S. 47 (in cases where the decree-holder is the purchaser) the order will not be appealable as a decree under this Code, as the definition of decree in S. 2 excludes even an order under S. 47 if it is appealable *as an order*. *See* Note 2 to S. 2, sub-S. 2. **O.21, R.89, Notes 29—30.**

In cases under S. 174 of the Bengal Tenancy Act an appeal lies as from a decree where the decree-holder is the purchaser,[7] but not where such purchaser is a stranger.[8] But the Bengal Legislature has in 1928 amended S. 174 of that Act by adding a clause providing for an appeal under that section in such cases.

When an application under this rule has been dismissed for default and an application for restoration thereof has been unsuccessful, no appeal lies against the order refusing to restore the application.[9]

30. Revision.—Where a Court refuses to entertain an application under this rule of a person who is entitled to apply, on the ground that the applicant has no *locus standi* to apply or allows the application of a person who has not the legal character specified in this rule, is the order revisable by the High Court? It has been held by the High Courts of Calcutta,[1] Madras,[2] and Patna[3] and by the Judicial Commissioner's Court of Nagpur[4] that the High Court can interfere, on the ground that, in such cases, the Court either refuses to exercise a jurisdiction vested in it by law or exercises a jurisdiction not vested in it by law. The High Court of Allahabad[5] has, however, taken a contrary view that the Court has jurisdiction to decide whether he is entitled to apply and that a decision arrived at in the *exercise of such jurisdiction*, even though erroneous cannot be interfered with by the High Court in revision.

Krishna Sahu, (1910) 6 Ind Cas 573 (573) Cal; *Nur Mustapha* v. *Mahomed Jamadar*, 1921 Lah 156 (157): 3 Lah L Jour 463: 62 Ind Cas 980; *Mussamat Khairan* v. *The Alliance Bank of Simla* (1919) 50 Ind Cas 914 (915) Lah; *Ghania Lal* v. *Pohlo Mal*, (1910) 7 Ind Cas 718 (719): 72 Pun Re 1910: 143 Pun L R 1910: 105 Pun W R 1910; *Wamdeo* v. *Hira Lal*, (1912) 17 Ind Cas 884 (885): 8 Nag L R 177; *Durga Prasad* v. *Chandika Prasad*, 1930 Oudh 9 (9): 118 Ind Cas 805; *Iftikha Haidar* v. *Ikram Fatima*, 1925 Oudh 622 (623): 12 Oudh L J 336: 2 Oudh W N 376: 88 Ind Cas 559: 29 Oudh Cas 86; *Razi ud din Hussain* v. *Bendeshri Prasad Singh* (1916) 36 Ind Cas 769 (770) Pat; *Jagmohan Singh* v. *Bachcha*, 1922 Oudh 146 (147): 25 Oudh Cas 78: 66 Ind Cas 929: 9 Oudh L J 50; *Maung Pe Sein* v. *Mu Thin Mya*, 1929 Rang 118 (148): 7 Rang 37: 117 Ind Cas 253. See *Kalinga Hebbara* v. *Narasimma*, (1911) 9 Ind Cas 937 (938): 21 Mad L Jour 631: (1911) 1 Mad W N 145: 9 Mad L Tim 259 [Party having right of second appeal under law before 1908—Cannot be defeated by O 43, R 1 of the Code]

(7) *Raghubar Dayal* v. *Jadu Nandan*, (1912) 13 Ind Cas 367 (368): 15 Cal L Jour 89: 16 Cal W N 736.

(8) *Raghunandan Pandey* v. *Garju Mandal*, 1927 Pat 525 (526): 1925 Pat H C C 183: 4 Pat 718: 6 Pat L Tim 795: 91 Ind Cas 217.

(9) *Ghasiti Bibi* v. *Abdul Samad*, (1907) 29 All 596 (597, 598): 1907 All W N 186.

Note 30.

(1) *Abdul Rahman* v. *Matiyar*, (1903) 30 Cal 425 (428).

(2) *Si Potti Nayakar* v. *Suppammal*, 1924 Mad 723 (724): 20 Mad L W 31: 79 Ind Cas 874; *A C Subba Reddi* v. *Vasi Reddi Jayaramayya*, 1923 Mad 659 (660): 17 Mad L W 680: 76 Ind Cas 853; *Sundaram* v. *Mamsa Mavuthar*, 1921 Mad 157 (161, 163): 44 Mad 554: 40 Mad L Jour 497: 13 Mad L W 498: 1921 Mad W N 272: 63 Ind Cas 937 F B; *Kandasami Asari* v. *Swarnavelu Stapathi*, (1919) 53 Ind Cas 958 (959): 10 Mad L W 556: 27 Mad L Tim 130: 1920 Mad W N 141; *Ananthe Lakshmi Ammal* v. *Kunnanchankurath Sankaran Nair*, (1913) 18 Ind Cas 579 (582): 1913 Mad W N 101: 24 Mad L Jour 205: 13 Mad L Tim 123. But see *Kopakka Chandrayya* v. *Robertson*, (1919) 52 Ind Cas 641 (641) Mad; *Idapa Subbaramudu* v. *Lakshminarasimma*, (1914) 22 Ind Cas 193 (194): 1914 Mad W N 147: 38 Mad 775: 15 Mad L Tim 98: 1 Mad L W 59.

(3) *Aulad Ali* v. *Abdul Hamid* 1923 Pat 490 (491): 2 Pat 715: 74 Ind Cas 102; *Musst Dhanwantikuer* v. *Sheo Shankar Lal*, (1919) 51 Ind Cas 873 (873, 874): 4 Pat L Jour 340: 1921 Pat H C C 364.

(4) *Onkar* v. *Dhan Singh*, 1926 Nag 10 (14, 15): 21 Nag L R 102: 90 Ind Cas 963.

(5) *Fad Ram* v. *Sundar Singh*, 1923 All 392 (392, 393): 21 All L J 313: 45 All 125: 1 L R A Civ 402: 74 Ind Cas 778 F B; *Ram Singh* v. *Salig Ram*, (1906) 28 All 84 (87, 88): 2 All L J 711: 1905 All W N 193.

O.21, R.89, Notes 30—31.

Where an applicant has complied with the terms of this rule and his application is nevertheless rejected,[6] or where a sale is set aside even though the applicant does not conform to the provisions of this rule,[7] the order is open to revision by the High Court.

See also the undermentioned cases.[8]

31. **Deposit—Suit for refund and contribution.**—Where property belonging to *A* is sold in execution of a decree against *B* and *A* has the sale set aside on depositing the amount under this rule can he sue the decree-holder for the recovery of such amount? It has been held by the High Courts of Bombay, Calcutta and Patna that he is not so entitled to recover.[1] They proceed upon the view that the payment under this rule must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally. But the High Court of Madras has held that *A* is entitled to recover the amount under S. 72 of the Indian Contract Act, as money paid under coercion.[2]

Where the deposit is made by one of several judgment-debtors or by a person entitled to apply under this rule and the sale is set aside in consequence, the person making the deposit is entitled to sue the other persons liable to pay the decree-amount for contribution or for re-imbursement as the case may be.[3] The High Court of Madras has held in the undermen-

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(6) *Abdul Wahid* v. *Tribhawan Das*, 1931 All 736 (757): 133 Ind Cas 407: 1932 All L J 13; *Abdul Nasar Rashid-ud-din Ahmad* v. *Lalita Prasad*, 1923 All 315 (318): 21 All L J 162; 71 Ind Cas 1018: 4 L R A Civ 121; *Panna Lal* v. *Bhola Nath*, 1930 All 843 (845): 128 Ind Cas 818; *Dip Chand* v. *Sheo Prasad*, 1929 All 593 (595, 596): 1929 All L J 769: 119 Ind Cas 103: 51 All 910; *Basi Poddar* v. *Ram Krishna Poddar*, (1897) 1 Cal W N 135 (136); *Rameshivendra Narayan Ojha* v. *Awadh Bihary Saran*, 1923 Pat 159 (162): 68 Ind Cas 629: 4 Pat L Tim 295; *Durga Prasad* v. *Chandika Prasad*, 1930 Oudh 9 (9, 10): 110 Ind Cas 805; *Mumtaz Ali* v. *Abbas Ali*, (1900) 3 Oudh Cas 236 (238); *Mt Zainab* v. *Paras Nath*, 1924 Pat 37 (38, 39): 1 Pat L R 361: 75 Ind Cas 430.

(7) *Sadashco Kartatkar* v. *Narayan*, 1929 Nag 10 (11): 106 Ind Cas 568.

(8) No revision lies:—*Biswanath Singh* v. *Dasrath Dube*, 1927 All 754 (754): 100 Ind Cas 726 [Decision that "Court" means Civil Court]; *Fazal Rab* v. *Mansur Ahmad*, (1918) 45 Ind Cas 773 (774): 40 All 425: 16 All L J 433, (Do.): *Syed Ibne Hasan* v. *Din Dayal*, 1931 All 449 (450): 1931 All L J 404: 132 Ind Cas 808 [Rejection of application on the ground that rule not complied with]; *Raoji* v. *Bansilal Narayan*, (1919) 53 Ind Cas 135 (136): 43 Bom 735: 21 Bom L R 885, (Do.); *Popooru Venkata Narasimma* v. *Jayanti Lakshmi Narasimham*, (1916) 32 Ind Cas 783 (784): 3 Mad L W 174 [Erroneous decision on limitation]; *Lalta* v. *Deputy Commissioner, Sitapur*, (1902) 5 Oudh Cas 377 (379) [Where no appeal lies, no revision]. Revision lies:—*Rangini Sundari Dasya* v. *Hiralal Biswas*, 1930 Cal 249 (250): 33 Cal W N 770: 126 Ind Cas 207 [Rejection on the ground that deposit is insufficient—Court officer misleading judgment-debtor—Revision lies]; *Vithal Singh* v. *Agar Chand*, 1925 Nag 17 (18, 19): 79 Ind Cas 903 [Dismissal for defect without asking applicant to give particulars]; *Sarooj Prasad* v. *Nannoo Rai*, (1916) 35 Ind Cas 779 (782): 1 Pat L Jour 459: 3 Pat L W 48 [Order without jurisdiction]; *Lachmi Narain* v. *Kali Prosonno*, (1919) 52 Ind Cas 344 (345) Pat; *Magan Lal Mulji* v. *Doshi Mulji*, (1901) 25 Bom 631 (635): 3 Bom L R 255; *Kedar Nath Sen* v. *Uma Charan* alias *Gopal Gupta*, (1902) 6 Cal W N 57 (60); *Bungshidhar Haldar* v. *Kedar Nath Mondal*, (1896) 1 Cal W W N 114 (117).

Note 31.

(1) *Narayan Vasudevacharya Katti* v. *Amgauda Malaguda Patil*, 1921 Bom 169 (171, 172): 45 Bom 1094: 23 Bom L R 455: 62 Ind Cas 104; *Kunja Behari Singha* v. *Bhupendra Kumar Dutt*, (1907-08) 12 Cal W N 151 (152, 153); *Raghu Ram Pandey* v. *Deo Kali Pande*, 1928 Pat 193 (194, 195): 7 Pat 30. See also *Bepin Behari Sarnokar* v. *Kaledas Chatterjee*, (1902) 6 Cal W N 336 (337).

(2) *Kotla Satyam* v. *Thammana Perraju*, 1931 Mad 753 (757, 759): 34 Mad L W 399: 135 Ind Cas 24. But see *Kumukutty* v. *Munnodath*, 1930 Mad 921 (924): 1930 Mad W N 524: 32 Mad L W 357: 53 Mad 943: 128 Ind Cas 507: 59 Mad L Jour 893 [Obiter].

(3) *Beni Madho* v. *Sanwar Dat*, 1923 All 127 (128): 20 All L J 42: 64 Ind Cas 918 [Deposit by mortgagee]; *Dori Lal* v. *Patti Ram*, (1911) 10 Ind Cas 458 (459): 8 All L J 622 [Claim regarding the five per cent. is not tenable]; *Bhagwan Singh* v. *Md Mazhar Ali Khan*, (1914) 23 Ind Cas 339 (340): 36 All 272: 12 All L J 394, (Do.); *Pankhabati Chowdhurani* v. *Noni Lal*, (1913) 21 Ind Cas 207 (209): 18 Cal W N 778: 19 Cal L Jour 72, (Do.); *Babu Bhagwati* v. *Maiyan Murat*, 1931 Pat 394 (400, 402): 10 Pat 528: 134 Ind Cas 139: 13 Pat L Tim 21, (Do.); *Baluk Nath Mandal* v. *Bepin Bihari Chaudhuri*, (1913) 17 Ind Cas 90 (92): 16 Cal W N 975: 17 Cal L Jour 179; *Jog Narain Singh* v. *Badri Das*, (1912) 13 Ind Cas 144 (147): 16 Cal L Jour 156; *Mohendra Ghoshal* v. *Bhuban Mardana*, (1910) 6 Ind Cas 810 (810, 813): 38 Cal 1: 12 Cal L Jour 566: 14 Cal W N 945

tioned case[4] that where the sale is set aside at the instance of a purchaser subsequent to the Court sale, the payment made by him is not lawful within the meaning of S. 70 of the Contract Act even though he was allowed by the Court to apply and, therefore, cannot sue for compensation. **O.21, R.89, Note 31.**

O.21, R.90.

R. **90.** [S. 311.] (1) *Where any immoveable property*[3] *has been sold in execution of a decree, the* decree-holder, or any person *entitled to share in a rateable distribution of assets*, or *whose interests are affected by the sale*,[8] may apply to the Court to set aside the sale on the ground of a material irregularity *or fraud* in publishing or conducting it:

Application to set aside sale on ground of irregularity or fraud.

Provided that no sale shall be set aside on the ground of irregularity *or fraud* unless *upon the facts proved the Court*[2] *is satisfied that the* applicant has sustained substantial injury by reason of such irregularity *or fraud*.

[1877—S. 311; 1859—S. 256.]

Local Amendments.

ALLAHABAD.

For the words "Provided that no" *read* the words "Provided that—

(*a*) no"

and *add* the following proviso:—

"(*b*) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up."

LAHORE.

Add the following proviso:—

"Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted."

NAGPUR.

After the proviso to Sub-Rule (1) of R. 90, *insert* the following further proviso:—

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale."

N.-W. F. P.

Add the following further proviso to sub-Rule (1) of R. 90:—

"Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted."

[Cannot recover the five per cent.]; *Bhicoobai* v. *Hariba Baahuji*, (1917) 42 Ind Cas 9 (16): 19 Bom L R 650: 42 Bom 556 [Can recover the five per cent also] *See Rakhohari Chattaraj* v. *Bipra Das Dey*, (1904) 31 Cal 975 (978) [Mortgagee paying the deposit has an additional lien]. But see *Shwe Bwa* v. *Maung Thauk Kya*, 1928 Rang 278 (280): 6 Rang 500.

(4) *Ganapathi Battu* v. *Sanna Sedu Beari*, 1930 Mad 644 (646): 126 Ind Cas 733.

O.21, R.90.

OUDH.

To R. 90, *add* the following second proviso:—

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale."

RANGOON.

For the present proviso to R. 90, the following shall be substituted, namely:—

"Provided that no application to set aside a sale shall be admitted unless—

(*a*) it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and

(*b*) the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realized by the sale, whichever is less, and in case the application is unsuccessful, the costs of the opposite parties shall be a first charge on the amount so deposited:

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. Immoveable property.
4. Sale will not be set aside unless application is made under this rule. See Note 2, above.
5. Who may apply under the rule.
6. Auction-purchaser.
7. Persons entitled to rateable distribution.
8. "Any persons whose interests are affected by the sale."
9. Strangers.
10. Grounds on which a sale can be set aside.
11. Material irregularity in publishing or conducting the sale.
12. Omission to attach property and irregularity in attaching property before sale.
13. Omission to make an order for sale.
14. Omission to issue notice.
15. Irregularities in publishing the sale—Omission to publish or irregularity in publishing sale proclamation.
16. Misdescription of property.
17. Omission or mis-statement of the value of the property.
18. Omission to state the revenue or rent payable on the land.
19. Omission or mis-statement of the encumbrances over the property.
20. Other mistakes in the sale proclamation.
21. Omission to beat drum.
22. Postponement of sale and issue of fresh proclamation.
23. Irregularities in conducting the sale—Sale within thirty days of the proclamation.
24. Sale on a holiday.
25. Omission to hold sale at stated time and place.
26. Sale of property in one lot though advertised for sale in separate lots.
27. Irregularities regarding the order of sale of lots.
28. Other cases where the sale is not in terms of the proclamation.
29. Purchase by decree-holder without permission to bid.
30. Irregularities in the grant of permission to bid
31. Sale after satisfaction of the decree.
32. Sale after an order of postponement.
33. Sale after attachment under R. 53.
34. Omission to make the legal representatives of the deceased judgment-

debtor or decree-holder parties to sale proceedings.
35. Non-representation of minor.
36. Other instances of material irregularity.
37. Fraud in publishing and conducting the sale.
38. Combination among bidders.
39. Substantial injury—Proviso.
40. Applicant must have sustained substantial injury by reason of such irregularity or fraud.
41. Waiver of irregularity and estoppel.
42. Bona fide purchaser for value without notice.
43. Setting aside sale on grounds not taken in the application.
44. Joinder of claims under S. 47.
45. Suit to set aside sale for material irregularity. See Notes to O. 21, R. 92, infra.
46. Sale if can be challenged by way of defence in suit for possession. See Notes to O. 21, R. 92, infra.
47. Necessary parties. See Notes to O. 21, R. 92, infra.
48. Applicability of O. 9 to applications under this rule.
49. Limitation.
49-A. Step-in-aid of execution.
50. Appeal.
51. Revision.

Appeal to Privy Council. See Note 50, Pt. (7).
Compromise of proceedings under this rule —Whether can be recorded under O. 23, R. 3. See Note 2, F.-N. (20).
Mere inadequacy of price—Whether sufficient ground. See Note 40, Pts. (12) and (13).
Objections that cannot be taken. See Note 2, Pts. (10) to (14-a).
Proceeding under this rule—Judicial. See Note 2, Pt. (18).
Rule whether applies to sales in execution of a decree on mortgage. See Note 2, Pt. (31).
Sale—Whether can be set aside by consent. See Note 2, Pt. (20).
Sale without notice to Receiver not in possession of property—Whether irregular. See Note 36, Pt. (13).
Sale under the Bengal Tenancy Act—Rule whether applies. See Note 2, Pt. (33).
"The Court"—Application to Collector. See Note 2, Pt. (8).

1. Legislative changes.—

1. The words "or any person entitled to share in a rateable distribution of assets" after the word "decree-holder" have been newly added. *See* Note 7, *infra*.

2. The words "or whose interests are affected by the sale" have been substituted for the words "or any person whose immoveable property has been sold". *See* Notes 6 and 8, *infra*.

3. The words "or fraud" have been newly added after the word "irregularity". *See* Notes 37 and 50, *infra*.

4 The words "unless upon the facts proved the Court is satisfied" have been substituted for the words "unless the applicant proves to the satisfaction of the Court". *See* Note 40, *infra*.

Under the second proviso added to this rule by the High Court of Rangoon, it has been held that the purchase-money deposited by the auction-purchaser and standing to the credit of the decree-holder may be treated as the deposit required by the proviso, when the applicant is the decree-holder.[1]

2. Scope and applicability of the rule.– The rule provides for the setting aside of sales in execution, on the ground of material irregularity or fraud in publishing or conducting them. The auction purchaser at an execution sale has no absolute right to its being confirmed when there is an irregularity or fraud in publishing or conducting it; if the irregularity or fraud is a *material* one and has caused *substantial* injury to any party, the sale

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Order 21, Rule 90—Note 1.
(1) *Maung Min Sin* v. *Maung Maung*, 1931 Rang 181 (181): 9 Rang 366: 133 Ind Cas 96.

O.21, R.90, Note 2.

will be set aside at the instance of *that party*[1] even though the purchaser be a stranger.[2]

Before, however, a sale can be so set aside, the following conditions must be satisfied, *viz.*:—

(1) *There must be an application for the purpose.*[3] The Court cannot set aside the sale under its inherent powers[4] especially when it is barred by limitation.[5] But the application need not be accompanied by a deposit as is necessary for an application under R. 89.[5-a]

(2) *The application must be one under this rule.* A sale cannot be set aside under this rule on an application made under R. 89.[6]

(3) *The application must be by one or other of the persons specified in the rule.*[7]

(4) *The application must be made to the Court executing the decree;* thus it cannot be made to the Collector to whom the decree has been transferred for execution.[8]

(5) *The application must be based on an irregularity or fraud in publishing or conducting the sale.*[9]

Thus the following objections are outside the scope of the rule, *viz.*:—

(*i*) An objection that the sale is illegal and therefore null and void.[10]

(*ii*) An objection that the Court had no jurisdiction to execute the decree or sell the property.[11]

Note 2.

(1) *Raja of Kalahasti* v. *Maharaj of Venkatagiri*, (1913) 21 Ind Cas 389 (392): 14 Mad L Tim 320: 25 Mad L Jour 198: 38 Mad 387.

(2) *Mrs Levenia Aston* v. *Madhabmoni Dasi*, (1910) 5 Ind Cas 390 (395): 14 Cal W N 560: 11 Cal L Jour 489.

(3) *Ram Narain* v. *Bishamber Nath*, 1882 All W N 1 (1); *Mt Indar Koer* v. *Sah Dharam Narain*, 1930 All 556 (557): 1930 All L J 1177: 128 Ind Cas 231 [Two decrees consolidated and property sold in execution by one bid—To challenge sale on ground of irregularity sales in execution of both decrees must be challenged]; *Abdul Kadir Khan Afridi* v. *Iqbal Begam*, 1926 Lah 514 (514): 8 Lah L Jour 238: 96 Ind Cas 415: 28 Pun L R 61 [An application signed by a duly authorised pleader is enough].

(4) *Muhammad Akbar Khan* v. *Amar Nath*, 1930 Lah 789 (790): 122 Ind Cas 102: 31 Pun L R 477: 12 Lah L Jour 71.

(5) *Muthiah Chettiar* v. *Bawa Sahib*, (1915) 26 Ind Cas 46 (49, 50): 27 Mad L Jour 605: 1 Mad L W 969.

(5-a) *Bhrij Kumar Lal Sahu* v. *Jagdamba Prasad*, 1929 All 671 (672): 121 Ind Cas 270.

(6) *Phul Chand* v. *Nursingh Pershad*, (1901) 28 Cal 73 (76). See *Basiruddin* v. *Faimulla*, (1911) 11 Ind Cas 196 (196): 17 Cal W N 476 [But where an application under R 89 has been withdrawn or dismissed, one under this rule may be made].

(7) See Notes 4 to 8.

(8) *Keshabdeo* v. *Radhe Prasad*, (1888) 11 All 94 (97, 99): 1889 All W N 10: 13 Ind Jur 272 F B; *Narayan* v. *Rasul Khan*, (1899) 23 Bom 531 (534, 535): 1 Bom L R 33.

(9) *Kusum Kumari* v. *Kutiswar*, 1926 Cal 829 (829, 830): 98 Ind Cas 870. See *Kishan Lal* v. *Umrao Singh*, (1908) 30 All 146 (150): 1908 All W N 49: 5 All L J 121; *Venkatarama Ayyar* v. *Paramasiva Ayyar*, 1925 Mad 325 (326): 78 Ind Cas 108.

(10) *Superior Bank, Ltd, Muzaffarnagar* v. *Budh Singh*, 1924 All 698 (699): 22 All L J 113: 5 L R (All) Civ 769: 83 Ind Cas 1028.

(11) *Shirin Begam* v. *Agha Ali Khan*, (1896) 18 All 141 (144, 145): 1896 All W N 9; *Behari Singh* v. *Mukat Singh*, (1906) 28 All 273 (275): 3 All L J 140: 1906 All W N 3; *Parashram Hanmanta* v. *Balamukund Lachiram*, (1908) 32 Bom 572 (574): 10 Bom L R 752; *Koli Nagiah* v. *Vappuburi Gopala Krishniah*, (1911) 9 Ind Cas 252 (253): 9 Mad L Tim 260 [An objection that the minor defendant was not properly represented in execution, does not fall under S 311]; *Narayana Kothan* v. *Kalianasundaram Pillai*, (1896) 19 Mad 219 (228) [A sale held subsequent to the judgment-debtor's insanity does not fall within the rule]; *Bhagwan Das Marwari* v. *Suraj Prasad Singh*, 1925 All 146 (150): 22 All L J 1060: 6 L R All Civ 89: 84 Ind Cas 1031: 47 All 217 [Fraud in bringing about the sale]; *Hub Lal* v. *Kanhia Lal*, (1885) 7 All 365 (366): 1885 All W N 52 [On the ground that he was no party to decree].

(*iii*) An objection that the property is not legally saleable.[12] O.21, R.90, Note 2.

(*iv*) An objection that the decree is invalid,[13] for example, on the ground of fraud in obtaining the decree.[13-a]

(*v*) An objection that the execution is barred by limitation[14] or that no execution ought to have issued under the decree.[14-a]

(6) *The applicant must prove not only irregularity or fraud in the publishing or conducting of the sale but, must also show that he has sustained substantial injury thereby.*[15]

An application under the rule cannot be disposed of summarily, without any investigation.[16] Opportunity must be given to either party to adduce evidence in respect of the several allegations made.[17] The proceeding under this rule is a judicial one.[18] and the decision must be based on findings arrived at, on legal evidence.[19]

It is open to the parties to compromise the proceedings.[20] In such a case all the parties affected must be parties to the compromise.[21] The

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(12) *Ramchhaibar* v. *Bechu*, (1885) 7 All 641 (642, 645): 5 All W N 190; *Sakhi Rai* v. *Ram Autar Rai*, (1920) 57 Ind Cas 261 (262): 1920 Pat H C C 221: 2 U P L R (Pat) 157: 1 Pat L Tim 742.

(13) *Matiur Rasul* v. *Abdul Said*, 1926 Cal 109 (110): 30 Cal W N 86: 89 Ind Cas 765.

(13-a) *Khagendra Nath Mahata* v. *Pran Nath Roy*, (1902) 29 Cal 395 (400): 29 Ind App 99: 4 Bom L R 363: 6 Cal W N 473: 8 Sar 266 P C; *Net Lal Sahoo* v. *Sheikh Kareem Bux*, (1896) 23 Cal 686 (689-690) [Non-service of summons].

(14) *Gangathara* v. *Rathabi Ammal*, (1882) 6 Mad 237 (239): 7 Ind Jur 191; *Mt Fatima Begum* v. *Ranjit Khan*, 1927 Oudh 488 (489): 1 Luck Cas 543: 105 Ind Cas 545; *Lakhu Rai* v. *Maharaja Kesho Prasad Singh Bahadur*, (1917) 38 Ind Cas 876 (877): 2 Pat L Jour 157: 3 Pat L W 403.

(14-a) *Nil Komal Chuckerbutty* v. *Sham Soonduree*, (1866) 6 Suth W R Mis 46 (47); *Alokeshi Dasi* v. *Biraj Mohini Dasi*, (1911) 10 Ind Cas 625 (625) Cal [On account of uncertified adjustment].

(15) *Anup Chand* v. *Mt Kawal Kaur*, 1924 Lah 592 (592): 75 Ind Cas 784; *Mani Ram* v. *Lachuman Das*, (1917) 39 Ind Cas 59 (60): 11 Pun L R 1917; *Kolli Nagiah* v. *Gopala Krishniah*, (1911) 9 Ind Cas 252 (253): 9 Mad L Tim 260; *Rajah Mohesh Narain* v. *Kishenmund Misser*, (1866) 5 Suth W R 7 (10): 9 Moo Ind App 324: Marsh 592: 2 Ind Jur O S 1: 1 Suth 488: 1 Sar 862 P C [The burden of proving both is on the applicant]; *Nufusa* v. *Mahomed Akbar*, (1865) 2 Suth W R 74 (74), (Do.); *Jodha Singh* v. *Bhup Singh*, 1887 All W N 117 (117), (Do.); *Keshti* v. *Narayan*, (1866-67) 3 Bom H C A C 110, (Do.). See also *Maharaj Bahadur Singh* v. *Sachindra Nath Roy*, 1928 Cal 328 (332): 32 Cal W N 309: 113 Ind Cas 562.

(16) *Kalee Sahoy* v. *Mahoond Lal*, (1875) 24 Suth W R 216 (217); *Madhorao* v. *Manohar Lal*, 1925 Nag 289 (291): 85 Ind Cas 779; *Jadoo Nath Chatterjee* v. *Anwani Kumar Banerjee*, (1912) 16 Ind Cas 974 (975): 16 Cal L Jour 98 [It cannot be dismissed on the ground that a similar application by another judgment-debtor has failed]; *Kusum Kumari Bodh* v. *Kutiswar Barai*, 1926 Cal 829 (829, 830): 93 Ind Cas 870, (Do.).

(17) *Jadunandan Prasad Bhagat* v. *Sheikh Wajid Ali Mian*, 1932 Pat 326 (327): 11 Pat 542; *Fazlur Rahman* v. *Jawahir Singh*, (1911) 9 Ind Cas 383 (384) Cal; *Rethbunjan Singh* v. *Mitturjeet Singh*, (1865) 4 Suth W R Mis 9 (9); *Khodeja Bibi* v. *Ram Narain Dan*, (1869) 12 Suth W R 511 (512); *Chandan Kuar* v. *Bhima Singh*, 1882 All W N 61 (61).

(18) *Brojo Mohun Thakur* v. *Shah Ameeroodeen*, (1873) 20 Suth W R 424 (425).

(19) *Sookh Raj Singh* v. *Moojtee Tuffozzool*, (1870) 2 N W P H C R 142; *Joy Tara* v. *Mahomed Hossein*, (1865) 2 Suth W R Mis 1 (15) [Regarding the service of processes in execution proceedings the returns of the Nazir are not evidence by themselves but must be proved on oath]; *Mohunt Megh Lal* v. *Shib Pershad*, (1881) 7 Cal 34 (38, 41): 8 Cal L Rep 369: 5 Ind Jur 176: 4 Shome L R 169, (Do.); *Balkrishna* v. *S M Chitnavis*, 1932 Nag 14 (15): 27 Nag L R 339: 135 Ind Cas 412, (Do.); *Pamidi Narri Gnamma* v. *Ketireddi*, 1924 Mad 217 (218, 220): 46 Mad 736: 45 Mad L Jour 263: 1923 Mad W N 463: 75 Ind Cas 369.

(20) *Md Abdul Rashid Ali Khan* v. *Budh Sen* (1918) 47 Ind Cas 885 (885): 16 All L J 750; *Sham Sunder Singh* v. *Munshi Mushaheb Lal*, 1923 Pat 418 (419): 72 Ind Cas 907: 2 Pat 534; *Chandan Bala Debi* v. *Probodh Chandra Ray*, (1909) 2 Ind Cas 338 (341): 36 Cal 422: 9 Cal L Jour 251; *Bhawani Dai* v. *Jitendra Nath*, 1929 Pat 400 (400) [Compromise should be recorded under O 23, R 3 and not under O 21, R 2 as proceedings are not in execution]; *Jagdish Missir* v. *Surenawar Missir*, 1921 Pat 107 (108): 6 Pat L Jour 253: 2 Pat L Tim 273: 62 Ind Cas 608; *Gobind Sahai* v. *Nar Singh*, 1929 Lah 886 (887): 118 Ind Cas 908 [It is not a proceeding in execution. It is in the nature of a suit . . . compromise can be recorded under O 23, R. 3; O. 21, R. 2 does not apply].

(21) *Bhupendranath Laskar* v. *Rai Charan Purkait*, 1925 Cal 779 (780): 85 Ind Cas 529.

O.21, R.90, Note 2

judgment-debtor and the decree-holder cannot, by a compromise between themselves, have the sale set aside behind the back of the auction-purchaser.[22]

An execution sale vitiated by irregularity or fraud should ordinarily be set aside in its *entirety*[23] except when the sale is by separate lots[24] in which case only the sale of the lots so vitiated, will be set aside.[25]

The effect of setting aside a sale under the rule is to restore the parties to the position which they occupied immediately before the sale.[26] If the purchaser has got into possession before the sale, the judgment-debtor can be put back in possession by way of restitution.[27] In proper cases he can be awarded compensation for the loss of profits during the period he was out of possession.[28] Conversely, the purchaser can recover from the judgment-debtor any money which he might have paid *bona fide* in order to save and preserve the property;[29] and if there was no irregularity or fraud for which he was responsible, he can also be awarded interest on the purchase money deposited by him.[30]

The rule applies also to sales in execution of mortgage decrees.[31] The principle of the rule is also applicable to the following sales, *viz.*:—

(1) Sales by Receivers appointed by Court.[32]

(2) Sales under the Bengal Tenancy Act.[33]

(3) Sales under the Madras Rent Recovery Act VIII of 1865.[34]

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(22) *Bibi Sharofan* v. *Mahomed*, (1911) 10 Ind Cas 148 (151, 152): 13 Cal L Jour 535: 15 Cal W N 685; *Nanhe Lal* v. *Umrao Singh*, 1931 P C 33 (35, 36): 33 Bom L R 450: 53 Cal L Jour 187: 35 Cal W N 381: 14 Nag L J 28: 1931 All L J 257: 60 Mad L Jour 423: 1931 Mad W N 281: 33 Mad L W 449: 8 Oudh W N 585: 130 Ind Cas 686: 58 Ind App 50: 27 Nag L R 95 P C [Approving 10 Ind Cas 148]; *Badal Singh* v. *Gur Prasad Singh*, 1925 Oudh 693 (693): 88 Ind Cas 534.

(23) *Ramesh Chandra Patranabis* v. *Birajasundari Gupta*, 1928 Cal 349 (351): 47 Cal L Jour 351: 32 Cal W N 519: 108 Ind Cas 33.

(24) *Kasum Kumari Lodh* v. *Kutiswar Bazai*, 1926 Cal 829 (829, 830): 93 Ind Cas 870.

(25) *Rajani Nath Rakshit* v. *Kasum Kamini Mazumdar*, (1914) 24 Ind Cas 64 (65): 18 Cal W N 947; *Ramachandra Ayyar* v. *Primathi Ammal*, (1910) 8 Ind Cas 1100 (1100): 1910 Mad W N 834: 9 Mad L Tim 250.

(26) *Saradindu Mohan Mukerjee* v. *Girish Chandra Tewari*, 1927 Cal 511 (512): 101 Ind Cas 334 [On setting aside sale, the execution petition should not be dismissed but opportunity should be given to the decree-holder to take further steps]; *Jira Bibi* v. *Majiruddin Chowdhury*, 1921 Cal 594 (595): 35 Cal L Jour 135: 64 Ind Cas 849 [A second application is one for revival of the earlier one]; *Gunno Singh* v. *Muddun Mohun*, 1864 Suth W R 26 (28): Marsh 80: 1 Hay 148 F B [Thus where a sale was set aside under the rule the attachment was held to have revived].

(27) *Raja Rampal Singh* v. *Lal Ramesh Singh*, (1906) 9 Oudh Cas 101 (103). See *Shadi Lal* v *Jagdamba Sahi*, 1931 All 655 (656): 1931 All L J 668: 133 Ind Cas 622 [Appellate decree in suit varied, amount reduced and charged only one property—Other properties sold in execution of original decree—Held though under R 90 petition failed and sale is confirmed judgment-debtor can apply for restitution].

(28) *Amirannessa Chowdhurain* v. *Karimannessa Chowdhurain*, (1914) 22 Ind Cas 839 (841): 18 Cal W N 1299 [*i.e.*, in case the decree-holder purchaser was guilty of fraud]; *Ram Ratan Prasad* v. *Banarsi Lal*, 1930 Pat 280 (281, 282): 11 Pat L Tim 156: 122 Ind Cas 589: 9 Pat 685.

(29) *Satya Charan Mukerjee* v. *Dina Nath Biswas*, (1917) 42 Ind Cas 516 (517): 21 Cal W N 1130 [A benamidar Court auction-purchaser who had paid money to save and preserve the estate, can, when the sale is set aside for irregularity recover it from the judgment-debtor].

(30) *Maharaj Bahadur Singh* v. *Forbes*, 1921 P C 27 (27): 19 All L J 101: 23 Bom L R 727: 33 Cal L Jour 176: 25 Cal W N 366: 40 Mad L Jour 141: 13 Mad L W 217: 1921 Mad W N 26: 30 Mad L Tim 187: 6 Pat L Jour 129: 2 Pat L Tim 115: 59 Ind Cas 782 P C.

(31) *Mallikarjunadu Setti* v. *Lingamurti Pantulu*, (1900) 25 Mad 244 (258, 266, 270): 12 Mad L Jour 279 F B; *Dakshina Mohan Roy* v. *Srimati Rasumati Debi*, (1899-1900) 4 Cal W N 474 (479, 480).

(32) *Fatmabai* v. *Abdool Succoor*, (1904) 6 Bom L R 1140 (1145).

(33) *Nobin Chandra* v. *Bepin Chandra Roy*, (1915) 29 Ind Cas 308 (310): 19 Cal W N 953: 22 Cal L Jour 244; *Azizoonessa Khatoon* v. *Gora Chand*, (1881) 7 Cal 163 (165): 8 Cal L Rep 498.

(34) *Pilly Theyagaraya Chettiar* v. *Sivapada Mudali*, (1911) 12 Ind Cas 137 (137, 138): 10 Mad L Tim 267: (1911) 2 Mad W N 275: 21 Mad L Jour 1008.

The rule does not apply to sales held by the Official Receiver under the Provincial Insolvency Act.[35] It has also been held to be inapplicable to sales under the Madras Estates Land Act.[36]

As to whether an application under this rule can be filed after confirmation of the sale, *see* the undermentioned case.[37]

3. Immoveable property.—*See also* S. 16, Note 4 and O. 21, R. 54. A house attached to land is "immoveable property".[1] A debt secured by a mortgagee of immoveable property or a decree thereon is only moveable property and this rule does not apply to a sale thereof in execution.[2]

4. Sale will not be set aside unless application is made under this rule. —*See* Note 2 above.

5. Who may apply under the rule.—Under the old Code the right to apply under the corresponding section was limited to the *decree-holder* and to persons *whose property had been sold*.[1-a] Under the present rule, however, the right is conceded to:—

(1) the decree-holder;

(2) any person entitled to share in a rateable distribution of the assets; and

(3) any person whose interests are affected by the sale.

Where *A* who holds a decree against *B*, attaches a decree held by *B* against *C*, and as attaching creditor executes *B's* decree, and *C's* properties are sold in such execution, *B* will be considered to be a decree-holder entitled to apply under the rule.[1]

Where after an application under the rule the applicant dies, his legal representative can continue the proceedings.[2]

See also Notes 6, 7, 8 and 9, *infra*.

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(35) *Ram Chand* v. *Mohra Shah Attar Chand*, 1929 Lah 622 (623): 30 Pun L R 320: 11 Lah L Jour 198: 119 Ind Cas 427; *Shakar Khan* v. *Sanmukh Singh*, 1932 Lah 320 (320): 33 Pun L R 332: 136 Ind Cas 267; *Arunachi Chetty* v. *Muthukaruppa Chetty*, (1918) 11 Ind Cas 885 (886): 7 Mad L W 406: 23 Mad L Tim 319: 1918 Mad W N 345: 31 Mad L Jour 319. See, however, *Balaji* v. *Gopal Mals*, 1927 Nag 262 (263): 102 Ind Cas 543.

(36) *Jagannadha Charyulu* v. *Rammadevaru Satyanarayana Varaprasada Rao*, (1920) 54 Ind Cas 508 (511): 37 Mad L Jour 706: 11 Mad L W 101: 1920 Mad W N 145: 43 Mad 351 27 Mad L Tim 282; *Ravuri Suranna* v. *Desu Narasimgadu*, 1921 Mad 507 (508): 14 Mad L W 232

(37) *Leeenia Ashton* v. *Madhabmoni Dasi*, (1910) 5 Ind Cas 390 (395): 14 Cal W N 560: 11 Cal L Jour 489 [Sale can be set aside even after confirmation]. See 26 Cal 324, 26 Cal 727, 32 Mad 242, 35 Cal 61; *Lakhu Rai* v. *Kesho Prasad Sing*, (1917) 38 Ind Cas 876 (877) 2 Pat L Jour 157: 3 Pat L W 403 [After confirmation of a sale in execution the only remedy of the judgment-debtor is to apply to have the sale set aside under the Rule] But see *Maung Po Thet* v. *Annamalay Chetty*, (1911) 9 Ind Cas 172 (474): 4 Bur L Tim 28 [Section 311 cannot be applied after the sale has been confirmed under S 312].

Note 3.

(1) *Kuar Lakshmiraj Singh* v. *Shankar*, 1930 All 513 (513): 124 Ind Cas 48

(2) *Tarvadi Bholanath* v. *Bai Koshi*, (1902) 26 Bom 305 (310, 312): 4 Bom L R 18; *Baij Nath Lohea* v. *Binomendra Nath Palit*, (1902) 6 Cal W N 5 (6) See also *Birendra Nath Mittra* v. *Uma Charan Banerjee*, (1924) 64 Ind Cas 388 (390) Cal. [Decree for possession of immoveable property is not immoveable property].

Note 5.

(1a) *Bisheshar Kuar* v. *Hari Singh*, (1883) 5 All 42 (44): 1882 All W N 146 (Co-sharer whose share has not been sold is not entitled to apply).

(1) *Sami Pillai* v. *Krishnasami Chetty*, (1898) 21 Mad 417 (418, 419): 8 Mad L Jour 77.

(2) *Smith* v. *Gokal Chandra*, 1932 Pat 234 (236): 11 Pat 424: 13 Pat L Tim 457, 139 Ind Cas 74.

O.21, R.90, Notes 6—8.

6. **Auction-purchaser.**—Under the old Code an auction-purchaser could not apply under this rule as he was neither a decree-holder nor a person whose immoveable property has been sold.[1] In the present rule the expression "or any person whose interests are affected by the sale" has been newly introduced Does this expression include an auction-purchaser? Yes, according to the High Courts of Madras and Allahabad, the reason being that the words "interests" are not confined to interest *prior to the sale* but include "interest" *created* by the sale itself.[2] The High Courts of Calcutta,[3] Lahore[4] and Patna[5] and the Judicial Commissioner's Court of Sind[6] have, on the other hand, held that the "interests" referred to in the rule are interests independent of the sale and not such as come into existence *as a result of the sale.*

The decisions of the High Court of Rangoon[7] and the Judicial Commissioner's Court of Nagpur[8] are conflicting on the point.

7. **Persons entitled to rateable distribution.**—Although a person entitled to rateable distribution had not been specified in Section 311 of the old Code as a person entitled to apply thereunder, such right had been conceded to him on the ground that he was a "decree-holder".[1] The present rule specifically includes such persons.[2]

Persons entitled to dividends under the Provincial Insolvency Act are not persons entitled to rateable distribution within the meaning of the rule, and cannot therefore apply to set aside execution sales.[3]

8. **"Any person whose interests are affected by the sale."**—The expression "any persons whose immoveable property has been sold", in the old S. 311 was interpreted by a Full Bench of the Calcutta High Court to mean "any person whose interests are affected by the sale".[1] The present rule gives effect to this view.

Note 6.

(1) *Brij Mohan* v. *Rai Uma Nath*, (1893) 20 Cal 8 (11) P C: 19 Ind App 154: 6 Sar 245.

(2) *Gopalakrishnayya* v. *Sanjeeva Reddi*, (1920) 55 Ind Cas 333 (334): 11 Mad L W 184: 1920 Mad W N 152: 38 Mad L Jour 228; *Ravi Nandan Prasad* v. *Jagar Nath*, 1925 All 459 (461, 463): 23 All L Jour 233: 6 L R (All) Civ 229: 87 Ind Cas 278: 47 All 479.

(3) *Surendra Nath Das* v. *Alauddin Mistry*, 1928 Cal 828 (830).

(4) *Nihal Chand Gopal Das* v. *Pritam Singh*, 1932 Lah 468 (469): 138 Ind Cas 817: 33 Pun L R 788 [Reversing 1931 Lah 630 on L P Appeal].

(5) *Kartik Chandra Chatterjee* v. *Nagendra Nath Roy*, 1924 Pat 319 (319): 5 Pat L Tim 41: 74 Ind Cas 760.

(6) *Kalumal Talaram* v. *Ahmed*, 1931 Sind 107 (110): 25 Sind L R 405: 134 Ind Cas 373.

(7) *K V A L Chettiar Firm* v. *M P Maricar*, 1929 Rang 33 (33): 6 Rang 621: 114 Ind Cas 538 (No); *S. N. V R. S. Subramania Chettiar* v. *N L N Chettiar Firm*, 1927 Rang 301 (302): 5 Rang 516: 105 Ind Cas 465 (Yes).

(8) *Balwant* v. *Ratan Lal*, 1923 Nag 161 (162): 68 Ind Cas 429, (No); *Shiv Prasad* v. *Santooji*, 1922 Nag 113 (114): 65 Ind Cas 875: 5 Nag L Jour 147: 18 Nag L R 98 (Yes).

Note 7.

(1) *Ajudhia Prasad* v. *Nand Lal*, (1893) 15 All 318 (320): 1883 All W N 119; *Bejoy Singh Dudhuria* v. *Hukum Chand*, (1902) 29 Cal 548 (554); *Lakshmi* v. *Kuttuni*, (1887) 10 Mad 57, (59, 62); *Chakrapani* v. *Dhanji* (1901) 24 Mad 311 (315); *Athappa Chetty* v. *Ramakrishna*, (1898) 21 Mad 51 (53). See *Chatturapat Singh* v. *Jadukul Prasad*, (1893) 20 Cal 673 (675). [But a person who is not entitled to come in under S 73 and share in the distribution of the sale proceeds, is not included within the term decree-holder under old section 311].

(2) *See Byomkesh Chakrabutty* v. *Hemanta Kumar Biswas*, (1914) 24 Ind Cas 88 (84): 18 Cal W N 1311; *Peria Karuppan Chettiar* v. *Somasundram Chetty*, 1927 Mad 67 (68): 51 Mad L Jour 661: 98 Ind Cas 628; *Kathiresan Chettiar* v. *Ramasami Chettiar*, (1915) 26 Ind Cas 93 (94): 27 Mad L Jour 302: 1914 Mad W N 871 [A person not entitled to come in under Section 73 is not entitled to apply under this Rule]. *See however Rustamji* v. *Perozshaw* 1925 Sind 101 (101).

(3) *Sullamanji Ibrahimji* v. *Pragji Kala*, (1917) 39 Ind Cas 932 (932): 10 Sind L R 189; *Pragji Kala* v. *Assa Jalal*, (1916) 35 Ind Cas 530 (531): 10 Sind L R 53

Note 8.

(1) *Asmutinnisa* v. *Ashruff*, (1888) 15 Cal 488 (492) F B: 13 Ind Jur 54.

O.21, R.90, Note 8.

The word 'interest' need not necessarily be a *proprietary* or a *possessory* interest; it may be a pecuniary or other interest.[2] Thus, an attaching creditor *in whose favour a decree has been passed* is a person 'whose interests are affected by the sale' within the meaning of this Rule.[3] Similarly where a mortgage decree was passed against *A* and *B*, and the sale of the properties of *A*, was postponed until the sale of the properties of *B*, and the properties of *B* were sold for an inadequate price it was held that *A* was a person whose interests were affected by the sale.[3-a] But a person who has merely obtained an attachment *before judgment* cannot be said to be a person having any such interest.[4] It is not necessary that the interest need be a *present* interest; a reversioner to a Hindu widow's estate[5] or a person who is entitled to specific performance of a contract to sell the property[6] can apply under this rule.

The following persons have been held entitled to apply as being persons '*whose interests are affected by the sale*:—

(1) A real owner of property sold in execution of a decree against his benamidar.[7]

(2) A judgment-debtor who has sold away his property.[8]

(3) The legal representative of a deceased judgment-debtor.[9]

(4) Where the judgment-debtor is a minor, his guardian.[10]

(5) Where the judgment-debtor is a ward of Court, the Court of wards.[11]

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(2) *Dhirendra Nath Roy* v. *Kamini Kumar Pal*, 1924 Cal 786 (787): 51 Cal 495: 28 Cal W N 899: 84 Ind Cas 119; *Narapanna* v. *Pappayi*, 1927 Mad 783 (784): 53 Mad L Jour 229: 26 Mad L W 164: 39 Mad L Tim 110: 103 Ind Cas 499; *Lakhan Choudhry* v. *Bachalal Singh* 1930 Pat 451 (452): 11 Pat L Tim 500: 126 Ind Cas 295. [A mortagagee who would be entitled to claim in satisfaction of his debt any surplus proceeds of the rent sale as against the mortgagor is a person interested] *Rakhal Chunder Bose* v. *Dwarkanath Miser*, (1886) 13 Cal 346 (348), (Do.); *Safar Ali* v. *Raj Mohun* (1905) 1 Cal L Jour 451 (455) (do); *Khagendra Bhanan Roy* v. *Jatindra Nath Roy* (1919) 50 Ind Cas 329 (329): 23 Cal W N 619 (do); *Sailabala Debi* v. *Nritya Gopal Sen Paddar* (1915) 31 Ind Cas 859 (861): 22 Cal W N 113, (do).

(3) *Narain Pal Singh* v. *Kudra Bhan Singh* 1932 All 2 (3): 133 Ind Cas 126: 1931 All L Jour 880: 53 All 759; *Dhirendra Nath Roy* v. *Kamini Kumar Pal*, 1924 Cal 786 (787, 789): 51 Cal 495: 28 Cal W N 899: 84 Ind Cas 119; *Krishnarav Venkatesh* v. *Vasudev Anant*, (1874) 11 Bom H C 15. But see *Matungini Dassi* v. *Monmotha Nath Bose*, (1909) 4 Cal W N 512 (515).

(3a) *Bibi Mehdatunnissa* v. *Sawak Ram*, 1931 Pat 217 (217, 218): 132 Ind Cas 111. But see *Man Kuar* v. *Tara Singh* (1885) 7 All 583 (585): 1885 All W N 124.

(4) *Badiar Rahman* v. *Sarada Kanta*, 1925 Cal 1103 (1104): 42 Cal L Jour 37: 89 Ind Cas 688; *Jogendra Nath Chatterjee* v. *Manmatha Nath Ghose*, (1912) 15 Ind Cas 668 (669): 16 Cal L Jour 566: 17 Cal W N 80.

(5) *Meenakshi* v. *Palaniappa Theran*, 1928 Mad 1138 (1139); *Adinarain Chetty* v. *Chinnasami Reddi*, 1926 Mad 959 (960): 24 Mad L W 406: 1926 Mad W N 631: 97 Ind Cas 574; *Brij Kishore Lal* v. *Pratap Narain*, (1919) 51 Ind Cas 359 (360): 4 Pat L Jour 360: 1919 Pat H C C 303. See *Hankar Sonar* v. *Basudeo Singh*, 1925 Pat 556 (557): 86 Ind Cas 575. [But a presumptive heir of the transferee of an occupancy holding cannot apply under this rule as no man is heir to a living person].

(6) *Brij Krishore Lal* v. *Pratap Narain*, (1919) 51 Ind Cas 359 (360): 4 Pat L Jour 360: 1919 Pat H C C 303.

(7) *Abdul Gani* v. *Dunne*, (1893) 20 Cal 418 (424, 425); *Timmana* v. *Mahabala*, (1896) 19 Mad 167 (168): 6 Mad L Jour 24.

(8) *Mohideen Maracayar* v. *Ramanadhan Chettiar*, 1926 Mad 217 (218): 22 Mad L W 872: 92 Ind Cas 597 [Before Court-sale]; *Shundi Bibi* v. *Mobarak Ali*, 1926 Cal 56 (56): 87 Ind Cas 94 [After Court sale].

(9) *Shundi Bibi* v. *Mobarak Ali*, 1926 Cal 56 (56): 87 Ind Cas 94; *Sheo Prasad* v. *Hira Lal*, (1890) 12 All 440 (446): 1890 All W N 103 F B; *Malkarjun* v. *Narhari*, (1901) 25 Bom 337 (348): 27 Ind App 216: 5 Cal W N 10: 2 Bom L R 927: 10 Mad L Jour 368: 7 Sar 739 P C: [Where a sale in pursuance of a decree obtained during the debtor's lifetime, is executed against the wrong person as representative, such a person can apply under this rule].

(10) *Shantabai* v. *Lacmichand*, 1930 Nag 185 (187): 26 Nag L R 173: 124 Ind Cas 247.

(11) *Umakanta Sen* v. *Hira Lal Roy*, (1916) 34 Ind Cas 86 (88): 20 Cal W N 852.

O.21, R.90, Notes 8—10.

(6) Where he is an adjudicated insolvent, the Official Receiver.[12]

(7) A purchaser from the judgment-debtor *pendente lite*.[13]

(8) A transferee of a tenure or occupancy holding sold in execution of a decree for arrears of its own rent.[14]

(9) One only of several co-sharer judgment-debtors.[15]

9. **Strangers.**—A person who claims the property sold by a title paramount, that is, adversely to the judgment-debtor, is not one whose interests are affected by the sale, and cannot therefore apply under this rule.[1]

10. **Grounds on which a sale can be set aside.**—Before a sale can be set aside under this rule it must be shown,

(*i*) that there has been a *material* irregularity or fraud in publishing and conducting the sale.[1]

(*ii*) and that substantial injury has resulted to the applicant thereby.[2]

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(12) *Subramania Ayyar* v. *Dharmapuram Janopakara Nidhi, Ltd*, 1928 Mad 454 (455): 1928 Mad W N 216: 109 Ind Cas 148 [An interim Receiver]; *Pragji Kala* v. *Assa Jalal*, (1916) 35 Ind Cas 530 (531): 10 Sind L R 53 [The insolvent cannot apply].

(13) *Narayanan* v. *Pappayi*, 1927 Mad 783 (784): 53 Mad L Jour 229: 26 Mad L W 164: 39 Mad L Tim 110: 103 Ind Cas 499. See *Bhagabuti Churn Bhuttacharjee Chowdhry* v. *Bisheshwar Sen*, (1882) 8 Cal 367 (369): 10 Cal L Rep 441 [Does not include a purchaser of the same property at a prior execution sale which has not been confirmed].

(14) *Tarini Prosad Roy* v. *Dava Prasanna Mukherjee*, 1925 Cal 925 (925): 86 Ind Cas 612; *Aubhoya Dassi* v. *Pudmo Lochun*, (1895) 22 Cal 802 (804); *Panye Chunder* v. *Hur Chunder*, (1884) 10 Cal 496 (500); *Azgar Ali* v. *Asaboddin Kazi*, (1905) 9 Cal W N 134 (140) [Purchaser of a portion]; *Abdul Aziz* v. *Tafajaddin*, (1914) 23 Ind Cas 839 (842): 19 Cal W N 326, (Do.)] *Suraj Narain Misser* v. *Hardowar Singh*, 1925 Pat 461 (461): 6 Pat L Tim 295: 87 Ind Cas 381, (Do.).

(15) *Tuhi Ram* v. *Izzat Ali*, (1908) 30 All 192 (196): 1908 All W N 77: 5 All L J 253. See *Ramchandra* v. *Gokul*, 1891 Bom P J 309 [Co-sharer who is not a judgment-debtor cannot apply under this rule].

Note 9.

(1) *Asmutunnissa Begum* v. *Ashruff Ali*, (1888) 15 Cal 488 (492): 13 Ind Jur 54 F B [Overruling 14 Cal 240 purchaser prior to attachment]; *Hardwari Lal* v. *Muhammad Salamat-ullah Khan*, (1916) 34 Ind Cas 272 (273): 14 All L J 409: 38 All 358 [Person not a party to a mortgage decree]; *Ram Narayan* v. *Ramchander Sarup*, (1913) 20 Ind Cas 16 (17) All, (Do.); *Kunjolal Pal* v. *Idurali Sardar*, 1927 Cal 82 (83, 84): 97 Ind Cas 757; *Asmutunnissa* v. *Ashruff Ali*, (1888) 15 Cal 488 (492) [Purchaser prior to attachment]; *Joye Narain Singh* v. *Bhugbano*, (1865) 2 Suth W R Mis 13 (14), (Do.); *Tulsee Mouee Dassee* v. *Peary Mohun Baboo*, (1876) 25 Suth W R 79 (79); *Subbarayudu* v. *Pedda Subbarazu*, (1893) 16 Mad 476 (478) [Decree against one brother—Not binding on the other—He is not entitled to apply]; *Ramchandra* v. *Gokul*, 1891 Bom P J 309 [A co-sharer who is not a judgment-debtor not entitled to apply]; *Kanhairam* v. *Kalicharan*, 1926 Nag 68 (71): 8 Nag L J 184: 91 Ind Cas 218 [Where during the pendency of a partition suit, the suit property was sold by auction in execution of a decree against one member alone as belonging to him only, the other members cannot apply under R 90 to have the sale set aside as the decree-holder could validly take only the share of that member]; *Narotam Das* v. *Md Raza*, 1926 Oudh 522 (523): 96 Ind Cas 14; *Medni Prasad Singh* v. *Nand Keshwar Prasad Singh*, 1923 Pat 451 (452): 2 Pat 386: 6 Pat L Tim 742: 85 Ind Cas 1014; *Maung Kun* v. *Ma Nan*, 1922 Upp Bur 22 (22): 4 U B R 97: 1 Bur L Jour 234: 70 Ind Cas 900. See also *Hankar Sonar* v. *Basudeo Singh*, 1925 Pat 556 (557): 86 Ind Cas 575 [But a person who holds a protected interest under the Bengal Tenancy Act in a holding which has been sold under that Act for arrears of rent is not entitled to apply]. But see *Sheo Prasad* v. *Hiralal*, (1890) 12 All 440 (457): 1890 All W N 103 F B.

Note 10.

(1) *Dakshina Mohan Roy* v. *Sm. Basumati Debi*, (1900) 4 Cal W N 474 (477); *Mohamed Maqbul Rahman* v. *Sayed Ali Khan*, (1914) 25 Ind Cas 18 (19) All [There was irregularity—but not a material one]; *Promatha Nath* v. *Bejoy Madhab*, (1919) 53 Ind Cas 143 (144) Cal; *Abdul Kashem* v. *Benode Lal*, (1908) 12 Cal W N 757 (758, 759) [The statement of the value of property which proves to be inadequate is an irregularity, but not a material irregularity]; *Gulab Singh* v. *Raghubir Saran*, 1932 All 369 (369): 1932 All L J 357; *Radha Charan Das* v. *Sharfuddin Hosain*, (1913) 20 Ind Cas 423 (424): 41 Cal 276: 17 Cal W N 1135 [Omission to issue a notification of a revenue sale in vernacular (while it was notified in English) is not an irregularity]; *Mahna Singh* v. *Salig Ram*, 1928 Lah 918 (918): 110 Ind Cas 339; *Nur Jahan Begam* v. *Girdhari Lal*, (1911) 12 Ind Cas 572 (572): 222 Pun L R 1911: 266 Pun W R 1911; *Korappalu Hengsu* v. *Gowri Hengsu*, 1925 Mad 729 (730): 21 Mad L W 521: 88 Ind Cas 228; *Mahpal Bahadur* v. *Ram Bahadur Singh*, (1919) 52 Ind Cas 167 (167): 1 U P L R (B R) 7 [The mere absence of a notice to a judgment-debtor of the intended sale of his property is not a material irregularity] *Mahomed Ali* v. *Mahabir Prasad*, (1916) 35 Ind Cas 411 (412) All.

(2) *Gulab Singh* v. *Raghubir Saran*, 1932 All 369 (369): 1932 All L J 357; *Ganga Prasad* v. *Jag Lal*, (1889) 11 All 338 (342, 343): 1889 All W N 115: 13 Ind Jur 471.

A sale which is *illegal and void* is not within the contemplation of this rule. Such a sale need not in fact be set aside at all and can be ignored.[3] Nor need any injury be shown to have been sustained by reason of such sale.[4] **O.21, R.90 Notes 10--12.**

In determining what is illegal and what is irregular it may be remarked that the distinction is one of *degree*.[5] As a general rule, in order to establish an illegality there must be shown some disregard of a positive prohibition of the law.[6]

See Note 12 to Section 115 for a fuller discussion on this point.

11. Material irregularity in publishing or conducting the sale.—The term "irregularity" means "not being in conformity to some recognised rule" and in the present context it means "not being in conformity to the rules prescribed for regulating execution sales".[1] The expression "publishing or conducting the sale" refers respectively to the proclamation of sale under R. 66 and to the action of the sale officer.[2] The words "conducting the sale" does not refer to anything done *before* the sale or any proceedings unconnected with the actual carrying out of the sale.[3] The material irregularity complained of must be one on the part of the Court or its officer.[4]

12. Omission to attach property and irregularity in attaching property before sale.—It was originally held by the High Court of Allahabad that a regularly perfected attachment was an essential preliminary to sales in execution of simple money-decrees and that where there was no such attachment the sale was *void* and not merely voidable.[1] In view of the decision of the Privy Council in *Tassaduk v. Ahmad*, I.L.R. 21, Cal. 66 it has now been held by the said High Court that the absence of attachment is only a material irregularity which would not render the sale *ipso facto* void.[2] The same view has been held by all the other Courts except the High Court of Bombay.[3]

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(3) *Balwant Rao v. Md Husain*, (1893) 15 All 324 (326, 327): 1893 All W N 110. *Sukhdeo Rai v. Sheo Ghulam*, (1882) 4 All 382 (384): 1882 All W N 77; *Ganga Devi v. Ram Prasad*, 1925 All 551 (552): 23 All L J 558: 88 Ind Cas 393: 6 L R A Civ 464; *Lakshmichaman Sen v. Srischandra Roy*, (1911) 9 Ind Cas 584 (585): 13 Cal L Jour 102.

(4) *Banke Lal v. Muhammad Husain Khan*, 1887 All W N 32 (32); *Arunachelam v. Kulandasami*, (1895) 5 Mad L Jour 70 (73).

(5) *M L M Ramanathan Chettiar v. Ramanathan Chettiar*, 1929 Mad 275 (279): 30 Mad L W 995: 117 Ind Cas 705.

(6) *Jagarama Aynar v. Vridhanari Aynar*, 1921 Mad 583 (585): 44 Mad 35: 59 Ind Cas 167: 39 Mad L Jour 188: 12 Mad L W 182: 1920 Mad W N 490.

Note 11.

(1) *Arunachelam v. Kulandasami*, (1895) 5 Mad L Jour 70 (73).

(2) *Parashram Hanmanta v. Balmukund*, (1908) 32 Bom 572 (574): 10 Bom L R 752.

(3) *Ramchhaibar v. Bechu*, (1885) 7 All 641 (645): 1885 All W N 190; *Neelu v. Subramania*, (1919) 53 Ind Cas 809 (810): 1919 Mad W N 897: 11 Mad L W 59 [Notice under R 66 not issued—Is not a material irregularity in publishing].

(4) *Huroo Soondaree Debia v. Broja Gobind Shaha*, (1865) 4 Suth W R Mis 11 (12).

Note 12.

(1) *Mahadeo Dubey v. Bhola Nath*, (1883) 5 All 86 (91): 1882 All W N 186; *Fida Husain v. Kutub Husain*, (1885) 7 All 38 (40): 1884 All W N 257; *Ram Chand v. Pitam Mal*, (1888) 10 All 506 (514, 517): 1888 All W N 195.

(2) *Sheo Dhyan v. Bhdanath*, (1899) 21 All 311 (313): 1899 All W N 84; *Panaru Shukul v. Baldeo Sahai*, (1913) 21 Ind Cas 46 (47) All

(3) *R K Pal v. M C Roy*, 1927 Cal 847 (847): 103 Ind Cas 698; *Nareshchandra Mitra v. Molla Ataul Haq*, 1931 Cal 35 (36): 57 Cal 1206: 129 Ind Cas 779; *Tarak Nath Roy Chowdhury v. Syama Charan Chowdhury*, (1916) 36 Ind Cas 292 (295) Cal; *Haricharan v. Chandra Kumar*, (1907) 34 Cal 787 (802): 11 Cal W N 745; *Tincouri v. Shib Chandra*, (1894) 21 Cal 639 (641); *Kishory Mohun v. Mahomed Mainfar*, (1891) 18 Cal 188 (193); *Peary Lal v. Chanpi Charan*, (1907) 5 Cal L Jour 80 (84): 11 Cal W N 163; *Lachmeepat v. Lekhraj Ray*, (1867) 8 Suth W R 415 (418, 419); *Md Abdulla v. Jamiat Rai*, 1930 Lah 685 (686): 121 Ind Cas 369; *Fakiruddin Khan v. Hazari Gir*, 1929 Lah 111 (442): 11 Lah L Jour 55: 117 Ind Cas 231; *Subramania Aynar v. Krishna Aynar*, 1926 Mad 211 (215): 1925 Mad W N 887: 92 Ind Cas 833: 51 Mad L Jour 172; *Sivakolundu Pillai v. Ganapathi Iyer*, (1917) 37 Ind Cas 964 (965): 1917 Mad W N 89; *Velayutha Moopan v. Subra-*

O.21, R.90, Notes 12—14.

The High Court of Bombay has held in the case cited below[3-a] that a sale without attachment is invalid and can be set aside in a proceeding under S. 47.

The question next arises whether, in cases in which it has been held that the absence of attachment is only a material irregularity, it is an irregularity in *publishing and conducting the sale* within the meaning of this rule. According to the High Courts of Calcutta and Rangoon, it is not.[4] The reason, it is conceived, is, that such an irregularity is one which is *antecedent* to the publishing and conducting of the sale and, therefore, will be a ground for a proceeding only under S. 47. The High Courts of Allahabad, Lahore and Madras have, on the other hand, held, that it is an irregularity in publishing and conducting the sale.[5] The publication of the attachment is . . . . . a step leading up to the publication of the sale, the actual proclamation of sale being a notice to the public that the sale is to take place upon a particular date. The absence of attachment may, therefore, be deemed to be a material irregularity in the publishing of the sale".[6]

Where there has been an attachment an error in the warrant of such attachment[7] or the absence of notice of the attachment to the judgment-debtor[8] would only be mere irregularities which will not vitiate the sale.

13. Omission to make an order for sale.—The omission to pass an order absolute for sale under S. 89 of the Transfer of Property Act in a mortgage decree was held in the undermentioned case[1] to be not an irregularity in publishing or conducting a sale but one *antecedent* to it and that, it, therefore, did not fall within this rule.

14. Omission to issue notice.—An omission to issue notice under R. 22 is an irregularity in proceedings which are *anterior* to the publishing or the conduct of the sale.[1] It also goes to the root of the jurisdiction

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manian, (1913) 18 Ind Cas 498 (499): 13 Mad L Tim 207: 24 Mad L Jour 70: 1913 Mad W N 136; *Muniappa* v. *Subramania*, (1895) 18 Mad 137 (439): 5 Mad L Jour 60; *Shanker Rao* v. *Manik Rao*, 1923 Nag 18 (20): 68 Ind Cas 643; *Raj Wazir Singh* v. *Bhikhari Ram*, 1923 Pat 45 (47): 4 U P L R (P) 100: 68 Ind Cas 363: 3 Pat L Tim 765: 1922 Pat H C C 321: 2 Pat 207; *Ma Pwa* v. *Mahomed Tambi*, 1924 Rang 124 (124): 1 Rang 533: 77 Ind Cas 368; *Adil Khan* v. *Mahomed Sadikali Khan*, (1910) 5 Ind Cas 798 (799, 800): 13 Oudh Cas 43 [Attachment by Court without jurisdiction—Does not affect sale]. See also *Patit Shahu* v. *Hari Mahanti*, (1900) 27 Cal 789 (792): 5 Cal W N 126; *Sasirama* v. *Meherban*, (1911) 9 Ind Cas 918 (922): 13 Cal L Jour 243 [But where an objection that the property proclaimed for sale has not been attached is taken before the sale, it is the duty of the Court not to proceed with the sale, and to direct an attachment]; *Jodhan* v. *Kapil Nath*, 1923 Nag 78 (79): 69 Ind Cas 563 [Minor irregularity in attachment—Sale not void]. But see *Panchanan* v. *Kunja*, (1917) 42 Ind Cas 259 (259) Cal.

(3-a) *Sorabji* v. *Kala*, (1912) 12 Ind Cas 911 (912): 36 Bom 156: 13 Bom L R 1193. See *Vaikunt* v. *Manjunath*, (1920) 58 Ind Cas 217 (219): 44 Bom 860: 22 Bom L R 640 [Question left open].

(4) *Rajani Kanto Pal* v. *Mohim Chandra Roy*, 1927 Cal 847 (847): 103 Ind Cas 698; *Ma Pwa* v. *Mahomed Tambi*, 1924 Rang 124 (124): 1 Rang 533: 77 Ind Cas 368.

(5) *Sheodhyan* v. *Bholanath*, (1899) 21 All 311 (313): 1899 All W N 84; *Md Abdulla* v. *Jamiat Rai*, 1930 Lah 685 (686): 121 Ind Cas 369; *Subramania* v. *Krishna*, 1926 Mad 211 (211, 215): 1925 Mad W N 887: 92 Ind Cas 833: 51 Mad L Jour 172.

(6) *Sheodhyan* v. *Bholanath*, (1899) 21 All 311 (318): 1899 All W N 84.

(7) *Madho Lal* v. *Jawahir Singh*, (1910) 6 Ind Cas 713 (715): 40 P R 1909: 211 Pun L R 1910: 63 Pun W R 1910; *Md Akbar Khan* v. *Amar Nath*, 1930 Lah 789: (791): 122 Ind Cas 102: 31 Pun L R 477: 12 Lah L Jour 71.

(8) *Nufusa* v. *Mahomed Akbar*, (1865) 2 Suth W R 74 (75).

Note 13.

(1) *S P Kain* v. *Kashmir Bank, Ltd, Fyzabad*, (1888) 1 Oudh Cas 155 (156).

Note 14.

(1) *Parashram* v. *Balmukund*, (1908) 32 Bom 572 (574): 10 Bom L R 752.

of the Court executing the decree and renders the sale *illegal* and *void*.[2] It is therefore not a matter coming under this rule.

There is a conflict of opinion as to whether the non-service of notice under R. 66 will be a ground for setting aside a sale under this rule. According to the High Court of Madras the irregularity is not one relating to the publication or the conduct of the sale and that the question can be considered only under S. 47.[3] The Chief Court of Lower Burma has held that the absence of such a notice is more than an irregularity and renders the sale void.[4] The High Courts of Calcutta and Lahore and the Judicial Commissioner's Court of Nagpur have held that it is an irregularity in publishing the sale.[5]

Where no notice under R. 66 is required to be given, as where, a fresh proclamation is ordered to issue under R. 69, the non-issue of notice is no ground for setting aside a sale under this rule.[6]

Non-publication of the notices prescribed by Regulation VIII of 1819 in cases of *putni sales* has been held to be a material irregularity.[7]

See also Note 61 to S. 47 and O. 21, R. 66, Notes 5 and 16.

15. Irregularities in publishing the sale—Omission to publish or irregularity in publishing sale proclamation.—The failure to publish the sale proclamation is an irregularity within this rule.[1] So is an irregularity in the preparation and service thereof.[2] As has been seen in the Note to R. 67, *ante*, the proclamation should be published on the spot[3] and a copy of the proclamation should be affixed to a conspicuous portion of the property[4] and a failure to do the one or the other will be an irregularity within this rule. If the properties are situated in several villages or are distinct, the failure to proclaim the sale at each village or property will be an irregularity.[5] If, however, the properties

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(2) *Imamunnissa Bibi* v. *Liakat Husain*, (1881) 3 All 424 (426): 1881 All W N 1; *Erava* v. *Sidramappa*, (1894) 21 Bom 424 (449, 453); *Gurudas* v. *Bhawanipore Zemindari Company*, 1921 Cal 609 (611): 25 Cal W N 972: 64 Ind Cas 476; *Krishnasami* v. *Ganapathy*, 1921 Mad 523 (523): 14 Mad L W 638: 1921 Mad W N 391: 63 Ind Cas 903.

(3) *Kamana Venkataswami* v. *Godavari Nagayya*, 1925 Mad 1142 (1142): 1925 Mad W N 701: 87 Ind Cas 413; *Thekkeduth Neelu Neithiar* v. *Subramania Moothan*, (1919) 53 Ind Cas 809 (813): 1919 Mad W N 897: 11 Mad L W 59; *Tanguturi Jagannadham* v. *Seshagiri Rao*, (1917) 37 Ind Cas 887 (888): 20 Mad L Tim 479.

(4) *Ramasami Chetty* v. *Ma U Tha*, (1917) 38 Ind Cas 98 (98): 11 Bur L Tim 40.

(5) *Bipin Bihari Bejali* v. *Kanti Chandra Mondal*, (1913) 18 Ind Cas 715 (717) Cal; *Jagannath* v. *Daud*, 1923 Lah 592 (593): 4 Lah 214: 75 Ind Cas 103; *Kanhya Lal* v. *Megh Rai*, 1927 Lah 84 (84): 99 Ind Cas 515; *Miraj Din* v. *Jalbagh Rai*, (1914) 25 Ind Cas 51 (52): 114 Pun L R 1914: 48 Pun W R 1914; *Tukaram* v. *Sakharama*, 1929 Nag 130 (131): 23 Nag L R 58: 115 Ind Cas 49.

(6) *Ahmed Hasan* v. *Kade Lal*, 1926 Oudh 76 (76, 77): 90 Ind Cas 351.

(7) *Runjit Singh* v. *Jnanendra Nath Sengupta*, (1915) 27 Ind Cas 825 (827): 19 Cal W N 967.

Note 15.

(1) *Nripati Nath Bhattacharjee* v. *Jatindra Kumar Das*, 1926 Cal 577 (578): 91 Ind Cas 407 [It is not an illegality]; *Rup Kishore* v. *Collector of Etah*, 1929 All 948 (949, 950): 27 All L J 1228: 120 Ind Cas 545: 52 All 115 [Where the Court alters the date fixed for a sale without giving notice to the parties as required by R 66 (2) there is a material irregularity].

(2) *Moinuddin Meerza* v. *Md Amin*, 1930 Pat 153 (154): 119 Ind Cas 891; *Bipin Behari Bejali* v. *Kanti Chandra Mandal*, (1913) 18 Ind Cas 715 (716) Cal.

(3) *Gur Prasad* v. *Debi Prasad*, 1882 All W N 53 (53); *M Megh Lal* v. *Shib Pershad Madi*, (1881) 7 Cal 31 (39, 41): 8 Cal L Rep 369: 5 Ind Jur 476: 4 Shome L R 169.

(4) *Rup Kishore* v. *Collector of Etah*, 1929 All 948 (948, 950): 27 All L J 1228: 120 Ind Cas 545: 52 All 115 [Affixed not on the property but on a tree some distance off—Is a material irregularity]; *Jamini Mohan Nundy* v. *Chandra Kumar*, (1902) 6 Cal W N 44 (46), (Do.); *Kalytara* v. *Ram Coomar*, (1881) 7 Cal 466 (469, 470): 9 Cal L Rep 114; *Wishnath* v. *Rahmat Ullah*, 1923 Lah 671 (672): 77 Ind Cas 879.

(5) *Tekait Krishna Prasad Singh* v. *Motichand*, (1913) 19 Ind Cas 296 (298): 40 Cal 635: 17 Cal W N 637: 1913 Mad W N 487: 11 All L J 517: 17 Cal L Jour 573: 15 Bom L R 515: 14 Mad L Tim 37: 25 Mad L Jour 140: 40 Ind App 140 P C; *Bassanta Kumari Guhan* v. *Ramkanai Sen Poddar*, (1911) 9 Ind Cas 698 (701): 13 Cal L Jour 192 [There need not be separate proclamation in each village unless proper notice of the sale could not otherwise be given]; *Tripura Sundari* v. *Durga Churn*, (1885) 11 Cal 74 (76).

O.21, R.90, Notes 15—17.

are sold in lots and they are sufficiently separated from each other, the affixture of the proclamation on one of such lots may be enough.[6] The failure to affix a copy of the sale proclamation in the Collector's office as required by R. 54 has also been held to be an irregularity under this rule [7]: but not the failure to direct an advertisement of sale in the Gazette.[8]

16. Misdescription of property.—A mere misdescription of property in the sale proclamation where the parties concerned knew what had been attached and sold is a mere irregularity which would not necessarily invalidate a sale.[1] But a fundamental misdescription of the property which has misled the purchaser will be a ground for setting aside the sale.[2] The principle of *caveat emptor* cannot apply to such cases.[3]

The non-specification of the share of the judgment-debtor in the property sold is also a material irregularity.[4]

17. Omission or mis-statement of the value of the property.—A mere *omission* to state in the proclamation of sale the estimated value of the property to be sold will not be a material irregularity under the rule.[1] But in particular cases it may be, necessary to give the value in order to enable the bidders to judge the value of the property; the omission in such cases, may amount to a material irregularity.[2]

A deliberate *mis-statement* of the value of the property calculated to mislead possible bidders and to prevent them from offering adequate prices or from

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(6) *Pedro Antonio De Penha* v. *Jalbhoy Ardeshir*, (1888) 12 Bom 368 (370) [Otherwise it would be an irregularity]; *Md Abdulla* v. *Jamiat Rai*, 1930 Lah 685 (687): 121 Ind Cas 869.

(7) *Nana Kumar* v. *Golam Chunder*, (1891) 18 Cal 422 (426) F B [It is not an illegality]; *Bandi Ali* v. *Madhub Chunder*, (1882) 8 Cal 932 (932, 933); *Pamidimarri Gnamma* v. *Kettireddi Krishna Reddi*, 1924 Mad 217 (219, 223): 46 Mad 736: 1923 Mad W N 463: 75 Ind Cas 369: 45 Mad L Jour 263.

(8) *Gopi Chand* v. *Benarasi Das*, (1919) 53 Ind Cas 794 (795) Lah.

Note 16.

(1) *Tikaram* v. *Narayan*, 1926 Nag 246 (248): 92 Ind Cas 44 [It is not an illegality]. See *Swaminatha Ayyar* v. *Sivagurunatha Chettiar*, (1916) 32 Ind Cas 990 (990) Mad.

(2) *Ravi Nandan Prasad* v. *Jagar Nath Sahu*, 1925 All 459 (462, 464): 47 All 479: 23 All L J 233: 87 Ind Cas 278: 6 L R A Civ 229; *Kishan Das* v. *Narain Dutt*, 1926 Lah 587 (588): 96 Ind Cas 196 [A mistake in the dimensions of the property is a material irregularity]; *Peachey* v. *Jamnadas*, 1905 Pun Re No 47: 175 Pun L R 1905: 50 Pun W R 1905; *Zaki Hasan* v. *Shambu Dayal*, (1903) 6 Oudh Cas 61 (62) [Inadequate description—Only numbers given and not boundaries]; *Smith* v. *Gokul Chandra Chakaravarti*, (1932) 11 Pat 424 (430): 1932 Pat 234: 13 Pat L Tim 457: 139 Ind Cas 74 [Wherein the proclamation of sale the area of the land was stated to be 144 acres, whereas in fact it was 440 acres and its value as Rs. 20,000 when in fact it was worth about two lakhs of rupees—A material irregularity]; *Arunachalam* v. *Arunachalam*, (1889) 12 Mad 19 (25): 15 Ind App 171: 5 Sar 265: 12 Ind Jur 371 [Assumed]. See also *Banke Lal* v. *Jagat Narain*, (1900) 22 All 168 170: (1900) A W N 31 [Description of property vague and misleading—Held to be material irregularity]. See *Nooral Hossein* v. *Ram Coomar Sahee*, (1876) 25 Suth W R 326 (327) [Case of no substantial injury by virtue of the misdescription].

(3) *Ravinandan Prasad* v. *Jagar Nath*, 1925 All 459 (462, 464): 23 All L J 233: 6 L R A Civ 229: 87 Ind Cas 278: 47 All 479.

(4) *Ganesh Singh* v. *Banno Bibi*, (1887) All W N 50 (51); *Hem Chandra Chowdhry* v. *Sarat Kamini Dasya*, (1902) 6 Cal W N 526 (528); *Shib Prokash* v. *Sardar Doyal*, (1877-78) 3 Cal 544 (546): 2 Cal L Rep 260. See *Venkataraman Krishna* v. *Mahableswar Narayan*, 1931 Bom 367 (368): 33 Bom L R 750: 134 Ind Cas 692 [Held to be no misdescription but only a lacuna in it]. See, however, *Baijnath Prasad* v. *Narendra Bahadur Pal*, 1921 All 223 (224): 19 All L J 147: 61 Ind Cas 74 [Mistake in sale proclamation regarding share of judgment-debtor—*Suit* by auction purchaser to set aside sale. Held intentional misrepresentation was essential].

Note 17.

(1) *Mohammad Ali* v. *Mohabir Prasad*, (1916) 35 Ind Cas 411 (412) All; *Daulat Bhiya* v. *Rahisa Banu*, 1931 Cal 490 (491): 85 Cal W N 75: 131 Ind Cas 853: 58 Cal 813: 53 Cal L Jour 575: *Mahomed Nizam-ud-din* v. *Amin-ud-din*, 1922 Lah 35 (36): 4 Lah L Jour 441: 67 Ind Cas 885; *Veerasami Pillai* v. *Kalyanasundaram Mudaliar*, 1927 Mad 1009 (1009): 106 Ind Cas 201 [Especially where decree-holder and judgment-debtor disagree hopelessly]; *Ripusudan Pershad* v. *Nanku Persad*, 1928 Nag 281 (282): 109 Ind Cas 443. See *Bejoy Singh* v. *Ashutosh Gossami*, 1924 Cal 589 (592): 28 Cal W N 552: 83 Ind Cas 430 [Valuation of both parties given in proclamation without value fixed by Court—It is no material irregularity].

(2) *Rup Kishore* v. *Collector of Etah*, 1929 All 948 (948, 949): 27 All L J 1228: 120 Ind Cas 545; *Madan Lal* v. *Ripusudan Prasad*, 1930 Nag 191 (192): 124 Ind Cas 250.

bidding at all is a material irregularity.[3] If it results in substantial injury, the sale will be set aside but not otherwise.[4] O.21, R.90, Notes 17—20.

18. Omission to state the revenue or rent payable on the land.—The omission in the sale proclamation of the government revenue payable on the land is a material irregularity under the rule[1] as also a materially incorrect statement of such revenue.[2] But the omission to state the *income* of the property has been held not to be a material irregularity.[3]

19. Omission or mis-statement of the encumbrances over the property.—An omission to state or a mis-statement of the encumbrances on the property will be a material irregularity under this rule.[1]

20. Other mistakes in the sale proclamation.—Where the sale proclamation advertised the sale of property in satisfaction of the whole decree amount but as a matter of fact part of the decree had been satisfied it was held in the case cited below[1] that it was only an irregularity and does not render the sale a nullity.

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(3) *Saadatmandkhan* v. *Phul Kuar*, (1898) 20 All 412 (417, 418): 25 Ind App 146: 2 Cal W N 550: 7 Sar 380; *Tekait Krishna Prasad Singh* v. *Moti Chand*, (1913) 19 Ind Cas 296 (298): 40 Cal 635: 40 Ind App 140: 17 Cal W N 637: 1913 Mad W N 487: 11 All L J 517: 15 Bom L R 515: 14 Mad L Tim 37: 25 Mad L Jour 140 P C; *Munshi Allauddin Ahmed* v. *Manoranjan Roy*, 1930 Cal 511 (512): 51 Cal L Jour 356: 127 Ind Cas 264; *Ambika Bandna Mazumdar* v. *Manikganj Loan Office, Ltd.*, 1929 Cal 818 (819): 33 Cal W N 848: 57 Cal 67; *Paresh Nath Ghose* v. *Hari Charan Shaha*, (1919) 52 Ind Cas 23 (24) Cal; *Mohendra Nath Jana* v. *Bepin Behari Ghose*, (1916) 33 Ind Cas 946 (947) Cal; *Jadav Nath Chatterjee* v. *Asutosh Kumar Banerjee*, (1912) 16 Ind Cas 974 (975): 16 Cal L Jour 98; *Pran Singh* v. *Janardan*, (1911) 13 Ind Cas 337 (341): 14 Cal L Jour 541; *Rudrananda Thakur* v. *Prithi Chand*, (1911) 11 Ind Cas 438 (441): 14 Cal L Jour 346: 16 Cal W N 704; *Sivadasee Debi* v. *Rajmohan Poddar*, (1911) 10 Ind Cas 475 (476): 15 Cal W N 577; *Basanta Kumari* v. *Ramkanai Sen*, (1911) 9 Ind Cas 698 (701): 13 Cal L Jour 192; *Nandakumar* v. *Govind Mohan Das*, (1910) 6 Ind Cas 135 (137): 13 Cal L Jour 312; *Bhikari Misra* v. *Rani Surya Moni Pal Maha Dai*, (1902) 6 Cal W N 48 (50); *Mati Laut Roy* v. *Bhawani Kunari Debi*, (1902) 6 Cal W N 836 (838); *Chokkalinga Servai* v. *Srinivasa Ayyar*, (1913) 21 Ind Cas 592 (593) Mad; *Raja of Kalahasti* v. *Maharajah of Venkatagiri*, (1913) 21 Ind Cas 389 (391): 38 Mad 387: 14 Mad L Tim 320: 25 Mad L Jour 198; *Sivasami Naicker* v. *Ratnasami Naicker*, (1909) 23 Mad 568 (570): 10 Mad L Jour 344; *Indrani* v. *Bindu Prasad*, 1930 Oudh 81 (81, 82): 6 Oudh W N 1085; 5 Luck 181: 121 Ind Cas 122; *Mt Subhrani Sarasvatiah* v. *Krishna Prasad Thakur*, 1928 Pat 108 (109): 105 Ind Cas 153: 9 Pat L Tim 189; *Mirza Mahomed Zahur Beg* v. *Gopal Saran Narayan Singh*, (1929) 57 Ind Cas 640 (641): 1 Pat L Tim 441: 3 U P L R (Pat) 12: 1921 Pat H C C 75; *Chattarapati Singh* v. *Surendranath Singh*, (1918) 41 Ind Cas 412 (412): 1918 Pat H C C 33; *Sahi Chand* v. *Kalanad Singh*, (1917) 42 Ind Cas 394 (396): 1917 Pat H C C 353: 1 Pat L W 88. But see *Moulvi Abdul Kashem* v. *Benode Lal Dhone*, (1908) 12 Cal W N 757 (759, 760) [Held to be not good law in 13 Ind Cas 337].

(4) *Haladhar Mitra* v. *Prafulla Nath*, (1920) 57 Ind Cas 892 (894) Cal; *Nand Kishwar Sahai* v. *Kedar Nath*, (1917) 40 Ind Cas 849 (850) Pat.

Note 18.

(1) *Baliram Singh* v. *Rai Bahadur Seth Narasinghdas*, 1923 P C 93 (93, 94): 18 Mad L W 137: 45 Mad L Jour 403: 28 Cal W N 593: 33 Mad L Tim 275: 1923 Mad W N 714: 4 L R P C 197: 75 Ind Cas 546; *Macnaughten* v. *Mahabir Prasad*, (1883) 9 Cal 656 (661): 10 Ind App 25: 11 Cal L Rep 494: 4 Sar 417: 4 Shom L R 285: 7 Ind Jur 164; *Girdhar Singh* v. *Hurdeo Narain*, (1877) 26 Suth W R 44 (47): 3 Ind App 230: 3 Sar 637: 3 Suth 294; *Mohabir Pershad* v. *Olpherts*, (1882) 9 Cal L Rep 134 (136); *Mohendro Kumar* v. *Heera Mohun*, (1881) 7 Cal 723 (725); *Lackram* v. *Mohesh Das*, (1869) 12 Suth W R 488 (488, 489); *Athappa* v. *Ramkrishna*, (1898) 21 Mad 51 (53); *Madarsah Maracayar* v. *Lalanappa Chetty*, (1900) 23 Mad 628 (629).

(2) *Raja of Kalahasti* v. *Maharajah of Venkatagiri*, (1913) 21 Ind Cas 389 (391): 38 Mad 387: 14 Mad L Tim 320: 25 Mad L Jour 198.

(3) *Mahna Singh* v. *Salig Ram*, 1928 Lah 918 (918): 110 Ind Cas 339; *Mani Ram* v. *Lachman Das*, (1917) 39 Ind Cas 59 (60): 1917 Pun L R 11.

Note 19.

(1) *Gulab Singh* v. *Raghubir Saran*, 1932 All 369 (370): 1932 All L J 357 [Where in a sale proclamation there is no mention of any incumbrance on the property to be sold, while actually the property is encumbered, this is material irregularity]; *Kanji Mal* v. *Sailo*, (1886) 8 All 116 (117): 1886 All W N 33; *Moti Lal* v. *Bhawani*, (1902) 6 Cal W N 836 (837); *Megh Lal Pooree* v. *Shib Pershad*, (1881) 7 Cal 34 (40, 42): 8 Cal L Rep 369: 5 Ind Jur 476: 4 Shom L R 169 [Encumbrance stated, but amount omitted material irregularity]; *Lakshmi* v. *Kuttumi*, (1887) 10 Mad 57 (62) [A material error in describing the encumbrances on the property sold may be a material irregularity]; *Pirtan Mandar* v. *Naresh Mohan Thakur*, 1929 Pat 588 (589). See *Musst Saraiti* v. *Ishri Pershad*, 1899 Pun Re No 30 [It is not necessary however to set out in the sale proclamation a charge to which the property would not be subject in the hands of a purchaser after sale]; *Mahomed Jawad Husain* v. *Maharaj Kumar Gopal Saran Narain*, 1921 Pat 479 (480): 80 Ind Cas 223: 2 Pat L Tim 248.

Note 20.

(1) *Kasthuri Ayyangar* v. *Arunachalam Chettiar*, (1916) 34 Ind Cas 350 (352): 1916 Mad W N 195.

O.21, R.90, Notes 21—25.

21. **Omission to beat drum.**—Omission to have the drum beaten at the time of the proclamation of sale as required by O. 21, Rr. 54 and 57 is a material irregularity within the meaning of this rule.[1] But an omission to have the drum beaten at the time of the sale is not such an irregularity.[2]

22. **Postponement of sale and issue of fresh proclamation.**—The executing Court can postpone a sale by seven days of its own motion and for a longer period with the consent of parties. (*See* Note 25, *infra*.)

Where, a sale is adjourned under R. 69 by more than seven days a fresh proclamation is necessary, unless the same has been waived.[1] A sale held without such a fresh proclamation is liable to be set aside on the ground of material irregularity.[2]

23. **Irregularities in conducting the sale—Sale within thirty days of the proclamation.**—A sale held within thirty days of the date of the publication of the proclamation at the place where the property is situate, or within thirty days of the affixture of the proclamation in the Court house is vitiated by a material irregularity within the meaning of this rule; but it does not become *ipso facto* null and void.[1]

24. **Sale on a holiday.**—To hold a sale on a holiday is neither an illegality nor an irregularity within the meaning of this rule.[1]

25. **Omission to hold sale at stated time and place.**—As to the effect of a sale held on a day different from that on which it was notified to be held, and of which judgment-debtor could have had no notice, *see* Note 12 to R. 69. Where the Court ordered the sale to be held at a particular place

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Note 21.

(1) *Tribbak Ravji* v. *Nana*, (1886) 10 Bom 504 (505); *Venkatasubbaraya Chetty* v. *Zamindar of Karvetnagar*, (1897) 20 Mad 159 (161).

(2) *Baghvati Prasad* v. *Mukand Sarup*, (1920) 56 Ind Cas 523 (523): 2 U P L R (All) 147.

Note 22.

(1) *Bipin* v. *Jotindra*, (1910) 6 Ind Cas 813 (815): 37 Cal 897: 14 Cal W N 1019; *Baboo Hurdeo Narain* v. *Girdhare Singh*, (1873) 19 Suth W R 227 (229); *Shoshee Mokhee* v. *Dwarkanath*, (1866) 6 Suth W R Mis 84 (84): Beng L R Sup Vol 541 [If no sale on adjourned day—Fresh proclamation is necessary].

(2) *Sanwal Singh* v. *Makhun Pandey*, (1870) 2 N W P 143; *Bagal Chunder* v. *Rameshur*, (1891) 18 Cal 496 (499); *Satischander* v. *Thomas*, (1885) 11 Cal 658 (660); *Jamini Mohan* v. *Chandra Kumar*, (1902) 6 Cal W N 44 (47); *Harbans Sahai* v. *Bhairo Pershad*, (1880) 5 Cal 259 (264): 4 Cal L Rep 23: 5 Ind Jur 78; *Gopee Nath* v. *Roy Luchmeeput*, (1877-78) 3 Cal 542 (543): 1 Cal L Rep 349; *Jhoomuck Chowdhury* v. *Radha Pershad*, (1876) 25 Suth W R 328 (329); *Kishen Prosunno Mojoomdar* v. *Nurduma Dossee*, (1872) 17 Suth W R 339 (339); *Okhoy Chunder* v. *Erskine*, (1865) 3 Suth W R Mis 11 (14); *Kamakhya Dutt* v. *Shyam Lal*, 1929 Oudh 235 (237, 238): 6 Oudh W N 220: 117 Ind Cas 471: 4 Luck 635 [Such fresh proclamation is necessary even in execution sales by the collector]; *Kashif Husain* v. *Ganga Baksh*, 1928 Oudh 98 (99): 4 Oudh W N 273: 2 Luck 490: 100 Ind Cas 787; *Moti Singh* v. *Prithipal Singh*, (1914) 25 Ind Cas 17 (17) Oudh; *Kirpal* v. *Kedernath*, (1917) 41 Ind Cas 68 (69): 3 Pat L W 357. See *Bishambar Das* v. *Udho Ram*, (1907) Pun Re No 25: 21 Pun L R 1908: 104 Pun W R 1907.

Note 23.

(1) *Tasadduk* v. *Ahmad*, (1894) 21 Cal 66 (69): 20 Ind App 176: 6 Sar 324: 17 Ind Jur 534: R & J 131; *Ganga Prasad* v. *Jaglal Rai*, (1889) 11 All 333 (338, 345): 1889 All W N 115: 13 Ind Jur 471; *Jasoda* v. *Mathura Das*, (1887) 9 All 511 (512, 513): 1887 All W N 145; *Nathu* v. *Harbhuj*, (1885) All W N 304 (304); *Kokil Singh* v. *Edal Singh*, (1904) 31 Cal 885 (892); *Mohunt Megh Lal* v. *Shib Prosad Madi*, (1881) 7 Cal 34 (40, 41): 8 Cal L Rep 369: 5 Ind Jur 476: 4 Shom L R 169; *Abdul Nassa* v. *Doolal Dass*, (1882) 11 Cal L Rep 303 (304); *Arunachalam* v. *Kulandasami*, (1895) 5 Mad L Jour 70 (72); *Venkata* v. *Sama*, (1891) 14 Mad 227 (228); *Ramji Patel* v. *Karkaji*, 1924 Nag 293 (294): 78 Ind Cas 746; *Laxmi Narayan* v. *Purnabai*, (1918) 48 Ind Cas 611 (612) Nag; *Raja Wazir Narain Singh* v. *Bhikhari Ram*, 1928 Pat 45 (48): 3 Pat L Tim 765: 2 Pat 207: 1922 Pat H C C Sup 321: 68 Ind Cas 363: 4 U P L R (Pat) 100.

In view of the Privy Council decision in 21 Cal 66, the following cases to the contrary are no longer good law; *Sadhusaran Singh* v. *Panchdeo Lal*, (1887) 14 Cal 1 (8); *Bakshinand* v. *Malak Chand*, (1885) 7 All 289 (289): 1885 All W N 42; *Ram Chunder* v. *Kanta Prasad*, (1882) 4 All 300 (302): 1882 All W N 43.

Note 24.

(1) *Bisram Mahton* v. *Sahib-un-nissa*, (1881) 3 All 333 (334); *Amirulla* v. *Khalil-ul Rahman*, 1882 All W AN 169 (169). But see *Haro Jamadar* v. *Jadhub Chunder*, (1865) 3 Suth W R Mis 24 (24).

but it was notified to be held and was actually sold at a different place, it was held that the sale was illegal.[1]

A Court is entitled to postpone a sale for a period of not more than seven days for sufficient reasons.[2] Such reasons must however, be recorded in writing; otherwise the postponement will constitute a material irregularity.[3] Where a sale is adjourned for a period of *more* than seven days it will be a material irregularity to hold the sale without a fresh proclamation.[4] It has also been held that where a re-sale is ordered or a sale is adjourned, the omission to fix the date and hour of the sale is a material irregularity.[5] As to whether the holding of sale at an earlier or later *hour* than that specified is an irregularity *see* Note 6 to R. 66 and the undermentioned cases.[6] *See* the same note and the following cases[7] as to the effect of the omission to state the place of sale, or of holding the sale at a place different from that notified.

26. Sale of property in one lot though advertised for sale in separate lots.—Where property has been ordered and advertised to be sold in separate lots, it will be a material irregularity to sell it in one lot.[1] But if there was no order for sale in separate lots though the sale proclamation described the property in several lots, it is not a material irregularity to sell all the property in one lot.[2] Again where property has been advertised for sale in one lot it is not an irregularity to sell it in separate lots.[3]

Note 25.

(1) *Jaya Rama Ayyar* v. *Vridhagiri Ayyar*, 1921 Mad 583 (585, 586): 44 Mad 35: 1920 Mad W N 490: 59 Ind Cas 167: 12 Mad L W 182. 39 Mad L Jour 188.

(2) *Rang Lal Singh* v. *Sir Ravaneshar Prasad Singh*, (1911) 12 Ind Cas 174 (175): 39 Cal 26: 16 Cal W N 1: 14 Cal L Jour 334. 3 All L J 1173: 10 Mad L Tim 161: (1911) 2 Mad W N 108: 13 Bom L R 823: 38 Ind App 200 P C; *Lal Mohan* v. *Nuna Mohamed*, (1890) 17 Cal 152 (154); *Mohunt Megh Lal* v. *Shib Pershad*, (1881) 7 Cal 34 (40): 8 Cal L Rep 369: 5 Ind Jur 476: 4 Shome L R 169 [Illness of the selling officer is a good reason]; *Asmatoonissa* v. *Khadumoonissa*, (1872) 17 Suth W R 278 (278) [That the date originally fixed was a holiday is a good reason]; *Nuddea Kishore* v. *Bungsee Mohun*, (1872) 17 Suth W R 210 (210) [That there was no bidder is a good reason]; *Alagakammal* v. *Arunachala Chetty*, (1902) 12 Mad L Jour 97 (99) [But a *sale officer* cannot adjourn the sale without leave of Court when sale is held within the precincts of the Court house]: *Vadugunatham Chetty* v. *E G Foy*, (1913) 20 Ind Cas 192 (193): 6 Bur L Tim 65, (Do.).

(3) *Gulab Singh* v. *Raghubir Saran*, 1932 All 369 (369): 1932 All L J 357; *Venkata* v. *Sama*, (1890) 14 Mad 227 (228) [Adjournment without ground is a material irregularity].

(4) *Hari Sadhan Roy* v. *Shib Gopal Mitra*, 1921 Cal 597 (598): 35 Cal L Jour 140: 65 Ind Cas 746; *Ramiah Theran* v. *Athmanatha Iyer*, 1929 Mad 624 (624): 117 Ind Cas 727. See however *Pir Mahomed* v. *Mayandi Chettiar*, (1910) 8 Ind Cas 564 (565): 9 Mad L Tim 148: 1910 Mad W N 684 [A sale in execution conducted from day to day for longer than seven days, is neither illegal nor irregular].

(5) *Abdul Rauf Khan* v. *Mt Qamrunnissa*, 1930 All 542 (543): 124 Ind Cas 721: 1930 All L J 1062; *Babu Ram* v. *Inamullah*, 1927 All 241 (241): 99 Ind Cas 926: 25 All L J 302: 49 All 402; *Pran Singh* v. *Janardhan Singh*, (1912) 13 Ind Cas 337 (343): 14 Cal L Jour 541; *Gour Kishore Basak* v. *Chandra Mohan Bandopadhya*, (1912) 16 Ind Cas 394 (395) Cal; *Bhikari Mina* v. *Rani Surajamoni*, (1902) 6 Cal W N 48 (51); *Venkatasubbaraya Chetty* v. *Zamindar of Karvetnagar*, (1897) 20 Mad 159 (161); *Sankara Narayana Pillai* v. *Gangammal*, 1925 Mad 631 (633): 21 Mad L W 232: 87 Ind Cas 1 [And place also case of re-sale].

(6) *Khodeja Bibi* v. *Moonshee Johad Roheem*, (1870) 14 Suth W R 320 (321); *Bykunt Nath* v. *Juggut Mohan*, (1875) 24 Suth W R 240 (240); *Ram Rattan* v. *Manja*, 1885 Pun Re No 96; *Sit Pwan* v. *Ngwe Thaln*, (1907-08) 4 L B R 123 (124); *Kallu* v. *Bubdayya*, 1887 All W N 129 (129).

(7) *Krishnaji* v. *Bomanji*, (1909) 2 Ind Cas 459 (460): 11 Bom L R 380; *Noor Mohamed Khan* v. *Malik Noor Mahomed Khan*, 1923 Lah 213 (216): 5 Lah L Jour 30: 71 Ind Cas 730 [Time, date and place not specified]; *Tuljaram Row* v. *Ramachandra Row*, 1921 Mad 484 (486): 41 Mad L Jour 465: 14 Mad L W 515: 1921 Mad W N 736: 68 Ind Cas 916 [Omission to state in the proclamation the place of sale did not mislead the bidders—*Held* sale not liable to be set aside].

Note 26.

(1) *Urquhart* v. *Nundeeput Mahaputtur*, (1869) 12 Suth W R 492 (493, 494).

(2) *Mani Ram* v. *Lachman Das*, (1917) 39 Ind Cas 59 (60): 11 Pat L R 1917.

(3) *Sam Pillai* v. *Krishnasami*, (1898) 21 Mad 417 (419): 8 Mad L Jour 77. See also *Abdool Hye* v. *Macrae*, (1875) 23 Suth W R 1 (4).

O.21, R.90, Notes 27—28.

27. **Irregularities regarding the order of sale of lots.**—Where the *decree itself directs* the sale of properties in a particular order, a sale held in any other order will be vitiated by a material irregularity.[1] Where a mortgage decree does not give any direction as to the order in which the mortgaged properties are to be sold but there are a number of judgment-debtors with rights of contribution, they can apply to the executing Court to look into the equities *inter se* and direct a sale in consonance therewith. A failure to do so is a material irregularity.[2] In the absence of any direction in the decree, a particular course followed by the Court in selling the properties, cannot be said to constitute a gross irregularity merely because a better way of carrying out the sale was possible.[3]

Where, in the absence of a direction in the decree the executing Court fixes the order in which the properties are to be sold, any change in the order so specified will be a material irregularity unless the change is notified in time to the bidders.[4]

In the absence of a direction by the executing Court for the sale of the properties in a particular order, the sale of the items in an order different from that specified in the sale list will not be irregular.[5]

28. **Other cases where the sale is not in terms of the proclamation.**—It is a material irregularity for a decree-holder to cause the sale officer to announce at the time of the sale an encumbrance not stated in the proclamation and an application to notify which, had been rejected by the Court.[1] It will be equally an irregularity if without notice the property is sold free of encumbrance, when the sale proclamation advertised the sale subject to encumbrances.[2]

Where an entire interest in a property has been proclaimed and brought to sale but on the date of sale, a portion only of such property is sold without fresh proclamation does it amount to an irregularity? According to the High Courts of Allahabad, Madras and Patna it is not.[3] But according to the High Courts of Calcutta and Lahore it is a material irregularity rendering the sale liable to be set aside.[4]

Note 27.

(1) *Manasaram Paria* v. *Nagendra Nath Sahu Roy*, (1912) 16 Ind Cas 235 (236): 16 Cal L Jour 557; *Palaniappa* v. *Arumuga*, (1916) 38 Ind Cas 692 (694): (1916) 1 Mad W N 256.

(2) *Raghunath Sahai* v. *Daroga Sahu*, 1925 Pat 148 (151): 78 Ind Cas 609.

(3) *Ramasami Ayyangar* v. *Ramanathan Chettiar*, 1928 Mad 684 (686): 107 Ind Cas 295.

(4) *Pokhraj Singh* v. *Gossain Munraj Pooree*, (1869) 12 Suth W R 281 (282); *Maulvi Mohammad Maqbul-ul-Rahman* v. *Saiyed Ali Khan*, (1914) 25 Ind Cas 18 (20) All [Where property to be sold was divided in nine lots and the Court ordered the sale only of so many lots as would satisfy the decree, but the Nazir sold all the items because there were a number of applications for rateable distribution—*Held*, it was a material irregularity]; *Amir Dulhin* v. *Administrator-General of Bengal*, (1896) 23 Cal 351 (356).

(5) *Inamullah Khan* v. *Zala Shambhu Dayal*, 1931 All 159 (160): 1931 All L J 62: 130 Ind Cas 485.

Note 28.

(1) *Sitapat Singh* v. *Mahabir Prasad*, 1925 Oudh 424 (424): 12 Oudh L J 331: 2 Oudh W N 315: 88 Ind Cas 532.

(2) *Fazlar Rahaman* v. *Jawahir Singh*, (1911) 9 Ind Cas 383 (384) Cal.

(3) *Md Said Khan* v. *Md Abdus Sami Khan*, 1932 All 664 (664): 138 Ind Cas 612; *Sethai Goundan* v. *Subramania Chettiar*, 11 Mad L W 477; *Baidyanath Sarkar* v. *Probhabati Dasi*, 1924 Pat 803 (808): 5 Pat L Tim 443: 78 Ind Cas 315.

(4) *Shib Prokash Singh* v. *Sardar Doyal Singh*, (1878) 3 Cal 544 (546): 2 Cal L Rep 260; *Mohiny Mohun Das* v. *Bhoobunjoy Shah*, (1880) 6 Cal L Rep 237 (238); *Chhotey Lal* v. *Nawal Kishore*, 1930 Lah 15 (16): 120 Ind Cas 536.

29. Purchase by decree-holder without permission to bid.—*See* Note 7 to R. 72 *ante*.

30. Irregularities in the grant of permission to bid.—Where after the decree-holder had been given leave to bid and without notice to him the Court imposed a limit below which the decree-holder should not bid and the property was sold at an undervalue, it was held that the sale can be set aside for irregularity.[1] The fact that no affidavit was filed in support of an application for permission to bid will not be an irregularity.[2]

31. Sale after satisfaction of the decree.—Where after a decree has been satisfied and the satisfaction has been recorded, a sale is held in execution of the decree, the sale is a nullity[1] and therefore the matter does not fall within this rule. *See* Note 71 to S. 47.

If the satisfaction has not been recorded and the period for certification has expired, the Court cannot go into the question at all and an application to set aside the sale on the ground that the decree was satisfied cannot be maintained under this rule.[2] Even if the ninety days have not elapsed, there is no irregularity or fraud in publishing or conducting the sale and the matter will not fall under this rule but only under S. 47.[3]

32. Sale after an order of postponement.—A sale held after an order of postponement passed by the executing Court is a *nullity* whether the order was or was not communicated to the selling officer before the sale.[1]

As to the effect of sales held in contravention of a stay order *see* Notes 66 to S. 47 and O. 41, R. 5.

Where an order of *injunction* restraining the sale has been obtained but the sale is held *before* the order is communicated, it is a material irregularity according to the Judicial Commissioner's Court of Nagpur[2] but not, according to the High Court of Allahabad.[3] Where the sale is held *after* the order of injunction was communicated, it is a nullity.[4]

33. Sale after attachment under R. 53.—A sale held in contravention of an attachment of the decree effected under Rule 53 is invalid as being without jurisdiction and is not a mere irregularity.[1]

Note 30.

(1) *Ali Abbas* v. *Narain Das*, 1925 Oudh 381 (382): 12 Oudh L J 321: 2 Oudh W N 297: 87 Ind Cas 997.

(2) *Kottapalli Hanu* v. *Gouri Hengsu*, 1925 Mad 729 (730): 21 Mad L W 521: 88 Ind Cas 228.

Note 31.

(1) *Maung Po Kyin* v. *C F M R M Anamalay Chetty*, (1911) 9 Ind Cas 452 (452): 4 Bur L Tim 12; *Mani Lal* v. *Uma Charan Chakravarti*, (1913) 20 Ind Cas 337 (340): 19 Cal L Jour 388; *Channi* v. *Lalaram*, (1894) 16 All 5 (7, 9): 1893 All W N 141.

(2) *Kanhya Lal* v. *Mohk Raj*, 1927 Lah 84 (84): 99 Ind Cas 515.

(3) *Alokeshi Dasi* v. *Biraj Mohini Dasi*, (1911) 10 Ind Cas 625 (625) Cal.

Note 32.

(1) *Brahm Singh* v. *Bhandu*, 1921 All 102 (103): 19 All L J 225: 62 Ind Cas 687; *Sant Lal* v. *Umrauissa*, (1890) 12 All 96 (98): 1890 All W N 201; *Mian Jan* v. *Man Singh*, (1878) 2 All 686 (687): 5 Ind Jur 323; *Maijha* v. *Jhoo*, (1874) 6 N W P H C 351, *Nanidh Singh* v. *Sohan Koer*, (1872) 4 N W P 135.

(2) *Dharamchand* v. *Messrs. Mitsui Bussan Kaisha & Co*, (1929) 54 Ind Cas 928 (929) Nag.

(3) *Ramji Das* v. *Lala Chhogal Lal*, 1922 All 282 (282): 69 Ind Cas 745.

(4) *Sitapat Ram* v. *Mahabir Prasad*, 1925 Oudh 424 (425): 12 Oudh L J 331: 2 Oudh W N 317, 88 Ind Cas 532.

Note 33.

(1) *Manik Lal* v. *Bonomali*, (1905) 32 Cal 1104 (1106): 10 Cal W N 193: 3 Cal L Jour 27.

O.21, R.90, Notes 34—36.

34. **Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceedings.**—Where an execution is taken against a wrong representative,[1] or where the judgment-debtor dies after attachment and the properties are sold without impleading his legal representatives[2] the sale is not a *nullity* though it may amount to a material irregularity.

A sale held during the lifetime of the judgment-debtor but confirmed after his death without impleading his legal representatives on the record is not void.[3]

Where properties had been attached during the lifetime of the decree-holder but the sale was held after his death without impleading his legal representatives it was held that there was no irregularity.[4]

35. **Non-representation of minor.**—A sale held in execution of a decree against a minor is not void for the reason that no guardian had been appointed for him in the execution proceedings.[1] It will, however, be a material irregularity under this rule.[2]

Where subsequent to the decree but prior to the sale in execution the judgment-debtor had been adjudged insane and no guardian was appointed for him in the execution proceedings, it was held to constitute a material irregularity under this rule.[3]

36. **Other instances of material irregularity.**—The following have been held to constitute material irregularity within the meaning of this rule *viz*:—

(1) Collusion between the decree-holder and the judgment-debtor.[1]

Note 34.

(1) *Malkarjun Bin* v. *Narhari Bin*, (1901) 25 Bom 337 (352): 27 Ind App 216: 5 Cal W N 10: 2 Bom L R 927: 10 Mad L Jour 368: 7 Sar 739 P C.

(2) *Doraisami* v. *Chidambaram Pillai*, 1924 Mad 130 (134, 136): 47 Mad 63: 45 Mad L Jour 413: 18 Mad L W 577: 1923 Mad W N 817: 33 Mad L Tim 25: 75 Ind Cas 46 [Dissenting from 6 Mad 180 and 23 Ind Cas 251]; *Sheo Prasad* v. *Hira Lal*, (1890) 12 All 440 (446): 1890 All W N 103 F B; *Stowell* v. *Ajudhia Nath*, (1884) 6 All 255 (259): 1884 All W N 67; *Rukmin* v. *Jodha Singh*, (1913) 19 Ind Cas 120 (121). All; *Aba* v. *Dhondu Bai*, (1895) 19 Bom 276 (281, 285); *Bepin Behari Bera* v. *Shashi Bhusan Datta*, (1914) 22 Ind Cas 95 (97): 18 Cal L Jour 628: 18 Cal W N 766; *Jagadish* v. *Bama Sundari*, (1919) 51 Ind Cas 972 (974, 975): 23 Cal W N 608: 29 Cal L Jour 411; *Net Lal* v. *Kareem Bux*, (1896) 23 Cal 686 (689); *Barhamdeo Narayan* v. *Salig Ram Sahay*, 1925 Pat 384 (387): 6 Pat L Tim 67: 1925 Pat H C C 53: 86 Ind Cas 141.

(3) *Kamakhya Dutt Ram* v. *Shyam Lal*, 1929 Oudh 235 (237): 6 Oudh W N 226: 117 Ind Cas 471: 4 Luck 635.

(4) *Dulari* v. *Mohan Singh*, (1880) 3 All 759 (765): 1881 All W N 57; *Amirullah* v. *Khalil-ul-rahman*, (1882) All W N 169 (169). See *Bimbadhar Panda* v. *Abdul Zalil*, 1929 Pat 200 (200): 117 Ind Cas 165 [Whether it is irregularity—*Quaere*].

Note 35.

(1) *Net Lal Sahu* v. *Kareem Bux*, (1890) 23 Cal 686 (689) [Nor even incorrect description of a person as a minor].

(2) *Tekait Krishna Prasad Singh* v. *Moti Chand*, (1913) 19 Ind Cas 296 (298): 17 Cal W N 637: 1913 Mad W N 487: 11 All L J 517: 17 Cal L Jour 573: 15 Bom L R 515: 14 Mad L Tim 37: 25 Mad L Jour 140: 40 Cal 635: 40 Ind App 140 P C; *Nakul Chandra Das* v. *Rajendra Chandra*, 1927 Cal 873 (874): 104 Ind Cas 196; *Matiur Rasul* v. *Abdul Said*, 1926 Cal 109 (112): 30 Cal W N 86: 89 Ind Cas 765; *Fani Bhusan Bhuian* v. *Surendra Nath Das*, 1921 Cal 476 (478): 35 Cal L Jour 9: 64 Ind Cas 25; *Keshawe Surendra Sahi* v. *Devendrabala Dasi*, (1915) 29 Ind Cas 211 (213) Cal. But see *Kolli Naglah* v. *Gopala Krishniah*, (1911) 9 Ind Cas 252 (253): 9 Mad L Tim 260.

(3) *Narayana Kothan* v. *Kaliana Sundaram*, (1896) 19 Mad 219 (228). See *Kalipada* v. *Hari Mohan*, (1917) 35 Ind Cas 856 (859): 24 Cal L Jour 375: 44 Cal 627: 21 Cal W N 1104.

Note 36.

(1) *Suraj Narain* v. *Hardowar Singh*, 1925 Pat 461 (462): 6 Pat L Tim 295: 87 Ind Cas 381.

(2) Disparaging remarks by the decree-holder about the property to be sold, which is calculated to deter bidders from bidding at the sale.[2] **O.21, R.90, Note 36.**

(3) Omission in the execution of a mortgage decree of the name of the subsequent mortgagee.[3]

For other cases of irregularity, *see* the undermentioned cases.[4]

In the following cases the sale was held to be *void* on the ground of *illegality*:—

(1) Omission to serve notice under R. 22.[5] *Vide also* notes under R. 22.

(2) Omission on the part of the Judge to sign the order of attachment and sale notification.[6]

(3) Selling the property as being subject to a mortgage when the decree directs its sale free from the mortgage.[7]

(4) Selling property not covered by the decree.[8]

See also Note 68 to S. 47 *ante*.

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(2) *Rukhinee Bullubh* v. *Brojonath Sircar*, (1880) 5 Cal 308 (310). See *Lalmohun Chowdhurt* v. *Nunu Mohamed Talukdar*, (1890) 17 Cal 152 (154) [But where disparaging remarks are made by bystanders or purchasers other than the decree-holder it is not a material irregularity].

(3) *Mahomad Rafi* v. *Mahamed Askari*, (1917) 37 Ind Cas 433 (434): 1 Pat L Jour 261: 3 Pat L W 390.

(4) *Brij Kumar Lal Sahu* v. *Jagdamba Prasad*, 1929 All 671 (672): 121 Ind Cas 270 [Time given to produce a person offering a higher bid and sale in his favour]; *Mohamed Ali* v. *Mahabir Prasad*, (1916) 35 Ind Cas 411 (411) All [Allowing a bidder for several lots to deposit 25 per cent at the conclusion of the sales of all the lots, as an irregularity]; *Anwari Begam* v. *Lachmin*, 1885 All W N 319 (319) [Landed ancestral estate which ought to be sold, under rules made by Government, by the Collector, was sold by the Civil Court. Held it is a material irregularity]; *Daulat Singh* v. *Phulchand*, 1882 All W N 39 (40) [Judgment-debtor preventing decree holder from bidding—Sale must be set aside]; *Karimunnessa Khatun* v. *Fazlal Karim*, 1924 Cal 1055 (1055): 40 Cal L Jour 78: 84 Ind Cas 471 [The objection that properties were sold in execution without the consent of the Court by which the receiver was appointed is not such as would render the sale void: at most, it was merely an irregularity]; *Beepin Chunder* v. *Puresh Nath*, (1883) 9 Cal 98 (99): 12 Cal L Rep 316: 5 Shom L R 91 [Default in making deposit under R 84 is a material irregularity. *See also* O 21, R 84, Note 4, Foot-note (3)]; *Hazura Singh* v. *Baldeo Das*, 1888 Pun Re No 5 [The omission to get the sanction of the Financial Commissioner (*vide* Notification No 1297, 10th September, 1885) is a material irregularity]; *Athappa Chetty* v. *Ramakrishna Naicken*, (1897) 21 Mad 51 (53) [High Court had ordered in execution of another decree to have the villages of the Zamindari sold one by one. In the present case decree-holder applied to sell the entire village subject to the decree in the other mortgage suit. In the remarks column the decree-holder was bound to state the effect of the High Court order. Non-mention is a material irregularity]; *Aditya Prasad* v. *Jagdish Prasad*, 1929 Oudh 26 (29): 5 Oudh W N 873: 4 Luck 93: 115 Ind Cas 105 [Amount of decree Rs 2,200. Two items sold. Decree-holder offered 1,800 rupees for one item and offered to bid for the rest with regard to other item. Sale officer refused to accept his bid and accepted the next lower bid of Rs 700. Held material irregularity in conducting the sale]; *Rastamji* v. *Ferozshaw*, 1925 Sind 101 (102) [Two secured decree-holders—A single sale by arrangement with Nazir —Proclamation mentioning only one charge—Held a material irregularity]; *Kamini Kumar* v. *Protap Chandra*, 1921 Cal 382 (383): 25 Cal W N 400: 66 Ind Cas 608 [Sale of mortgaged property in execution of a decree for costs against the mortgagee decree-holder].

(5) *Raghunath Das* v. *Sundar Das Khetri*, 1914 P C 129 (131): 42 Cal 72: 41 Ind App 251: 13 All L J 154: 16 Bom L R 814: 20 Cal L J 555: 18 Cal W N 1058: 27 Mad L Jour 150: 16 Mad L Tim 353: 1 Mad L W 567: 1914 Mad W N 747: 24 Ind Cas 304 P C; *Sarada Prosad Roy* v. *Krishna Dome*, 1926 Cal 539 (540): 91 Ind Cas 711; *Gurudas* v. *Thakamani*, 1921 Cal 609 (611): 25 Cal W N 972: 64 Ind Cas 476; *Rajagopala Ayyar* v. *Ramanujachariar*, 1924 Mad 431 (436, 438): 47 Mad 288: 46 Mad L Jour 104: 19 Mad L W 179: 34 Mad L Tim 37: 1924 Mad W N 182: 80 Ind Cas 92 F B.

(6) *Ram Dayal* v. *Mahtab Singh*, (1885) 7 All 506 (510) P C: *Ram Dial* v. *Mahtab Singh*, (1881) 3 All 701 (704, 705): 1881 All W N 62.

(7) *Gur Baksh Lal* v. *Jawahir Singh*, (1893) 20 Cal 599 (602).

(8) *Ganga Devi* v. *Ram Prasad*, 1925 All 551 (552): 23 All L J 558: 88 Ind Cas 393: 6 L R (All) Civ 464. See also *Nagabhatta* v. *Nagappa*, 1923 Bom 62 (63): 24 Bom L R 423: 67 Ind Cas 857: 46 Bom 914. But see *Imtiaz-un-nissa* v. *Chuttun Lal*, 1925 All 236 (237): 22 All L J 1119: 6 L R (All) Civ 153: 84 Ind Cas 746: 17 All 304.

O.21, R.90, Notes 36—37.

The following circumstances have been held to constitute no irregularity:—

(1) Omission to make an application for sale as required by R. 66.[9]

(2) Holding a sale for a sum larger than what is really due.[10]

(3) Knocking down the sale to the highest bidder for a price which is subsequently found to be too low.[11]

(4) Knocking down the sale to a lower bidder when the higher bidders are not *bona fide* and have no money to deposit as required.[12]

(5) Sale held without notice to a receiver who is not in possession of the property sold.[13]

Where the same property has been notified for sale in execution of two decrees, it is quite proper and regular to hold one sale in respect of both of them.[14] In the undermentioned case[15] the High Court had directed stay of sale on the judgment-debtor furnishing security. He did not furnish security, but on the day of sale offered a security which was rejected by the officer conducting the sale. Thereupon the sale was held. It was held that the sale could not be set aside on the ground that there was an impression that the sale had been postponed and consequently few bidders attended the sale.

37. **Fraud in publishing and conducting the sale.**—S. 311 of the old Code provided only for cases of material irregularity as a ground for setting aside a sale and did not include *fraud* in publishing and conducting a sale as a ground of attack. It was held under that Code that such an application came within the scope of S. 244 (now S. 47).[1] The fact that S. 312 of the old Code provided that the sale shall be confirmed in the absence of an application under S. 311 on the ground of material irregularity, was held not to deprive the Court of the power to refuse to confirm the sale where it had been brought about by fraud.[2] The present rule has been framed so as to include fraud as well, so that an application can now be made under this rule to set aside a sale on the

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(9) *Muhammad Abdulla* v. *Jammat Rai*, 1930 Lah 685 (686): 121 Ind Cas 369; *Mani Ram* v. *Lachman Das*, (1917) 39 Ind Cas 59 (60): 11 Pun L R 1917.

(10) *Chuttur Singh* v. *Mst Dhurrum Koonwar*, (1869) 1 N W P H C R 61.

(11) *Lakshmi* v. *Krishnabhat*, (1884) 8 Bom 424 (425): 9 Ind Jur 40; *Raghoo Nath Singh* v. *Jooday Singh*, (1873) 5 N W P 19.

(12) *Raja Mahesh Narain* v. *Kishanand*, (1861) 9 Moo Ind App 324 (342): Marsh 592: 2 Ind Jur O S 1: 5 Suth W R P C 7: 1 Suther 488: 1 Sar 862.

(13) *Maung Ohm Tin* v. *P R M P S R M Chettiar Firm*, 1929 Rang 311 (312): 7 Rang 425: 120 Ind Cas 142.

(14) *Bhawani Das* v. *Rup Ram*, 1881 All W N 89 (89). See also *Court of Wards* v. *Gaya Prasad*, (1879) 2 All 107 (112) [But same property sold separately on same date in pursuance of two orders for sale in two different decrees, no irregularity in the conduct of sale].

(15) *Sheo Sahai* v. *Bhagwan Prasad*, 1881 All W N 104 (104).

Note 37.

(1) *Gaya Prasad* v. *Randhir Singh*, (1906) 28 All 681 (682, 688): 3 All L J 456: 1906 All W N 206; *Wahid-un-nissa* v. *Girdhari*, (1905) 27 All 702 (703): 2 All L J 469: 1905 All W N 162; *Harihar* v. *Rama Pandoo Shetty*, (1909) 4 Ind Cas 253 (254): 11 Bom L R 1113: 33 Bom 698; *Debendra Nath Bhattacharjee* v. *Prasanna Kumar Chakravarti*, (1907) 5 Cal L Jour 328 (332); *Khirode Sundari* v. *Jnanendra Nath*, (1902) 6 Cal W N 283 (285, 288); *Bhubon Mohun* v. *Nanda Lal Dey*, (1899) 26 Cal 324 (329, 330): 3 Cal W N 399; *Rojoni Kant* v. *Hossainuddin*, (1899) 4 Cal W N 538 (540); *Nemai* v. *Deno Nath*, (1898) 2 Cal W N 691 (693); *Matura Das* v. *Lachman Ram*, (1902) 24 All 239 (241): 1902 All W N 49 [Suit to set aside sale on the ground of fraud was held to be barred under S 244]; *Durga Kunwar* v. *Balwant*, (1901) 23 All 478 (480): 1901 All W N 175, (Do.).

(2) *Sabhaji Rao* v. *Srinivasa Rao*, (1878-80) 2 Mad 264 (269, 270): 4 Ind Jur 505.

ground of fraud in publishing and conducting the sale.[3] The effect of including fraud in this rule is to take the applications setting up fraud in publishing and conducting the sale out of the scope of S. 47 and to bring them under this rule.[4] *See also* Note 55 to S. 47.

The word "fraud" in this rule means "that which is dishonest and morally wrong" and does not include an irregularity.[5] The burden of proving fraud rests upon the applicant and must be proved by clear and definite evidence.[6] General and vague allegations of fraud[7] and mere proof of suspicious circumstances are not enough.[8] But it is open to a Court to make an inference of fraud from established facts taken together as a whole.[9] In order to enable an applicant to succeed, it is not necessary that the *auction-purchaser* should also have been a party to the fraud; the fraud of the decree-holder would be sufficient.[10] The reason is that the applicant claims relief not against the purchaser alone but also against the decree-holder. The view expressed in the undermentioned cases[11] that it must be proved that the auction-purchaser was a party to the fraud is, it is submitted, not correct.

A mere under-valuation of property will not amount to fraud within the meaning of this rule.[12] But a wilful misstatement of value in the sale proclamation evidencing a deliberate design to get the property sold for a low price will amount to fraud.[13] Similarly any other wilful misstatement in the sale proclamation calculated to affect the price of the property may amount to fraud.[14] The fact that a decree-holder purchaser dissuaded others from bid-

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(3) *Nazir Husain* v. *Kanhaya Lal*, (1916) 35 Ind Cas 473 (474) All; *Grace Rosamund Rhodes* v. *Padmanabha Chettiar*, (1915) 26 Ind Cas 369 (374): 1 Mad L W 1033: 1914 Mad W N 921: 17 Mad L Tim 18.

(4) *Jagannath* v. *Daud*, 1923 Lah 592 (593): 4 Lah 243: 75 Ind Cas 103.

(5) *Paresh Nath Mullick* v. *Hari Charan Dey*, (1911) 10 Ind Cas 361 (362): 15 Cal W N 875: 38 Cal 622: 14 Cal L Jour 300.

(6) *Sewa Dat* v. *Ghullam Nabi*, (1909) 4 Ind Cas 1006 (1008, 1009): 150 Pun W R 1909: 151 Pun L R 1909.

(7) *Raj Mohun* v. *Govinda*, (1912) 14 Ind Cas 53 (54): 17 Cal W N 524; *Babu Das Narayan Singh* v. *Muhammad Yusuf* alias *Bhekho*, 1921 Pat 145 (147): 1921 Pat H C C 181: 6 Pat L Jour 319: 2 Pat L Tim 191: 61 Ind Cas 823: 3 U P L R (Pat) 31.

(8) *Sewa Dat* v. *Ghullam Nabi*, (1909) 4 Ind Cas 1006 (1008, 1009): 150 Pun W R 1909: 151 Pun L R 1909; *Sher Khan* v. *Musi Lal*, 1926 Oudh 45 (46): 89 Ind Cas 197 [The mere fact that at an auction sale a property fetches a smaller price than it is worth raises no presumption of fraud].

(9) *Kishundeo Narayan* v. *Ramrijhan Singh*, 1924 Pat 67 (69): 1923 Pat H C C 298: 3 Pat L Tim 61: 83 Ind Cas 717. *Bon Behari* v. *Satish Kantha Roy*, 1923 P C 73 (76): 73 Ind Cas 391: 45 Mad L Jour 363: 28 Cal W N 327: 39 Cal L Jour 165: 33 Mad L Tim 325 [*See* observations of the Privy Council in proof of fraud].

(10) *Jagdeo* v. *Ujiyari Kunwar*, 1928 All 351 (354): 26 All L J 412: 108 Ind Cas 899; *Khirode Sundari* v. *Jnanendra Nath*, (1902) 6 Cal W N 283 (285, 288): *Mahabir Rao* v. *Rama bahadur Dubey*, 1923 Pat 435 (436): 4 Pat L Tim 306: 72 Ind Cas 625. See also *Ambika Prasad* v. *Sitaram*, (1907) 6 Cal L Jour 111 (118) [Allegation of fraud against purchaser alone—Held can succeed]; *Adhar Mani Dassi* v. *Monmotha Nath Bose*, (1901) 6 Cal W N 279 (281). (Do.).

(11) *Abbubaker Sahib* v. *Mohidin Sahib*, (1897) 20 Mad 10 (12): *Mohesh Chunder* v. *Dwarka Nath*, (1875) 24 Suth W R 260 (260). See *Lalla Bunseedhur* v. *Koonwar Bindeseree*, (1866) 10 Moo Ind App 454 (473, 474): 2 Sar 167 [Observations of their Lordships was in a suit to set aside a sale in the exercise of Court's equitable jurisdiction].

(12) *Nripati Nath* v. *Jatindra Kumar Das*, 1926 Cal 577 (578): 91 Ind Cas 407; *Ramduri Chowdhuri* v. *Deonandhan Prasad Singh*, 1922 Pat 507 (510, 511): 3 Pat L Tim 501: 1922 Pat H C C 269: 77 Ind Cas 957: 2 Pat 65: 1 Pat L R 18: 4 U P L R (Pat) 71; *Chitambar* v. *Krishnappa*, (1902) 26 Bom 543 (549): 4 Bom L R 249.

(13) *Kishori Dasi* v. *Mukund Lal*, (1911) 11 Ind Cas 295 (298): 15 Cal W N 965; *Ramdhari Chowdhury* v. *Deo Nandan Prasad Singh*, 1922 Pat 507 (510, 511): 3 Pat L Tim 501: 1922 Pat H C C 269: 77 Ind Cas 957: 2 Pat 65: 1 Pat L R 18: 4 U P L R (Pat) 71; *Bajrang Prasad Singh* v. *Mt Sonejhari Kuer*, 1925 Pat 521 (521): 85 Ind Cas 622: 6 Pat L Tim 567.

(14) *Meenakshi* v. *Palaniappa Theran*, 1928 Mad 1138 (1139) [To bring property to sale subject to a bogus mortgage is fraud]; *Sreekunt* v. *Ramjeebun*, (1872) 18 Suth W R 342 (343) [Where six tenures with separate recorded jamas were lumped together and sold in one lot, and no description of the property to be sold was given, in consequence of which the purchaser was the only bidder, the sale was set aside, as being fraudu-

O.21. R.90. Notes 37—39.

ding at a Court sale and thus caused the property to be sold at a low price is not a sufficient ground for setting aside a sale.[15] But if he deterred persons by threats and intimidation from attending the sale, who would otherwise have attended and bid, it would amount to fraud.[16]

See also the undermentioned cases[17] as to particular instances of fraud. *See* the undermentioned cases[18] for circumstances which were held not to amount to fraud.

38. **Combination among bidders.**—There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale.[1] Therefore, a charge against a bidder or decree-holder that he and other bidders who have acted in concert with him have acted in such a manner as to prevent the best price from being obtained does not *of itself* amount to a charge of fraud, nor will proof of such concert invalidate the sale.[2] There is a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition. If the object be to obtain the property at a sacrifice by artifice, the combination is fraudulent; if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent.[3]

39. **Substantial injury—Proviso.**—Before a sale is set aside under this rule, it is essential under the proviso to the rule that there should

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lent].

(15) *Uttam Chand* v. *Dhanpat Rai*, (1911) 9 Ind Cas 816 (817): 102 Pun L R 1911: 203 Pun W R 1911. But see *Woopendro Nath Sircar* v. *Brojendronath Mundul*, (1881) 7 Cal 346 (347): 9 Cal L Rep 263: 4 Shome L R 188 [*Obiter*].

(16) *Bul Chand* v. *Zinatunnissa*, 1881 All W N 106 (106).

(17) *Sarat Kumari* v. *Nimai Charan*, (1901) 5 Cal W N 265 (267) [The purchase of property by a decree-holder in the name of another at a price less than that at which the decree-holder obtained permission to bid for the property constitutes fraud]; *Nanda Kumar* v. *Gobind Mohan Das*, (1910) 6 Ind Cas 135 (136): 13 Cal L Jour 312, (Do.); *Subbarayudu* v. *Kottayya*, (1892) 15 Mad 389 (391, 329): 2 Mad L Jour 166 [The decree-holder's vakil having obtained leave to bid for his client, acting in an underhand manner, purchased the property himself, held, this was fraud]; *Ali Abbas* v. *Narain Das*, 1925 Oudh 381 (382, 383): 12 Oudh L J 321: 2 Oudh W N 297: 87 Ind Cas 997 [Where the purchaser at an auction sale was the clerk of the pleader who represented the decree-holder in the suit, held, that he was in a position of active confidence towards the decree-holder, that his purchase without informing the decree-holder of his intention was a gross abuse of confidence and amounted to a fraud]; *Raj Kuer* v. *Chunnoo Lal*, (1912) 15 Ind Cas 888 (889): 1912 Mad W N 174 [Permission to bid was granted on condition that his minimum bid was the decree amount. He bids for less—Amounts to fraud]; *Sheikh Maula Bux* v. *Raghubar Ganjhu*, (1918) 48 Ind Cas 560 (561): 3 Pat L Jour 645 [Where the decree-holder agreed not to hold the sale if payment was made within a certain time and he then fraudulently proceeded to sell the property in contravention of this arrangement, amounts to fraud]. See also cases in foot-notes (1) and (2) *ante*. See also *Golam Ahad Chowdhry* v. *Judhister Chunder Shaha*, (1903) 30 Cal 142 (153): 7 Cal W N 305; *Durga Charan Mandal* v. *Kali Prasanna Sarkar*, (1899) 26 Cal 727 (732): 3 Cal W N 586; *Sadho Chaudhuri* v. *Abhenandan Prasad*, 26 All 101: 23 All W N 208.

(18) *Babu Das Narayan Singh* v. *Muhammad Yusuf*, 1921 Pat 145 (147): 1921 Pat H C C 181: 6 Pat L Jour 319: 2 Pat L Tim 401: 61 Ind Cas 828: 3 U P L R (Pat) 33 [Mere want of diligence is not fraud]; *Piare Lal* v. *Kishan Lal*, 1928 All 704 (705): 110 Ind Cas 876 [The fact that certain property alleged to be wrongly sold was not included in the mortgaged property decreed to be sold is not fraud]; *Bishun Chand Buchhaol* v. *Bijoy Singh*, (1911) 11 Ind Cas 399 (401): 15 Cal W N 648: 8 All L J 587: 13 Cal L Jour 588: 13 Bom L R 440: (1911) 2 Mad W N 418: 21 Mad L Jour 652: 10 Mad L Tim 335, P C [Where the plaintiff was dissuaded from bidding at the sale by the pleader for the judgment-debtor falsely assuring them that he had instructions to apply for a postponement, the auction-purchaser could not be held responsible for the misrepresentation].

Note 38.

(1) *Hari Balkrishna* v. *Naro Moreshwar*, (1894) 18 Bom 342 (346).

(2) *Mahomed Mira Rowthar* v. *Savvasi Vijaya Raghunadha Gopalar*, (1900) 23 Mad 227 (233, 234): 27 Ind App 17: 4 Cal W N 228: 10 Mad L Jour 1: 2 Bom L R 640: 7 Sar 661 P C [Affirming 19 Mad 315 on this point]; *Satish Chandra Mukerjee* v. *A R Porter*, (1909) 1 Ind Cas 158 (160): 13 Cal W N 18: 9 Cal L Jour 244: 36 Cal 226; *Sewa Datt Pershad* v. *Ghulam Nabi*, (1909) 4 Ind Cas 1006 (1012): 150 Pun W R 1909: 151 Pun L R 1909; *Pragji Kala* v. *Assa Jalal*, (1916) 35 Ind Cas 530 (531): 10 Sind L R 53.

(3) *Ambika Prasad Singh* v. *R H Whitwell and Sitaram Singh*, (1907) 6 Cal L Jour 111 (115).

have been *substantial injury* and that such injury should have been sustained by the applicant *by reason of the irregularity or fraud*. A Court has no jurisdiction to set aside a sale under this rule without going into the question of substantial injury.[1] That is to say, the applicant must prove substantial injury in addition to the material irregularity, or fraud in publishing and conducting the sale and mere proof of irregularity or fraud alone is of no avail.[2] The onus of proving substantial injury lies on the applicant.[3]

"Injury" means loss which is wrongful.[4] Such loss must also be *substantial*.[5] The fact that the price realised at the sale is less than the value stated in the proclamation of sale is no proof of wrongful loss.[6] Nor is the *market value* of the property a safe criterion in finding substantial injury.[7]

Where, in a case it was found that there had been material irregularity in the conduct of the sale and the property fetched an inadequate price in consequence, the mere fact that the real value of the property did not exceed the amount of the decree and that the unsatisfied balance of the decree could not be realized from the judgment-debtor on account of limitation, would not bring the case within the provisio to this rule.[8]

40. Applicant must have sustained substantial injury by reason of such irregularity or fraud.—As has been already mentioned in Note 39 above, in order that an applicant under this rule may have a sale set aside, a mere proof of irregularity is not enough; he must show that he sustained substantial

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Note 39.

(1) *Srish Chandra Ghose v. Sadhu Charan Rautra*, (1918) 46 Ind Cas 81 (85): 5 Pat L W 15: 1918 Pat H C C 284. See *Malkarjun v. Narhari*, (1901) 25 Bom 337 (343): 27 Ind App 216: 5 Cal W N 10: 2 Bom L R 927: 10 Mad L Jour 308: 7 Sar 739 P C [Where sale is illegal, no injury need be proved]; *Saul Lal v. Umrao-un-nissa*, (1890) 12 All 96 (98): 1890 All W N 201, (Do.); *Ramchand v. Pitam Mal*, (1888) 10 All 506 (517): 1888 All W N 195, (Do.); *Arunachelam v. Kutandasami*, (1895) 5 Mad L Jour 70 (73, 74) [In both cases injury must be proved. This is not good law]

(2) *Ranglal Singh v. Ramnandan Prashad Singh*, (1911) 12 Ind Cas 174 (175): (1911) 2 Mad W N 168: 10 Mad L Tim 161: 13 Bom L R 823: 14 Cal L Jour 334: 8 All L J 1173: 16 Cal W N 1: 39 Cal 26: 38 Ind App 200 P C; *Siradurga Debi v. Rajmohan Pedda*, (1911) 10 Ind Cas 475 (476): 15 Cal W N 577; *Tarubala Dasi v. Moni Lal Das*, (1909) 1 Ind Cas 246 (247) Cal; *Bandu Ali v. Madhub Chandra Nag*, (1882) 8 Cal 932 (933); *Subbarama Reather Minda Naiur v. Muthammal*, (1914) 22 Ind Cas 780 (785) Mad; *Moti Singh v. Prithipal Singh*, (1914) 25 Ind Cas 17 (17) Oudh; *Nemai Choudhury v. Ram Sunder Thakur*, 1931 Pat 43 (44): 11 Pat L Tim 701: 129 Ind Cas 661; *Bras Singh v. Khedu Mian*, 1930 Pat 58 (60): 123 Ind Cas 637 [And one of the most usual forms of showing that the applicant has sustained injury is to show that the property has been sold for a gross under-value]; *Eknath Pandey v. Singeshwar Nath*, 1924 Pat 785 (786): 5 Pat L Tim 250: 76 Ind Cas 168; *Muhammad Jawad Husain v. Kumar Gopal Saran Narain Singh*, 1921 Pat 179 (180): 2 Pat L Tim 248: 80 Ind Cas 223; *Maung Kan v. Ma Nan*, 1922 U B 22 (22): 4 U B R 97; *Rustomji Cursetji v. Perozshah D Mirvala*, 1925 Sind 253 (254): 18 Sind L R 130: 86 Ind Cas 1045. See *Maharaj Bahadur Singh v. Nachindra Nath Roy*, 1928 Cal 328 (331): 32 Cal W N 309 [The fact that decree-holder offered to return the property to the judgment-debtor for the price bought may be considered].

(3) *Raghunath Sahai v. Daroga Sahu*, 1925 Pat 148 (149): 78 Ind Cas 609.

(4) *Shosi Bhusan Sadhu v. Ahmed Hossain*, (1903) 7 Cal W N 439 (440) [When a person loses what he has been in the habit of wrongfully gaining, it is no substantial injury or injury of any sort or kind]; *Ravi Nandan Prasad v. Jagarnath Sahu*, 1925 All 459 (462): 23 All L J 233: 6 L R (All) Civ 229: 87 Ind Cas 218: 47 All 479 [Loss need not be pecuniary]

(5) *Nakul Chandra Das v. Rajendra Chandra Gangopadhya*, 1927 Cal 873 (874): 101 Ind Cas 196; *Jamit Lal Seal v. Jagat Chandra Thakur*, 1926 Pat 202 (203): 4 Pat 696: 93 Ind Cas 935: 7 Pat L Tim 165.

(6) *Rajbans v. Ankaran*, 1922 Pat 550 (551): 1 Pat 214: 75 Ind Cas 185; *Mt Subhrani Sarasvataia v. Krishna Prasad Thakur*, 1928 Pat 108 (109): 105 Ind Cas 153: 9 Pat L Tim 189.

(7) *Meah Khan v. Narain Chunder*, (1872) 18 Suth W R 197 (197, 198).

(8) *Sant Persad Singh v. Shea Narain Singh*, (1912) 17 Ind Cas 728 (729): 16 Cal W N 1022.

O.21, R.90, Note 40.

injury *as a result of* such material irregularity or fraud.[1] In the absence of evidence to show that the injury is the result of irregularity, the Court cannot presume from the proved existence of irregularity and injury, that the latter occurred by reason of the former.[1-a]

The proviso to S. 311 of the old Code provided that "no sale shall be set aside . . . . *unless the applicant proves to the satisfaction of the Court* that he has sustained substantial injury by reason of such irregularity." In a case[2] arising under that section their Lordships of the Privy Council observed as follows:—"Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was held without full compliance with the provisions of the S. 290 (now R. 68 of O. 21). The section clearly contemplates *direct evidence* on the subject". Relying upon this passage, the High Court of Allahabad[3] held that it was not sufficient for an applicant under S. 311 to prove material irregularity and injury, but that he must *connect* the irregularity with the inadequacy of price as cause and effect, by means of direct evidence. But the High Courts of Calcutta[4]

Note 40.

(1) *Macnaughten* v. *Mahabir Pershad Singh*, (1883) 9 Cal 656 (660, 662): 10 Ind App 25: 11 Cal L Rep 494: 4 Sar 417: 4 Shome L R 285: 7 Ind Jur 164 P C [Injury cannot be inferred from proof of irregularity]; *Bhagwati Prasad* v. *Mukund Sarup*, (1920) 56 Ind Cas 523 (523): 2 U P L R All 147; *Mahomed Ali* v. *Mahabir Prasad*, (1916) 35 Ind Cas 411 (414) All; *Ram Narain* v. *Ram Chander Sarup*, (1913) 20 Ind Cas 16 (17) All; *Superior Bank, Ltd* v. *Budh Singh*, 1924 All 698 (699): 22 All L J 413: 5 L R (All) Civ 769: 83 Ind Cas 1028; *Maharaj Bahadur Singh* v. *Sachindra Nath Roy*, 1928 Cal 328 (331): 32 Cal W N 309; *Karimunnessa* v. *Fazal Karim*, 1924 Cal 1055 (1055): 40 Cal L Jour 78: 84 Ind Cas 471; *Hari Sadhan Roy* v. *Shib Gopal Mitra*, 1921 Cal 597 (598): 35 Cal L Jour 140: 65 Ind Cas 746; *Haladhar Mittra* v. *Prafulla Nath*, (1920) 57 Ind Cas 892 (894) Cal; *Taimuddi Bepari* v. *Sheikh Lakpat Bepari*, (1918) 45 Ind Cas 212 (213) Cal; *Gour Kishore Basak* v. *Chandra Mohan Bandhopadhya*, (1912) 16 Ind Cas 394 (395, 396) Cal; *Jiwan Ram* v. *Hari Charan*, (1907) 5 Cal L Jour 240 (242): 2 Mad L Tim 153 F B; *Ismail Khan* v. *Abdul Aziz Khan*, (1905) 32 Cal 502 (507, 508): 9 Cal W N 343: 1 Cal L Jour 14 F B [A Court cannot, without evidence, and upon a mere supposition find that an irregularity did cause injury]; *Sheo Prokash* v. *Hurdai Narain*, (1874) 22 Suth W R 550 (550); *Chunder Sheekhur* v. *Jadub Chunder*, (1873) 19 Suth W R 78 (78); *Syud Nujmooddeen Ahmed* v. *Abdool Azeez*, (1871) 15 Suth W R 95 (95); *Alexander Shaw Urquhart* v. *Nundeeput Mahaputtur*, (1869) 12 Suth W R 492 (493); *Lack Ram* v. *Mohesh Doss*, (1869) 12 Suth W R 488 (489); *Nilmonee* v. *Ram Churn*, (1865) 6 Suth W R Mis 45 (46); *Reet Bhunjan* v. *Mitturjeet*, (1866) 6 Suth W R Mis 31 (31); *Joytara* v. *Mohamed Hussain*, (1865) 2 Suth W R Mis 1 (2); *Mahomed Mukarram Ali Khan* v. *Nanak Chand Kastur Chand*, 1930 Lah 692 (695): 122 Ind Cas 234; *Kanhya Lal* v. *Megh Raj*, 1927 Lah 84 (84): 99 Ind Cas 515; *Kishan Das* v. *Narain Dutt*, 1926 Lah 587 (588): 96 Ind Cas 196; *Anup Chand* v. *Mt Kawal Kaur*, 1924 Lah 592 (592): 75 Ind Cas 784; *Noor Mahomed Khan* v. *Malik Noor Mahomed Khan*, 1923 Lah 213 (216): 5 Lah L Jour 30: 71 Ind Cas 730; *Mahomed Nizam-ud-din* v. *Amin-ud-din*, 1922 Lah 35(36): 67 Ind Cas 855: 4 Lah L Jour 441; *Gopi Chand* v. *Benarsi Das*, (1919) 53 Ind Cas 794 (796) Lah; *Sivakolandu Pillai* v. *Ganapathy Ayyar*, (1917) 37 Ind Cas 964 (965): 1917 Mad W N 89; *Kolli Nagiah* v. *Gopalakrishniah*, (1911) 9 Ind Cas 252 (253): 9 Mad L Tim 260; *Arunachellam* v. *Arunachellam*, (1889) 12 Mad 19 (26): 15 Ind App 171: 5 Sar 265: 12 Ind Jur 371 P C; *S P Kain* v. *Kashmiri Bank, Ltd, Fyzabad*, (1898) 1 Oudh Cas 155 (156); *Sajid Ali* v. *Bindraban*, (1898) 1 Oudh Cas 14 (17); *Nand Kishwar Sahai* v. *Kedar Nath*, (1917) 40 Ind Cas 849 (850) Pat; *Kirpal Singh* v. *Kedar Nath Bose*, (1917) 41 Ind Cas 68 (70): 3 Pat L W 357; *Vaduganatham Chetty* v. *E G Foy*, (1913) 20 Ind Cas 192 (193): 6 Bur L Tim 65.

(1-a) *Macnaughten* v. *Mahabir Pershad Singh*, (1883) 9 Cal 656 (660, 662): 10 Ind App 25: 11 Cal L Rep 494: 4 Sar 417: 4 Shome L R 285: 7 Ind Jur 164 P C; *Arunachella* v. *Arunachella*, (1889) 12 Mad 19 (25): 15 Ind App 171: 5 Sar 265: 12 Ind Jur 371 P C; *Satish Chunder Rai Chowdhri* v. *Thomas*, (1885) 11 Cal 658 (660, 661); *Mobaruck Lal* v. *Secretary of State*, (1885) 11 Cal 200 (210, 213); *Bonomalai Mazumdar* v. *Woomesh Chunder Bundopadhya*, (1881) 7 Cal 730 (732): 9 Cal L Rep 341: 4 Shome L R 191; *Shirin* v. *Agha Ali Khan*, (1896) 18 All 141 (143): 1896 All W N 9.

(2) *Tasuddak Rasul* v. *Ahmed Husain*, (1894) 21 Cal 66 (70): 20 Ind App 176: 6 Sar 324: 17 Ind Jur 534: R & J 131 P C.

(3) *Jagannath* v. *Makund*, (1896) 18 All 37 (41): 1895 All W N 154; *Shirin* v. *Agha Ali Khan*, (1896) 18 All 141 (143): 1896 All W N 9.

(4) *Mahabir Pershad Singh* v. *Dhanukdhari Singh*, (1904) 31 Cal 815 (819, 820): 8 Cal W N 686; *Sheoruttun* v. *Net Loll*, (1903) 30 Cal 1 (9): 6 Cal W N 688; *Nibaran Chandra* v. *Chiranjib Prasad Bose*, (1905) 32 Cal 542 (549): 9 Cal W N 487; *Moti Lal Roy* v. *Bhawani Kumari Debi*, (1902) 6 Cal W N 836 (838); *Bhikari Misra* v. *Rani Surja Moni Pat Maha Debi*, (1902) 6 Cal W N 48 (55); *Hemchandra Chowdhry* v. *Sarat Kamini Dasya*, (1901) 6 Cal W N 526 (528); *Jamini Mohun Nundy* v. *Chandra Kumar Roy*, (1901) 6 Cal W N 44 (48); *Surnomoyee Debi* v. *Dakhina Ranjan Sanyal*, (1897) 24 Cal 291 (294,

and Madras[5] and the Judicial Commissioner's Court of Oudh[6] held that the relation of cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be *inferred*, where such inference is reasonable from the nature of the irregularity and the extent of the inadequacy of the price. As regards the phrase "direct evidence" used by their Lordships of the Privy Council, it was held that their Lordships intended only to say that there must be evidence showing that substantial injury was the *necessary* result of the irregularity complained of.[7] The substitution of the words "unless upon the facts proved the Court is satisfied" in this rule gives legislative recognition to the latter view.[8] In order to connect the two things the applicant should point out some facts from which the Court can reasonably infer substantial injury from the irregularity or fraud complained of.[9] Thus, where in a sale proclamation the property is undervalued and it has been sold at an inadequate price, the sale may be set aside.[10] The reason is that where the irregularity is an understatement of the probable price of the property, the connection is so near that it is open to the Court to infer without any other evidence that injury has resulted from the irregularity.[11]

A *mere* inadequacy of price is, however, no ground for setting aside a sale.[12] The inadequacy must have been occasioned by some irregularity.[13]

For other cases where substantial injury has been held to be the result of irregularity or fraud, *see* the following cases.[14]

41. Waiver of irregularity and estoppel.—If a judgment-debtor has received notice under R. 66, *ante*, or has knowledge of the contents of the pro-

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295); *Guru Baksh Lal* v. *Jawahir Singh*, (1893) 20 Cal 599 (604); *Tripurasundari* v. *Durga Charn Pal*, (1885) 11 Cal 74 (76); *Kalyatara* v. *Rameswar*, (1881) 7 Cal 466 (467): 9 Cal L Rep 114; *Gopee Nath Dobey* v. *Roy Lachmeepat*, (1877-78) 3 Cal 512 (514). But see *Asmutunnissa* v. *Ashruff*, (1888) 15 Cal 188 (491): 13 Ind Jur 54 F B.

(5) *Venkatasubbarayu* v. *Zamindar of Karvetinagar*, (1897) 20 Mad 159 (161); *Ramanna Naidu* v. *Chidambaram Chettiar*, (1899) 22 Mad 440 (448). See *Palaniappa* v. *Arunagu Pandaram*, (1916) 33 Ind Cas 692 (693, 694): (1916) 1 Mad W N 256 [Some casual connection must be shown]. But see *Sundaatha Ammal* v. *Sivaramaratha Chettiar*, (1916) 32 Ind Cas 990 (990) Mad.

(6) *Zaki Hasan* v. *Sambhu Dayal*, (1903) 6 Oudh Cas 61 (66).

(7) *Surno Moyee Debi* v. *Dalkina Ranjan Sanyal*, (1897) 24 Cal 291 (294, 295).

(8) *Babu Ram* v. *Inayatullah*, 1927 All 241 242): 99 Ind Cas 926: 25 All L J 302: 49 All 402 [Serious irregularities in conducting sale -Inadequacy of price fetched will be attributed to such irregularities]; *Rup Kishore* v. *Collector of Etah*, 1929 All 948 (949, 950): 1929 All L J 1228: 120 Ind Cas 545, (Do.); *Pirtam Mander* v. *Naresh Mohan Thakur*, 1929 Pat 588 (590): (Do.); *Chotey Lal* v. *Firm Nawal Kishore Khairati Lal Johri*, 1930 Lah 15 (16): 120 Ind Cas 536 [Loss may be inferred from the nature of the irregularity and the inadequacy of the price]; *Ganapathia Pillai* v. *Malaiperumal Chettiar*, 1925 Mad 202 (203): 20 Mad L W 736: 85 Ind Cas 342

(9) *Mohamed Maqbul-ul-Rahman* v. *Sayed Ali Khan*, (1914) 25 Ind Cas 18 (21) All.

(10) *Sivadurga Debi* v. *Rajmohan Poddar*, (1911) 10 Ind Cas 475 (476): 15 Cal W N 577; *Mirza Mahomed Zahur Beg* v. *Maharaja Gopal Saran Narayan Singh*, (1920) 57 Ind Cas 640 (641): 1 Pat L Tim 441: 3 U P L R (Pat) 12: 1921 Pat H C C 75; *Tarubala Dasi* v. *Moni Lal Das*, (1909) 1 Ind Cas 246 (247) Cal [But if property sold at fair value, sale will not be set aside]. But see *The Alliance Bank of Simla* v. *Lowrie*, 1926 Lah 588 (588): 96 Ind Cas 186.

(11) *Adanamoli Chetty* v. *Chinnasami Reddi*, 1926 Mad 959 (960): 24 Mad L W 406: 1926 Mad W N 631: 97 Ind Cas 574; *Paresh Nath Ghose* v. *Hari Charan Shaha*, (1919) 52 Ind Cas 23 (25) Cal.

(12) In the matter of *Baboo Hurdeo Narain* v. *Girdharee Singh*, (1873) 19 Suth W R 227 (229); *Nooral Hossein* v. *Rao Coomar*, (1876) 25 Suth W R 326 (327).

(13) *Korapalu Hengsu* v. *Gouri Hengsu*, 1925 Mad 729 (730): 21 Mad L W 521: 88 Ind Cas 228.

(14) *Chockalinga Servai* v. *R Srinivasa Aupar*, (1913) 21 Ind Cas 592 (593) Mad [Irregularity in fixing value]; *Babu Sitapat Ram* v. *Mahabir Prasad*, 1925 Oudh 424 (424): 12 Oudh L J 331: 2 Oudh W N 315: 88 Ind Cas 532, (Do.); *Mahomed Ali* v. *Gobind Prasad*, (1915) 28 Ind Cas 184 (186): 18 Oudh Cas 1 [Time of sale on adjourned date not specified]; *Raj Kuar* v. *Chunnoo Lal*, (1912) 15 Ind Cas 888 (890): 16 Oudh Cas 86.

O.21, R.90, Note 41.

clamation of sale before it is issued and neglects to take any objection to the proceedings, he will not afterwards be allowed to object to the sale under this rule on any of the grounds which he might have then urged.[1] The reason of this rule of estoppel is stated by their Lordships of the Privy Council as follows:—"It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property, if the judgment-debtors could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which they knew well, but of which the execution creditor or decree-holder might be perfectly ignorant, that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated".[2] The same principle will apply if the judgment-debtor had consented to the irregularity before sale.[3]

Where a judgment-debtor applies for postponement of the sale and gets it adjourned, he must be deemed to have admitted that the proclamation was correct, or at any rate, there was no such mistake or irregularity as would be likely to mislead.[4] The judgment-debtor cannot also urge any objections to the sale if at the time of postponement of the sale he consented to waive any irregularity.[5] Where, however, he was not aware of the facts to which he was bound to object at the time where he had an opportunity of so doing, there can be no waiver or estoppel.[6] The reason is that a person can be taken to have waived only such rights as were within his knowledge.

Note 41.

(1) *Abdul Rauf Khan* v. *Mt Qamrunnissa*, 1930 All 542 (543): 124 Ind Cas 721: 1930 All L J 1062; *Mohan Lal* v. *Kali Charan*, 1927 All 513: 25 All L J 524: 102 Ind Cas 126: 49 All 788; *Mahesh Narain Singh* v. *Beeheshar Lonia*, 1931 All 534 (535): 1931 All L J 432: 133 Ind Cas 532; *Behari Singh* v. *Mukat Singh*, (1906) 28 All 273: 3 All L J 140: 1906 All W N 3; *Umed* v. *Jas Ram*, (1907) 29 All 612 (614): 1907 All W N 198: 4 All L J 519; *Krishnaji Ramachandra Dater* v. *Bomanji Edalji*, (1909) 2 Ind Cas 459 (460): 11 Bom L R 380; *Mahomed Abdulla* v. *Sakharam Habaji Misby*, 1930 Bom 290 (291): 32 Bom L R 436: 54 Bom 348: 125 Ind Cas 908; *Maharaj Bahadur Singh* v. *Sachindra Nath Roy*, 1928 Cal 328 (331): 32 Cal W N 309; *Devi Prasad Bhagat* v. *Nagendra Kumar Nag*, 1925 Cal 552 (555): 78 Ind Cas 727; *Jashimuddin Sarkar* v. *Manmohini Dasya*, 1922 Cal 93 (94): 70 Ind Cas 308 [Value of the land not stated in sale proclamation is only a material irregularity—Failure to serve sale proclamation but judgment-debtor aware of it—Sale is not vitiated]; *Mansaram* v. *Nagendranath*, (1912) 16 Ind Cas 235 (236): 16 Cal L Jour 557; *Banday Ali* v. *Madhub Chunder*, (1882) 8 Cal 932 (933); *Md Abdulla* v. *Jamiat Rai*, 1930 Lah 685 (686): 121 Ind Cas 369; *Pamidimarri Guamma* v. *Kettireddi Krishna Reddi*, 1924 Mad 217 (218, 220): 46 Mad 736: 1923 Mad W N 463: 75 Ind Cas 369: 45 Mad L Jour 263; *Saminatha Ayyar* v. *Sivagurunatha Chettiar*, (1916) 32 Ind Cas 990(990)Mad; *Subbaraya Rowthe Minda Nainar* v. *Muthammal*, (1914) 22 Ind Cas 780 (784) Mad; *Radhakrishnaswami Naidu* v. *Annamalai Chettiar*, 1922 Mad 301 (302): 15 Mad L W 643: 31 Mad L Tim 122: 43 Mad L Jour 92: 1922 Mad W N 655: 70 Ind Cas 365 [Defendant becoming major after decree—Not recorded as major—Sale held—Ex-minor knew of proceedings—Is estopped]; *Gajadhar Rai* v. *Bechraj Marwari*, 1931 Pat 63 (64): 130 Ind Cas 265; *Mahadeo Singh* v. *Dhobi Singh*, 1924 Pat 111 (112): 2 Pat 916: 4 Pat L Tim 721: 1923 Pat H C C 283: 74 Ind Cas 888; *Gendaram* v. *O A O R M Chettiar Firm*, 1931 Rang 179 (180): 131 Ind Cas 721 [The Rangoon High Court has added a proviso to this rule giving effect to this principle]. See also *Abdul Razak* v. *Muhammad Hajjam*, 1922 Oudh 11 (13): 9 Oudh L J 131: 67 Ind Cas 797 [Property sold as belonging to one sharer—Other co-sharers who are parties keeping quiet even though aware of the sale—Estopped from suing for their shares]. But see *Madanlal* v. *Ripsudanprasad*, 1930 Nag 191 (193): 124 Ind Cas 250.

(2) *Arunachalam* v. *Arunachalam*, (1889) 12 Mad 19 (25): 15 Ind App 171: 5 Sar 265: 12 Ind Jur 371 P C.

(3) *M L M Ramanathan Chettiar* v. *Ramanathan Chettiar*, 1929 Mad 275 (277): 117 Ind Cas 705: 30 Mad L W 995; *Samiruddin* v. *Abdul Syed*, (1918) 44 Ind Cas 734 (736) Cal.

(4) *Girdhari Singh* v. *Hurdeo Narain*, (1877) 26 Suth W R 44 (48) P C.

(5) *Nripati* v. *Jatindra*, 1926 Cal 577 (578): 91 Ind Cas 407; *Lakshmi Prasanna Mojumdar* v. *Rajindar Poddar*, (1918) 47 Ind Cas 831 (832) Cal; *Raja Thakur Barham* v. *Anant Ram*, (1905) 2 Cal L Jour 584 (587, 589); *Govind Chunder* v. *Ramun Doss*, (1874) 22 Suth W R 481 (481).

(6) *Basanta Kumari* v. *Ram Kantai Sen*, (1911) 9 Ind Cas 698 (703, 704): 13 Cal L Jour 192; *Dhanukdhari Singh* v. *Nathum Sahu*, (1907) 6 Cal L Jour 62 (69, 70): 11 Cal W N 348;

In the following instances it has been held that there is no waiver:— O.21, R.90, Note 41.

(1) Where a judgment-debtor agrees to waive an irregularity provided the sale is postponed, but the Court does not allow such postponement, there can be no relinquishment of his right to object to the sale.[7]

(2) Where the judgment-debtor waives the issue of a fresh proclamation only, he can urge any objection on the ground of an irregularity in the publication of the *original* proclamation.[8]

(3) Even though a sale is postponed at the instance of the debtor on the condition that fresh proclamation is waived, if an attaching decree-holder subsequently applies that a fresh proclamation should issue and that prayer is refused, the latter can question the sale on the ground of want of fresh proclamation.[9]

(4) A judgment-debtor who waives a fresh proclamation will not be deemed to have waived the non-specification of the hour of sale on the day to which the sale is postponed.[10]

(5) The fact that the applicant himself bid at the sale will not amount to a waiver of the irregularity.[11]

Where a judgment-debtor's objection to an irregularity made before sale is overruled by the Court, he is not precluded from urging the same ground in an application to set aside the sale.[12]

Where, during the pendency of an application under this rule to set aside a sale, the debtor got time for paying the decree amount on condition that the petition should be dismissed on his failure to do so, he would be estopped, on his failure to abide by the agreement, from continuing the proceedings.[13]

A question of waiver is a mixed question of law and fact.[14]

As to whether an objection can be taken in the event of appeal, *see* Note 43, *infra*.

Preo Lal Paul v. *Radhika Prasad Paul*, (1901) 6 Cal W N 42 (43, 44); *Ambika Pra ad Singh* v. *R H Whitwell*, (1907) 6 Cal L Jour 111 (113); *Raja of Kalahasti* v. *Maharaja of Venkatagiri*, (1913) 21 Ind Cas 389 (392): 14 Mad L Tim 320: 25 Mad L Jour 198: 38 Mad 387; *Chandrika Bakhsh Singh* v. *Brij Bihari Lal*, (1901) 4 Oudh Cas 379 (384). See also *Raman* v. *Kunhappa*, (1894) 17 Mad 304 (305); *Syud Nujmooddeen Ahmed* v. *Abdool Azeez*, (1871) 15 Suth W R 95 (95).

(7) *Emamuddin Jamdar* v. *Abdul Jabbar*, (1910) 5 Ind Cas 489 (490) Cal; *Mahtab Dee* v. *Lee Jaanand*, (1881) 7 Cal 613 (615): 9 Cal L Rep 398.

(8) *Thakur* v. *Prithi Chand*, (1911) 11 Ind Cas 438 (440): 14 Cal L Jour 346: 16 Cal W N 704.

(9) *Chakrapani Chettiar* v. *Dhanji Setti*, (1901) 24 Mad 311 (315, 316).

(10) *Bhikari Misra* v. *Rani Surajmani*, (1902) 6 Cal W N 48 (54).

(11) *Punjab National Bank, Ltd* v. *Sundar Singh*, 1929 Lah 673 (675): 118 Ind Cas 901.

(12) *Mt Indarani* v. *Binda Prasad*, 1930 Oudh 81 (82): 6 Oudh W N 1085: 5 Luck 481: 124 Ind Cas 422; *Maharaj Bahadur Singh* v. *Rai Bahadur P C Lal Chaudury*, 1928 Pat 25 (27): 6 Pat 588: 105 Ind Cas 689: 9 Pat L Tim 387.

(13) *Uttam Chandra* v. *Khetra Nath*, (1902) 29 Cal 577 (580).

(14) *Basant Kumari* v. *Rani Kanai Sen*, (1911) 9 Ind Cas 698 (703, 704): 13 Cal L Jour 192.

O.21, R.90, Notes 42--44.

42. Bona fide purchaser for value without notice.—Where the conditions laid down in this rule are satisfied, the fact that the auction purchaser is a stranger and a *bona fide* purchaser for value without notice of irregularity or fraud will not prevent the sale from being set aside.[1] *See also* Note 37 *ante*. The plea of *bona fide* purchaser for value may, however, be given effect to in proceedings or suits to set aside sales on the ground that the decree and the execution proceedings are tainted by fraud and collusion.[2]

43. Setting aside sale on grounds not taken in the application.—It has been held by the High Courts of Allahabad and Lahore that where an application under this rule is made on certain grounds, it is not open to the applicant to ask the Court to adjudicate upon objections which were not expressly taken in the application, after the period of limitation has expired.[1] But he can apply, even after the expiry of thirty days, to be allowed to furnish *further particulars* and this application may be treated as one to amend the original application.[2] The High Court of Madras has, however, held that there is nothing to prevent a Court even in appeal from considering the validity of the sale from every point of view and exercise its inherent powers in setting aside a sale on a ground not pleaded.[3] But a new ground requiring evidence cannot be taken for the first time in appeal.[4]

44. Joinder of claims under S. 47.—A prayer for a relief coming within the scope of S. 47 can be joined with a prayer for a relief under this rule in one and the same application.[1] Every application to set aside a sale involves a question relating to the execution, discharge or satisfaction of the decree and therefore comes within the scope of S. 47. But where the application falls within the scope of this rule also besides S. 47 a second appeal

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Note 42.

(1) *Bireshwar Ghosh* v. *Panchcouri Ghosh*, 1923 Cal 538 (541): 37 Cal L Jour 145: 27 Cal W N 587: 74 Ind Cas 975; *Tangutur Jagannadham* v. *Seshagiri Rao*, (1917) 37 Ind Cas 387 (388): 20 Mad L Tim 479; *Mahabir Ram* v. *Ram Bahadur Dubey*, 1923 Pat 435 (435): 4 Pat L Tim 306: 72 Ind Cas 625. See also *Abdul Hye* v. *Nawab Raj*, (1868) 9 Suth W R 196 (199): Beng L R Sup Vol 911.

(2) *Lalla Bunseedhur* v. *Koonwar Bindesser*, (1866) 10 Moo Ind App 454 (473, 474): 2 Sar 167; *Chitambar* v. *Krishnappa*, (1902) 26 Bom 543 (550): 4 Bom L R 249; *Bireshwar Ghose* v. *Panchcouri Ghose*, 1923 Cal 538 (550, 551): 37 Cal L Jour 145: 27 Cal W N 587: 74 Ind Cas 975; *Maung Aung Ban* v. *Maung Shwe Pe*, 1900 L B R 22 (23). See also *Narayana Kothan* v. *Kalianasundaram*, (1896) 19 Mad 219 (228, 229).

Note 43.

(1) *Volkart Brothers of Karachi* v. *Ghulam Hamdani*, 1932 Lah 576 (576): 33 Pun L R 701; *Harbans Lal* v. *Kundan Lal*, (1899) 21 All 140 (142): 1898 All W N 212; *Mohamad Maqbal-ul-Rahman* v. *Sayed Ali Khan*, (1914) 25 Ind Cas 18 (22) All; *Gopi Chand* v. *Benarsi Das*, (1919) 53 Ind Cas 794 (796): 1 Lah L Jour 197; *Uttam Chand* v. *Dhanpat Rai*, (1911) 9 Ind Cas 816 (817): 102 Pun L R 1911: 203 Pun W R 1911.

(2) *Ram Saran Das* v. *Girdhari Lal*, 1926 All 305 (305): 24 All L J 286: 92 Ind Cas 567: 48 All 286.

(3) *Akshia Pillai* v. *Govindarajulu Chetti*, 1924 Mad 778 (778): 47 Mad L Jour 549: 1924 Mad W N 842: 84 Ind Cas 975. See *Sadashiv Rao* v. *Umaji*, 1927 Nag 319 (319): 103 Ind Cas 532 [If in the course of hearing other irregularities *ejusdem generis* come to light, Court can consider them provided parties have notice of them]; *Mahabir Pershad Singh* v. *R Olpherts*, (1882) 9 Cal L Rep 134 (135).

(4) *Md Mira Ravuthar* v. *S V Raghunadha Gopalar*, (1900) 23 Mad 227 (234): 27 Ind App 17: 4 Cal W N 228: 10 Mad L Jour 1: 2 Bom L R 640: 7 Sar 661 P C; *Macnaghten* v. *Mahabir Pershad Singh*, (1883) 9 Cal 656 (663): 10 Ind App 25: 11 Cal L Rep 494: 4 Sar 417: 4 Shome L R 285: 7 Ind Jur 164 P C. See *Baliram Singh* v. *Narasingdas*, 1923 P C 93 (94, 95): 18 Mad L W 137: 45 Mad L Jour 403: 28 Cal W N 593: 33 Mad L Tim 275: 1923 Mad W N 714: 4 L R P C 197: 75 Ind Cas 546 [Applicant did not ask for opportunity to let it in evidence—Cannot ask for it before the Privy Council].

Note 44.

(1) *Jamila Khatoon* v. *Dayanand Thakur*, 1928 Pat 272 (272): 107 Ind Cas 848: 7 Pat 331. But see *Shirin Begam* v. *Ayha Ali Khan*, (1896) 18 All 141 (143, 144): 1896 All W N 9.

against an order on such a question is barred by S. 104.[2] *See* Note 15 to S. 2, sub-S. (2), *ante*. But where the matter falls within S. 47 alone even though the application purports to be under this rule also, and the question is between parties to the suit, the order would be appealable as a decree.[3] Where an application contains grounds coming both under S. 47 and this rule, that portion of the order relating to the question under S. 47 is open to second appeal.[4]

Where an application really comes under this rule, the mere mention of S. 47 in the application will not make it one under that section for the purpose of appeal.[5]

45. Suit to set aside sale for material irregularity.—*See* Notes to O. 21, R. 92, *infra*.

46. Sale if can be challenged by way of defence in suit for possession.—*See* Notes to O. 21, R. 92, *infra*.

47. Necessary parties.—*See* Notes to O. 21, R. 92, *infra*.

48. Applicability of O. 9 to applications under this rule.—The general trend of opinion is that the provisions of O. 9 do not apply to proceedings under this rule.[1] *See* Note 2 to S. 141. But the Court has got inherent power to set aside an order under this rule passed *ex parte* or to restore an application dismissed for default.[2] *See also* Note 1 to O. 9, R. 1.

As regards appeal against orders of dismissal for default of an application under this rule and orders refusing to restore such an application, *see* Note 50, *infra*.

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(2) *Anantharama Ayyar* v. *Vettath Kuttimalu Kovilamma*, (1916) 31 Ind Cas 829 (830): 19 Mad L Tim 357: 3 Mad L W 504: 30 Mad L Jour 611; *Palaniappa Udayar* v. *Arumuga Pandaram*, (1916) 33 Ind Cas 692 (694): (1916) 1 Mad W N 256.

(3) *Jiteswari Dassi* v. *Sudha Krishna Mukerjee*, 1932 Cal 672 (673): 36 Cal W N 125: 55 Cal L Jour 85: 59 Cal 956: 139 Ind Cas 186 [Application purporting to be under R 90 also]; *Rampada Nag* v. *Kanai Rai*, 1926 Cal 1219 (1220): 44 Cal L Jour 167: 98 Ind Cas 200, (Do.); *Akshia* v. *Govindarajulu*, 1924 Mad 778 (779): 47 Mad L Jour 549: 1924 Mad W N 812: 81 Ind Cas 975; *Rajagopala Iyer* v. *Ramanujachariar*, 1924 Mad 431 (432): 47 Mad 288: 46 Mad L Jour 104: 19 Mad L W 179: 34 Mad L Tim 37: 1924 Mad W N 182: 80 Ind Cas 92 F B; *Venkataswami* v. *Godavarti Narasaya*, 1925 Mad 1142 (1142): 1925 Mad W N 701: 87 Ind Cas 413; *Anantharama Ayyar* v. *Vettath Kuttimalu Kovilamma*, (1916) 34 Ind Cas 829 (830): 19 Mad L Tim 357: 3 Mad L W 504: 30 Mad L Jour 611; *Palaniappa Udayar* v. *Arumuga Pandaram*, (1916) 33 Ind Cas 692 (694): (1916) 1 Mad W N 256; *Kishundeo Narayan* v. *Ramrojhan Singh*, 1924 Pat 67 (68): 1923 Pat H C C 298: 5 Pat L Tim 61: 83 Ind Cas 747; *Ma Pwa* v. *Mahomed Tambi*, 1924 Rang 124 (124): 1 Rang 533: 77 Ind Cas 368 [Defective attachment—Question comes under S 47] *Superior Bank, Ltd* v. *Budh Singh*, 1924 All 698 (699): 22 All L J 413: 5 L R All Civ 769: 83 Ind Cas 1028.

(4) *Rajagopala Iyer* v. *Ramanujachariar*, 1924 Mad 431 (432): 47 Mad 288: 46 Mad L Jour 104: 19 Mad L W 179: 34 Mad L Tim 37: 1924 Mad W N 182: 80 Ind Cas 92 F B. See *Babu Dass Narayan Singh* v. *Mir Mahamed Yusuf*, 1921 Pat 145 (149): 1921 Pat H C C 181: 6 Pat L Jour 319: 2 Pat L Tim 401: 61 Ind Cas 823: 3 U P L R (Pat) 33 [Application on grounds under S. 47 and R 90—Second Appeal—Held the whole case considered by the Court].

(5) *Matiur* v. *Abdul*, 1926 Cal 109 (110): 30 Cal W N 86: 89 Ind Cas 765; *Anantharama Ayyar* v. *Vettath Kuttimalu Kovilamma*, (1916) 31 Ind Cas 829 (830): 30 Mad L Jour 611: 3 Mad L W 504: 19 Mad L Tim 357 [Conversely also].

Note 48.

(1) *Dwarka Das Babu Ram* v. *Vaish Flour Mill*, 1931 All 594 (594, 595): 1931 All L J 622; *Dasarathy Chakravarthy* v. *Maharaja Khanish Chandra*, 1927 Cal 938 (939): 45 Cal L Jour 60: 100 Ind Cas 343; *Basaratullah* v. *Rezaddin*, 1926 Cal 77: (775, 777): 30 Cal W N 570: 53 Cal 679: 96 Ind Cas 705; *Narendra Nath Chatterji* v. *Rathal Das Tarafdar*, 1925 Cal 510 (511): 79 Ind Cas 351: 41 Cal L Jour 286; *Bhubaneswar* v. *Tilakdhari*, (1919) 49 Ind Cas 617 (619): 1919 Pat H C C 75: 4 Pat L Jour 135 F B.

(2) *Dwarka Das* v. *Vaish Flour Mill*, 1931 All 594 (594, 595): 1931 All L J 622; *Bhikhan Gir Gossain* v. *Jalpadat Jha*, 1921 Pat 293 (295): 2 Pat L Tim 270: 62 Ind Cas 113; *Inar Singh* v. *Udhavdas*, 1921 Sind 55 (56): 17 Sind L R 105: 83 Ind Cas 749. See *Ram Shankar Tewari* v. *Ram Narain Tewari*, 1928 All 301 (301): 26 All L J 382: 108 Ind Cas 576 [Mistaken order of dismissal set aside under S 151].

O.21, R.90, Note 49.

49. Limitation.—It has been already mentioned in Note 37 *ante* that an application to set aside a sale on account of fraud in publishing and conducting the sale fell within the scope of S. 244 (now S. 47). It was therefore held that under Art. 178 (now Art. 181) of the Limitation Act of 1877, the period of limitation for such an application was three years from the date of the sale.[1] Under the Limitation Act of 1908, an application to set aside a sale in execution of a decree is governed by Art. 166 of that Act which provides for a period of thirty days from the date of sale. Therefore an application under this rule whether made on the ground of material irregularity or fraud must be made within thirty days of the date of sale.[2] The starting point of limitation is the date on which the officer conducting the sale has accepted the final bid and therefore the period of limitation does not begin to run until then.[3]

The period of limitation prescribed by Art. 166 cannot be enlarged by S. 5 of the Limitation Act.[4] Where an execution sale was held by the Collector to whom the decree was transferred for execution, and the applicant applied to the Collector under this rule and after the expiry of thirty days preferred a second application to the *Court*, the time spent in prosecuting the first application cannot be excluded under S. 14 of the Limitation Act.[5] Where the applicant was a minor on the date of sale he is entitled to the benefit of S. 7 of the Limitation Act in computing the period of limitation for an application under this rule.[6]

Where, in an application under this rule made more than thirty days of the sale, the applicant relies upon fraud as an exemption from limitation, he must bring his case within S. 18 of the Limitation Act.[7] Where a sale is brought about by fraud, for instance, by suppression of processes and submission of false returns, and an application to set aside the sale is made more than thirty days after the date of the sale, it is not enough for the applicant to show that the execution proceedings were irregular and fraudulent, but he

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Note 49.

(1) *Purna Chandra Mandal* v. *Anukul Biswas*, (1909) 2 Ind Cas 844 (845): 36 Cal 654; *Srimati Sarat Kumari* v. *Nimai Charan*, (1901) 5 Cal W N 265 (266); *Bhuban* v. *Rajah Peary Mohan*, (1899) 26 Cal 324 (332): 3 Cal W N 399; *Lachmiput* v. *Mt Mandil Koer*, (1899) 3 Cal W N 333 (336); *Nimai* v. *Deno Nath*, (1898) 2 Cal W N 691 (693); *Virsingappa* v. *Shadashivappa*, (1870) 7 Bom H C R A C 74. See *Hira Lal Ghose* v. *Chundra Kanto Ghose*, (1899) 26 Cal 539 (542, 544): 3 Cal W N 403.

(2) *Matiur* v. *Abdul*, 1926 Cal 109 (110): 30 Cal W N 86: 89 Ind Cas 765; *Calstaun* v. *Syed Mahomed Husain*, (1932) 36 Cal W N 242 (245); *Paramashiva* v. *Pulukaruppa*, 1924 Mad 137 (139, 143): 45 Mad L Jour 829: 18 Mad L W 780: 1924 Mad W N 27: 33 Mad L Tim 137: 77 Ind Cas 631: 47 Mad 525; *Muthiah Chettiar* v. *Bava Sahib*, (1915) 26 Ind Cas 46 (49, 50): 27 Mad L Jour 605: 1 Mad L W 969; *Newal Chowdhury* v. *Ram Sundar Thakur*, 1931 Pat 43 (44): 11 Pat L Tim 701: 129 Ind Cas 661; *Iswardas Marwari* v. *Bisesar Lal Marwari*, 1926 Pat 266 (267): 1926 Pat H C C 83: 94 Ind Cas 31: 7 Pat L Tim 532; *Ghanasham* v. *Basdeb Jha*, (1921) 60 Ind Cas 529 (530) Pat; *Kokil Singh* v. *Edal Singh*, (1904) 31 Cal 385 (392) [Cases of material irregularity under the old Code]; *Fatmabai* v. *Abdul Succoor*, (1904) 6 Bom L R 1140 (1145), (Do.); *Madho Lal* v. *Jawahir Singh*, (1910) 6 Ind Cas 713 (715): 40 Pun Re 1910: 63 Pun W R 1910: 211 Pun L R 1910, (Do.). See *Samandan Karkat Edathil Rapparappan Nambiar* v. *Malikandi Aketh Mayah*, (1914) 23 Ind Cas 251 (251): 26 Mad L Jour 267 [Where sale is nullity Art 166 does not apply]; *Ramasami* v. *Maung*, (1917) 37 Ind Cas 827 (828): 10 Bur L Tim 249, (Do.).

(3) *Abdullah Khan* v. *Ganpat Rai*, 1930 Lah 41 (42): 118 Ind Cas 900.

(4) *Umrao Singh* v. *Beni Parshad Mehr Chand*, 1926 Jour 109 (1): 92 Ind Cas 839.

(5) *Narayan* v. *Rusul Khan*, (1899) 23 Bom 531 (535): 1 Bom L R 33.

(6) *Baldeo Singh* v. *Kishon Lal*, (1887) 9 All 411 (413): 1887 All W N 58; *Gujjar Mal* v. *Sita Ram*, (1910) 6 Ind Cas 488 (489): 5 Pun L R 1910: 118 Pun W R 1910.

(7) *Abha Munshi* v. *Kamu Molla*, (1918) 48 Ind Cas 970 (971), Cal; *Lachmiput* v. *Mt Mandil*, (1899) 3 Cal W N 333 (336).

must carry the fraud further and show that the existence of his right to set aside the sale has been kept concealed from his knowledge by the fraud of the decree-holder or auction purchaser.[8] When once such fraud has been established by the applicant, it is for the opposite party to show at what precise point of time the applicant had clear and definite knowledge of the facts which would entitle him to apply for setting aside the sale. The reason is that the fraud is a continuing influence and until that influence ends, it retains its power of mischief.[9] O.21, R.90, Notes 49—50.

In cases where fraud is relied on in support of an application made after time, it is immaterial that the application is made after confirmation of the sale.[10]

49-a. Step-in-aid of execution.—An application by a decree-holder praying for the dismissal of an application made by the judgment-debtor under this rule is a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act.[1]

50. Appeal.—O. 43, R. 1, Cl. (*j*) provides for an appeal against an order under R. 92, *infra* setting aside or refusing to set aside a sale.[1] S. 174 of the Bengal Tenancy Act as amended by the Bengal Legislative Council in 1928 allows an appeal against an order under that rule.[2]

It has been already mentioned in Note 37 *ante* that S. 311 of the old Code allowed an application to be made only on the ground of material

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(8) *Rudranda Thakur* v. *Prithi Chand*, (1911) 11 Ind Cas 438 (441): 14 Cal L Jour 346: 16 Cal W N 704; *Kailash* v. *Bissonath*, (1897) 1 Cal W N 67 (70); *Nabin Chandra* v. *Bipin Chandra*, 1926 Cal 229 (230, 231): 87 Ind Cas 555; *Bajrang Prasad Singh* v. *Mt Sonehari Kuer*, 1925 Pat 521 (522): 85 Ind Cas 622: 6 Pat L Tim 567; *Mahabir Ram* v. *Ram Bahadur Dubey*, 1923 Pat 435 (436): 4 Pat L Tim 306: 72 Ind Cas 625; *Ram Dhari Chaudhary* v. *Deonandan Prasad Singh*, 1922 Pat 507 (510): 3 Pat L Tim 501: 1922 Pat H C C 209: 77 Ind Cas 957: 2 Pat 65: 1 Pat L R 18: 4 U P L R (Pat) 71; *Bashi Ram* v. *Hassan Muhammad*, (1919) 51 Ind Cas 447 (448) Lah; *Purna Chandra Mandal* v. *Anukul Biswas*, (1909) 2 Ind Cas 841 (845): 36 Cal 651.

(9) *Ramesh Chandra* v. *Birajsundari Gupta*, 1928 Cal 349 (350): 47 Cal L Jour 351: 32 Cal W N 519: 108 Ind Cas 33; *Nabin Chandra Haldar* v. *Bipin Chandra Haldar*, 1926 Cal 229 (230, 231): 87 Ind Cas 555; *Bhuchanmani Das* v. *Prafulla Kanta Deb*, 1921 Cal 251 (252): 48 Cal 119: 60 Ind Cas 861; *Narayan Sahu* v. *Damodar Das*, (1912) 16 Ind Cas 464 (465): 16 Cal W N 894; *Golam Ahad* v. *Judhister*, (1903) 30 Cal 142 (153): 7 Cal W N 305; *Babu Lal* v. *Parem Kunar*, 1929 Pat 228 (229): 10 Pat L Tim 231: 117 Ind Cas 46; *Beas Singh* v. *Khedu Mian*, 1930 Pat 58 (60): 123 Ind Cas 937; *J P Thakur Mahton* v. *Jhaman Mahton*, 1924 Pat 496 (497): 5 Pat L Tim 200: 80 Ind Cas 764; *Ram Pershad Lal* v. *Chamari Singh*, 1922 Pat 422 (423): 70 Ind Cas 675.

(10) *Golam Ahad* v. *Judhister*, (1903) 30 Cal 142 (147): 7 Cal W N 305; *Mohendra Narain* v. *Gopal*, (1890) 17 Cal 769 (776); *Ram Pershad Lal* v. *Chamari Singh*, 1922 Pat 422 (423): 70 Ind Cas 675. But see *Gobind Chandra Majumdar* v. *Uma Charan Sen*, (1887) 14 Cal 679 (680, 681).

Note 49-a.

(1) *Gobind Pershad* v. *Rung Lall*, (1894) 21 Cal 23 (26); *Umesh Chander* v. *Sounder Narain*, (1889) 16 Cal 747 (748).

Note 50.

(1) *Bibi Sharafan* v. *Mahomed Habibuddin*, (1911) 10 Ind Cas 148 (150): 15 Cal W N 685: 13 Cal L Jour 535 [Auction-purchaser is entitled to appeal]; *Haji Mahomed* v. *Ghulam Hussain Khan*, 1927 Lah 681 (682): 104 Ind Cas 148 [Auction-purchaser can appeal]; *Mani Gir* v. *Hazari Gir*, 1928 Lah 414 (416): 10 Lah L Jour 161: 108 Ind Cas 391; *Lachman Lal* v. *Padarath Singh*, 1924 Pat 346 (347): 4 Pat L Tim 735: 79 Ind Cas 594 [S 96 (3) does not apply to execution proceedings]; *Balkrishna* v. *Chitnacis*, 1932 Nag 14 (15): 27 Nag L R 339: 135 Ind Cas 412; *Mandari* v. *R Misser*, (1917) 39 Ind Cas 372 (373): (1916) 2 U B R 179: 11 Bur L Tim 8; *Baldeo Singh* v. *Kishen*, (1887) 9 All 411 (412, 413): 1887 All W N 78; *Tota Ram* v. *Khub Chand*, (1885) 7 All 253 (255, 256): 1885 All W N 17; *Gopal Singh* v. *Dular Kuar*, (1878-80) 2 All 352 (353, 354): 4 Ind Jur 168; *Kanthi Ram* v. *Banker Lal*, (1879) 2 All 396 (398); *Harbans Sahai* v. *Bhairo Pershad*, (1880) 5 Cal 259 (262): 4 Cal L Rep 23: 5 Ind Jur 78. But see *Raghunath* v. *Tooley*, (1873) 5 N W P H C R 19 [Under 1861 Code].

(2) The following cases are no longer law in view of the amendment:—*Gour Routh* v. *Digambar Giri*, 1926 Cal 790 (791): 30 Cal W N 586: 96 Ind Cas 669; *Durga Charan Sarkar* v. *Bishnupada Sana*, 1927 Cal 833 (834): 46 Cal L Jour 172: 104 Ind Cas 825; *Anar Prasad Deb* v. *Gagan Chandra Haldar*, 1922 Cal 180 (180): 77 Ind Cas 522; *Kali Mandal* v. *Ramsarbasya Chakravarti*, (1905) 32 Cal 957 (961): 9 Cal W N 721: 1 Cal L Jour 476 F B.

O. 21, R. 90, Note 50.

irregularity and that an application to set aside a sale on the ground of fraud in publishing and conducting the sale fell within the scope of S. 244. It was therefore held that no second appeal lay against an order on an application seeking to set aside a sale on the ground of material irregularity,[3] but that if fraud was the ground of the application, a second appeal would lie if the matter was between parties to the suit.[4] But under this Code an order on an application under this rule, whether made on the ground of material irregularity or on the ground of fraud, is not open to second appeal by virtue of the provisions of S. 104.[5] The result will be the same even if the question fell within S. 47; for, the order being appealable as an *order* will not fall within the definition of the term 'decree' in S. 2 *ante*. As to the right of second appeal in cases where objections are taken both under this rule and under S. 47, *see* Note 44 *ante*.

No appeal lies under the Letters Patent against the order of a single Judge of the High Court made on appeal or in revision against the order of an executing Court in an application under this rule.[6]

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(3) *Narayan* v. *Rasul Khan*, (1899) 23 Bom 531 (535): 1 Bom L R 33; *Uma Kanta Roy* v. *Deno Nath*, (1901) 28 Cal 4 (6): 5 Cal W N 124; *Aubhoya Dassi* v. *Pudmo Lochun Mondal*, (1895) 22 Cal 802 (804); *Nana Kumar* v. *Golam Chunder*, (1891) 18 Cal 422 (426); *Abdul Kureem* v. *Ooghun Lal*, (1866) 6 Suth W R Mis 119 (119, 120); *Sami Pillai* v. *Krishnasami*, (1898) 21 Mad 417 (419): 8 Mad L Jour 77; *Daivanayagam Pillai* v. *Rangasami Iyer*, (1896) 19 Mad 29 (30): 5 Mad L Jour 153; *Timmanna Banta* v. *Mahabala Bhatta*, (1896) 19 Mad 167 (168): 6 Mad L Jour 24; *Varadha Reddi* v. *Venkata Subba Reddi*, (1869-70) 5 Mad H C R 213 (214).

(4) *Lal Bihary Mitra* v. *Nagendra Nath Chatterjee*, (1912) 16 Ind Cas 690 (691): 22 Cal L Jour 266: [Right of second appeal under the Code cannot be affected by new Code]; *Kokil Singh* v. *Edal Singh*, (1904) 31 Cal 385 (390, 391); *Hira Lal* v. *Chundra Kanto*, (1899) 26 Cal 539 (542, 545): 3 Cal W N 403; *Bhubon Mohun Pal* v. *Nunda Lal*, (1899) 26 Cal 324 (326): 3 Cal W N 899; *Lachman Misra* v. *Ram Jas Sahu*, (1909) 2 Ind Cas 983 (984) Cal.

(5) *Genda Mal* v. *Narsingh Das*, 1929 All 553 (553): 115 Ind Cas 686; *Jagdeo* v. *Ujiyari Kunwar*, 1928 All 354 (354): 26 All L J 412: 108 Ind Cas 899; *Sheo Prasad Singh* v. *Mst Premma Kuar*, (1918) 43 Ind Cas 522 (523): 40 All 122: 15 All L J 920; *Mohitosh Dutta* v. *Rai Satish Chandra Chaudhuri*, 1932 Cal 203 (204): 35 Cal W N 971: 136 Ind Cas 593; *Kuar Radhika Raman* v. *Mt Gulzari Kuar*, (1912) 13 Ind Cas 147 (147) All; *Satyendra Nath* v. *Charu Chandra Majumdar*, 1927 Cal 657 (658): 45 Cal L Jour 557: 104 Ind Cas 188 [Even though between decree-holder purchaser and judgment-debtor]; *Gour Routh* v. *Digambar Giri*, 1926 Cal 790 (791): 30 Cal W N 586: 96 Ind Cas 669; *Nabin Chandra* v. *Bipin Chandra*, 1926 Cal 229 (231): 87 Ind Cas 555; *Rakhal Chandra* v. *Manaranjan Das*, (1917) 41 Ind Cas 753 (754) Cal; *Fulsummannessa* v. *Halamuddi Molla*, (1917) 40 Ind Cas 426 (427): 25 Cal L Jour 399; *Bipin Bihari Bejali* v. *Kanti Chandra Mandal*, (1913) 18 Ind Cas 715 (717) Cal; *Lal Bihari Mitra* v. *Nagendra Nath Chatterjee*, (1912) 16 Ind Cas 690 (691): 22 Cal L Jour 266; *Nilmoni Singh* v. *Brinda Dasya*, (1912) 16 Ind Cas 436 (436) Cal. [Application under old Code on the ground of fraud—Order after new Code—No second appeal]; *Benode Behari Bhadra* v. *Ram Sarup Chamar*, (1912) 15 Ind Cas 679 (680): 16 Cal W N 1015, (Do.); *Raj Mohan Pal* v. *Gobind Chandra Pal*, (1912) 14 Ind Cas 53 (54): 17 Cal W N 524, (Do.); *Bhadreshwar Goloi* v. *Bishnu Charan Sen*, (1910) 8 Ind Cas 3 (4): 17 Cal W N 525-n, (Do.); *Bissonath Rai* v. *Kawaleswari Prasad Singh*, (1911) 9 Ind Cas 135 (135) Cal; *Rahmat Ullah* v. *Ladhu Shah*, 1930 Lah 208 (209): 120 Ind Cas 684: 11 Lah L Jour 546: 31 Pun L R 57; *Bhagela Shah* v. *Sita Ram*, 1928 Lah 444 (444): 107 Ind Cas 488; *Manigir* v. *Hazarigir*, 1928 Lah 414 (416): 10 Lah L Jour 161: 108 Ind Cas 391; *Nanak Chand* v. *Mt Jamna Devi*, 1926 Lah 204 (204): 91 Ind Cas 213; *Parja Mal Chandi Mal* v. *Mulchand Murari Lal*, 1925 Lah 624 (625): 6 Lah 250: 94 Ind Cas 521; *Jagannath* v. *Daud*, 1923 Lah 592 (593): 4 Lah 243: 75 Ind Cas 103; *Jagannath Sethi* v. *Pir Mohamad*, 1923 Lah 287 (288): 72 Ind Cas 788: *Nur Mustafa* v. *Jamadar Mahomed*, 1921 Lah 156 (157): 3 Lah L Jour 463: 62 Ind Cas 986; *Jiwan Singh* v. *Sawan Mal*, (1919) 54 Ind Cas 941 (941): 168 Pun Re 1919: 2 Lah L Jour 41: 76 Pun L R 1920; *Bashi Ram* v. *Hassan Mahomed*, (1919) 51 Ind Cas 447 (448) Lah: *Babu Lal* v. *Chanda*, (1915) 27 Ind Cas 589 (590): 6 Pun W R 1915: 38 Pun L R 1915: *Ramiah Thevan* v. *Athmanatha Ayyar*, 1929 Mad 624 (624): 117 Ind Cas 727; *Dorairaja Pillai* v. *Veeranan Ambalam*, (1910) 8 Ind Cas 883 (883): 9 Mad L Tim 171; *Gulam Ahmad* v. *Kanhaiyalal*, 1930 Nag 58 (58): 120 Ind Cas 209; *Tung Nath* v. *Kandhaiya*, (1917) 41 Ind Cas 121 (121): 4 Oudh L J 372; *Baidyanath Sarkar* v. *Prabhabati Dasi*, 1924 Pat 803 (803): 5 Pat L Tim 443: 78 Ind Cas 315; *Hirji Jivraj Baldeo* v. *Ramjas Agarwala*, 1924 Pat 182 (183): 72 Ind Cas 670: *Mahadeo Singh* v. *Dhobi Singh*, 1924 Pat 111 (112): 2 Pat 916: 4 Pat L Tim 721: 1923 Pat H C C 283: 74 Ind Cas 838; *Shri Krishna Rai* v. *Ram Saran Rai*, (1920) 56 Ind Cas 646 (646): 1 Pat L Tim 267; *Sheikh Maula Bux* v. *Raghubar Ganjhu*, (1918) 48 Ind Cas 560 (561): 3 Pat L Jour 645; *Maung Shwe Myat* v. *Maung Shwe Ban*, (1917) 39 Ind Cas 374 (375): (1916) 2 U B R 139: 11 Bur L Tim 26. But see *Madanlal* v. *Ripusudan Prasad*, 1930 Nag 191 (192): 124 Ind Cas 250 [Submitted to be erroneous].

(6) *Piarelal* v. *Madan Lal*, (1917) 39 Ind Cas 460 (460): 39 All 191: 15 All L J 46; *Md Nainul-lah Khan* v. *Ishan-ul-lah Khan*, (1892) 14 All 226 (232): 1892 All W N 14 F B; *Parja Mal Chandimal* v. *Mul Chand Murari Lal*, 1925 Lah 624 (625): 6 Lah 250: 94 Ind Cas 521.

The provisions of S. 104 and O. 43, R. 1 cannot restrict the provisions relating to appeals to the King in Council. Therefore, an appeal to the Privy Council will lie against an order of the High Court under R. 92.[7] O.21, R.90, Notes 50—51.

An order dismissing an application under this rule for default is appealable under O. 43, R. 1, the effect of such order being the confirmation of the sale.[8] The fact that a distinct order confirming the sale has not been recorded does not alter the character of the order and is no ground for refusing to entertain an appeal.[9] But an order refusing to restore an application under this rule which has been dismissed for default is not appealable.[10] The reason is, as already mentioned, in Note 48 *ante*, that O. 9 does not apply to proceedings under this rule.

51. Revision.—Where a sale is set aside under this rule without proof of substantial injury[1] or on the application of a person who is not entitled to apply[2] the order is open to revision. But an order passed by a Court under this rule in the exercise of its jurisdiction is not revisable even though it may be erroneous.[3] An order dismissing an application under this rule

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(7) *Tekait Krishna Prasad Singh* v. *Motichand*, (1913) 19 Ind Cas 296 (300): 40 Cal 635: 40 Ind App 140: 17 Cal W N 637: 1913 Mad W N 487: 11 All L J 517: 15 Bom L R 515: 14 Mad L Tim 37: 25 Mad L Jour 140: 17 Cal L Jour 573 P C.

(8) *Ansarali* v. *Bhim Sankar Dutta Tewari*, 1929 Cal 407 (409): 56 Cal 969: 33 Cal W N 392: 119 Ind Cas 371; *Debendra Narain Singh* v. *Narendra Narayan Singh*, 1925 Cal 360 (360): 80 Ind Cas 678; *Narendra Nath Chatterjee* v. *Rakhal Das Tarafdar*, 1925 Cal 519 (511): 79 Ind Cas 351: 41 Cal L Jour 286 [Same is the case with order dismissing an application for restoration of original application to the file]; *Kali Kanta* v. *Shyam Lal*, (1917) 38 Ind Cas 598 (599): 25 Cal L Jour 163; *Girindra Kishore Bhowmik* v. *Nanda Lal Singh Roy*, (1917) 38 Ind Cas 63 (64) Cal: *Brojo Sundar Roy* v. *Motilal*, (1910) 5 Ind Cas 493 (494): 11 Cal W N 573: 13 Cal L Jour 153. See *Basanta Kumar Adak* v. *Khirode Chandra Ghose*, 1928 Cal 25 (26): 104 Ind Cas 759: 55 Cal 616 [Opposite party ready—Order of dismissal is appealable—1926 Cal 773 distinguished]. But see *Basaratulla Mean* v. *Rezauddin Mean*, 1926 Cal 773 (778): 30 Cal W N 570: 53 Cal 679: 96 Ind Cas 705 [Dissented from in 1929 Cal 407].

(9) *Ansarali* v. *Bhim Sankar Dutta Tewari*, 1929 Cal 407 (409): 33 Cal W N 392: 56 Cal 969: 119 Ind Cas 371

(10) *Ningappa* v. *Gangava*, (1826) 10 Bom 433 (434): *Dasarathy Chakravarthy* v. *Maharaja Khanish Chandra*, 1927 Cal 938 (938): 45 Cal L Jour 60: 100 Ind Cas 343; *Adar Mani Namasudrani* v. *Puran Chandra Malangi*, 1926 Jour 121 (1): 97 Ind Cas 704; *Ambica Charan* v. *Ismail*, (1920) 56 Ind Cas 981 (981) Cal; *Charu Chandra Ghosh* v. *Chandi Charan Row Chowdhry*, (1915) 27 Ind Cas 492 (493): 19 Cal W N 25; *Mrinalini* v. *Benode Chandra*, (1910) 6 Ind Cas 148 (148) Cal; *Jung Bahadur* v. *Mahadeo Prosad*, (1904) 31 Cal 207 (209): 8 Cal W N 160; *Sujauddin* v. *Reauddin*, (1900) 27 Cal 414 (415); *Kanta Lal* v. *Punjab National Bank, Ltd. Multan*, 1926 Lah 109 (109): 89 Ind Cas 360; *Bishambar Das* v. *Udho Ram*, 1907 Pun Re No 25: 21 Pun L R 1908: 104 Pun W R 1907; *Raja* v. *Srinivasa*, (1888) 11 Mad 319 (321); *Mt Soharan Kuar* v. *Edemb*, (1907) 10 Oudh Cas 353 (354); *Sripal Singh* v. *Pandit Raten Lal and Maiku Lal*, (1907) 10 Oudh Cas 171 (172). But see *Bhuban Behari Nag* v. *Dhirendra Nath*, (1916) 33 Ind Cas 581 (582): 20 Cal W N 1203; *Diljan Milha Bibi* v. *Hemanta Kumar Roy*, (1915) 29 Ind Cas 395 (397): 19 Cal W N 758; *Abdur Rahman Mullick* v. *Khorban Mullick*, (1909) 2 Ind Cas 156 (156), Cal; *Gori* v. *Hinga*, (1921) 59 Ind Cas 575 (576): 23 Oudh Cas 349. See *Paresh Nath Mullick* v. *Hari Charan Dey*, (1911) 10 Ind Cas 361 (363): 38 Cal 622: 15 Cal W N 875: 14 Cal L Jour 300 [Held to be doubtful].

Note 51.

(1) *Superior Bank, Ltd* v. *Budh Singh*, 1924 All 698 (699): 22 All L J 413: 5 L R A Civ 768: 83 Ind Cas 1028; *Beas Singh* v. *Khedu Mean*, 1930 Pat 58 (60): 123 Ind Cas 637; *Ekmath Panday* v. *Singeshwa Nath Chowdhry*, 1924 Pat 785 (786): 5 Pat L Tim 250: 76 Ind Cas 168; *Chakrapani Chettiar* v. *Dhanji Settu*, (1901) 24 Mad 311 (315); *Lakshmana* v. *Najimudin*, (1876) 9 Mad 145 (146).

(2) *Birj Mohun* v. *Rai Umanath*, (1893) 20 Cal 8 (11): 19 Ind App 154: 6 Sar 245 P C.

(3) *Raghubir Singh* v. *Gokul Singh*, 1932 All 140 (140): 134 Ind Cas 463; *Krishna Parasharam Chamohar* v. *Bhau Piraji Phalee* 1929 Bom 198 (199): 31 Bom L R 831: 116 Ind Cas 249; *Satish Chandra De Sarkar* v. *Rakhal Chandra Saha*, 1928 Cal 189 (190): 47 Cal L Jour 62: 107 Ind Cas 733 [Erroneous view of limitation]; *Basaratulla Mean* v. *Rezauddin Mean*, 1926 Cal 773 (774, 775): 53 Cal 679: 30 Cal W N 570: 96 Ind Cas 705 [Refusal to restore an application dismissed for default]; *Babu Lal* v. *Chanda*, (1915) 27 Ind Cas 589 (591): 38 Pun L R 1915: 6 Pun W R 1915; *Bipin Bihari Bajali* v. *Kanti Chandra Mandal*, (1913) 18 Ind Cas 715 (717, 718) Cal; *Benode Behari Bhodra* v. *Ram Sarup Chamar*, (1912) 16 Ind Cas 679 (681): 16 Cal W N 1015; *Aubhoya Dassi* v. *Padmo Lochun Mundol*, (1895) 22 Cal 802 (805); *Gopi Kuri* v. *Gopi Lal*, (1894) 21 Cal 799 (806), *Kuti Bara Bibi* v. *Jitendra Nath Roy*, 1931 Cal 425 (426): 181 Ind Cas 561: 35 Cal W N 31; *Sookoomar Singh* v. *Kashee Singh*, (1870) 13 Suth W R 250 (251) [Absence of specific grounds in application—Court treating it as an application under this rule and deciding—High Court will not interfere in revision]; *Ramiah Theran* v. *Athmanatha Apuar*, 1929 Mad 624 (624):

O.21, R.90, Note 51.

for default is not open to revision, since the order is appealable.[4] *See also* the undermentioned cases in which revision was not allowed.[5]

It is not open to the petitioner to urge a new point in revision which was not taken in the Court below.[6]

O.21, R.91.

Application *by purchaser* to set aside sale on ground of judgment-debtor having no saleable interest.

R. 91. [S. 313.] The purchaser at any such sale *in execution of a decree* may apply to the Court to set aside the sale, on the ground that the *judgment-debtor* had no saleable interest *in the property sold.*

[1877—S. 313.]

Local Amendment.

BOMBAY.

The following shall be added as Rule 91-*A*:—

"**91-A.** Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under Rules 89, 90 or 91, and in the case of an application under Rule 89, the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the Local Government under S. 70 of the Code, shall be deemed to have been made to or in the Court within the meaning of Rules 89, 90 and 91."

Synopsis.

1. Scope of the rule.
2. Saleable interest.
3. Who may apply under this rule.
4. Necessary parties to application.
5. Limitation.
6. To what Court application should be made where execution is transferred to Collector.
7. Notice. See Rule 92 proviso.
8. Compensation for loss of property bought at Court sale.
9. Suit for refund of purchase money where there is no saleable interest. See Notes to O. 21, R. 93 infra.
10. Appeal.

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117 Ind Cas 727; *Adanamoli Chetti* v. *Chinnaswami Reddi*, 1926 Mad 959 (960): 24 Mad L W 406: 1926 Mad W N 681: 97 Ind Cas 574; *Aditya Prasad* v. *Jagdish Prasad*, 1929 Oudh 26 (29): 5 Oudh W N 873: 4 Luck 93: 115 Ind Cas 105; *Kali Kanta* v. *Shyam Lal*, (1917) 38 Ind Cas 598 (599): 25 Cal L Jour 163; *Hansraj* v. *S. M. Sheik Mohideen Rowther*, (1915) 29 Ind Cas 745 (746) Mad.

(4) *Nagendra Nath Chatterji* v. *Rakhal Das*, 1925 Cal 510 (512): 79 Ind Cas 351: 41 Cal L Jour 286.

(5) *Dwarka Das Babu Ram* v. *Vaish Flour Mill*, 1931 All 594 (595): 1931 All L J 622: *Mahadeo Prasad* v. *Khubi Ram*, 1929 All 793 (793): 118 Ind Cas 189: 51 All 1023: 1903 All L J 97; *Jagdeo* v. *Ujiyari Kunwar*, 1928 All 354 (354): 26 All L J 412: 108 Ind Cas 899; *Ram Saran Das* v. *Girdhari Lal*, 1926 All 305 (306): 24 All L J 286: 92 Ind Cas 567: 48 All 286; *Ali Gaubar* v. *Bansi Dhar*, (1893) 15 All 407 (409): 1893 All W N 173; *Bhairab Chandra Sinha* v. *Kalidhan Roy Chowdhury*, 1929 Cal 736 (737): 33 Cal W N 569: 120 Ind Cas 451; *Gour Routh* v. *Digambar Giri*, 1926 Cal 790 (791): 30 Cal W N 586: 96 Ind Cas 669; *Bhushanmand Dasi* v. *Prafulla Krista Deb*, 1921 Cal 251 (252): 48 Cal 119: 60 Ind Cas 801; *Manigir* v. *Hazarigir*, 1928 Lah 414 (417): 10 Lah L Jour 161: 108 Ind Cas 891; *Subbaji Rau* v. *Srinivasa Rao*, (1878-80) 2 Mad 264 (269): 4 Ind Jur 505; *Pirtam Mandar* v. *Naresh Mohan Thakur*, 1929 Pat 588 (590): *A V M Avanashi Chetty* v. *Muthu Karuppan Chetty*, (1918) 44 Ind Cas 885 (886): 7 Mad L W 406: 23 Mad L Tim 319: 1918 Mad W N 345. See also *Kuar Radhka Raman Parshad* v. *Gulzari Kuar*, (1912) 13 Ind Cas 147 (148) All; *Gajadhar Rai* v. *Bechraj Marwari*, 1931 Pat 63 (64): 130 Ind Cas 265; *Ramji Patel* v. *Karkaji*, 1924 Nag 293 (294): 78 Ind Cas 746.

(6) *Nizam-ud-din* v. *Amin-ud-din*, 1922 Lah 35 (36): 67 Ind Cas 885: 4 Lah L Jour 441; *Suraj Narain Misser* v. *Hardowar Singh*, 1925 Pat 461 (461): 6 Pat L Tim 295: 87 Ind Cas 381.

No warranty of title in Court-sales. See Note 8, Pts. (1) and (2), also Note 1, Pts. (1) and (2).

Remedies open to purchaser. See Note 8, Pts. (6) to (8). See also Note 1, Pts. (2) and (5).

Rule inapplicable to purchaser knowing want of saleable interest at sale itself. See Note 1, Pt. (3).

O.21, R.91. Note 1.

1. **Scope of the rule.**—The general principle is that a Court sale carries with it no guarantee that the property is the property of the judgment-debtor; the auction purchaser takes the risk and bears the loss if it is subsequently discovered not to be the property of the judgment-debtor. A sale in execution of a decree is, therefore, not void by reason of the fact that the property sold does not belong to the judgment-debtor.[1] This rule may be described as an exception to the general principle in that it allows an auction purchaser to set aside sale by an application under this rule, on the ground that the judgment-debtor had no saleable interest in the property sold. The object of the rule is to provide a quick and inexpensive remedy in such cases by which the auction purchaser could get out of his difficulty.[2] But the rule is intended for the protection of an *innocent* auction purchaser; where therefore the purchaser *knew* at the time of the sale that the judgment-debtor had no saleable interest in the property sold, he is not entitled to the benefit of the provisions of this rule.[3]

It follows from what has been stated above that an auction sale cannot be set aside on the ground of the want of a saleable interest in the judgment-debtor, except by an application under this rule within the period of limitation prescribed therefor. Where, therefore, no application under this rule is filed within time and the sale is confirmed under Rule 92, the auction purchaser cannot treat the sale as void or apply for execution again on the ground that he has subsequently discovered that the judgment-debtor had no saleable interest in the property sold. This is the view of the High Court of Madras. The High Court of Patna has, however, held that the proposition that no judicial sale can be set aside for want of saleable interest in the judgment-debtor, except by a resort to the procedure of O. 21, is not well founded; it has accordingly held that where in a suit to which both the auction purchaser and the judgment-debtor were parties the auction sale has been declared to be invalid as against a stranger, the sale must, in effect, be taken to have been set aside, and the auction purchaser, if he is the decree-holder, can again apply for execution.[5]

Where a sale in execution of a decree is set aside on the ground that the judgment-debtor had no saleable interest in the property sold, the exe-

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Order 21, Rule 91—Note 1.

(1) *Muthukumaraswamy Pillai* v. *Muthuswami Theran*, 1927 Mad 394 (395): 52 Mad L Jour 148: 25 Mad L W 232: 38 Mad L Tim 84: 100 Ind Cas 522: 50 Mad 639.

(2) *Nathe Mal* v. *Lachmi Narain*, (1887) 9 All 43 (45): 1886 All W N 289.

(3) *Mahabir Prasad* v. *Dhanman Das*, (1881) 3 All 527 (527): 1881 All W N 19.

(4) *Jagannadha Rao* v. *Basavayya*, 1927 Mad 835 (837, 839): 53 Mad L Jour 257: 26 Mad L W 242: 1927 Mad W N 224: 39 Mad L Tim 121: 101 Ind Cas 614; *Muthukumaraswamy Pillai* v. *Muthuswami Theran*, 1927 Mad 394 (395): 52 Mad L Jour 148: 25 Mad L W 232: 38 Mad L Tim 84: 100 Ind Cas 522: 50 Mad 639. See also *Baraja Charchi* v. *Odhikari Basudeb Das*, 1928 Mad 152 (153): 1928 Mad W N 83: 107 Ind Cas 653.

(5) *Radha Kishen Lal* v. *Kashi Lal*, 1924 Pat 273 (274): 2 Pat 829: 1 Pat L R 358: 1923 Pat H C C 342: 76 Ind Cas 927: 5 Pat L Tim 345; *Ganga Ram Gairaj* v. *Muktiram Marwari*, 1931 Pat 405 (407): 12 Pat L Tim 639: 134 Ind Cas 616.

O. 21, R. 91, Notes 1—2.

cution proceedings are revived and the decree-holder can file an application for execution again within three years of the judgment of the Court setting aside the sale.[6]

This rule does not apply to sales held under the Bengal Tenancy Act 1885[7] or to sales under the Orissa Tenancy Act (II of 1913) [S. 228, sub-S. (3)] or to proceedings under the Madras Estates Land Act (I of 1908). [S. 192, sub-S. (*a*)]. It does not also apply to sales held by the Registrar under Chapter 27 of the Calcutta High Court Rules.[8]

This rule is applicable to proceedings under the Chota Nagpur Tenancy Act, *see* R. 95, Note 1 below.

Where after a sale in execution of a decree, a third party files a suit for a declaration that the properties belong to him, and the purchaser thereupon files an application that he should be allowed to pay the purchase money after the decision of the declaratory suit, it has been held that such an application is not one under this rule and is not justified by any provision in the Code.[9]

2. Saleable interest.— *See also* Note 5 to S. 60 *ante*. The words 'no saleable interest' in this rule mean 'nothing to sell' and are not intended to be confined to cases where a judgment-debtor's interest is unsaleable either by prohibition of law or for some other reason.[1] Where there is a total failure of consideration for the price paid by the purchaser at a Court sale by reason of the fact that the judgment-debtor has no saleable interest whatever in the property sold, the sale can be set aside on an application under this rule.[2] But where the judgment-debtor has some saleable interest, however small it may be, the purchaser buys at his own risk and, there being no warranty that the property sold shall answer to the description given of it, the sale cannot be set aside under this rule.[3] Thus, where in a Court sale several parcels of immoveable properties are sold in one lot and it is found that the judgment-debtor has a saleable interest in one of such parcels and none in others, this rule does not apply.[4] The fact that it is found that the property sold is subject to a mortgage does not mean that the

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(6) *Salig Ram Misir* v. *Lachman Das*, 1928 All 46 (49): 25 All L Jour 937: 50 All 211: 107 Ind Cas 42.

(7) *Sasadhar* v. *Bishnu Narain Kunda*, 1926 Cal 738 (739, 740): 43 Cal L Jour 279: 94 Ind Cas 292 [S 174 excludes such applicability].

(8) *Mohun Lal Kundu* v. *Nanibala Dabee*, 1929 Cal 207 (208): 33 Cal W N 177: 118 Ind Cas 887.

(9) *Mana Shah Kaka Shah* v. *Lakshmidas Manohar Lal*, 1931 Lah 244 (245): 32 Pun L R 63: 134 Ind Cas 496.

Note 2.

(1) *Munna Singh* v. *Gajadhar*, (1883) 5 All 577 (585, 588): 1883 All W N 130: 8 Ind Jur 264 F B.

(2) *Sheo Gobind Singh* v. *Dhanukhdari Singh*, (1913) 21 Ind Cas 774 (776): 19 Cal W N 1291; *Dinobhundhoo Pal* v. *Shoshee Mohun*, (1883) 9 Cal 217 (220): 5 Shome L R 76: 7 Ind Jur 308; *Chutka Panda* v. *Goburdhone Das*, (1880) 6 Cal L Rep 85 (90); *Sind Bank, Ltd* v. *Amersi Dyal*, 1925 Sind 193 (195): 17 Sind L R 281: 78 Ind Cas 279.

(3) *Sheo Gobind Singh* v. *Dhanukdhari Singh*, (1913) 21 Ind Cas 774 (776): 19 Cal W N 1291; *Makhanchora Sarkar* v. *Nisind Gonai*, (1909) 3 Ind Cas 438 (439): 10 Cal L Jour 492; *Sonaram Das* v. *Mohiram Das*, (1901) 28 Cal 235 (237); *Faizuddin Ali* v. *Tincowrie Saha*, (1895) 22 Cal 565 (573); *Ram Coomar Dey* v. *Shushee Bhooshun Ghose*, (1883) 9 Cal 626 (627): 7 Ind Jur 608; *Nizamuddin* v. *Jumma*, 1926 Nag 17 (19): 88 Ind Cas 693 [House and site sold—After sale destroyed by fire]. See also *Kedar Nath Goenka* v. *Jagar Nath Das*, 1924 Pat 355 (359): 1 Pat L R 73: 74 Ind Cas 134.

(4) *Krishnama Naicken* v. *Kandaswami Goundan*, (1912) 15 Ind Cas 109 (110): 23 Mad L Jour 108: 12 Mad L Tim 164: 1912 Mad W N 824; *Maung Tha Dun* v. *Chokalingam Chetty*, (1914) 23 Ind Cas 383 (384): 7 Bur L Tim 18.

debtor has no saleable interest[5] and this is so, even if the amount due under the encumbrance exceeds the value of the property.[6] O.21, R.91, Notes 2—7.

The saleable interest contemplated by this rule is the interest *on the date of sale.*[7] Thus, where a decree for foreclosure of certain mortgaged properties, allowed time till 20—7—1883 to the mortgagor to redeem and the property was sold in execution of a money decree on 30—6—1883, it was held that the fact that before the *confirmation* of the sale, the judgment-debtor had lost his interest was immaterial and that this rule did not apply inasmuch as, on the date of sale, he had a saleable interest.[8]

3. Who may apply under this rule.—It is only the *auction purchaser* that is entitled to apply under this rule.[1] The judgment-debtor cannot apply under this rule.[2] Where the purchase is made by an executor of the deceased judgment-debtor in his personal capacity, he is not debarred from applying under this rule, even though he had applied under R. 90, *ante* in the capacity of executor.[3]

4. Necessary parties to application.—A person alleged by the auction purchaser to be the real owner of the property is not a necessary party to an application under this rule, as he is not a person who will be affected by order.[1] *See also* Notes to R. 92, *infra.*

5. Limitation.—An application under this rule is governed by Art. 166 of the Limitation Act and must be made within thirty days of the date of the sale.[1]

6. To what Court application should be made where execution is transferred to Collector.—Where a decree is transferred for execution to the Collector, an application under this rule should be made to the Civil Court and not to the Collector.[1]

7. Notice.—*See* R. 92 proviso.

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(5) *Protap Chunder* v. *Panioty*, (1883) 9 Cal 506 (507): 12 Cal L Rep 438. *Khetra Mohan Dutt* v. *Dilwar*, (1918) 46 Ind Cas 614 (614, 615): 3 Pat L Jour 516: 5 Pat L W 151. But see *Naharmul Marwari* v. *Sadut Ali*, (1881) 8 Cal L Rep 468 (470).

(6) *Sant Lal* v. *Ranji Das*, (1887) 9 All 167 (168): 1887 All W N 6.

(7) *Sind Bank, Ltd* v. *Amersi Dyal*, 1925 Sind 193 (195): 17 Sind L R 281: 78 Ind Cas 279; *Hari Charan Bose* v. *Hari Das Roy*, (1905) 2 Cal L Jour 506 (507) [Purchaser after default in payment of revenue cannot apply in the event of a subsequent revenue sale].

(8) *Janki Das* v. *Maya Ram*, (1884) All W N 318 (318).

Note 3.

(1) *Bhaichand* v. *Mt Jhania*, (1905) 1 Nag L R 167.

(2) *Umed* v. *Jas Ram*, (1907) 29 All 612 (613): 1907 All W N 193: 4 All L J 519.

(3) *Maharaj Bahadur Singh* v. *Surendra Narain Singh*, (1915) 28 Ind Cas 898 (901): 19 Cal W N 152.

Note 4.

(1) *Koil Kandadai Amman Ramanujachariar* v. *The Conjeevaram Hogenpet Danarakshaka Nidhi, Ltd.* (1914) 24 Ind Cas 44 (45): 1 Mad L W 112.

Note 5.

(1) *Muthu Kumarasamia Pillai* v. *Muthuswami Thevan*, 1927 Mad 394 (395): 52 Mad L Jour 148: 25 Mad L W 232: 38 Mad L Tim 84: 100 Ind Cas 522: 50 Mad 639; *Jagannadha Rao* v. *Basavayya*, 1927 Mad 835 (837, 839): 53 Mad L Jour 255: 26 Mad L W 212: 1927 Mad W N 224: 39 Mad L Tim 121: 104 Ind Cas 614; *Lakshmichand* v. *Chaturbhuj*, 1921 Nag 60 (62): 4 Nag L Jour 274: 65 Ind Cas 230. See *Hari-charan Bose* v. *Haridas Roy*, (1905) 2 Cal L Jour 506 (507) [Under Art 172 of the Limitation Act of 1877 a period of 60 days was allowed. This is no longer law].

Note 6.

(1) *Nathumal* v. *Lachminarain*, (1887) 9 All 43 (45): 1886 All W N 289; *Keshabdeo* v. *Radha Prasad*, (1889) 11 All 94 (96): 1889 All W N 10: 13 Ind Jur 272.

O.21, R.91, Note 8.

8. **Compensation for loss of property bought at Court sale.**—As has been seen in Note 1 above there is no warranty of title in Court sales.[1] The reason is, as observed by Peacock, C. J.—"A purchaser at a sale in execution knows that all that he purchases is the right, and title of the judgment-debtor. He knows that no one guarantees to him that the judgment-debtor has a good title, and he purchases the property with his eyes open, and he regulates the price which he bids for the land with reference to the circumstances under which he is purchasing, and the risk he runs".[2]

Now, suppose that, subsequent to the sale, the auction purchaser finds that the judgment-debtor has title only to a portion of the property, that is to say, that he has only a fractional interest. It has been already mentioned in Note 2 *ante* that to such a case this rule does not apply. Has the purchaser got any other remedy? On the principle mentioned above, he cannot claim to recover a proportionate part of the purchase money by way of compensation either by an application in the execution proceedings[3] or by a separate suit.[4] Where the purchaser is induced by *misrepresentation or fraudulent concealment*, to buy the property for a price much more than it is really worth, the purchaser has no remedy under this rule.[5] He can, however, recover compensation in a *separate suit*.[6]

It has been held by the High Court of Calcutta that in the case of execution sales held by the Registrar on the original side of that Court, the purchaser is entitled to recover compensation for deficiency of the interest of the judgment-debtor.[7] *See also* Note 1 *ante*.

An execution sale is also liable to be set aside on account of the misrepresentations of the *Officer*, conducting the sale, which has led to a useless property being sold for a high price.[8] The reason is that it is incumbent on

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Note 8.

(1) *Dorab Ally* v. *Abdool Azeez*, (1878) 3 Cal 806 (816): 5 Ind App 116: 2 Cal L Rep 529: 3 Suth 519: 3 Sar 818: 2 Ind Jur 426.

(2) *Sowdamini Chowdhrain* v. *Krishna Kishore*, (1869) 12 Suth W R 8: 4 Beng L R 11 F B.

(3) *Anand Krishna* v. *Kishan Devi*, 1931 All 377 (378): 1931 All L J 228: 53 All 496: 132 Ind Cas 417.

(4) *Baijnath Prasad* v. *Raja Narendra Bahadur Rai*, 1921 All 223 (224): 19 All L J 147: 3 U P L R (A) 32: 61 Ind Cas 74; *Muhammad Rahmat Ul'ah* v. *Bachcho*, (1905) 27 All 537 (539): 1905 All W N 99: 2 All L J 244; *Shanto Chander Mukerjee* v. *Nain Sukh*, (1901) 23 All 355 (357, 358): 1901 All W N 101; *Ram Narayan* v. *Mahadab*, (1879) 2 All 828 (829, 830); *Mahomed Sayad* v. *Novroji*, (1886) 10 Bom 214 (218); *Abinash Chandra Kar* v. *Bhuban Chandra Maity*, 1921 Cal 115 (117): 25 Cal W N 756: 63 Ind Cas 126; *Ram Narain* v. *Dwarka Nath*, (1900) 27 Cal 264 (268): 4 Cal W N 13; *Muthuswami Pillai* v. *Muthuveeram Pillai*, (1915) 29 Ind Cas 392 (392): 2 Mad L W 517; *Sundara Gopalan* v. *Venkatavarada*, (1894) 17 Mad 228 (231): 3 Mad L Jour 293; *Bhagwan Das* v. *Ilah Bakksh*, (1919) 51 Ind Cas 595 (595): 52 Pun Re 1919: 84 Pun L R 1919; *Bulaki Chand* v. *Mukunda Mal*, 1880 Pun Re No 16; *Buta Singh* v. *Chattar Singh*, 1879 Pun Re No 131. See also *Sabapathi* v. *Thandavaroya*, (1920) 54 Ind Cas 515 (517): 43 Mad 309: 37 Mad L Jour 620: 11 Mad L W 108. But see *Baboo Neelakanth Sahee* v. *Asmun Matho*, (1871) 8 N W P 67.

(5) *Brij Mohun* v *Rai Uma Nath*, (1893) 20 Cal 8 (10, 11): 19 Ind App 154: 6 Sar 245 P C; *Sheo Gobind Singh* v. *Dhanukdahri Singh*, (1913) 21 Ind Cas 774 (777): 19 Cal W N 1291; *Durga Sundari Devi* v. *Govinda Chandra Addy*, (1884) 10 Cal 368 (372).

(6) *Makhanchora Sarkar* v. *Nisind Gonai*, (1909) 3 Ind Cas 438 (439): 10 Cal L Jour 492; *Venkata Suryanaraina* v. *Goluguri Bapiraju*, (1910) 7 Ind Cas 60 (63 to 65): 34 Mad 143: 1910 Mad W N 286: 8 Mad L Tim 154; *Dayaldas* v. *Shankar*, 1931 Nag 116 (118): 14 Nag L J 20: 27 Nag L R 318: 134 Ind Cas 269; *Hashim Isphany* v. *N A P K Chetty Firm*, (1916) 33 Ind Cas 1003 (1006): 9 Bur L Tim 169: 8 L B R 427. See *Maung Tha Dun* v. *Chokalingam Chetty*, (1914) 23 Ind Cas 383 (384): 7 Bur L Tim 18 [He cannot recover when he is not misled by such fraud].

(7) *Administrator-General of Bengal* v. *Aghore Nath*, (1902) 29 Cal 420 (426): 6 Cal W N 873; *Doyal Krishna* v. *Amrit Lal*, (1902) 29 Cal 370 (378).

(8) *Mahomed Kala Mea* v. *Harperink*, (1909) 1 Ind Cas 122 (124): 36 Ind App 32: 13 Cal W N 249: 36 Cal 323: 6 All L J 34: 5 Mad L Tim 126: 9 Cal L Jour 165: 11 Bom L R 227: 19 Mad L Jour 115 P C. See also *Chima Bai* v. *Dhula Kuppa*, (1919) 50 Ind Cas 384 (389, 391): 21 Bom L R 281.

the Court to be scrupulous in the extreme and to be very careful to *see* that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its officers. **O.21, R.91, Notes 8—10.**

9. Suit for refund of purchase money where there is no saleable interest.—*See* Notes to O. 21, R. 93, *infra.*

10. Appeal—Under O. 43, R. 1, Cl. (*j*) , an appeal lies against an order setting aside or refusing to set aside a sale under R. 92 read with this rule.

O.21, R.92.

R. **92.** [Ss. 312, 314.] (1) *Where* no application *is* made *under rule* 89, *rule* 90 *or rule* 91, or *where* such application is made and disallowed, the Court shall *make* an order confirming the sale[12], *and thereupon the sale shall become absolute.*

Sale when to become absolute or be set aside.

(2) *Where* such application *is* made and allowed, *and where, in the case of an application under rule* 89, *the deposit required by that rule is made within thirty days*[3] *from the date of sale*, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby[4].

(3) No suit[5] to set aside an order *made* under this *rule* shall be brought by any person against whom such order *is* made.

[1877—Ss. 312, 314; 1859—Ss. 256, 257.]

Local Amendments.

ALLAHABAD.

In sub-Rule (1) *after* the words "the Court shall", *insert* the words "subject to the provisions of Rule 58 (2)".

MADRAS.

In sub-Rule (2) *after* the words "within thirty days from the date of sale" *insert* the following words:—

"and in case where the amount deposited has been diminished owing to any cause not within the control of the depositor such deficiency has been made good within such time as may be fixed by the Court."

NAGPUR.

In sub-Rule (1) of Rule 92, *after* the word "make" *insert* the words "subject to the provisions of Rule 58 (2)".

OUDH.

In Rule 92, sub-Rule (1), *after* the words "the Court shall", *insert* the words "subject to the provisions of Rule 58 (2)".

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Deposit made within thirty days. See Notes to O. 21, R. 89.
4. Necessary parties and notice to them.
5. Suit to set aside sale when barred.
6. Plea of irregularity or fraud in defence.
7. Suits to set aside sales under other acts.
8. Limitation for suits to set aside sales.

O.21, R.92, Notes 1—2.

9. Court-fee on a plaint to set aside sale.
10. Sale by receiver.
11. Sale held by Collector—Confirmation.
12. Confirmation before thirty days.
13. Appeal.
14. Appeal to the Privy Council. See Note 6 to S. 109, ante and Note 50 to O. 21, R. 90.
15. Step-in-aid of execution.
16. Revision.

Absence of application—Effect. See Note 4, Pt. (1) also see Note 2.
Application disallowed—Effect. See Note 2.
Confirmation—Effect. See Note 2, Pt. (3) also Note 6, Pts. (2) and (3).
Effect of reversal of decree before confirmation. See Note 2, Pt. (6).
Inherent powers to set-aside sales. See Note 2, Pts. (5) to (10).
Letters Patent appeals. See Note 13, Pt. (7).
Plea of irregularity of sale not raisable after confirmation. See Note 6, Pt. (2).
Sale not liable to be set-aside merely because execution was barred. See Note 2, Pt. (7).
Second appeal. See Note 13, Pt. (6).
Suit for setting aside sale barred by S. 47. See S. 47, Notes 51 to 72.
Suits on other grounds for setting aside sales. See Note 5, Pts. (3) and (7).
Suit on the ground of want of title. See R. 91, Note 8.
When sale is to be set aside under this rule. See Note 2.

1. Legislative changes.—

1. Under S. 312 of the old Code, the Court was bound to confirm the sale only if no application under S. 311 (now R. 90) had been made or if such application is made and disallowed. Under the present rule the Court should confirm the sale only where no application is made *under Rules* 89, 90 *or* 91 or where such application is made and disallowed.
2. The words "as regards the parties to the suit" which occurred in the first para. of S. 312 of the old Code have been omitted. *See* the undermentioned case.[1]
3. The words "on the ground of such irregularity" after the words "no suit to set aside" in the last para. of S. 312 corresponding to sub-Rule (3) have been omitted.

2. Scope of the rule.—This rule provides for the confirmation of sale in certain cases and for the setting aside of the sale in certain other cases. A sale should be *confirmed* where no application is made under Rr. 89, 90 or 91 or where such application is made and disallowed. It is the duty of the Court in such cases to confirm the sale,[1] even without an application by, or the presence of, the party concerned.[2] Upon such confirmation the sale

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Order 21, Rule 92—Note 1.

(1) *Ahmed Ally* v. *Maung Shwe Thin*, (1900) 1 L B R 53 (54).

Note 2.

(1) *Somasundaram* v. *Bhimisetty Kondayya*, 1926 Mad 12 (14, 17): 49 Mad L Jour 401: 91 Ind Cas 443; *Seth Nanhelal* v. *Umrao Singh*, 1931 P C 33 (34): 33 Bom L R 450: 53 Cal L Jour 187: 35 Cal W N 381: 14 Nag L J 28: 1931 All L J 257: 60 Mad L Jour 423: 1931 Mad W N 281: 33 Mad L W 449: 8 Oudh W N 585: 130 Ind Cas 686: 58 Ind App 50: 27 Nag L R 95 P C; *Birj Mohan* v. *Uma Nath*, (1893) 20 Cal 8 (11): 19 Ind App 154: 6 Sar 245 P C; *Girdharee Singh* v. *Hurdeo Narain Singh*, (1876) 3 Ind App 230 (236): 26 Suth W R P C 44: 3 Sar 637: 3 Suth 294 P C; *Harbans Lal* v. *Kundan Lal*, (1899) 21 All 140 (141): 1898 All W N 212; *Shirin Begam* v. *Agha Ali Khan*, (1896) 18 All 141 (145): 1896 All W N 9; *Lakshmi* v. *Krishnabhai*, (1884) 8 Bom 424 (425): 9 Ind Jur 40; *Khetter Nath Biswas* v. *Faizudin Ali*, (1897) 24 Cal 682 (685); *Baboo Hurdeo Narain* v. *Girdharee Singh*, (1873) 19 Suth W R 227 (229); *Girdhari Lal* v. *Bhago*, 1907 Pun Re No 92: 152 Pun W R 1907; *The Official Assignee of Madras* v. *Ponnuswami Mudali*, (1915) 26 Ind Cas 421 (423): 1 Mad L W 1028; *Nizamuddin* v. *Jumma*, 1926 Nag 17 (19): 88 Ind Cas 693: *Sitaram* v. *Kaniram*, 1926 Nag 193 (194:) 21 Nag L R 157: 91 Ind Cas 962; *Dharam Chand* v. *Bhussan Kaisha & Co*, (1920) 54 Ind Cas 928 (931) Nag; *N K R M Chetty Firm* v. *Subraya Mudaliar*, 1925 Rang 271 (273): 3 Rang 132: 89 Ind Cas 300. See *Prem Das* v. *Gokalchand*, 1927 Lah 71 (72): 98 Ind Cas 866.

(2) *Ramprasad* v. *Kodu*, 1930 Nag 134 (135): 120 Ind Cas 405.

will become absolute.[3] A formal order, however, is not necessary, and, where, from the action of the executing Court, it is clear that the Court intended to confirm the sale, the absence of a formal order to that effect will be immaterial.[4] O.21, R.92, Note 2.

A sale should be *set aside* under this rule where an application under Rr. 89, 90 or 91, is made and allowed. But this does not mean that the Court has no power to set aside an execution sale on any ground whatever in the absence of such an application. Under its *inherent powers*, the Court can refuse to confirm the sale or can set it aside where it has been misled by the decree-holder or where there has been abuse of the process of Court,[5] or where the decree has been reversed before the date of confirmation of the sale.[6] But a sale is not liable to be set aside merely on the ground that the application for execution was time barred,[7] or on the ground that the decree has been amended.[8] As to the effect of the reversal of a decree on the rights of the auction-purchaser *see* Note 13 to S. 144. As to the effect of an adjustment of the decree after sale and before confirmation *see* Notes to O. 21, R. 2 and R. 89 and the undermentioned cases.[8-a]

Where an application to set aside the sale is made under the inherent powers of the Court,[9] or where an application is made under R. 90 after the expiry of thirty days from the date of the sale relying on S. 18 of the Limitation Act,[10] the fact that the sale has been confirmed is no bar to the maintainability of the application.

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(3) *Narasingerji Gyangerji* v. *Panuganti Parthasarathi*, 1921 Mad 498 (507): 1921 Mad W N 519; *Arunagiri Mudaliar* v. *Uthando Mudali*, (1912) 17 Ind Cas 242 (243): 12 Mad L Tim 311: 1912 Mad W N 1136; *Ram Rattan* v. *Manja*, 1885 Pun Re No 96.

(4) *Rahela Khatun* v. *Amburennessa Choudhurani*, 1927 Cal 881 (882): 104 Ind Cas 38; *Sawan Mal* v. *Shib Dyal*, (1915) 31 Ind Cas 251 (254): 81 Pun Re 1915: 178 Pun W R 1915.

(5) *Raghavachariar* v. *Muruyesa Mudali*, 1923 Mad 635 (636, 638): 44 Mad L Jour 680: 17 Mad L W 750: 32 Mad L Tim 285: 1923 Mad W N 323: 72 Ind Cas 515: 46 Mad 583; *Rahmatullah* v. *Ladha Shah*, 1930 Lah 208 (210): 120 Ind Cas 681: 11 Lah L Jour 546: 31 Pun L R 57; *Ali Muhammad* v. *Alia Khanum*, (1915) 30 Ind Cas 230 (232): 2 Oudh L J 216; *Ramessuri* v. *Doorgadas*, (1881) 6 Cal 103 (106): 7 Cal L Rep 85; *J H Paulson* v. *J W Dunn*, (1872) 18 Suth W R 11 (12); *Raj Coomar Singh* v. *Lalljee Sahoo*, (1872) 18 Suth W R 333 (334); *Bagga Mal* v. *Bashshar Lal Mithan Lal*, 1930 Lah 793 (794): 126 Ind Cas 443; *Subbaji Rau* v. *Srinivasa Rau*, (1880) 2 Mad 264 (267, 268, 269): 1 Ind Jur 505; *Nizamuddin* v. *Jumna*, 1926 Nag 17 (18): 88 Ind Cas 693; *Rustomji Kursetji* v. *Perozshah Mirwala*, 1925 Sind 253 (254): 18 Sind L R 130: 86 Ind Cas 1015. See also Note 2, point 38 to S 151. See *Baldeo Prasad* v. *Sukhdeo Prasad*, 1929 All 485 (491, 492): 121 Ind Cas 552 [Where the remedy is *time* barred it cannot be given by the use of inherent powers].

(6) *Ariatallah* v. *Sashi Bhusan*, (1920) 55 Ind Cas 547 (549): 24 Cal W N 73; *Hariram* v. *Gopikasan*, 1921 Nag 121 (122): 61 Ind Cas 571. See also *Jitmal* v. *Zimberlal*, 1925 Nag 60 (61): 20 Nag L R 168: 84 Ind Cas 471.

(7) *Kamar-ud-din* v. *Manmatha Nath Manna*, (1913) 19 Ind Cas 377 (378) Cal; *Saroda Churn* v. *Mahomed Isuf*, (1885) 11 Cal 376 (378); *Mahomed Hossain* v. *Kokil Singh*, (1881) 7 Cal 91 (96): 9 Cal L Rep 53; *Gangthara* v. *Rathabai*, (1883) 6 Mad 237 (239) 7 Ind Jur 191; *Lakshu Rai* v. *Maharaja Kesho Pershad*, (1917) 38 Ind Cas 876 (877): 2 Pat L Jour 157: 3 Pat L W 403. But see *Golam* v. *Lakhimani*, (1870) 13 Suth W R 273 (275): 5 Beng L R 68.

(8) *Fateh Lal* v. *Sher Singh*, 1925 All 264 (266): 6 L R (All) Civ 63: 85 Ind Cas 660. See *Prithi Nath* v. *Mt Kunji Koer*, 1926 All 41 (42): 24 All L J 65: 6 L R (All) Civ 420: 89 Ind Cas 369 [Setting aside sale—Sale held in accordance with decree—Decree subsequently amended—Sale cannot be set aside as against *bona fide* purchaser].

(8-a) *Meyyappa Chettiar* v. *P Pan Hla*, 1931 Rang 148 (149): 9 Rang 104: 132 Ind Cas 713; *Shankar Lal* v. *Jawahar Lal*, 1928 Nag 265 (272): 24 Nag L R 127: 11 Nag L J 142: 111 Ind Cas 895 P B; *Ramchandra* v. *Lakshman*, 1926 Nag 298 (300); *Maroti* v. *Vithoba*, 1928 Nag 43 (44): 100 Ind Cas 565 [No longer law in view of 1931 P C 33].

(9) *Satdhar* v. *Ram Chandra*, 1924 All 261 (262): 46 All 153: 21 All L J 917: 4 L R (All) Civ 607: 79 Ind Cas 532; *Durga Charan* v. *Kali Prasanna*, (1898) 26 Cal 727 (731): 3 Cal W N 586; *Khirode Sundari Debi* v. *Jnanendra Nath Pal Chaudhri*, (1902) 6 Cal W N 283 (285)

(10) *Sheo Ram Koeri* v. *Ikramunnissa Bibi*, 1923 All 282 (284): 21 All L J 176: 71 Ind Cas 631: 45 All 316: 4 L R (All) Civ 129.

O.21, R.92, Notes 2—4.

Where a sale is set aside, and, in the meanwhile, the purchaser has obtained possession of the properties, the Court has got inherent power to order restitution to be made.[11] *See also* Note 34 to S. 144.

A decree-holder is entitled to interest on the decretal amount up to the date of confirmation, inasmuch as he is not bound to withdraw the money deposited by the auction-purchaser before the sale is confirmed.[12]

The effect of an order setting aside the sale is to remit the parties to the position in which they stood before the date of the sale.[13]

3. Deposit made within thirty days.—*See* Note 28 to O. 21, R. 89.

4. Necessary parties and notice to them.—It has been seen in the notes to Rr. 89, 90 and 91 *ante* that an application under these rules to set aside the sale must be made within thirty days of the date of the sale under Art. 166 of the Limitation Act. If no such application is made within time the sale cannot be set aside under this rule.[1]

Before an order setting aside a sale under this rule is made, it is essential that notice of the application should be given to all persons affected by the order thereon.[2] An order setting aside the sale, made without giving such persons an opportunity of being heard, is without jurisdiction.[3] But it is not necessary that the notice should be given *within thirty days* of the date of the sale.[4]

It is not necessary that the persons that would be affected by an order under this rule need be described as parties in the application: it is sufficient

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(11) *Ram Ratan Prasad* v. *Banarsi Lal*, 1930 Pat 280 (281): 11 Pat L Tim 156: 122 Ind Cas 589: 9 Pat 685; *Jagdip Narain Singh* v. *F H Holloway*, (1917) 39 Ind Cas 653 (654): 2 Pat L Jour 206: 3 Pat L W 423: 1919 Pat H C C 282. See *Thakur Kamakhya* v. *Munshi Prag Narain*, (1905) 8 Oudh Cas 254 (256).

(12) *Upendra Nath Chowdhury* v. *Bhudeb Chandra Roy*, (1914) 25 Ind Cas 859 (861) Cal; *Nafar Chandra Pal* v. *Gopal Chandra*, (1914) 22 Ind Cas 946 (947): 19 Cal L Jour 358.

(13) *Gunno Singh* v. *Muddun Mohun Singh*, 1864 Suth W R Sup No 26 (28).

Note 4.

(1) See *Intiaz-un-nissa* v. *Chuttan Lal*, 1925 All 236 (237): 22 All L J 1119: 6 L R A Civ 153: 84 Ind Cas 746: 47 All 304.

(2) *Kanthi Ram* v. *Bankey Lal*, (1878-80) 2 All 396 (397); *Vithoba* v. *Esat*, (1894) 18 Bom 594 (596); *Bala Kadar* v. *Gulam Mohidin*, (1883) 7 Bom 424 (424, 425); *Gulam Mohideen* v. *Bala*, 1880 Bom P J 254; *Menajuddi Biswas* v. *Toam Mandal*, (1912) 15 Ind Cas 176 (176): 39 Cal 881; *Bibi Sharofan* v. *Mahomed Habibuddin*, (1911) 10 Ind Cas 148 (150): 13 Cal L Jour 535: 15 Cal W N 685; *Konnormal Oswal* v. *Nabin Chandra Das*, (1912) 15 Ind Cas 228 (228) Cal; *Kripali Singh* v. *Pairoo Raut*, (1910) 5 Ind Cas 305 (305): 11 Cal L Jour 86; *Nityanand Patra* v. *Hiralal Karmakar*, (1900) 5 Cal W N 63 (65); *Janardhan* v. *Kali Kristo*, (1896) 23 Cal. 393 (396) Note; *Bungshidhar Haldar* v. *Kedar Nath Mondal*, (1896) 1 Cal W N 114 (118); *Bharrab Pal* v. *Premchand*, (1896) 1 Cal W N 161 Note; *Nur Mustafa* v. *Jamadar Mohomed*, 1921 Lah 156 (157): 3 Lah L Jour 463: 62 Ind Cas 986; *Kunja Singh* v. *Barho Ray*, 1923 Pat 353 (353): 4 Pat L Tim 247: 73 Ind Cas 12; *Kumar Ramanand* v. *Rajit Singh Jha*, 1924 Pat 507 (509): 5 Pat L Tim 233: 75 Ind Cas 863. See *Charan Chandra Ghosh* v. *Rai Behari Lal Mitra Bahadur*, 1925 Cal 157 (158): 80 Ind Cas 931 [If a party has actual notice the absence of formal notice does not vitiate the proceedings]; *Aditya Dat Ram* v. *Jagjiwan Das*, 1927 Oudh 23 (24): 98 Ind Cas 69 [Judgment-debtor dies before confirmation—No notice is necessary to his legal representative]; *Surendra Mohini Debi* v. *Loharam Chattopadha*, (1912) 14 Ind Cas 67 (69): 16 Cal W N 570: 89 Cal 687; *Pahlad Singh* v. *Sajivan Rai*, 1921 Pat 54 (55): 6 Pat L Jour 16: 2 Pat L Tim 66: 61 Ind Cas 126 [The provisions of O 21, R 92, C P Code requiring notice to be served does not apply to proceedings brought by a judgment-debtor to set aside a sale under S 174 of the Bengal Tenancy Act].

(3) *Sundara Raja Ayyangar* v. *Asiri Naidu*, (1916) 32 Ind Cas 891 (893) Mad; *Bhikhan Gir Gossain* v. *Jalpadat Jha*, 1921 Pat 293 (294): 2 Pat L Tim 270: 62 Ind Cas 113. See also *Brij Kumar Lal Sahu* v. *Jagdamba Prasad*, 1929 All 671 (672): 121 Ind Cas 270. But see *Umesh Chandra Majumdar* v. *Safiyatannessa Khatun*, 1928 Cal 267 (268): 107 Ind Cas 476 [Such an order is only a wrong order].

(4) *Ganesh Bub Naik* v. *Vithal Vaman Mahayya*, (1913) 19 Ind Cas 475 (476): 15 Bom L R 244: 37 Bom 387; *Kirpa Ram* v. *Nand Lal*, 1928 Lah 413 (414): 107 Ind Cas 494; *Narayana Sahu* v. *Petamma*, 1929 Mad 763 (764): 30 Mad L W 276: 57 Mad L Jour 310: 1929 Mad W N 626: 52 Mad 861: 121 Ind Cas 855; *Nittai Dutta* v. *Bishun Lal Sao*, 1932 Pat 255 (256): 11 Pat 504: 13 Pat L Tim 488; *Ishwar Das* v. *Biseswar Lal*, 1926 Pat 266 (267): 1926 Pat H C C 83: 94 Ind Cas 31: 7 Pat L Tim 532; *Mt Bibi Zainab* v. *Paras Nath*, 1924 Pat 37 (38): 4 Pat L Tim 491: 1 Pat L R 361: 2 Pat 800: 75 Ind Cas 430; *Abdur Rahiman* v. *Babu Har Narayan Das*, 1922 Oudh 129 (130): 9 Oudh L J 211: 68 Ind Cas 238; *Jit Singh* v. *Daultia Tamta*, 1930 All 167 (168): 124 Ind Cas 28.

O.21, R.92, Notes 4—5.

if the notice required by this rule is given to them.[5] Where an application to set aside a sale was made *bona fide* impleading the decree-holder as a party, but he was dead on the date of the application, and his legal representative was brought on the record after the expiry of the period of limitation, it was held in the undermentioned case that the application would not be defeated by reason of the fact that the legal representative of the decree-holder was not impleaded within the period of limitation.[6]

Where the auction-purchaser is alleged to be a *benamidar* for a third party it is not necessary to give notice to the latter under this rule.[7] Persons who have applied for rateable distribution in the proceeds of an execution sale have no such direct or proximate interest as would entitle them to notice under this rule.[8]

5. **Suit to set aside sale when barred.**—S. 312 of the old Code provided in the last para thereof that "no suit to set aside on the ground of such irregularity, an order passed under this section shall be brought . . . . . etc." In the undermentioned cases these words were interpreted as not including suits to *confirm* the sale which had been set aside under S. 312.[1] These cases are now no longer law in view of the alteration effected in sub-R. 3 of the present rule, which enacts that "no suit to set aside *an order made under this rule* shall be brought, etc."

A suit to set aside an execution sale on grounds covered by Rr. 89, 90 and 91 is barred by sub-R. 3,[2] inasmuch as the suit would in effect be one to set aside an order under this rule.

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(5) *Dip Chand* v. *Sheo Prasad*, 1929 All 593 (596): 1929 All L J 769: 51 All 940: 119 Ind Cas 103; *Ganesh Bab Naik* v. *Vithal Vaman* (1913) 19 Ind Cas 475 (476): 37 Bom 387: 15 Bom L R 241; *Raj Chandra Das* v. *Kali Kanta Das*, 1923 Cal 394 (396, 397): 82 Ind Cas 776; *Satish Chandra De Sarkar* v. *Rakhal Chandra Saha*, 1928 Cal 189 (189): 47 Cal L Jour 62: 107 Ind Cas 733 [Obiter]; *Kirpa Ram* v. *Nand Lal*, 1928 Lah 113 (114): 107 Ind Cas 194; *Wazi Gir* v. *Hazari Gir*, 1928 Lah 414 (417): 10 Lah L Jour 161: 108 Ind Cas 391; *Bakhshi Sain Das* v. *Punjab National Bank, Ltd.*, 1928 Lah 418 (419): 111 Ind Cas 506; *Haji Mahomed* v. *Ghulam Hussain Khan*, 1927 Lah 681 (682): 104 Ind Cas 148; *Sewak Ram* v. *Kundan Lal*, 1897 Pun Re No 3; *Narayana Sahu* v. *Pentayana*, 1929 Mad 763 (764): 30 Mad L W 276: 57 Mad L Jour 310: 1929 Mad W N 626: 52 Mad 861: 121 Ind Cas 555; *Nathu Datta* v. *Bisho Lal Sao*, 1932 Pat 255 (256): 11 Pat 41: 1 Pat L Tim 488; *Jagarda Marwari* v. *Pitam Lal* 1926 Pat 265 (267): 7 Pat L Tim 532: 1926 Pat H C C 83: 94 Ind Cas 31; *Mt Bibi Zainab* v. *Puran Nath*, 1924 Pat 37 (37): 4 Pat L Tim 124: 4 Pat L R 361: 2 Pat 800: 75 Ind Cas 130; *Ghazanfar Husain* v. *Kanaiya*, (1914) 25 Ind Cas 907 (908): 17 Oudh Cas 306. See *Rameshwar Singh Bahadur* v. *Munni Prasad Sahu*, 1930 Pat 318 (318, 319): 9 Pat 310: 125 Ind Cas 570: 11 Pat L Tim 880 [But in an appeal he must implead him in the beginning]. See also *Ramanand Sinha* v. *Bajit Jha*, 1924 Pat 507 (509): 75 Ind Cas 863: 5 Pat L Tim 233. But see *Karamat* v. *Mir Ali*, (1891) 14 All W N 121 (121); *Ali Gauhar* v. *Bansidhar*, (1893) 15 All 407 (409): 1893 All W N 173; *Ajiuddin Ahamed* v. *Khoda Bux Koudkar*, (1919) 50 Ind Cas 5 (6) Cal; *Menajuddi* v. *Toun Mandal*, (1912) 17 Ind Cas 176 (176): 39 Cal 881; *Bahadur Ali Khan* v. *Co-operative Credit Society, Basti Baba Khel*, 1929 Lah 778 (779): 120 Ind Cas 165; *Haridas* v. *Mofat Lal*, 1930 Nag 5 (5): 26 Nag L R 127: 121 Ind Cas 658; *Mussammat Sumitra Koer* v. *Damri Lal*, 1921 Pat 498 (498): 2 Pat L Tim 336: 62 Ind Cas 61.

(6) *Sailabala* v. *Kalipada*, 1932 Cal 733 (733): 55 Cal L Jour 345.

(7) *Baroda Kanta Bose* v. *Chunder Kanta Ghose*, (1902) 29 Cal 682 (686): 6 Cal W N 706. See also *Mt Bhaggo* v. *Mata Prasad*, 1923 All 462 (463): 76 Ind Cas 507.

(8) *Ramnath Chunilal* v. *Grandhi Sattiraju*, 1931 Mad 465 (467): 1931 Mad W N 423: 132 Ind Cas 111: 61 Mad L Jour 909: 34 Mad L W 824. But see *Komandur Krishnamacharlu* v. *Danoji*, (1918) 48 Ind Cas 38 (39): 8 Mad L W 592: 35 Mad L Jour 604: 24 Mad L Tim 482: 1918 Mad W N 716.

Note 5.

(1) *Shiam Behari Lal* v. *Rup Kishore*, (1898) 20 All 379 (382): 1898 All W N 81 F B [Overruling 18 All 437]; *Mathura Das* v. *Jamna Prasad*, (1903) 25 All 355 (357): 1903 All W N 69; *Azimuddin* v. *Baldeo*, (1881) 3 All 551 (558, 561): 1881 All W N 31 F B; *Banno Bibi* v. *Jasoda Kuar*, 1888 All W N 218 (218); *Bandi Bibi* v. *Kalka*, (1887) 9 All 602 (604): 1887 All W N 110; *Queen-Empress* v. *Bhagwan Das*, 1891 All W N 40 (42); *Ram Dial* v. *Mahtab Singh*, (1881) 3 All 701 (704): 1881 All W N 62; *Diwan Singh* v. *Bharat Singh*, (1881) 3 All 208 (210); *Sukhai* v. *Daryai*, (1876) 1 All 374 (377): 1 Ind Jur 779; *Chuttur Singh* v. *Dhurum Kouwar*, (1869) 1 N W P H C R 61; *Mathurdas* v. *Panhalal*, (1895) 19 Bom 216 (219, 220).

(2) *Gajrajmati Tewain* v. *Akbar Husain*, (1907) 29 All 196 (202): 34 Ind App 37: 9 Bom L R

O.21, R.92, Notes 5—6.

A suit to set aside a sale in execution on grounds other than those covered by Rr. 89, 90 and 91 is not within the prohibition of sub-R. 3 and is, therefore, not barred by it.[3] Thus, where the decree and the sale are attacked on the ground of fraud (not covered by R. 90)[4] or where the sale is attacked on the ground of want of jurisdiction,[5] a suit to set aside such a sale on those grounds is not barred by this rule. Where in execution of a mortgage decree a property not included in the mortgage was sold, a suit by the mortgagor to recover possession of the property from the mortgagee purchaser was held not to be barred by this rule.[6]

The rules relating to the execution of decrees under this Code do not apply to insolvency proceedings: a suit, therefore, questioning an order dismissing an application to set aside a sale held by the Insolvency Court is not barred by this rule.[7]

6. Plea of irregularity or fraud in defence.—Where a party applies under R. 90, *ante* to set aside the sale and the application is dismissed, he

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83: 5 Cal L Jour 138: 11 Cal W N 393: 17 Mad L Jour 112: 2 Mad L Tim 47 P C; *Mt Indar Koer* v. *Sah Dharam Narain*, 1930 All 556 (557): 1930 All L J 1177: 128 Ind Cas 231; *Chiranji Lal* v. *Ishwar Das*, 1930 All 578 (579): 123 Ind Cas 755; *Piare Lal* v. *Kishan Lal*, 1928 All 704 (705): 110 Ind Cas 876; *Nazir Husain* v. *Kanhaya Lal*, (1916) 35 Ind Cas 473 (475) All; *Raghubar Dayal* v. *Illahi Baksh*, (1885) 7 All 450 (454): 1885 All W N 65; *Alimuddin Husain* v. *Naubat Rai*, 1884 All W N 264 (264); *Ram Sarup* v. *Raghunandan*, 1881 All W N 38 (39); *Bhaleliy Chunni Lal* v. *Chakkerpan*, 1922 All 56 (57): 20 All L J 281: 44 All 380: 67 Ind Cas 934; *Damodar* v. *Vinayak*, (1902) 26 Bom 40 (42): 3 Bom L R 463; *Jagadish* v. *Rama Sundara*, (1919) 51 Ind Cas 972 (974): 23 Cal W N 608: 29 Cal L Jour 411; *Grace Rosamand Rhodes* v. *Padmanabha Chettiar*, (1915) 26 Ind Cas 369 (374): 1 Mad L W 1033: 1914 Mad W N 921: 17 Mad L Tim 18; *Jagannath* v. *Watson & Co*, (1892) 19 Cal 341 (345); *Siva Pershad Maity* v. *Nundo Lal Kar*, (1891) 18 Cal 139 (143); *Bhim Singh* v. *Sarwan*, (1889) 16 Cal 33 (40); *Panye Chander Sircar* v. *Hurchunder Chowdhry*, (1884) 10 Cal 496 (500); *Mohendra Narain* v. *Gopal Mondol*, (1890) 17 Cal 769 (772); *Gobind Singh* v. *Mohunt Munno Ram Das*, (1873) 19 Suth W R 414 (416); *Radhi* v. *Buta Mal*, 1929 Lah 618 (619): 119 Ind Cas 431; *Nand Kishore* v. *Sultan Singh*, 1926 Lah 165 (165): 7 Lah 1: 27 Pun L R 258: 93 Ind Cas 1007; *Meenakshi* v. *Palaniappa Theran*, 1928 Mad 1138 (1139); *Kalinadhabhotla* v. *Marta Appayya Sastri*, 1921 Mad 121 (121): 44 Mad 351: 40 Mad L Jour 55: 13 Mad L W 16: 1921 Mad W N 9: 62 Ind Cas 203; *Tukaram* v. *Sukharamsa*, 1929 Nag 130 (131): 25 Nag L R 58: 118 Ind Cas 49; *Deoba* v. *Laxman*, (1918) 44 Ind Cas 978 (979) Nag; *Sher Khan* v. *Misri Lal*, 1926 Oudh 45 (46): 89 Ind Cas 107; *Ma Saw* v. *Maung Kyaw Gaung*, 1928 Rang 18 (19): 5 Rang 606: 105 Ind Cas 706; *S N V R S Subramanian Chettiar* v. *N L M Chettiar Firm*, 1927 Rang 301 (301): 5 Rang 516: 105 Ind Cas 465. See *Sheikh Abdool Hye* v. *Allah Nowah Roy*, (1864) 1 Suth W R 204 (204) [S 257, Act VIII of 1859, applies only to sales held after that Act came into operation]. But see *Gajadhar Prasad* v. *Md Abdul Majid*, 1921 All 327 (328): 19 All L J 530: 63 Ind Cas 425; *Bhan Singh* v. *Prithmi Chand*, (1917) 36 Ind Cas 212 (213): 104 Pun L R 1916: 179 Pun W R 1916; *Nund Lal Doss* v. *Delawar Ali*, (1869) 11 Suth W R 244 (244); *Umbika Churn* v. *Dwarka Nath Ghose*, (1867) 8 Suth W R 506 (506); *Manakkal Bhattathiripad* v. *Manakkal Damodaran*, (1898) 8 Mad L Jour 115 (116).

(3) See cases in points 4 to 6 *infra*. *Kalipada Mukerji* v. *Basanta Kumar Dutta*, 1932 Cal 126: 35 Cal W N 877: 59 Cal 117: 138 Ind Cas 177 [The sub-rule however has no application here; what is prayed for in the suit is not the setting aside of the order confirming the sale but certain declarations the nature of which has already been set out and also an injunction as regards the taking of possession]; *Lachmi Narain* v. *Rebati Debya*, 1925 Pat 376 (378): 1925 Pat H C C 37: 86 Ind Cas 648: 6 Pat L Tim 473 [The rule does not apply when the property for possession of which the judgment-debtor sued was never sold at all but was wrongly taken possession of by the auction purchaser]; *Raghubar Dayal* v. *Ilahi Baksh*, (1885) 7 All 450 (452): 1885 All W N 65; *Jammal Ali* v. *Tirbhee Lal Das*, (1869) 12 Suth W R 41 (42). See also *Ganga Pershad* v. *Gopal Singh*, (1883) 11 Cal 136 (138): 11 Ind App 234: 4 Sar 573: 8 Ind Jur 687 P C; *Bishan Chand* v. *Bijoy Singh*, (1911) 11 Ind Cas 399: 15 Cal W N 648: 8 All L J 587: 13 Cal L Jour 588: 13 Bom L R 440: (1911) 2 Mad W N 418: 21 Mad L Jour 652: 10 Mad L Tim 335 P C [So assumed].

(4) *Khagendra Nath* v. *Pran Nath*, (1902) 29 Cal 395 (400): 29 Ind App 99: 4 Bom L R 368: 6 Cal W N 473: 8 Sar 266 P C; *Bhagwan Das Marwari* v. *Suraj Prasad Singh*, 1925 All 146 (150, 154): 22 All L J 1060: 6 L R (All) Civ 89: 84 Ind Cas 1031: 47 All 217; *Prannath* v. *Mohesh Chander*, (1897) 24 Cal 546 (548); *Sreemunto Puramanick* v. *Obhoychurn Manna*, (1869) 11 Suth W R 297 (298).

(5) *Ram Kishun* v. *Lalta Singh*, 1928 All 527 (530, 532): 26 All L J 1160: 112 Ind Cas 534; *Diwan Singh* v. *Bharat Singh*, (1881) 3 All 206 (210); *Amirit Misser* v. *Gurdu Pardan*, (1876) 7 N W P H C R 183; *Balgauda* v. *Mallappa*, (1920) 57 Ind Cas 440 (441): 22 Bom L R 759: 44 Bom 551; *Premchand Dey* v. *Mokhoda Debi*, (1890) 17 Cal 699 (703); *Lala Seva Ram* v. *Kanai Ram*, 1890 Pun Re No 76. See also *Unnocool Chunder* v. *Hurry Nath*, (1878) 2 Cal L Rep 334 (338) [Suit by purchaser for possession—Defence that sale is void for want of jurisdiction—Allowed].

(6) *Bulaki Das* v. *Kesri*, 1928 All 363 (364): 26 All L J 716: 50 All 686; *Natha Ram* v. *Ram Gir*, 1929 All 673 (673): 119 Ind Cas 852.

(7) *Harnam* v. *Ganpat*, 1923 Lah 224 (225): 5 Lah L Jour 9: 73 Ind Cas 367.

will, in answer to a suit by the purchaser for possession, be barred by *res judicata* from impeaching the sale on the same grounds.[1] Even if no such application is made, such a plea in defence cannot, be raised after confirmation of the sale.[2] The reason is that the sale becomes absolute and the order confirming the sale amounts to a judicial determination that none of the objections exists upon which the validity of the sale could have been questioned. Nor can a third person impeach the title of the auction-purchaser on the ground of any alleged irregularities in the execution sale.[3] **O.21, R.92, Notes 6—7.**

It has been held in the undermentioned cases[4] that the fact that an application under R. 89 or R. 90 has been dismissed will not preclude the mortgagor-judgment-debtor from pleading by way of defence in a suit by the auction-purchaser for possession, that the properties sold were not included either in the mortgage or in the decree thereon.

7. Suits to set aside sales under other Acts.

(1) *Public Demands Recovery Act (Bengal Act III of* 1913).—It was held under the repealed Act I of 1895 that this rule did not apply to sales held in enforcement of a certificate under that Act and that a suit to set aside such a sale was maintainable.[1] *See* S. 25 of Act III of 1913.

(2) *Bengal Tenancy Act (Act VIII of* 1885).—It has been held that this rule does not apply to sales held under the Bengal Tenancy Act, inasmuch as S. 174 thereof contains a complete rule on the subject.[2] There is a conflict of opinion as to whether a suit is maintainable to set aside or to confirm such a sale. *See* the cases cited below.[3]

As to cases under Bengal Act XI and Act X of 1859, *see* the undermentioned cases.[4]

Note 6.

(1) *Jhara Biswas* v. *Amritomoni Dasi*, (1917) 38 Ind Cas 47 (48) Cal; *Mata Din* v. *Gaya Din*, (1909) 3 Ind Cas 24 (25) . 6 All L J 799 . 6 M L Tim 99 : 31 All 599; *Tarak Nath Roy Chowdhury* v. *Saman Charan Chowdhury*, (1916) 30 Ind Cas 292 (295) Cal.

(2) *Jagmowar Sikdar* v. *Kailash Mandal*, [illegible] Cal 81 (81, 82) . 25 Cal W N 321 . 35 Ind Cas 126, *Lakshan Chandra* v. *Reandos*, 1924 Cal 374 (378) : 33 Cal W N 795 . 49 Cal L Jour 111 : 118 Ind Cas 857 F B; *Bipin Behari Bera* v. *Sashi Bhushan Datta*, (1911) 22 Ind Cas 96 (97) . 18 Cal L Jour 628 : 18 Cal W N 746; *Beera Mal* v. *Karunamoy Gupta* (1912) 13 Ind Cas 542 (541) Cal, *Jeeadambal Ammal* v. *Ramaswami Ayyangar*, (1912) 17 Ind Cas 126 (126) Mad; *Velamtha Moopan* v. *Subbarao Iyer Chetty*, (1913) 18 Ind Cas 498 (499) : 13 Mad L Tim 207 : 24 Mad L Jour 70 . 1913 Mad W N 136. *See Lala Ram* v. *Thakur Prasad*, (1918) 47 Ind Cas 947 (947) : 16 All L J 691 : 40 All 680 But see *Dodhasappa* v. *Pradhanappa*, 1926 Bom 33 (34, 36) : 27 Bom L R 1318 : 91 Ind Cas 426 [*obiter*].

(3) *Kunjolal Pal* v. *Idwaril Sardar*, 1927 Cal 82 (83, 84) : 97 Ind Cas 757.

(4) *Munishi* v. *Munishi*, 1921 Mad 279 (280) : 41 Mad L Jour 261 : 70 Ind Cas 303 : 14 Mad L W 424 : 1921 Mad W N 536. See also *Tamooel Chunder* v. *Harry Nath*, (1878) 2 Cal L Rep 334 (338) [Suit by purchaser for possession—Plea that sale is void for want of jurisdiction—Allowed to be raised].

Note 7.

(1) *Girish Chander Chaugdar* v. *Golam Karim*, (1906) 33 Cal 451 (458) : 10 Cal W N 317 : 3 Cal L Jour 235; *Raghubans Sahai* v. *Phool Kumari*, (1905) 32 Cal 1130 (1140) : 1 Cal L Jour 542; *Ram Tarak* v. *Dilwar Ali*, (1902) 29 Cal 94 (98) . 6 Cal W N 240; *Ram Tarak* v. *Dilwar Ali*, (1902) 29 Cal 73 (91, 93) : 5 Cal W N 521; *Sadhusaran Singh* v. *Panchdeo Lal*, (1887) 14 Cal 1 (6) : *Ram Logun Ojha* v. *Bhawani Ojha*, (1887) 14 Cal 9 (12). See also *Janukdhari Lal* v. *Gossain Lal*, (1909) 1 Ind Cas 871 (873) : 13 Cal W N 710 : 37 Cal 107 : 11 Cal L Jour 254. But see *Hari Charan Singh* v. *Chandra Kumar Dey*, (1907) 31 Cal 787 (809) : 14 Cal W N 715.

(2) *Pahlad Singh* v. *Sajiwan Rai*, 1924 Pat 54 (57) : 6 Pat L Jour 16 : 2 Pat L Tim 66 : 61 Ind Cas 120

(3) *Kabilan Koer* v. *Raghunath*, (1891) 18 Cal 481 (483). (No.) : *Pahlad Singh* v. *Sajiwan Rai*, 1924 Pat 54 (57) : 6 Pat L Jour 16 : 2 Pat L Tim 66 : 61 Ind Cas 120. (No) [Reversing 52 Ind Cas 982 (984)] ; *Golab Chand Ray* v. *Fida Hussain* (1918) 44 Ind Cas 532 (533) : 3 Pat L W 561 . 3 Pat L Jour 122 (Yes).

(4) Under Act XI of 1859: *Harkhoo Singh* v. *Bunsidhur Singh*, (1889) 27 Cal 876 (879) : 2 Cal W N 360 [Revenue sale where there is no

O. 21, R. 92, Notes 7—12.

(3) *Madras Estates Land Act (Act I of* 1908.)—A suit will lie to set aside a sale held under the Madras Estates Land Act.[5]

8. Limitation for suits to set aside sales.—In cases not covered by this rule and to which the bar under sub-rule does not apply, a suit to set aside an execution sale should be brought within one year from the date of confirmation of sale under Art. 12 of the Limitation Act of 1908.[1] That Article however does not apply where the sale is a nullity.[2] Such a sale does not require to be set aside, but may be *declared* to be void. A third person whose property has been sold is not bound by the sale and a suit by him for setting aside the sale is not governed by Art. 12 of the Limitation Act.[3]

9. Court-fee on a plaint to set aside sale.—A suit to set aside an auction sale for arrears of revenue is in no sense a suit for a mere declaration without consequential relief.[1] The plaint in such a suit should be stamped as if it were a suit for recovery of the property sold.[2]

10. Sale by Receiver.—A sale by a Receiver appointed by a Court is not one in execution of a decree and need not be confirmed under this rule.[1]

11. Sale held by Collector—Confirmation.—The Collector to whom a decree has been transferred for execution is not a Court executing the decree.[1] The Civil Court is the proper Court to confirm a sale held by the Collector.[2] *See* Notes 2, 4, 5 and 6 to S. 70.

12. Confirmation before thirty days.—No sale can be confirmed or can become absolute under this rule before the expiry of the period of 30 days from the date of the sale.[1]

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arrears of revenue is void and can be set aside]: *Balkishen Das* v. *Simpson*, (1898) 25 Cal 833 (841): 25 Ind App 151: 2 Cal W N 513: 7 Sar 363 P C, (Do.); Under Act X of 1859: *Damodar* v. *Iswar*, (1910) 7 Ind Cas 387 (388): 15 Cal W N 78 [Suit lies]: *Bhad Narain* v. *Court of Wards*, (1871) 15 Suth W R 58 (60), (Do.).

(5) *Jagannatha Pillai* v. *Kathaperumal Pillai*, 1927 Mad 1035 (1036, 1037): 53 Mad L Jour 688: 26 Mad L W 572: 39 Mad L Tim 389: 105 Ind Cas 88: 1927 Mad W N 913: 51 Mad 76; *Mahalinga Naicker* v. *Vellaya Naicker*, 1926 Mad 190 (191): 22 Mad L W 794: 1925 Mad W N 884: 92 Ind Cas 412: 49 Mad 490: 51 Mad L Jour 559.

Note 8.

(1) *Malkarjun* v. *Narhari*, (1901) 25 Bom 337 (351, 352): 27 Ind App 216: 5 Cal W N 10: 2 Bom L R 927: 10 Mad L Jour 368: 7 Sar 739 P C; *Mt Rukmin* v. *Jodha Singh*, (1913) 19 Ind Cas 120 (121) All; *Baijnath Sahai* v. *Ramgut Singh*, (1895) 23 Cal 775 (785): 23 Ind App 45: 7 Sar 1 P C; *Mahomed Hossein* v. *Purundur Mahto*, (1885) 11 Cal 287 (292); *Abdul Munsoor* v. *Abdool Hamid*, (1876-77) 2 Cal 98 (103); *Subramania* v. *Siva Subramania*, (1894) 17 Mad 316 (322): 4 Mad L Jour 152; *Suryanna* v. *Durai*, (1884) 7 Mad 258 (261, 262). See *Kishori Lal* v. *Kuber Singh*, (1910) 7 Ind Cas 503 (504): 7 All L J 937: 33 All 93.

(2) *Natha Ram* v. *Ram Gir*, 1929 All 673 (673): 119 Ind Cas 852; *Bulaki Das* v. *Kesri* 1928 All 363 (365): 26 All L J 716: 50 All 686; *Azimkhan* v. *Karim*, 1924 Lah 396 (397): 71 Ind Cas 822.

(3) *Nilakandan* v. *Thandamma*, (1886) 9 Mad 460 (463); *Haji* v. *Atharaman*, (1884) 7 Mad 512 (514); *Ahmed Ally* v. *Maung Shwe Thin and Ma Shwe Ma*, 1900 L B R 53 (55); *Hajee Goya Kaka* v. *Zachcheus*, (1910) 4 L B R 40 (42). See also *Lachmi Narain Singh* v. *Rebati Debya*, 1925 Pat 376 (378): 1925 Pat H C C 37: 86 Ind Cas 648: 6 Pat L Tim 473.

Note 9.

(1) *Tara Prasanna Changlar* v. *Narsinha Moozari Pal*, 1924 Cal 731 (732): 51 Cal 216: 28 Cal W N 683: 39 Cal L J 212: 81 Ind Cas 763.

(2) *Drapu Chowdhry* v. *Ishan Chunder*, (1882) 9 Cal L Rep 231 (232).

Note 10.

(1) *Narain Das* v. *Ram Chandra*, 1926 All 124 (126): 24 All L J 26: 6 L R (All) Civ 610: 90 Ind Cas 116: 48 All 209.

Note 11.

(1) *Bhagwan Das* v. *Suraj Prasad*, 1925 All 146 (149): 22 All L J 1060: 6 L R All Civ 89: 84 Ind Cas 1031: 47 All 217.

(2) *Parma Nand* v. *Sohna*, 1896 Pun Re No 83.

Note 12.

(1) *Marimuthu Udayan* v. *Subbaraya Pillai*,

O.21, R.92, Notes 13—14.

13. Appeal.—An order under this rule setting aside or refusing to set aside an execution sale is appealable under O. 43, R. 1 (*j*) of the Code.[1] An order merely confirming the sale in the absence of an application to set it aside[2] or an order refusing to confirm a sale on the ground that the decree had been satisfied[3] is not an order setting aside or refusing to set aside a sale and is, therefore, not appealable. Similarly an order setting aside a sale *suo motu* under the Court's *inherent* powers is not one under this rule and is not appealable.[4] As to whether an appeal lies from an order setting aside or refusing to set aside a sale under the Madras Estates Land Act or the Bengal Tenancy Act or the Agra Tenancy Act, *see* the following cases.[5]

No second appeal will lie from an order setting aside or refusing to set aside a sale under this rule.[6] *See* S. 104, sub-S. 2. As to whether an appeal lies under the Letters Patent against an order under this rule, *see* Note 50 to O. 21, R. 90 and the undermentioned cases.[7]

14. Appeal to the Privy Council.—*See* Note 6 to S. 109 *ante* and Note 50 to O. 21, R. 90.

(1903) 13 Mad L Jour 231 (234); *Baldeo Singh* v. *Kishan Lal*, (1887) 9 All 411 (413): 1887 All W N 58; *Atar Singh* v. *Lajpat Rai*, 1884 Pun Re No 19; *Haji* v. *Atharaman*, (1884) 7 Mad 512 (514) [Case under S. 312 of the old Code—The period allowed there was 60 days].

Note 13.

(1) *Shib Kumar* v. *Sheo Ghulam*, 1922 All 90 (90): 20 All L J 11: 64 Ind Cas 932. 41 All 209; *Tota Ram* v. *Khub Chand*, (1885) 7 All 253 (256): 1885 All W N 17; *Baldeo Singh* v. *Kishen*, (1887) 9 All 411 (413): 1887 All W N 58; *Kanthi* v. *Banker*, (1878-80) 2 All 396 (398). *Gopal Singh* v. *Dular Kuar*, (1878-80) 2 All 352 (353, 354): 4 Ind Jur 468; *Bhiaron Din Singh* v. *Ram Sahai*, (1881) 3 All 316 (320); *Shahsi Bhushan Banerjee* v. *Charu Shila Debi*, (1916) 36 Ind Cas 809 (810) Cal; *Brijoy Singh* v. *Hukum Chand*, (1902) 29 Cal 518 (552); *Dakshina Mohan Roy* v. *Srimati Basumati*, (1900) 4 Cal W N 474 (479); *Anand Chunder Roy* v. *Natai Bhoomij*, (1889) 16 Cal 429 (432); *Vedala Lakshminarasamnah* v. *Pucha Lakshmi Ammal*, (1912) 14 Ind Cas 326 (326): (1912) 1 Mad W N 756; *Balkrishna* v. *N M Chitnavis*, 1932 Nag 14: 27 Nag L R 339: 135 Ind Cas 412; *Ram Das* v. *Bhagwat Narain Singh*, 1931 Pat 97 (98): 134 Ind Cas 533: 12 Pat L Tim 505. See *Bhagwan Das* v. *Amritsar National Bank Ltd.* 1928 Lah 675 (676): 111 Ind Cas 132 [A judgment-debtor who has been adjudicated an insolvent cannot appeal from an order confirming sale of his property]; *Lalman* v. *Rama Lal*, 1882 All W N 117 (117). But see *Mst Mana Koer* v. *Luchmun Bhagat*, (1878) 1 Cal L Rep 250 (251); *Barkat Hussein* v. *Mojdoonissa*, (1879) 3 Cal L Rep 208 (210); *Mt Hurdei Bechi* v. *Baboo Nurjoo Pershad*, (1874) 6 N W P H C R 309.

(2) *Bahadur Ali Khan* v. *Co-operative Credit Society*, 1929 Lah 778 (779): 120 Ind Cas 165; *Brij Kumar Lal Saha* v. *Jagadamba Prasad*, 1929 All 671 (672): 121 Ind Cas 270; *Aditya Dat Ram* v. *Jaujwan Das*, 1927 Oudh 23 (24): 98 Ind Cas 69. But see *Ganga Prasad* v. *Jag Lal Rai*, (1889) 11 All 333 (337): 1889 All W N 115: 13 Ind Jur 471.

(3) *Gulab Singh Bhagwan Singh* v. *Kishen Singh Man Singh*, 1929 Lah 438 (439): [illegible] and Cas 231.

(4) *Rustomji Kursetji* v. *Peroz Shah*, 1925 Sind 253 (254): 18 Sind L R 130: 86 Ind Cas 1045.

(5) *T R Sundaraswamiar* v. *K R Narayanaswamiar*, 1928 Mad 1107 (1107): 109 Ind Cas 722 [Madras Estates Land Act—No appeal lies]; *Dhiramoyi Dasi* v. *Anantram Chakravarthy*, (1918) 46 Ind Cas 748 (750) Cal [Bengal Tenancy Act—No appeal lies]; *Md Yusuf Ali Khan* v. *Hasan Fatima*, (1905) 2 All L Jour 130 (131): 1905 All W N 55 [Agra Tenancy Act—No appeal lies].

(6) *Narayan* v. *Rasul Khan*, (1899) 23 Bom 531 (534): 1 Bom L R 33; *Rangini Sundari Dasya* v. *Hiralal Biswas*, 1930 Cal 249 (250): 33 Cal W N 1170: 126 Ind Cas 207; *Banshidhar* v. *Chhaunal Bibi*, 1926 Cal 400: 90 Ind Cas 228: 42 Cal L Jour 176; *Jagadish Narain* v. *Mahamuddin Mahomed*, (1918) 46 Ind Cas 529 (529) Cal; *Surendra Mohini* v. *Loharam*, (1912) 14 Ind Cas 67 (68): 16 Cal W N 570: 39 Cal 687; *Umkanto* v. *Dino Nath*, (1901) 28 Cal 4 (6): 5 Cal W N 124; *Aubhoy Dassi* v. *Padmo Lochun Mondal*, (1895) 22 Cal 802 (804); *Gopi Koeri* v. *Gopi Lal*, (1894) 21 Cal 799 (802); *Nana Kumar* v. *Golam Chunder*, (1891) 18 Cal 422 (426); *Lachmipat* v. *Mandil Koer*, (1898) 3 Cal W N 333 (335); *Kooldeep Narain Singh* v. *Luckhun Singh*, (1868) 9 Suth W R 218 (220, 223): Beng L R Sup Vol 917; *Mahomed Hossein* v. *Sheikh Afzul Ali*, Beng L R Sup Vol App 1: 1 Suth W R F B 83: Marsh 296: 2 Hay 293; *Bhajun Ram Tewaree* v. *Lalla Ojoo Dhya Pershad*, (1865) 2 Suth W R Mis 29 (30); *Kooldep Singh* alias *Lodoo Singh* v. *Juggurnath Singh*, (1865) 2 Suth W R Mis 19 (19); *Jhanda* v. *Muhammad Ismail*, 1927 Lah 808 (809): 28 Pun L R 130: 101 Ind Cas 520; *Wasudeo* v. *Hiralal*, (1912) 17 Ind Cas 884 (884, 885): 8 Nag L R 177; *Tung Nath* v. *Kandhaiya Lal*, (1917) 41 Ind Cas 121 (121): 4 Oudh L J 372; *Maung Shwe Myat* v. *Maung Shwe Ban*, (1917) 39 Ind Cas 374 (375): 2 U B R (1916) 139: 11 Bur L Tim 26. See *Lal Behari Mitra* v. *Nagendra Nath Chatterjee*, (1912) 16 Ind Cas 690 (691): 22 Cal L Jour 266 [Where second appeal lay under S 241 of the old Code, right cannot be defeated by new Code].

(7) *Bansidhar* v. *Gulab Kuar*, (1893) 16 All 113 (119) [No appeal lies]; *Roy Nandipat Mahata* v. *Urquhart*, (1870) 4 Beng L R A C 181: 13 Suth W R 209 [Appeal lies]

O.21, R.92, Notes 15—16.

15. Step-in-aid of execution.—An application or an objection preferred by the decree-holder praying that an application to set aside a sale should not be granted is a step-in-aid of execution within the meaning of Art. 182 of the Limitation Act.[1] But an application merely asking for a confirmation of sale where no application under Rr. 89, 90 or 91 is preferred is not a step-in-aid of execution; inasmuch as it is the duty of the Court to confirm the sale even in the absence of any application for the purpose.[2] Nor will the mere act of confirmation by the *Court* amount to a step-in-aid by the party.[3]

16. Revision.—*See* Note 24 to S. 115 and the undermentioned case.[1]

O.21, R.93, Note 1.

R. **93.** [S. 315.] *Where* a sale of immoveable property is set aside under *rule* 92[2], the purchaser shall be entitled[6] *to an order for repayment of* his purchase-money, with or without interest[7] as the Court may direct, *against* any person to whom *it* has been paid.

Return of purchase-money in certain cases.

[1877—S. 315; 1859—S. 258.]

Synopsis.

1. Legislative changes.
2. "Where a sale of immoveable property is set aside under R. 92."
3. Sale set aside for want of saleable interest.
4. Suit for purchase-money in such cases.
5. Sale set aside for irregularity.
6. What the purchaser is entitled under this rule. See Notes 7 to 10, infra.
7. Interest.
8. Value of improvements effected by him.
9. Poundage fee.
10. Liability for mesne profits.
11. Limitation for such application.
12. Order, under this rule—Executability of.
13. Appeal and Revision.

"Caveat emptor"—Applicability to Court sales. See Note 4, Pt. (1), also Note 3, Pt. (1).

Misrepresentation, fraud or negligence of the decree-holder—Effect. See Note 4, Pt. (4).

1. Legislative changes.—

S. 315 of the old Code ran as follows:—

"Where a sale of immoveable property is set aside under S. 310-A, 312 or 313, or when it is found that the judgment-debtor had no saleable interest in the property which was purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid.

Note 15.

(1) *Gobind Pershad* v. *Rung Lal*, (1894) 21 Cal 23 (26).

(2) *Umesh Chandra Das* v. *Shib Narain Mandal*, (1904) 31 Cal 1011 (1013): 9 Cal W N 193.

(3) *Mohendro Chandra* v. *Mohendro Nath*, (1882) 10 Cal L Rep 330 (330); *Mullick Enayet* v. *Wahed Ali*, (1870) 13 Suth W R 315 (315): *Shib Ram* v. *Banee Madhab*, (1869) 11 Suth W R 117 (117): 2 Beng L R A C 235; *Jugguttmoninee* v. *Ramchand*, (1868) 9 Suth W R 100 (101); *Maharaja of Burdwan* v. *Lackheemonee*, (1867) 8 Suth W R 359 (360); *Dhiraj Mahtab Chand* v. *Ram Brahma*, (1870) 4 Beng L R A C 115: 13 Suth W R 38. But see *Govind Chunder* v. *Junkoor-un-nissa*, (1872) 18 Suth W R 156 (157); *Wahed Ali* v. *Mullick Enayet Hussein*, (1873) 20 Suth W R 31 (33): 12 Beng L R 500; *Gunga Bishen* v. *Dhiraj Mahtab Chand*, (1874) 12 Beng L R 506 Note: 10 Suth W R 224.

Note 16.

(1) *Rustomji Cursetji* v. *Peroz Shah D Minwala*, 1925 Sind 253 (254): 18 Sind L R 130: 86 Ind Cas 1045 [Where sale is set aside under inherent powers, a revision lies].

O.21, R.93, Notes 1—4.

The repayment of the said purchase money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided for by this Code for the execution of a decree for money."

As to the effect of the changes introduced into this rule, *see* Notes 3 and 4 *infra*.

2. "Where a sale of immoveable property is set aside under R. 92." —Where a sale of immoveable property is set aside under R. 92, *supra*, the auction-purchaser is entitled to an order under this rule for repayment of the purchase-money.[1] The decree-holder is also entitled to apply for a fresh sale but limitation therefor under Art. 181 of the Limitation Act does not begin to run until he is compelled to refund the purchase-money.[2]

This rule is applicable to sales for arrear of rent under the Orissa Tenancy Act (II of 1913), S. 228, sub-S. 2, as well as to sales of immoveables under the Chota Nagpur Tenancy Act, *see* R. 95 below.

3. Sale set aside for want of saleable interest.—It has been already mentioned in Notes 1 and 8 to R. 91, *supra* that there is no warranty of title in Court-sales. The purchaser must be taken to buy the property with all risks and all defects in the judgment-debtor's title, except as provided by R. 91 and this rule.[1] But this rule as well as R. 91 will apply only to cases of *entire absence of interest* in the judgment-debtor and not to cases where the judgment-debtor has *some* interest in the property, however small that may be.[2]

Under S. 315 of the old Code the purchaser could *apply* for refund of the purchase-money even where it was found in a *separate suit* that the judgment-debtor had no saleable interest in the property sold.[3] The omission of the words "where it is found that the judgment-debtor has no saleable interest . . . . . " in the present rule, now makes it clear that the purchaser is not entitled to apply for refund of purchase-money unless the sale is set aside *under R.* 92.[4]

Where a Court-sale is set aside on an application under R. 91, *ante* and the auction-purchaser thereupon withdraws the money but the sale is subsequently confirmed by the appellate Court, the Court can, under its inherent powers, compel the auction-purchaser to refund the money so withdrawn.[5]

4. Suit for purchaser-money in such cases.—Where it is found that the judgment-debtor has no saleable interest in the properties sold, can the purchaser institute a suit for refund of purchase-money?

Order 21, Rule 93—Note 2.

(1) *Mathura Prasad* v. *Gauri Shankar Das*, (1910) 6 Ind Cas 564 (565): 12 All 380: 7 All L J 325; *Umesh Chandra Majumdar* v. *Mt Safiatunnessa Khatun*, 1928 Cal 267 (268): 107 Ind Cas 476; *Ghulam Shah* v. *Gaupat Rai*, 1886 Pun Re No 45 (Note); *Mt Prem Vanti* v. *Mukund Lal*, 1883 Pun Re No 183; *Pala Shah* v. *Saad Hamid Shah*, 1883 Pun Re No 68.

(2) *Venkatappa Row* v. *Anjanna*, (1907) 30 Mad 209 (211): 17 Mad L Jour 194.

Note 3.

(1) *Muhammad Rahmat Ullah* v. *Bachcha*, (1905) 27 All 537 (539): 2 All L J 244: 1905 All W N 99; *Shanto Chander Mukerji* v. *Nain Sukh*, (1901) 23 All 355 (357): 1901 All W N 101.

(2) *Nagalinga Chettiar* v. *Guruswami Ayyar*, 1930 Mad 856 (856): 59 Mad L Jour 232: 1930 Mad W N 767: 32 Mad L W 299: 128 Ind Cas 514; *Kuhammad* v. *Chatu*, (1886) 9 Mad 437 (439) [Court has no jurisdiction to order refund in such a case].

(3) *Kunhi Moidin* v. *Tarayil Moidin*, (1885) 8 Mad 101 (103); *Nihal Chand* v. *Jiwan Singh*, 1884 Pun Re No 157. See also *Sivarama* v. *Rama*, (1885) 8 Mad 99 (101) [Applied after a successful resistance to possession].

(4) *Inti Tarini* v. *Komala Bisoyi*, (1917) 37 Ind Cas 763 (763) Mad.

(5) *Sukhdeo Das* v. *Rita Singh*, (1917) 39 Ind Cas 763 (765): 2 Pat L Jour 361: 1 Pat L W 551 [S 144 does not apply to such a case].

O. 21, R. 93, Note 4.

Under the Code of 1859 there was no provision for the return of the purchase-money in cases where the judgment-debtor was found to have no saleable interest. It was, therefore, held applying the general principle of *caveat emptor* that a purchaser could not claim to recover the purchase-money on the ground that the judgment-debtor had no saleable interest.[1] S. 315 of the Code of 1882 gave the purchaser the right to set aside the sale and recover the purchase-money where the judgment-debtor had no saleable interest in the property sold. That section also provided that such right "may be enforced" under the rules provided by this Code for the execution of a decree for money. It was held, however, that the purchaser's remedy was not limited to the procedure prescribed in the execution department but that he could file a separate *suit* for the purchase-money.[2]

Material alterations have been made in this rule and there is a conflict of opinion under this Code as to whether a separate suit will lie. The words "may be enforced, etc." have now been omitted and the words "the purchaser shall be entitled to an *order* for the repayment of his purchase-money" substituted. It has been held by all the High Courts except the High Court of Lahore and the Chief Court of Oudh that the auction-purchaser's right of *suit* has been taken away under this Code and that his only remedy is that prescribed in R. 91, *ante* and this rule.[3] The result is

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Note 4.

(1) *Hira Lal* v. *Karimunnissa*, (1879) 2 All 780 (783, 785); *Ram Narain* v. *Mahtab*, (1880) 2 All 828; *Kelly* v. *Gobind Das*, (1874) 6 N W P 168; *Kalu* v. *Damodhar*, (1871) 9 Bom H C 92; *Krishnapa* v. *Panchapa*, (1889) 6 Bom H C 258; *Dhondu* v. *Ramji*, (1867) 4 Bom H C A C J 114; *Sowdamini* v. *Krishna Kishore*, (1869) 12 Suth W R 8 (10): 4 Beng L R 11 F B; *Golam* v. *Lakhimani*, (1870) 13 Suth W R 273 (275): 5 Beng L R 68; *Shaikh Mahomed Bazirool* v. *S. Abdullah*, 15 Suth W R 196 (196) Note: 4 Beng L R App 35; *Rajib Lochan* v. *Bimalamani Dasi*, (1869) 2 Beng L R A C 82: 10 Suth W R 365. See *Bisseswar Panday* v. *Bhagwan Das*, (1869) 12 Suth W R 176 (177): 3 Beng L R A C 301. But see In the matter of the petition of *Mulo*, (1879) 2 All 299 (300): 4 Ind Jur 359; *Court of Wards* v. *Gaya Prasad*, (1878-80) 2 All 107 (111); *Mt Doolhin Hur Nath* v. *Baijo Ooja*, (1867) 2 Agra 50; *Bank of Hindustan* v. *Premchand*, (1867) 5 Bom H C Oudh Cas 83.

(2) *Munna Singh* v. *Gajadhar Singh*, (1883) 5 All 577 (583, 586, 588, 589): 1883 All W N 130: 8 Ind Jur 264 F B; *Girdhar Das* v. *Sidheswari Prasad Narain Singh* v. *Mayanand Gir*, 697 (698): 40 All 411: 16 All L J 236; *Sidheswari Prasad Narain Singh* v. *Mayanand Gir*, (1913) 19 Ind Cas 986 (988): 11 All L J 606: 35 All 419; *Kishen Lal* v. *Muhammad*, (1891) 13 All 383 (385): 1891 All W N 138 [Can recover money rateably distributed]; *Raghunath Das* v. *Kakkan Mal*, (1881) 3 All 568 (573): 1881 All W N 35; *Sumerchand* v. *Wahid Hussain Khan*, (1906) 3 All L J 819 (825): 1906 All W N 310; *Rustomji* v. *Vinayak Gangadhar*, (1910) 7 Ind Cas 955 (956): 12 Bom L R 723: 35 Bom 29 [Such suit cognisable by Small Cause Court]; *Gurshidawa* v. *Gangaya*, (1898) 22 Bom 783 (785); *Abdulbhai* v. *Nashia*, (1906) 8 Bom L R 369 (370) [Suit is cognizable by Court of Small Causes]; *Ram Kumar Shaha Poddar* v. *Ram Gour*, (1909) 2 Ind Cas 559 (561): 13 Cal W N 1080: 10 Cal L Jour 558: 37 Cal 67; *Surendra Nath Ghose* v. *Beni Madhab Misra*, (1906) 10 Cal W N 274 (275, 276); *Nityanand Roy* v. *Juggat Chandra Guha*, (1903) 7 Cal W N 105 (107); *Hari Doyal Singh Roy* v. *Sheikh Samsuddin*, (1901) 5 Cal W N 240 (241); *Prasanna Kumar Khan* v. *Uma Charan Hazra*, (1896) 1 Cal W N 140 (141) [Suit cognizable by Small Cause Court]; *Benode Behari* v. *Mohesh Chunder*, (1883) 12 Cal L Rep 331 (332); *Pichu Ayyar* v. *Palaniappa Chettiar*, (1910) 6 Ind Cas 291 (291): 7 Mad L Tim 232 [Can recover money rateably distributed]; *Nilkanta* v. *Imamshahib*, (1893) 16 Mad 361 (362, 363): 3 Mad L Jour 134; *Sundara* v. *Venkata*, (1894) 17 Mad 228 (230, 231): 3 Mad L Jour 293; *Pachayappan* v. *Narayana*, (1888) 11 Mad 269 (274): 12 Ind Jur 92 and 381 [Is not of a nature cognisable by Small Cause Court]. But see *Maung Tun* v. *Ma Ngan*, (1909) 3 Ind Cas 672 (675, 679): 5 L B R 58.

(3) *Ram Saroop* v. *Dalpat Rai*, 1921 All 377 (381, 384): 43 All 60: 58 Ind Cas 105: 18 All L J 905; *Man Mohan Lal* v. *Gopi Nath*, (1918) 46 Ind Cas 103 (103): 16 All L J 511; *Nannu Lal* v. *Bhagwan Das*, (1917) 37 Ind Cas 9 (10): 14 All L J 1216: 39 All 114; *Balwant Ranganath* v. *Bala Malu*, 1922 Bom 205 (206): 24 Bom L R 308: 67 Ind Cas 360: 46 Bom 833; *Raja Rishee Case Law* v. *Manik Molla*, 1926 Cal 971 (973, 974): 43 Cal L Jour 418: 96 Ind Cas 64: 53 Cal 758; *Banka Behari Das* v. *Guru Das Dhar*, 1924 Cal 172 (172): 28 Cal W N 20: 80 Ind Cas 257: 40 Cal L Jour 157; *Bipin Behari Ghosh* v. *Hari Charan Ghosh*, (1921) 64 Ind Cas 628 (629) Cal; *Juranu Mahomed* v. *Jathi Mahomed*, (1918) 46 Ind Cas 783 (784): 22 Cal W N 760; *Prasanna Kumar Bhattacharjee* v. *Ibrahim Mirza*, (1917) 41 Ind Cas 924 (927) Cal; *Makar Ali* v. *Sarfaddin*, 1923 Cal 85 (88, 89): 36 Cal L Jour 132: 27 Cal W N 183: 50 Cal 115: 70 Ind Cas 606; *Subbu Reddi* v. *Ponnambala Reddi*, (1919) 49 Ind Cas 359 (361): 1918 Mad W N 655; *Tirumalasami Naidu* v. *Subramaniam Chettiar*, (1918) 45 Ind Cas 109 (110): 40 Mad 1009 [*Obiter*]; *Lakmichand* v. *Chaturbhuj*, 1921 Nag 60 (62, 63): 4 Nag L J 274: 65 Ind Cas 230; *Dewaji* v. *Amrita*, (1919) 52 Ind Cas 818 (821): 15 Nag L R 140; *Krishnaji* v. *Ladhuram Marwadi*, (1917) 42 Ind Cas 440 (443) Nag; *Govind* v. *Shankar*, (1917) 42 Ind Cas 453 (454) Nag; *Nagendra Nath Ghosh* v. *Sambhu Nath Pandey*, 1925 Pat 106 (110): 3 Pat 947: 88 Ind Cas 219: 6 Pat L Tim 769; *Maung Naung* v. *Maung Ba Gyi*, 1926 Rang 272 (273): 6 Rang

O.21, R.93, Notes 4—6.

that where a purchaser finds, after the expiry of thirty days from the date of the sale, that the judgment-debtor has no saleable interest in the property sold, he has no remedy whatever. Where, however, the purchaser is induced to buy the property on account of fraud or misrepresentation or gross neglect of duty on the part of the decree-holder, he can maintain a suit for the recovery of purchase money.[4] The High Court of Lahore and the Chief Court of Oudh have taken the view that R. 92 *ante* and this rule have no application to a case where the auction-purchaser has been deprived of the property purchased by him after the confirmation of the sale owing to the action of a person having paramount title to it and on the ground that the judgment-debtor had no saleable interest in it; that in such cases he obtains a right under the *substantive law* for refund of the purchase money; and not under this rule.[5]

The right of the auction-purchaser to maintain a suit for refund of purchase-money in cases where the sale took place while the old Code was in force must be determined with reference to the provisions of that code.[6]

Where certain properties are sold in execution of a mortgage decree and in a separate suit by a defendant, it is declared that the *decree* and the sale in execution are not binding on him and the auction-purchaser is deprived of the property, he is entitled to apply for refund of the purchase-money under S. 47.[7]

5. **Sale set aside for irregularity.**—Where a sale is set aside on account of material irregularity the auction-purchaser is entitled to sue and recover from the decree-holder the amount of poundage which was deducted from the purchase-money deposited by him, as well as interest on such deposit.[1] The reason is that the right of suit in such a case exists *independently of the Code* and the words "shall be entitled to an order for repayment" do not take away the right of suit to enforce the same.

6. **What the purchaser is entitled under this rule.**—*See* Notes 7 to 10, *infra*.

408; 112 Ind Cas 436; *U Pae* v. *N R M A Chetty*, (1921) 61 Ind Cas 805 (806); 13 Bur L Tim 152; *Soodomaya Dassin Singi* v. *S S A O Chetty Firm*, (1919) 52 Ind Cas 174 (176, 177); 12 Bur L Tim 211. But see *Muhammad Najibullah* v. *Jai Narain*, (1915) 36 All 529 (531); 12 All L J 908; 26 Ind Cas 59; *Biraj Bonod* v. *Raja Bijoy Sinha*, 1926 Cal 297 (298, 299); 39 Cal W N 79; 91 Ind Cas 768 [So assumed].

(4) *Balwant Rang Nath* v. *Bala Mala* 1922 Bom 205 (207); 24 Bom L R 308; 67 Ind Cas 360; 46 Bom 833; *Raja Rishee Case Law* v. *Manik Molla*, 1926 Cal 971 (974); 43 Cal L Jour 418; 96 Ind Cas 64; 53 Cal 758; *Lakshmichand* v. *Chaturbhuj*, 1921 Nag 60 (63); 4 Nag L J 274; 65 Ind Cas 230; *Govind* v. *Shankar*, (1917) 42 Ind Cas 453 (454) Nag.

(5) *Mehar Chand* v. *Mikhi Ram*, 1932 Lah 401 (411, 412); 138 Ind Cas 47; 33 Pun L R 649 F B; *Asadullah Khan* v. *Karam Chand*, 1924 Lah 115 (115); 4 Lah 354; 6 Lah L Jour 67; 76 Ind Cas 695; *Bahadur Singh* v. *Ram Phal*, 1930 Oudh 148 (153, 159); 7 Oudh W N 232; 124 Ind Cas 641; 5 Luck 552. The following cases are no longer law:—*Habib-ud-din* v. *Hatim Mirza*, 1925 Lah 467 (469); 6 Lah 283; 86 Ind Cas 622; 26 Pun L R 133; *Hatim Mirza* v. *Bhaowana*, 1925 Lah 199 (201); 78 Ind Cas 517; *Ram Dayal* v. *Rampat Singh*, (1919) 51 Ind Cas 95 (97); 6 Oudh L J 160; 22 Oudh Cas 42.

(6) *Makar Ali* v. *Sarfuddin*, 1923 Cal 85 (90); 36 Cal L Jour 132; 27 Cal W N 183; 50 Cal 115; 70 Ind Cas 606. See *Mahadeen Ibrahim* v. *Mahamed Meera Levvai*, (1912) 17 Ind Cas 437; 12 Mad L Tim 431; 23 Mad L Jour 187; 1912 Mad W N 1130.

(7) *Bindeshri Prasad* v. *Badal Singh*, 1923 All 391 (396); 21 All L J 228; 45 All 369; 4 L R (All) Civ 161; 74 Ind Cas 873 F B. See also *Makunda Lal* v. *Kaunsila*, (1876) 1 All 568 (579).

Note 5.

(1) *Parvathi Ammal* v. *Govindaswami*, (1915) 30 Ind Cas 827 (829, 830); 39 Mad 803; 2 Mad L W 861; 29 Mad L Jour 467; 1915 Mad W N 797.

O.21, R.93, Notes 7—13.

7. **Interest.**—When a sale is set aside and a refund of purchase-money is ordered, under this rule, the Court has got power to award interest on the amount of the purchase-money.[1]

8. **Value of improvements effected by him.**—Where the auction-purchaser gets into possession of the properties sold to him and effects improvements thereon, he is entitled to compensation for such improvements, upon the sale being set aside.[1]

9. **Poundage fee.**—Where a sale is set aside under R. 92, the purchaser is entitled to a refund of the poundage fee paid by him, but is not entitled to recover it from the judgment-debtor.[1]

As to a suit for recovery of poundage fee *see* Note 5 *ante*.

10. **Liability for mesne profits.**—When an order for refund of purchase-money is made under this rule, the purchaser must account to the judgment-debtor for the rents and profits realised by him, if he has been in possession of the properties purchased.[1]

11. **Limitation for such application.**—The period of limitation for an application under this rule is three years under Art. 181 of the Limitation Act, 1908, from the date of the order setting aside the sale.[1] Art. 120 of the Limitation Act will apply to cases where it has been held that a *suit* lies for the refund of purchase-money.[2]

12. **Order under this rule—Executability of.**—A purchaser, who has obtained an order for refund of purchase-money under this rule, can execute the order as if it were a decree.[1]

13. **Appeal and revision.**—No appeal lies against an order under this rule, granting, or refusing, refund of the purchase-money to the purchaser.[1] But where the executing Court ordered refund in a case where the judgment-debtor had *some* saleable interest, it was held that the order was without jurisdiction and should be set aside in revision.[2]

Note 7.

(1) *Maharaj Bahadur Singh* v. *A H Forbes*, 1921 P C 27 (27): 19 All L J 101: 23 Bom L R 727: 33 Cal L Jour 176: 25 Cal W N 366: 40 Mad L Jour 141: 13 Mad L W 217: 1921 Mad W N 26: 30 Mad L Tim 187: 6 Pat L Jour 129: 2 Pat L Tim 115: 59 Ind Cas 782 [Even though the security bond taken did not provide for interest, Court can award interest]; *Sati Nath* v. *Ratanmani Naskar*, (1917) 41 Ind Cas 200 (202) Cal; *Jogendro Nath* v. *Govind Chunder*, (1886) 12 Cal 252 (256); *Govind Lal* v. *Punjab National Bank, Ltd, Bhera*, 1929 Lah 617 (618): 30 Pun L R 439: 116 Ind Cas 715. See *Raghubar* v. *Bank of Upper India*, (1883) 5 All 364 (365): 1883 All W N 51 F B; *Kunhi Moidin* v. *Yarail Moidin*, (1885) 8 Mad 101 (103) [If the purchaser himself has contributed to the loss he has incurred, interest *may be refused*]; *Kishun Lal* v. *Md Safdar Ali Khan*, (1891) 13 All 383 (386): 1891 All 138 [Where a person claims more than what he is entitled to, the Court may refuse interest].

Note 8.

(1) *E Morgan* v. *Moulvie Abdool Hye*, (1875) 23 Suth W R 393 (395); *Beni Madho Singh* v. *Pran Singh*, (1912) 14 Ind Cas 456 (457): 15 Call L Jour 187; *Narayan* v. *Behari Lal*, 1926 Nag 160 (161): 89 Ind Cas 18.

Note 9.

(1) *Raghubar Dayal Sukul* v. *Jadu Nandan Missir*, (1912) 13 Ind Cas 365 (370): 16 Cal W N 736: 15 Cal L Jour 89.

Note 10.

(1) *E Morgan* v. *Moulvie Abdool Hye*, (1875) 23 Suth W R 393 (395); *Beni Madho Singh* v. *Pran Singh*, (1912) 14 Ind Cas 456 (457): 15 Cal L Jour 187.

Note 11.

(1) *Girdhari* v. *Sital*, (1889) 11 All 372 (374): 1889 All W N 113; *Makar Ali* v. *Sarfaddin*, 1923 Cal 85 (88, 89): 36 Cal L Jour 132: 27 Cal W N 183: 50 Cal 115: 70 Ind Cas 606.

(2) *Raja Sidheswari Prasad Narain Singh* v. *Ghoshain Mayanand Gir*, (1913) 19 Ind Cas 986 (988): 35 All 419: 11 All L J 606.

Note 12.

(1) *V Venkataramanamurthi* v. *Sundara Ramiah*, (1918) 47 Ind Cas 630 (631): 23 Mad L Tim 355.

Note 13.

(1) *Rahim Baksh* v. *Dhuri*, (1890) 12 All 397 (399): 1890 All W N 135; *Debi Das* v. *Sujan Singh*, 1884 All W N 178 (178); *Lingam Krishna Bhupati Devu Garu* v. *Jogani Venkataswamy*, (1916) 33 Ind Cas 235 (236): 3 Mad L W 105: (1916) 1 Mad W N 109; *Kunhamed* v. *Chathu*, (1886) 9 Mad 437 (439).

(2) *Kunhamed* v. *Chathu*, (1886) 9 Mad 437 (439).

0.21, R.94, Notes 1—2.

R. 94. [S. 316.] *Where* a sale of immoveable property has become absolute, the Court shall grant a certificate[2] *specifying*[5] the property sold and the name of the person[4] who at the time of sale is declared to be the purchaser. Such certificate shall bear date *the day on which the* sale *became absolute.*

Certificate to purchaser.

[1877—S. 316; 1859—S. 259.]

Local Amendments.

NAGPUR.

In Rule 94 *add* a comma after the word "Sold" and *insert* the words "the amount of the purchase-money" between the word "Sold" and the word "and".

RANGOON.

The following shall be *inserted* as Rules 94-*A* and 94-*B*:—

"**94-A.** A copy of every sale certificate issued under R. 94 shall be sent forthwith to the Sub-Registrar within whose sub-district the land sold or any part thereof is situate.

Copy of sale certificate to the Sub-Registrar.

"**94-B.** If in execution of a decree any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under Rule 92 (1)."

Certification of name and address of purchaser to Superintendent of Land Records.

Synopsis.

1. Legislative changes.
2. "The Court shall grant a certificate."
3. Certificate, if transfers title.
4. To whom certificate should be granted.
5. Contents of certificate of sale.
6. Construction of sale certificate.
7. Amendment of certificate.
8. What passes at a Court sale.
9. Variance between proclamation of sale and sale certificate.
10. Effect of new interpretation of law on sale.
11. Effect of certificate of sale.
12. Certificate if operates as res judicata.
13. Limitation.
14. Registration of sale certificate.
15. Court-fee on application for sale certificate.
16. Appeal.

Absence of certificate—Title. See Note 3, Pt. (6).

Legal representative entitled to certificate. See Note 4, Pt. (3).

1. Legislative changes.—

This rule corresponds with the first part of S. 316 of the old Code. The latter part of that section has been re-enacted under the present Code in S. 65.

The only important alteration under the present rule is the addition of the words "such certificate shall bear date the day on which the sale became absolute".

2. "The Court shall grant a certificate".—The provisions of this rule are mandatory and impose a positive and imperative duty on the Court to grant a sale certificate.[1] In granting such certificate it is the duty of the Court, not to determine what property is to pass by the sale but merely to

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Order 21, Rule 94—Note 2.

(1) *Baikunti Muar v. Narmda Sundari Debi,* (1917) 38 Ind Cas 576 (577): 1 Pat L Jour 446: 3 Pat L W 76; *Hari Govind v. Ramachandra,* (1871-72) 9 Bom H C A C J 61 (65).

O.21, R.94, Notes 2—4.

record the already accomplished fact of a transaction that has taken place and to state what has been sold. Its action in granting the certificate is *ministerial* and not judicial.[2]

The provisions of this order do not apply to sales by receivers and the Court neither confirms nor grants certificates in the case of such sales.[3]

This provision applies to sales under the Chota Nagpur Tenancy Act, VI of 1920. *See* S. 50 of the Act.

3. Certificate, if transfers title.—The title of the Court auction-purchaser becomes complete on the confirmation of the sale under R. 92,[1] and under Section 65 the property vests in the purchaser *from the date of sale.*[2] The certificate of sale does not, by itself, create title but is merely evidence of title.[3] As already observed in the previous note the certificate simply records an accomplished fact and states what has been sold.[4] Hence a mere omission to obtain the certificate does not destroy or take away the title of the purchaser.[5] He can prove his title and purchase by evidence *aliunde.*[6] The production of the order of confirmation of sale is sufficient to prove his title.[7]

4. To whom certificate should be granted.—The person who is declared to be the purchaser after the bids are concluded, is the person in

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(2) *F F Christian* v. *Prasaud Raut*, 1925 Pat 615 (616): 1925 Pat H C C 220: 4 Pat 760: 90 Ind Cas 501: 7 Pat L Tim 280.

(3) *Narain Das* v. *Ram Chandra*, 1926 All 124 (126): 24 All L J 26: 6 L R (All) Civ 610: 99 Ind Cas 116: 48 All 209.

Note 3.

(1) *Salig Ram* v. *Narain Das*, (1910) 5 Ind Cas 263 (264) All, *Juggilal* v. *Hukum Chand*, (1911) 9 Ind Cas 25 (25); *Siraj-ud-din* v. *Munlaz-un-nissa*, (1909) 2 Ind Cas 81 (82) All; *Muzaffar Hussain* v. *Ali Hussain*, (1883) 5 All 297 (299): 1883 All W N 41; *Gobind Ram* v. *Tulsi Ram*, 1887 All W N 217 (218); *Tara Prasad* v. *Nund Kishore*, (1883) 9 Cal 842 (843): 12 Cal L Rep 448; *Lanka Gopalam* v. *Lanka Ratnamma*, (1915) 26 Ind Cas 353 (353, 354): 28 Mad L Jour 666: 1915 Mad W N 15; *Appaya Shetti* v. *Kunhati Behari*, (1907) 30 Mad 214 (215): 17 Mad L Jour 127; *Sawan Mal* v. *Shib Dayal*, (1915) 31 Ind Cas 254 (255): 81 Pun Re 1915: 178 Pun W R 1915.

(2) *Hushmat Ali* v. *Mahewa Estate*, (1918) 45 Ind Cas 248 (249): 5 Oudh L J 31; *Raja Luchmi Nath* v. *Maharaja of Vizianagaram*, (1875) 7 N W P H C R 310; *Umes Chunder Sircar* v. *Zahur Fatima*, (1891) 18 Cal 164 (177): 17 Ind App 201: 5 Sar 507 P C; *Dhobi Roy* v. *Mahadeo Singh*, 1923 Pat 355 (356): 4 Pat L Tim 318: 73 Ind Cas 451: 1 Pat L R 269 [Purchaser entitled to growing crops]. Under the old Code in the absence of S 65 it was held that the purchaser had an equitable interest after sale till confirmation and grant of certificate, *see* the following cases:—*Banke Lal* v. *Jagat Narain*, (1900) 22 All 168 (174): 1900 All W N 31; *Chiddo* v. *Piari Lal*, (1897) 19 All 188 (190): 1897 All W N 14; *Dagdu* v. *Panchamsingh*, (1893) 17 Bom 375 (382); *Chintamanrav Natu* v. *Vithabai*, (1887) 11 Bom 588 (590); *Yeshwant Baburav* v. *Govind Shankar*, (1886) 10 Bom 453 (456); *Nanjundepa* v. *Hemapa Bin Irapa*, (1885) 9 Bom 10 (14); *Khaja Pathanji*, In re, (1880-81) 5 Bom 202 (206); *Prangour Mozoomdar* v. *Himanta Kumari Debya*, (1886) 12 Cal 597 (601); *Adhur Chunder Banerjee* v. *Aghore Nath Aroo*, (1898) 2 Cal W N 589 (591); *Bhawani Koer* v. *Mathura Prasad*, (1908) 7 Cal L Jour 1 (34, 35); *Rameshwar* v. *Mewar Juggeet*, (1885) 11 Cal 341 (342); *Kalee Das* v. *Hur Nath*, 1864 Suth W R (Gap) 279 (279); *Lala Gaya Pershad* v. *Misra Sidh Gopal*, (1905) 8 Oudh Cas 202 (205).

(3) *Promotha Nath* v. *Sorav Dasi*, (1920) 58 Ind Cas 327 (329) 47 Cal 1108: 31 Cal L Jour 463: 24 Cal W N 1011; *Mt Bahuns Koonwar* v. *Lalla Buhoree Lal*, (1872) 18 Suth W R 157 (158): 14 Moo Ind App 496: 10 Beng L R 159: 3 Sar 69; *Chandramoni* v. *Halijennessa*, (1909) 9 Cal L Jour 464 (466): 4 Ind Cas 168; *Mahant Krishna Dayal Gir* v. *Sued Abdul Gafur*, (1917) 40 Ind Cas 13 (28): 2 Pat L Jour 402: 2 Pat L W 229. But see *Parbat* v. *Bindraj*, (1911) 12 Ind Cas 360 (361): 7 Nag L R 134.

(4) *Basir Ali* v. *Hafiz Nazir*, (1915) 30 Ind Cas 406 (407): 43 Cal 124: 9 Cal W N 817.

(5) *Shivaram Narain* v. *Ravji*, (1883) 7 Bom 254 (255): 7 Ind Jur 481; *Naipar Timappa* v. *Bhaskar Paramaya*, (1886) 10 Bom 444 (448); *Krishnaji Ravji Godbole* v. *Ganesh Bapuji Patovardhan*, (1881-82) 6 Bom 139 (142); *Kala Husan* v. *Farid Saheb*, 1887 Bom P J 180 (180); *Bunda Ali Khan* v. *Mt Bibee Ameerun*, (1876) 25 Suth W R 493 (494); *Than Singh* v. *Kazim Ali*, 1893 Pun Re No 92: *Sanwal Singh* v. *Prag Dut*, (1914) 25 Ind Cas 8 (9) Oudh: *Sadagopa* v. *Jamuna Bhai*, (1882) 5 Mad 54 (60).

(6) *Velan* v. *Kumarasami*, (1888) 11 Mad 296 (300); *Brojo Nath* v. *Joggeswar Bagchi*, (1909) 1 Ind Cas 62 (66): 9 Cal L Jour 346; *Tantadhari* v. *Sundar Lal*, (1908) 7 Cal L Jour 384 (385); *Het Ram* v. *Baldeo*, 1894 All W N 54 (54).

(7) *Jagan Nath* v. *Baldeo*, (1883) 5 All 305 (309) 1883 All W N 48; *Doorga Narain Sen* v. *Baney Madhub Mozoomdar*, (1881) 7 Cal 199 (207): 6 Ind Jur 34; *Ajudhia Pershad* v. *Chandan*, 1903 Pun Re No 9: 36 Pun L R 1903; *Benodi Lal Ghose* v. *Tamizuddin*, (1880) 7 Cal L Rep 115 (116).

whose name the certificate should be granted.[1] If there are joint purchasers the certificate should be issued in the names of all of them.[2] If the purchaser is dead. his legal representative is entitled to the certificate.[3] But the Court cannot issue the certificate in favour of an undisclosed principal.[4]

O.21, R.94, Notes 4—6.

5. **Contents of certificate of sale.**—What is sold at a judicial sale is nothing but the property attached, and that property is conclusively described in, and by the schedule to the order of attachment. The certificate should be granted only in respect of the property attached and proclaimed for sale, and not in respect of some other property treating the case as one of misdescription. It was so laid down in *Raja Thakur Barmha* v. *Jiban Ram Marwari*.[1]

In that case *A* mortgaged a 10 annas share of a *mouza* belonging to him. *B*, in execution of a simple money decree against *A*, attached a 6 annas share which was described in the sale proclamation as being subject to a mortgage and got the same sold in Court auction. The auction-purchaser, in applying for the sale certificate contended that the property sold to him, was the unencumbered, 6 annas share and the word 'not' was omitted in the sale proclamation. It was held by the Judicial Committee that the Court has no jurisdiction to issue the certificate describing the property as unencumbered. If in the above illustration no mention is made of the existence of any encumbrance in the sale proclamation, the *prima facie* presumption would be that it is the *unencumbered* 6 annas share that is sought to be attached and sold, and the purchaser would be entitled to the share purchased free from encumbrance.[1a]

The encumbrances existing on the property subject to which the property is sold should be entered in the sale certificate.[2] It is incumbent on the Court to *see* that the certificate is clear and does not furnish materials for fresh litigation.[3]

6. **Construction of sale certificate.**—Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. Where there is *no ambiguity* in the words of the certificate, the object of the certificate would be defeated if it were possible to change its plain meaning by reference to other documents.[1] The Court ought not to embark upon an enquiry as to what was intended to be sold and must be deemed to have been

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Note 4.

(1) *Baburam Mondal* v. *Dalshiau* [illegible] *Namasudrani*, (1920) 51 Ind Cas 726 (727): 24 Cal W N 27. See *Hemanginee* v. *Jug* [illegible] *Narain*, (1869) 12 Suth W R 236 (237).

(1a) *Sheo Narain* v. *Noor Muhammad*, (1907) 29 All 463 (465): 1907 All W N 131: 4 All L J 131. See *Douglas* v. *Collector of Benares*, (1850-51) 5 Moo I A 271 (296, 297): 1 Sar 174: 1 Suth 231 P C.

(2) *Bhabataran Chattopadhya* v. *Dayamohanadini Debi*, 1926 Cal 719 (719): 51 Cal 992: 81 Ind Cas 1029.

(3) In re *Vinayak*, (1900) 24 Bom 120 (122): 1 Bom L R 645.

(4) *The Punjab National Bank* v. *Firm of Idamji Jafferji*, 1928 Sind 54 (54): 105 Ind Cas 880.

Note 5.

(1) (1914) 41 Cal 590 (598, 599): 41 Ind App 38: 18 Cal W N 313: 15 Mad L Tim 137: 12 All L J 156: 19 Cal L Jour 161: 26 Mad L Jour 89: 1914 Mad W N 118: 16 Bom L R 156: 21 Ind Cas 936 P C.

(2) *Shantappa* v. *Subrao*, (1894) 18 Bom 175 (177) F B: In re *Ram Krishna*, (1885) 9 Bom 17 (19): 1884 Bom P J 260.

(3) *Someshwar Rajaram* v. *Manilal Bhailal*, 1932 Bom 210 (212): 34 Bom L R 206: 137 Ind Cas 603.

Note 6.

(1) *Ramhadra Naidu* v. *Kadirinarasami Naicker*, 1922 P C 252 (253): 24 Bom L R 692: 30 Mad L Tim 34: 48 Ind App 155: 44 Mad 483: 14 Mad L W 125: 1921 Mad W N 371: 63 Ind Cas 708 P C. See also *V I S Nambudri* v. *Vykunda Kammathi*, 1923 Mad 48 (49): 16 Mad L W 319: 43 Mad L Jour 477 1922 Mad W N 707: 31 Mad L Tim 363: 69 Ind Cas 1001; *Vasanji*

O.21, R.94, Notes 6—7.

sold, by reference to surrounding circumstances and other documents.[1-a] Thus where, in execution of a mortgage decree, the sale certificate was issued in respect of "the whole of the *Pannai* lands belonging to and enjoyed by the sons of the first defendant", the certificate cannot by reference back to the mortgage deed be construed as limiting, in any way, the extent of the *Pannai* land to which it referred or to exclude any portion of the *Pannai*.[2] Where, however, the terms of the certificate are *ambiguous* and stand in need of explanation evidence may be adduced to clear the ambiguity.[3] Evidence may also be let in to *identify* the property described in the sale certificate.[4] The Court can thus, for this purpose look into the decree[5] and even into the suit document.[6]

The boundaries of the property sold as given in the certificate prevail over the areas mentioned therein.[7] But where the certificate contains only a general description of the boundaries of the whole area sold without specifying the boundaries of the plots sold, the *paimash* and survey numbers should be taken as far more correct description of what is sold, than the boundaries.[8]

7. **Amendment of certificate.**—The Court has inherent juridiction to amend a sale certificate incorrectly describing the property actually sold.[1] Thus the Court can rectify a mistake in the description of the boundaries[2] or correct an apparent error therein as, for instance, where the certificate includes properties which were not sold but advertised for sale.[3] But the Court has no jurisdiction to amend the certificate so as to show the purchase of a larger share of the property than what is stated in the proclamation of sale.[4]

A sale certificate should not be amended without notice to the judgment-debtor.[5]

Bhimbhai v. *Haribhai Monbhai*, (1900) 2 Bom L R 533 (535).

(1-a) *Natesa Patter* v. *Ganapathi*, 1927 Mad 311 (312): 52 Mad L Jour 68: 99 Ind Cas 838; *Mookhya Huruckraj Joshee* v. *Ram Lal Gomashta*, (1870) 14 Suth W R 435 (436); *Krishna Gopal Bhowmik* v. *Hem Chandra Bairagi*, (1918) 46 Ind Cas 908 (909) Cal.

(2) *Ramabhadra Naidu* v. *Kadiriyasami Naicker*, 1922 P C 252 (253): 24 Bom L R 692: 30 Mad L Tim 34: 48 Ind App 155: 44 Mad 483: 14 Mad L W 125: 1921 Mad W N 374: 63 Ind Cas 708 P C.

(3) *Barhamdeo Singh* v. *Ram Narain Singh*, (1914) 22 Ind Cas 280 (282): 19 Cal L Jour 182: *Mukhtar Ahmad* v. *Kabir Ahmad*, 1924 All 856 (857): 78 Ind Cas 666 [Sale certificate having two irreconcilable descriptions]; *Lalla Bissessur* v. *Doolar Chand*, (1874) 22 Suth W R 181 (182): *Pearee Mohun* v. *Gosto Behary*, (1877) 26 Suth W R 104 (104). See also *Rajendra Prasad Saha* v. *Gangan Koer*, (1917) 41 Ind Cas 282 (283): 2 Pat L Jour 623: 2 Pat L W 81.

(4) *Promotha Nath Mazumdar* v. *Nagendra Nath Mazumdar*, 1930 Cal 235 (236): 33 Cal W N 1211: 125 Ind Cas 603; *Malleebun* v. *Raseeda*, (1876) 25 Suth W R 401 (403); *Kuleemooddeen* v. *Ashruf Ali*, (1873) 19 Suth W R 276 (277): *Mouda Buksh* v. *Kuruck Lal*, (1867) 7 Suth W R 245 (245). See also *Tara Nath* v. *Joy Soonduree*, (1874) 21 Suth W R 93 (94).

(5) *Mukhtar Ahmad* v. *Kabir Ahmad*, 1924 All 856 (857): 78 Ind Cas 666.

(6) *Pramotha Nath Mazumdar* v. *Nagendra Nath Mazumdar*, 1930 Cal 235 (236): 33 Cal W N 1211: 125 Ind Cas 603.

(7) *Gossain Das Kundu* v. *Mrittunjoy Agnan Sardar*, (1914) 22 Ind Cas 26 (27): 18 Cal L Jour 541; *Raghunandan Thaker* v. *Babu Kishundeo Narain Mahta*, 1926 Pat 257 (257): 7 Pat L Tim 134: 98 Ind Cas 851; *Bhaya Lal* v. *Dwarka Prasad*, (1902) 15 C P L R 163 (166).

(8) *Kuppuswami Ayyangar* v. *Subbaraya Rowtha Minda*, (1912) 13 Ind Cas 324 (325): 22 Mad L Jour 161: 11 Mad L Tim 15: 1912 Mad W N 1. See also *Secretary of State* v. *Narendra Nath*, (1921) 61 Ind Cas 91 (100): 32 Cal L Jour 402.

Note 7.

(1) *Nasiruddin* v. *Sayadur Rahman*, (1914) 23 Ind Cas 811 (812): 19 Cal L Jour 209; *Ram Gopal Barick* v. *Shib Pershad Sircar*, (1869) 12 Suth W R 483 (484).

(2) *Nandi Lal Agrani* v. *Jogendra Chandra Dutta*, 1924 Cal 881 (888): 39 Cal L Jour 222: 28 Cal W N 403: 82 Ind Cas 297.

(3) *Gobinda Chandra* v. *Abhoy Charan*, (1908) 12 Cal W N 1027 (1028).

(4) *Nazir Abshan* v. *Dalip Mahton*, (1913) 18 Ind Cas 725 (726) Cal.

(5) *Yagnasami Ayyar* v. *K Chidambaranatha*, 1922 Mad 63 (65): 1922 Mad W N 180: 65 Ind

O.21, R.94, Note 8.

8. What passes at a Court sale.—The general rule in the case of all private sales in that there is an implied warranty of title, in the absence of a contract to the contrary.[1] This rule, however, does not apply to sales *in invitum*. The principle applicable to such sales is *caveat emptor*.[2] What is sold in such sales is nothing but the *right, title and interest* of the judgment-debtor; all that is guaranteed is, that the purchaser shall have the right and interest whatever they may be of the judgment-debtor, and that the judgment-debtor shall not recover back the properties sold.[2-a] The purchaser gets the property with all the risks and defects in the judgment-debtor's title.[3] In the absence of fraud, he has no remedy of suit against the judgment-debtor or the decree-holder for any defect in the property sold. It is only in cases where the judgment-debtor is proved to have *no saleable interest at all* that the purchaser has got the remedy provided for in R. 91, *viz.*, to apply to set aside the sale.[4] If the sale is set aside he would be entitled to a refund of the purchase-money under R. 93. The purchaser gets the property subject to the same restrictions and equities to which the judgment-debtor himself was subject.[5] Thus if the

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Cas 732: 16 Mad L W 760 [Amendment without notice irregular and revisable]; *Raghu Nundun* v. *Robert Wilson*, (1875) 23 Suth W R 301 (303); *Mackenzie* v. *Ram Peare Koery*, (1913) 20 Ind Cas 588 (590) Cal; *Gurupadapa* v. *Irappa*, (1890) 14 Bom 558 (561).

Note 8.

(1) See S 55 of the Transfer of Property Act, 1882.

(2) *W M Kelly* v. *Seth Gobind Dass*, (1874) 6 N W P 168; *Dhondu* v. *Ramji*, (1866) 4 Bom H C R 114 (117, 118); *Soudamini Chowdhrain* v. *Kishen Kishore Poddar*, (1869) 12 Suth W R 8 (10): 4 Beng L R 11 F B; *Jummal Ali* v. *Terbhee Lall Dass*, (1869) 12 Suth W R 41 (44); *Shahaboodeen* v. *Ramnutty*, (1868) 9 Suth W R 556 (557); *Sheikh Mahomed Basirulla* v. *Sheikh Abdulla*, (1870) 15 Suth W R 196 (Note): 4 Beng L R App 35; *Hassan Ali* v. *Mian Jan Khan*, (1910) 7 Ind Cas 409 (411): 33 All 15: 7 All L J 893.

(2-a) *Dorab Ali Khan* v. *Khazah Mohecoodeen*, (1878) 3 Cal 806 (815): 5 Ind App 116: 2 Cal L Rep 529: 3 Suth 519: 3 Sar 818: 2 Ind Jur 426 P C; *Ram Narain Singh* v. *Mahtab Bibi*, (1880) 2 All 828 (829); *Hiralal* v. *Karimunnissa*, (1880) 2 All 780 (783); *Kishen Lal* v. *Ganga Ram*, (1891) 13 All 28 (51): 1890 All W N 216; *Mohammad Abdul Kadir* v. *Kutub Hussain*, (1887) 9 All 136 (138, 139): 1886 All W N 327; *Akhe Ram* v. *Nand Kishore*, (1875) 1 All 236 (237, 238, 239, 240): 1 Ind Jur 100 F B; *Seth Oudey Kurran* v. *Chaitram*, (1867) 2 Agra 125 (126); *Mahamed Bukh* v. *Mahomed Hussain*, (1868) 3 Agra 171 (174); *Ali Saheb* v. *Kafi Ahmed*, (1891) 16 Bom 197 (199); *Shaikh Abdool Kureem* v. *Soud Jan Ali*, (1867) 18 Suth W R 55 (57); *Kushaba Bin* v. *Pitambar Dhari*, (1875) 12 Bom H C R 15 (16); *Dhurga Dhur Biswas* v. *Huro Mohinace Dabee*, (1909) 13 Cal W N 270 (273): 1 Ind Cas 184; *Abdul Aziz* v. *Amir Ali*, 1923 Cal 166 (168): 67 Ind Cas 149; *Hulkhora Lal* v. *Sheo Churn Lal*, (1875) 24 Suth W R 109 (109); *Baluk Das* v. *Nimaye Chunder*, (1872) 17 Suth W R 511 (512); *Mohamud Haldar* v. *Akial Mehaldar*, (1868) 9 Suth W R 118 (119); *Barton* v. *Brija Nath*, (1865) 3 Suth W R 65 (65); *Gangaram* v. *Yashodhabai*, (1917) 13 Nag L R 163 (164): 42 Ind Cas 261; *Babu Mahendra Nath Dab Singh* v. *Jadunath Singh*, (1913) 21 Ind Cas 262 (264) Oudh [Sale in execution of joint and several decree]; *Fakir Mahomed* v. *Aga Mahomed Ali*, (1911) 12 Ind Cas 831 (832): 4 Bur L Tim 135; *Kunhammad* v. *Kutti*, (1889) 12 Mad 90 (91) [Decree against some of the heirs of a deceased judgment-debtor the interests of the other heirs do not pass in execution sale]; *Annamathammessa* v. *Lutchmeeput*, (1879) 4 Cal 142 (156): 2 Cal L Rep 223: 1 Shome L R 219 F B, (Do.); *Sitanath* v. *Luchmiput*, (1882) 11 Cal L Rep 268 (272), (Do.); *Hendry* v. *Mutty Lal*, (1876) 2 Cal 395 (398), (Do.); *Davalava* v. *Bhimaji Dhondu*, (1896) 20 Bom 338 (345) [Unless the other heirs are liable for the decree debt]; *Kurshet Bibi* v. *Keso*, (1888) 12 Bom 101 (103), (Do.); *Shadi Ram* v. *Amin Chand*, 1930 Lah 937 (941): 12 Lah L Jour 203: 130 Ind Cas 513.

(3) *Shantochandar Mukerji* v. *Nain Sukh*, (1901) 23 All 355 (357): 1901 All W N 101; *Krishnapa* v. *Panchapa*, (1869) 6 Bom H C R 258 (262); *Sonaram* v. *Mohiram*, (1901) 28 Cal 235 (237).

(4) *Muhammad* v. *Bacheho*, (1905) 27 All 537 (539): 2 All L J 244: 1905 All W N 99; *Ram Narain* v. *Mahtab Bibi*, (1878) 2 All 828 (830); *Dossi* v. *Amrita*, (1902) 29 Cal 370 (374); *Administrator-General* v. *Aghore*, (1902) 29 Cal 420 (424): 6 Cal W N 873; *Kissorymohan Rai* v. *Kalichurn Ghose*, (1896) 1 Cal W N 106 (109) [Registrar's sale—Compensation awarded for deficiency]; *Banku Behari Das* v. *Guru Das Dhar*, 1924 Cal 172 (172): 28 Cal W N 20: 80 Ind Cas 257: 40 Cal L Jour 157; *Ram Narain* v. *Dwarkanath*, (1900) 27 Cal 264 (267): 1 Cal W N 13; *Sundara Gopalan* v. *Venkata Varada*, (1894) 17 Mad 228 (230, 231): 3 Mad L Jour 293; *Sabapathi Pillay* v. *Thandavaroya Odayar*, (1920) 54 Ind Cas 515 (517): 43 Mad 309: 37 Mad L Jour 620: 11 Mad L W 108.

(5) *Kinlock* v. *Collector of Etawah*, (1881) 3 All 433 (435): 1881 All W N 1; *Ahamaduddin* v. *Majlis Rai*, (1881) 3 All 12 (14); *Zalim* v. *Chooneo Lal*, (1868) 3 Agra 194; *Pandit Hanuman Dat* v. *Mutti Assad-ullah*, (1875) 7 N W P H C 115; *Kalian Das* v. *Bhagirathi*, (1883) 6 All 47 (48): 1883 All W N 198 F B; *Gladstone* v. *Sonatan Pal*, 1925 Cal 485 (491): 78 Ind Cas 668; *Bhut Nath Chatterjee* v. *Ram Nath Naskar*, 1921 Cal 199 (201): 48 Cal 93; *Nanda Lal Agrani* v. *Jogendra Chandra Dutta*, 1924 Cal 881 (886): 39 Cal L Jour 222: 28 Cal W N 103: 82 Ind Cas 297; *Pareshnath* v. *Anandnath*, (1883) 9 Cal 265 (270): 9 Ind App 147: 4 Sar 384:

O.21, R.94, Note 8.

property is subject to any valid encumbrance, the purchaser gets it subject to the same[6] although if the encumbrance turns out to be invalid the benefit of it goes exclusively to the purchaser.[7] Similarly, if the property is subject to a lease or liable for arrears of revenue, the purchaser is also bound by the same.[8] So also where any plea of limitation could have been successfully urged against the judgment-debtor it can also be availed of against the purchaser.[9] If the judgment-debtor had sold the property *benami* in the name of his wife and she as ostensible owner mortgaged it to a third person, the subsequent purchaser in Court sale cannot acquire any superior right to that of the mortgagee.[10] But a mere omission on the part of the judgment-debtor to take an objection as to want of jurisdiction to execute the decree in another execution proceeding against him, will not operate as an estoppel so as to defeat the rights of the purchaser.[11] The Court-sale would also be effected by *lis pendens* if the sale is held during the pendency of a suit relating to the same property.[12]

The words 'right, title and interest of the judgment-debtor' are ambiguous words and, in order to determine what passes to the purchaser at a Court-sale, regard must be had to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place.[13]

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5 Shome L R 127: 6 Ind Jur 549 P C; *Ram Lochan* v. *Ramnarain*, (1878) 1 Cal L Rep 296 (313); *Chandi* v. *Katyani Debi*, 1922 Cal 87 (91): 35 Cal L Jour 292: 69 Ind Cas 126: 49 Cal 948; *Parbhulal* v. *Mylne*, (1887) 14 Cal 401 (414); *Kishory Mohun* v. *Mahomed Mujaffar*, (1884) 18 Cal 188 (198); *Bhuggobutty Dassee* v. *Shama Churn Bose*, (1876) 1 Cal 337 (353); *Dewan Roy* v. *O Riddell*, (1868) 9 Suth W R 521 (521); *Konapa* v. *Janardan*, (1874) 11 Bom H C R 193 (194).

(6) *Bharat Indu* v. *Gobardhan Das*, (1915) 28 Ind Cas 901 (903, 904) All; *Ganesh Narain Khare* v. *Gopal Vishnu Apte*, (1917) 39 Ind Cas 3 (5): 41 Bom 357: 19 Bom L R 75; *Rup Chand* v. *Daulatraw*, (1881) 6 Bom 495 (497); *Ranchodas Daljaldas* v. *Ranchodas Nanabai*, (1875) 1 Bom 581 (585); *Prayag Raj* v. *Sidhu Prasad*, (1908) 35 Cal 877 (886); *Shyama Churn* v. *Ananda Chandra*, (1898-99) 3 Cal W N 323 (325); *Janoky Bullubh Sen* v. *Johiruddin Mahomed Abu Ali Soher Chowdhery*, (1884) 10 Cal 567 (571): 8 Ind Jur 565; *Gadadhar Mandal* v. *Manaka Dassi*, 1926 Cal 859 (860): 94 Ind Cas 391; *Land Mortgage Bank* v. *Ram Ruttun*, (1874) 21 Suth W R 270 (271); *Oojagur Roy* v. *Ram Khelawan*, (1868) 10 Suth W R 384 (384); *Jogul Kishore* v. *Bhukha Chowdhery*, (1868) 9 Suth W R 243 (245, 246); *Gurdit Singh* v. *Hakumat Rai*, 1932 Lah 56 (57): 135 Ind Cas 201: 32 Pun L R 759; *Ram Chandra* v. *Hazi Kassim*, (1893) 16 Mad 201 (211, 213); *Govindrao* v. *Hirchand*, 1926 Nag 446 (447): 95 Ind Cas 563; *Pandurang* v. *Narayan*, 1924 Nag 111 (111): 6 Nag L J 78: 76 Ind Cas 615; *Sri Chand* v. *Naidar Singh*, (1911) 8 All L J 407 (408): 10 Ind Cas 14 [Purchaser can plead that interest is unconscionable]; *Ramkumar* v. *Dwarka Prasad*, (1912) 15 Oudh Cas 211 (218): 15 Ind Cas 5; *U Po Hla* v. *U Po Tha*, 1927 Rang 332 (333): 6 Bur L Jour 230: 106 Ind Cas 861.

(7) *Izzatunnissa* v. *Partab Singh*, (1909) 31 All 583 (589): 26 Ind App 203: 19 Mad L Jour 682: 11 Bom L R 1220: 6 All L J 817: 13 Cal W N 1143: 3 Ind Cas 793: 10 Cal L Jour 313: 6 Mad L Tim 277 P C; *Ganesh* v. *Purshottam*, (1909) 1 Ind Cas 106 (108): 33 Bom 311: 5 Mad L Tim 228: 11 Bom L R 26; *Mitsui Busan Kaisha, Ltd* v. *Padmaraj Fulchand*, 1923 Nag 219 (221): 72 Ind Cas 461: 6 Nag L J 217.

(8) *Chatraput* v. *Grindra Chunder*, (1881) 6 Cal 389 (391): 7 Cal L Rep 456; *Rajah Enayat Hossein* v. *Girdharee Lal*, (1869) 11 Suth W R P C 29 (30): 12 Moo Ind App 366: 2 Beng L R P C 75: 2 Suth 202: 2 Sar 455 P C; *Banee Pershad* v. *Reet Bhujan*, (1868) 10 Suth W R 325 (325); *Khoda Buksh* v. *Degambaree*, (1864) Suth W R 207 (207); *Ramani Pershad* v. *Mahant Gossain*, (1904) 31 Cal 380 (383).

(9) *Shridhar Vinayak* v. *Babaji*, (1886) 6 Bom H C R 220 (223).

(10) *Mahomed Mozuffer Hossein* v. *Kishore Mohan Roy*, (1895) 22 Cal 909 (919): 5 Mad L Jour 101: 6 Sar 583: 22 Ind App 129 P C.

(11) *Veerappa* v. *Ramasami*, (1919) 53 Ind Cas 579 (583): 43 Mad 135: 11 Mad L W 232: 26 Mad L Tim 271: 37 Mad L Jour 442.

(12) *Radhamadhub* v. *Monohur*, (1888) 15 Cal 756 (761): 15 Ind App 97: 5 Sar 211: 12 Ind Jur 297 P C; *Mahomed Tayab* v. *Hem Chandra Bose*, (1909) 10 Cal L Jour 590 (592): 4 Ind Cas 731; *Surjiram* v. *Barhamdeo*, (1905) 2 Cal L Jour 202 (214): 1 Cal L Jour 337; *Deno Nath* v. *Shama Bibi*, (1900) 28 Cal 23 (27): 4 Cal W N 740; *Har Shankar* v. *Shew Gobind*, (1899) 26 Cal 966 (970): 4 Cal W N 317; *Gobind* v. *Guru Churn*, (1888) 15 Cal 94 (99); *Jharoo* v. *Raj Chunder*, (1886) 12 Cal 299 (301); *Lala Kali Prasad* v. *Buli Singh*, (1879) 4 Cal 789 (792): 3 Cal L Rep 396: 4 Ind Jur 75; *Mati Lal* v. *Preo Nath*, (1909) 9 Cal L Jour 96 (98, 103): 13 Cal W N 226: 3 Ind Cas 696; *Kadir Mohideen* v. *Muthu Krishna*, (1903) 26 Mad 230 (236): 12 Mad L Jour 368; *Mahesh Bakhsh Singh* v. *Manohar Lal*, (1915) 18 Oudh Cas 369 (371): 33 Ind Cas 657.

(13) *Akhoy Kumar* v. *Bejoy Chand*, (1902) 29 Cal 813 (819); *Appaji Bapuji* v. *Keshav Shamrav*, (1889) 15 Bom 13 (18, 19); *Mt Gurdevi* v. *Kharaiti Mal*, 1927 Lah 685 (687): 104 Ind Cas 222: 10 Lah L Jour 23 [Purchaser not bound to look behind the decree]; *Girdharee Lal* v. *Kantoo Lal*, (1874) 22 Suth W R 56 (59): 14 Beng L R 187: 1 Ind App 321: 3 Sar 380, (Do.);

In the absence of any limitation, they mean all the interest which the judgment-debtor could have honestly disposed of in the property.[14] The question to be decided in each case is as pointed out by the Judicial Committee "what did the Court intend to sell and what did the purchaser understand that he bought"[15] and this is a mixed question of law and fact in each case.[16] O.21, R.94, Note 8.

Sale in execution of mortgage decree.—In the case of a sale in execution of a mortgage decree, the purchaser acquires the interest of the mortgagor and the mortgagee as *on the date of the mortgage*,[17] whereas in a sale in exe-

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Rewa Mahton v. *Ram Kishen Singh*, (1887) 14 Cal 18 (25): 13 Ind App 106: 10 Ind Jur 428: 4 Sar 746 P C, (Do.).

(14) *Sobhag Chand* v. *Bhal Chand*, (1880) 6 Bom 193 (202): 6 Ind Jur 363 F B; *Bapuji Balal* v. *Satya Bhamabai*, (1881) 6 Bom 490 (493): 6 Ind Jur 590; *Jatha Naik* v. *Venktapa*, (1880) 5 Bom 14 (19, 20): 5 Ind Jur 368; *Kumud Krishna Mandal* v. *Jogendra Nath*, (1917) 41 Ind Cas 511 (513): 21 Cal W N 854: 26 Cal L Jour 250; *Jnan Chandar Das* v. *Rajani Kanta Pal*, (1917) 41 Ind Cas 850 (851): 22 Cal W N 522; *Doolee Chund* v. *Oomda*, (1875) 24 Suth W R 263 (264); *Mathunsa* v. *Apsa*, (1913) 12 Ind Cas 444 (446): 36 Mad 194: 21 Mad L Jour 969: 10 Mad L Tim 373: (1911) 2 Mad W N 425; *Kishen Chunder* v. *Ashooran*, (1863) Marsh 647; *Mookta Sunduree* v. *Muthoora Nath*, (1874) 22 Suth W R 209 (209); *Ramalinga* v. *Samiappa*, (1890) 13 Mad 15 (16) [Right to growing crops also pass]; *Huree Madhub* v. *Hem Chunder*, (1874) 22 Suth W R 522 (522) [Right to easement also passes]; *Faqueer Nonnar* v. *Khuderun*, (1870) 2 N W P H C 251 (252) [Trees on the land not severed also pass]; *Lala Ram Surun* v. *Lokebas Koer*, (1872) 18 Suth W R 39 (39) [Right of decree-holder to question validity of any transaction does not pass to the purchaser]; *Narainrao* v. *Fatlelal*, (1919) 15 Nag L R 18 (50) 43 Ind Cas 907, (Do.).

Sales in execution of rent decree.—*Doolar Chand* v. *Lall Chabeel*, (1878) 3 Cal L Rep 561 (566, 568): 6 Ind App 47: 3 Sar 885: 3 Suth 577 P C; *Parini Charan Sardar* v. *Srish Chandra Pal* 1928 Cal 880 (880): 48 Cal L Jour 97: 32 Cal W N 587; *Jatindra Narain* v. *Chandra Nath Prananik*, 1925 Cal 1217 (1217) 87 Ind Cas 742; *Jnanendra Mohan* v. *Umesh Chandra*, 1922 Cal 514 (518): 26 Cal W N 985 *Niladhri* v. *Bichitranand*, (1910) 37 Cal 823 (829) 14 Cal W N 905: 6 Ind Cas 605: 12 Cal L Jour 158; *Ananda Kumar* v. *Hari Das*, (1909) 27 Cal 545 (549): 4 Cal W N 608; *Nazir Mohamed* v. *Girish Chunder*, (1898) 2 Cal W N 251 (253 254); *Nityi Behari* v. *Hari Gavuda*, (1899) 26 Cal 677 (690, 691, 699); *Ayatullo Sardar* v. *Dwarka Nath*, (1879) 4 Cal 814 (815): 4 Cal L Rep 95; *Muhammad Abdul Kadir* v. *Kutub Husain*, (1887) 9 All 136 (139): 1886 All W N 327; *Bimanand Sawati* v. *Thakur Mahto*, 1923 Pat 592 (595): 4 Pat L Tim 659: 1923 Pat H C C 249: 76 Ind Cas 277; *Durga Prasad* v. *Dineshwar Nath*, (1918) 43 Ind Cas 534 (535): 4 Pat L W 147: 1918 Pat H C C 5

Revenue sales—*Bhawani Kunwar* v. *Mathura Prasad Singh*, (1912) 16 Ind Cas 210 (212): 40 Cal 89: 39 Ind App 228: 16 Cal W N 985: 23 Mad L Jour 311: 14 Bom L R 1046: 16 Cal L Jour 606: 12 Mad L Tim 352: 1912 Mad W N 244 P C; *Kalappa* v *Shiraya*, (1896) 20 Bom 492 (494); *Jatindra Nath* v. *Narayan Das*, 1926 Cal 97 (98): 52 Cal 862: 90 Ind Cas 901; *Musst Raja Koer* v. *Ganga Singh*, (1909) 13 Cal W N 750 (752): 1 Ind Cas 197: 10 Cal L Jour 201; *Nand Kumar* v. *Ajodhya*, (1912) 16 Cal W N 351 (352): 14 Cal L Jour 202: 11 Ind Cas 465; *Ram Nandan Sahay* v. *Jaigobind Pandey*, 1924 Pat 213 (226): 2 Pat 839: 75 Ind Cas 955; *Ram Tuhul Singh* v. *Bisseseswar Lal Sahoo*, (1875) 23 Suth W R 305 (308, 309): 2 Ind App 131: 15 Beng L R 208: 3 Sar 477: 3 Suth 136 P C. *Sale of a Zemindari.*—*Minakshi Nayudu* v. *Immudi Kanaka Ramayya*, (1889) 12 Mad 142 (147): 16 Ind App 1: 5 Sar 271: 13 Ind Jur 9 P C; *Har Lal* v. *Himmat Rai*, (1885) 5 All W N 301 (301): *Durga Singh* v. *Bisheshar Dayal*, (1902) 24 All 218 (224): 1902 All W N 27; *Hasan Ali Khan* v. *Azha Rul Hasan*, (1919) 41 All 45 (47): 16 All L J 900: 48 Ind Cas 367; *Abu Husan* v. *Ramzan Ali*, (1882) 4 All 381 (382): 1882 All W N 73; *Sakhawat Ali Shah* v. *Muhammad Abdul Karim*, (1915) 31 Ind Cas 809 (810): 38 All 59: 13 All L J 1098; *Sonasundara Acalappa Naicker* v. *Murugappa Chettiar*, (1912) 12 Mad L Tim 571 (579: 36 Mad 325: 1913 Mad W N 86: 18 Ind Cas 49: 23 Mad L Jour 658

Sale of an impartible **Zamindari.**—*Muttayan* v. *Zamindar of Sivagiri*, (1883) 6 Mad 1 (16, 18): 9 Ind App 128: 12 Cal L Rep 169: 1 Sar 354: 6 Ind Jur 486: 5 Shome L R 57 P C; *Sivaganga Zamindar* v. *Lakshmana*, (1886) 9 Mad 188 (197, 200); *Abdul Aziz* v. *Appayasami*, (1899) 22 Mad 110 (112) [Sale in execution of decree against minor represented by guardian]; *Vasudev Moribhat Kale* v. *Krishnaji Ballal Gokhale*, (1896) 20 Bom 534 (536); *Natesayyan* v. *Narasimmayyar*, (1890) 13 Mad 480 (483, 484); ***Ganga Prasad Chowdhry*** v. *Umbica Churn Coondoo*, (1887) 14 Cal 754 (757); *Achut* v. *Manjunath*, (1897) 21 Bom 539 (543).

(15) *Pethachi Chettiar* v. *Chinnatambiar*, (1887) 10 Mad 241 (248, 251): 14 Ind App 84: 11 Ind Jur 272: 5 Sar 38 P C. See also *Tara Lal Singh* v. *Sarobar Singh*, (1900) 27 Cal 407 (413): 27 Ind App 33: 4 Cal W N 533: 7 Sar 657: 2 Bom L R 5 P C; *Saharm* v. *Citabai*, 1923 Nag 333 (334): 75 Ind Cas 823.

(16) *Somasundara* v. *Murugappa*, (1913) 36 Mad 325 (339): 1913 Mad W N 86: 12 Mad L Tim 571: 18 Ind Cas 49: 23 Mad L Jour 658; *Alagaraya Gounden* v. *Minakshi Naidu*, (1911) 12 Ind Cas 389 (390): 37 Mad 22: 24 Mad L Jour 652: 10 Mad L Tim 298 (1911) 2 Mad W N 328; *Barkandeo* v. *Rao Narain*, (1913) 19 Cal L Jour 182 (185): 22 Ind Cas 280, *Gowree Kunal* v. *Surat Chunder Dass* (1874) 22 Suth W R 408 (408).

(17) *Manaklal* v. *Shakara*, (1898) 22 Bom 945 (948); *Abdulla Saiba* v. *Abdulla*, (1880) 5 Bom 8 (12, 13); *Mohun* v. *Tuga*, (1886) 10 Bom 224 (226); *Kheiraj Jusrup* v. *Lingaya*, (1880) 5 Bom 2 (5); *Hari* v. *Lakshman*, (1881) 5 Bom 614 (618); *Gopi Vasudev* v. *Markande*, (1878) 3 Bom 30 (33); *Land Mortgage Bank of India* v. *Vishnu Govind*, (1877) 2 Bom 670 (672); *Shringarpure* v. *Pethe*, (1877) 2 Bom 662 (665); *Mahadeo* v. *Narsingh*, 1892 Bom P J 346 (347); *Muhammad Husen* v. *Dharam Singh*, (1895) 18 All 31 (33): 1895 All W N 111, *Abdul Shakur* v. *Mahomed Matin*, 1924 All 307 (308): 22 All L J 202: 5 L R (All) Civ 93: 78 Ind Cas 429: 46 All 414; *Sheoratan* v. *Choley Lal*, (1880)

O.21. R.94, Note 8.

cution of a simple money decree, the purchaser gets the interest of the judgment-debtor as it stood on the date of the attachment freed from all subsequent private alienations.[18] *See also* Note 56 to S. 11.

Sale in execution of decree against member of Hindu family.—In a sale in execution of a decree against an undivided member of a joint Hindu family the purchaser buys only an uncertain and fluctuating interest with the right of converting it at any moment after the purchase, by partition, into definite property.[19] If the purchaser buys certain specific properties as belonging to the share of the judgment-debtor, and in a subsequent partition between the members of the family some of the items purchased are allotted to the share of the other members the purchaser cannot compel the judgment-debtor to give him other properties which the judgment-debtor got in substitution. The reason is that in sale *in invitum* there is *no privity of contract* between the judgment-debtor and the purchaser; there being no act or representation on the part of the former he is not bound by any rule of estoppel.[20] If the judgment-debtor is the *manager* of the undivided family and if he is sued substantially in his capacity as manager, the sale of the right, title and interest of the judgment-debtor will pass the entire interest of all the members of the family provided the debt in respect of which the decree is obtained was incurred for a *legal necessity or for the benefit of the family*.[21] In a joint Hindu family, the father has a disposing power over

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8 All 647 (650, 651, 652): 1881 All W N 43 F B; *Naba Krishna Pal* v. *Mohit Kali Debi*, (1911) 9 Ind Cas 840 (841) Cal; *Raja Janaki Nath Roy* v. *Habibulla Saheb*, 1927 Cal 359 (364): 45 Cal L Jour 151: 100 Ind Cas 413; *B Raj Narain* v. *Sheira Mean*, (1867) 7 Suth W R 67 (67); *Ganguly* v. *Ancha*, (1882) 4 Mad 73 (86, 87): 6 Ind Jur 71 F B; *Tanjore Palace Estate by its Receiver Sundaram Ayyar* v. *Thiyagaraja Pillai*, 1923 Mad 160 (163): 50 Mad L Jour 183; *Sohan Lal* v. *Jot Singh*, (1913) 16 Oudh Cas 148 (154): 20 Ind Cas 458; *Basanta Kumari* v. *Balmakund*, 1923 Pat 371 (373): 1923 Pat H C C 1: 2 Pat 277: 1 Pat L R 338: 72 Ind Cas 912; *Mahabir Pershad* v. *Macnaghten*, (1889) 16 Cal 682 (692): 16 Ind App 107: 5 Sar 345: 13 Ind Jur 133 P C [Mortgagee purchasing with leave of Court not a trustee for the mortgagor]; *Krishnasami Ayyar* v. *Janakiammal*, (1895) 18 Mad 153 (157). (Do.).

(18) *Tarakchandra Bhuttacharju* v. *Baikuntnath*, (1881) 7 Cal 107 (118): 8 Ind App 65: 4 Sar 213: 10 Cal L Rep 281: 5 Ind Jur 376: 4 Shome L R 236 P C; *Coomrao Singh* v. *Shimboo Nath*, (1870) 2 N W P 38 (40, 41); *Ponnappa Pillai* v. *Pappu Vayyangar*, (1882) 4 Mad 1 (65); *Aba* v. *Dhondu*, (1895) 19 Bom 276 (282, 285); *Ram Onoograho* v. *Montorun*, (1866) 6 Suth W R 223 (224, 225); *Syedunnessa Khattum* v. *Amiruddi*, (1917) 41 Ind Cas 353 (357): 45 Cal 294: 21 Cal W N 847; 25 Cal L Jour 629; *Sheikh Baicho* v. *Howard*, (1868) 3 Agra 15 (15).

(19) *Deendyal* v. *Jugdeep Narain*, (1878) 3 Cal 198 (209): 4 Ind App 247: 1 Cal L Rep 49: 3 Sar 730: 1 Ind Jur 604: 3 Suth 468 P C; *Rangasami* v. *Krishnayyan*, (1891) 14 Mad 408 (418): 1 Mad L Jour 603 F B; *Hardai Narain* v. *Ruder Perkash*, (1884) 10 Cal 626 (685): 11 Ind App 26: 4 Sar 510: 8 Ind Jur 211 P C; *Hasan Ammal Bibi* v. *Ismail Moideen*, (1915) 29 Ind Cas 976 (978): 28 Mad L Jour 642: 1915 Mad W N 414; *Udaram Sitaram* v. *Ram Panduji*, (1874) 11 Bom H C R 76 (80, 82); *Pandurang Anandrav* v. *Bhaskar Shadashiv*, (1874) 11 Bom H C R 72 (73, 74); *Rajani Kanth* v. *Ram Nath*, (1884) 10 Cal 244 (246); *Ram Dulari* v. *Balakram*, (1915) 37 All 120 (123): 13 All L J 105: 27 Ind Cas 696.

(20) *Sabapathi Pillai* v. *Thandavaraya Odayar*, (1920) 54 Ind Cas 515 (517): 43 Mad 309: 37 Mad L Jour 620: 11 Mad L W 108; *Vasanji* v. *Lallu*, (1885) 9 Bom 285 (288).

(21) *Baldeo Sonar* v. *Mobarak Ali*, (1902) 29 Cal 583 (586, 587): 6 Cal W N 370; *Jumoona Pershad Singh* v. *Dig Narain Singh*, (1884) 10 Cal 1 (7, 8): 13 Cal L Rep 74: 8 Ind Jur 192; *Sheo Pershad* v. *Saheb Lal*, (1893) 20 Cal 458 (463); *Abilak Roy* v. *Rabbi Roy*, (1885) 11 Cal 293 (295): 9 Ind Jur 425; *Jeo Lal Singh* v. *Gunga Pershad*, (1884) 10 Cal 996 (1001); *Damodar Das* v. *Mahuram*, (1883) 13 Cal L Rep 96 (101); *Hari Vithal* v. *Jairam*, (1890) 14 Bom 597 (602, 604); *Loki Mahtoh* v. *Ajaib Lal*, (1879) 5 Cal 144 (147): 4 Cal L Rep 465: 2 Shome L R 258; *Ramnarain Lal* v. *Bhawani Prasad*, (1881) 3 All 443 (453, 455): 1881 All W N 11: 5 Ind Jur 606 F B; *Lal Singh* v. *Pulandar*, (1906) 28 All 182 (184): 2 All L J 647: 1905 All W N 248; *Phulchand* v. *Lachmi Prasad*, (1882) 4 All 486 (491): 1882 All W N 123: 7 Ind Jur 208; *Sundar Lal* v. *Yakub Ali*, (1884) 6 All 862 (865): 1884 All W N 117; *Balwant Singh* v. *Aman Singh*, (1911) 33 All 7 (13, 14): 7 All L J 852: 7 Ind Cas 112; *Sakharam* v. *Devji*, (1899) 23 Bom 372 (374, 375); *Jankibai* v. *Mahadev*, (1894) 18 Bom 147 (151); *Bhana* v. *Chindu*, (1888) 21 Bom 616 (619); *Jairam Babuji* v. *Joma*, (1887) 11 Bom 361 (365): 11 Ind Jur 427; *Pemraj Chandrabhan* v. *Savalya*, (1891) 15 Bom 293 (296); *Succaram Morarji* v. *Kalidas Kalianji*, (1894) 18 Bom 631 (636); *Krishnama* v. *Perumal*, (1885) 8 Mad 388 (393); *Dorasami* v. *Atiratra*, (1884) 7 Mad 136 (138); *Doulat Ram* v. *Mehr Chand*, (1888) 15 Cal 70 (81, 82): 14 Ind App 187: 1 P R 1888: 5 Sar 84: 11 Ind Jur 485 P C; *Tara Lal Singh* v. *Sarobur Singh*, (1899-1900) 27 Ind App 33 (38): 27 Cal 407: 4 Cal W N 583: 7 Sar 657: 2 Bom L R 5. But see following *Lakshman* v. *Kashinath*, (1887) 11 Bom 700 (702); *Kisansingh* v. *Moreshwar*, (1883) 7 Bom 91 (94, 95): 7 Ind Jur 264; *Sethuvayyan* v. *Muthusami*, (1889) 12 Mad 325 (329, 330); *Sub-*

O.21, R.94, Note 8.

the ancestral family property to pay off his antecedent debts not tainted with illegality or immorality. If therefore, a decree is obtained against a Hindu *father* in respect of a debt which is neither illegal nor immoral and his right, title and interest is sold in execution without any limitation, the sale has the same effect as a private conveyance by the father and the purchaser gets the entire interest in the family property including that of the sons.[22] "All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own . . . . . If the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings".[23] There are only two cases in which the sons' interests do not pass in a sale in execution of a decree against the father.

(1) When the father's interest in the property is alone sold excluding that of the sons.

(2) When the debt is proved to be not binding on them.[24]

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ramanian v. *Subramaniayyan*, 5 Mad 125 (126, 129); 6 Ind Jur 297 F B; *Arumugam* v. *Sabapathi*, (1882) 5 Mad 12 (14). *Decree against Karnavan in a Malabar Tarwad.*—*Achuta* v. *Manmavu*, (1887) 10 Mad 357 (361); *Elayachanidathil Koo bi* v. *Lakshmi*, (1882) 5 Mad 201 (207); *Kuahup pa* v. *Shrideri*, (1895) 18 Mad 451 (453).

(22) *Natesa Pather* v. *Gnanpathi Subbu Pathar*, 1927 Mad 311 (314): 52 Mad L Jour 68: 99 Ind Cas 838; *Kunhali Beari* v. *Kishuna*, (1888) 11 Mad 64 (76): 12 Ind Jur 15; *Narasanna* v. *Gurappa*, (1886) 9 Mad 424 (428, 429); *Umameswara* v. *Singaperumal*, (1885) 8 Mad 376 (379): 9 Ind Jur 265; *Srinivasa* v. *Velaya*, (1882) 5 Mad 251 (252): 6 Ind Jur 408; *Velliyammal* v. *Katha Chetty*, (1882) 5 Mad 61 (68); *Venkataramanaya* v. *Venkataramana*, (1906) 29 Mad 200 (204): 16 Mad L Jour 69: 1 Mad L Tim 28 F B; *Gnanammal* v. *Muthuswami*, (1890) 13 Mad 47 (51); *Muthu Raman* v. *Ettappaswami*, (1899) 22 Mad 372 (375): 9 Mad L Jour 113; *Venkataramayyan* v. *Dikshatar*, (1876-78) 1 Mad 358 (369, 370): 3 Ind Jur 15 F B; *Debi Singh* v. *Jia Ram*, (1900) 25 All 214 (226, 228): 1903 All W N 21 F B; *Keshri Singh* v. *Chunni Lal*, (1911) 33 All 436 (439, 440): 8 All L J 216: 9 Ind Cas 476; *Muhammad Husain* v. *Dipchand*, (1892) 14 All 190 (192): 1892 All W N 53; *Pem Singh* v. *Partab*, (1892) 14 All 179 (182): 1892 All W N 49 F B; *Basa Mal* v. *Maharaj Singh*, (1886) 8 All 205 (213): 1886 All W N 58; *Ramsewaklass* v. *Raghubeer Rai*, (1881) 3 All 72 (74): 5 Ind Jur 488; *Pandit Hait Ram* v. *Mulu*, (1875) 7 N W P H C 110 (112, 113); *Sheo Dayal* v. *Jagannath*, (1911) 8 All L J 922 (924): 12 Ind Cas 111; *Ram Nath Rai* v. *Lachman Rai*, (1899) 19 All W N 27 (28): 21 All 193; *Nanak* v. *Jaimangal*, (1881) 3 All 294 (297): 5 Ind Jur 491 [Not good law]; *Kapal Ganpaya* v. *Nanjappa*, (1888) 12 Bom 691 (694); *Govind* v. *Sakharam*, (1904) 28 Bom 383 (390): 6 Bom L R 344; *Narayanrav* v. *Javhervahu*, (1888) 12 Bom 431 (435): 13 Ind Jur 226; *Maruti Sakhram* v. *Babaji*, (1891) 15 Bom 87 (88, 89): 1890 Bom P J 213; *Sakaram* v. *Sitaram*, (1887) 11 Bom 42 (44); *Bhikaji Ram Chandra* v. *Yeshwantrav*, (1884) 8 Bom 489 (491, 492): 9 Ind Jur 118; *Trimbak* v. *Narayan*, (1881) 5 Bom 481 (486): 1884 Bom P J 120; *Mahabir Pershad* v. *Maheshwar Nath*, (1890) 17 Cal 584 (588, 589): 17 Ind App 11: 5 Sar 489 P C; *Busa Koer* v. *Hurry Das*, (1883) 9 Cal 495 (504): 12 Cal L Rep 292: 7 Ind Jur 472; *U Prosad Tewary* v. *Ram Sahay Lal*, (1882) 8 Cal 898 (907): 10 Cal L Rep 505: 7 Ind Jur 79; *Sheo Prasad* v. *Jung Bahadur*, (1883) 9 Cal 389 (393, 394): 12 Cal L Rep 494: 5 Shom L R 119; *Parsidh Narain* v. *Hanuman Sahai*, (1882) 11 Cal L Rep 263 (264) *Khalilul Rahman* v. *Gobind Pershad*, (1893) 20 Cal 328 (337, 348); *Luchmun Das* v. *Giridhur Chowdhry*, (1880) 5 Cal 855 (863): 6 Cal L Rep 473: 3 Shom L R 143 F B; *Pursid Narain* v. *Honooman Sahay*, (1880) 5 Cal 845 (853): 5 Cal L Rep 576; *Studd* v. *Brij Nundun*, (1882) 9 Cal L Rep 350 (352); *Bhagwat Das* v. *Gouri Kunwar*, (1881) 7 Cal L Rep 218 (220) [Not good law]; *Collector of Monghyr* v. *Hurdai Narain*, (1880) 5 Cal 425 (435, 436): 5 Cal L Rep 112: 5 Ind Jur 251, (Do.); *Luchmee Dai* v. *Asman Singh*, (1876) 25 Suth W R 421 (424): 2 Cal 213: 1 Ind Jur 625; *Mt Anooraghee Koer* v. *Mt Bhugobutty Kooer*, (1876) 25 Suth W R 148 (149); *Satya Charan* v. *Satpir Mahanty*, (1919) 4 Pat L Jour 309 (310, 312): 51 Ind Cas 791.

(23) *Nanomi* v. *Modun Mohun*, (1885-1886) 13 Cal 21 (36, 37): 13 Ind App 1: 4 Sar 682: 10 Ind Jur 151 P C; *Suraj Bunsi Koer* v. *Sheo Pershad Singh*, (1880) 5 Cal 148 (173, 174): 6 Ind App 88: 4 Cal L Rep 226: 4 Sar 1: 3 Suth 539: 2 Shom L R 242 P C; *Dalip Narain Singh* v. *Parmaoti Bibi*, (1919) 42 All 58 (60): 17 All L J 982: 67 Ind Cas 931; *Krishnaji Lakshman* v. *Vithal Ravji*, (1888) 12 Bom 625 (631): 1887 Bom P J 337; *Hardai Narain* v. *Haruk Dhari Singh*, (1883) 12 Cal L Rep 104 (113, 118); *Jutadharee Lal* v. *Rughabar Pershad*, (1883) 9 Cal 508 (510): 12 Cal L R 255; *Ganesh* v. *Dubee Dayal*, (1880) 5 Cal L Rep 36 (40); *Luljee Sahoi* v. *Fakeer Chand*, (1881) 6 Cal 135 (140, 141): 7 Cal L Rep 97; *Ponnappa* v. *Pappuvayyangar*, (1886) 9 Mad 343 (351, 353) F B; *Sivasankara* v. *Parrati*, (1882) 4 Mad 96 (97, 98) F B; *Beni Madho* v. *Baadeo*, (1890) 12 All 99 (104): 1890 All W N 17 [The *onus* is upon the sons to show that the debt is not binding]; *Bhagbut Pershad* v. *Girja Koer*, (1888) 15 Cal 717 (724): 15 Ind App 99: 5 Sar 186: 12 Ind Jur 289 P C. (Do.); *Chintamanrav* v. *Kashinath*, (1890) 14 Bom 320 (326). (Do.).

(24) *Sripat Singh* v. *Prodyat Kumar Tagore*, 1916 P C 220 (221): 44 Cal 524: 44 Ind App 1: 15 All L J 147: 19 Bom L R 290: 15 Cal L Jour 220: 21 Cal W N 442: 32 Mad L Jour 133: 21 Mad L Tim 222: 1917 Mad W N 193: 39 Ind Cas 252; *Joharmal* v. *Ekunth*, (1900) 24 Bom 343

O.21, R.94, Notes 8—9.

Sale in execution of a decree against a Hindu limited owner.—In order to determine the interest that passes to a purchaser in execution of a decree against a limited owner such as a *Hindu widow,* the test to be applied is whether the suit in respect of which the sale was directed was brought against the widow upon a cause of action *personal* to herself or one which affected the *whole inheritance* of the property in suit. Where it appears that the decree against the widow is in respect of the inheritance and binds the reversionary heirs, the purchaser of her right, title and interest takes the estate absolutely. No inference can be drawn from the circumstance that the certificate describes the property sold as the right, title and interest of the widow.[25] The matters for consideration in such cases is as pointed out by Sir Lawrence Jenkins, C. J.

(1) What property could have been brought to sale in a properly constituted suit.

(2) What property was actually intended to be sold and bought.

(3) Has there been such an error in the constitution of the suit or the conduct of the proceedings, that effect cannot be properly given to the intention or to state it conversely, has there been a substantial representation of those interested in the property intended to be sold and bought.[26]

9. Variance between proclamation of sale and sale certificate.—When there is a variance between the description of the property as given in the proclamation of sale and as given in the sale certificate, the description in the former should be taken as conclusive and correct.[1] The description in the sale proclamation follows the description of the property attached and as pointed out by the Judicial Committee "what is sold in a Judicial sale is the property described in the schedule to the order of attachment".[2]

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(344): 1 Bom L R 839: 3 Bom L R 322; *Ram Sahai* v. *Kewal Singh,* (1887) 9 All 672 (679, 681): 1887 All W N 221: 12 Ind Jur 154; *Pareman* v. *Bhattu Mahton,* (1897) 24 Cal 672 (675, 676); *Subbayan* v. *Nagasami,* (1883) 6 Mad 155 (158): 7 Ind Jur 72; *Simbhunath* v. *Golap Singh,* (1887) 14 Cal 572 (579, 580): 14 Ind App 77: 5 Sar 5: 11 Ind Jur 811 P C [Held father's interest alone sold].

(25) *Brojo Nath* v. *Joggeswar Bagchi,* (1909) 1 Ind Cas 62 (65:) 9 Cal L Jour 346; *Jotindra Mohun* v. *Jugal Kishore,* (1881) 7 Cal 357 (366): 9 Cal L Rep 57; *Narendra Nath* v. *Bhupendra Narain,* (1896) 23 Cal 374 (388, 389); *Baroda Kanta* v. *Jatindra Narain,* (1895) 22 Cal 974 (981); *Sotish Chunder* v. *Nilcomul,* (1885) 11 Cal 45 (51); *Jugul Kishore* v. *Jotindro Mohun,* (1883-1884) 10 Cal 985 (991): 11 Ind App 66: 4 Sar 553: 8 Ind Jur 455 P C; *Bistoobehari Sahoy* v. *Biajnath Prasad,* (1871) 7 Beng L R 213 (216): 16 Suth W R 49; *Buksh Ali* v. *Essan Chunder,* (1862-64) Suth W R F B 119 (121): Marsh 614; *Debendra Narain* v. *Chundornath Roy,* (1873) 20 Suth W R 30 (31); *Nuzeerun* v. *Ameeroodeen,* (1875) 24 Suth W R 3 (4); *Baijun Doobey* v. *Brij Bhookun Lal,* (1875) 24 Suth W R 306 (308): 1 Cal 133: 2 Ind App 275: 3 Sar 541: 3 Suther 207 P C; *Phoolbas Koonwar* v. *Lalla Jogeshur,* (1876) 25 Suth W R 285 (289, 290): 1 Cal 226: 3 Ind App 7: 3 Sar 573: 8 Suth 236 P C; *Radha Mohun* v. *Soshi Bhoosun,* (1879) 3 Cal L Rep 530 (533); *Court of Wards* v. *Coomar Ramaput,* (1872) 17 Suth W R 459 (461): 14 Moo Ind App 605: 10 Beng L R 294: 2 Suth 575: 3 Sar 117 P C; *Beebee Tokai Sherob* v. *Davod Mullick,* (1865) 4 Suth W R P C 87 (90): 6 Moo Ind App 510: 1 Suth 259: 1 Sar 259; *Moti Shah* v. *Ghandharap Singh,* 1926 All 715 (718): 24 All L J 873: 96 Ind Cas 595: 48 All 637; *Mandal* v. *Tara,* (1893) 17 Bom 398 (399, 400); *Bai Jamna* v. *Bhaishankur,* (1892) 16 Bom 233 (237); *Narana Maiya* v. *Vasteva Karanta,* (1894) 17 Mad 208 (209): 4 Mad L Jour 62; *Veerabadra Ayyar* v. *Marudaga Nachiar,* (1911) 34 Mad 188 (204, 205): 1910 Mad W N 799: 9 Mad L Tim 235: 8 Ind Cas 1072: 21 Mad L Jour 320; *Ramasami Chetty* v. *Saluckai,* (1874-1875) 8 Mad H C 186 (188); *Ramanadan* v. *Rangammal,* (1889) 12 Mad 260 (265, 267, 272) F B; *Jiban Krishna* v. *Brojo Lal,* (1903) 30 Cal 550 (555): 7 Cal W N 425: 30 Ind App 81: 5 Bom L R 428 P C [Decree against daughter —Held only limited interest passed].

(26) *Devji* v. *Sambu,* (1900) 24 Bom 135 (146, 147): 1 Bom L R 627.

Note 9.

(1) *Uma Churn* v. *Govind,* (1878) 1 Cal L Rep 460 (463); *F F Christian* v. *Prasad Raut,* 1925 Pat 615 (616): 1925 Pat H C C 220: 4 Pat 760: 7 Pat L Tim 280: 90 Ind Cas 501. See also *Rasik Behari Prasad Chaudhury* v. *Hirdenarain Chaudhury,* 1923 Pat 30 (31).

(2) *Raja Thakur Barmha* v. *Jiban Ram,* (1913) 21 Ind Cas 936 (937, 938): 41 Cal 590: 41 Ind App 38: 18 Cal W N 313: 15 Mad L Tim 137:

A obtains a decree against five brothers and takes out execution against them all. The proclamation of sale describes that the interest of all the brothers are to be sold. *B* purchases in Court auction. But the order of confirmation of sale as well as the sale certificate by mistake mentioned only the share of the eldest brother as being purchased. In such a case, it has been held, that the entire interest of all the brothers as described in the sale proclamation nevertheless passes to *B*.[3] O.21, R.94, Notes 9—12.

10. Effect of new interpretation of law on sale.—The rights of the parties in an execution sale are fixed with reference to the state of the law *at the time of sale* and any subsequent interpretation of the law will not operate so as to affect the result of that sale.[1] In *Abdul Aziz* v. *Appayasami*, I.L.R. 27 Mad. 131 P.C. a purchase was made, in Court auction, of the right title and interest of a *Zamindar* in an impartible *Zamindari*. By the law as it stood at the time of the sale, the Zamindar took only a life estate. But subsequent to the sale, the law was changed by the Judicial Committee holding that the zamindar took an absolute estate. Taking advantage of the subsequent change in the interpretation of the law the purchaser contended that the entire absolute estate passed to him under the Court sale. The Judicial Committee negatived this contention holding that "the reversal of the previously accepted interpretation of the law does not displace its application to the construction of the contracts contained in the certificate of sale under consideration" and that the "parties must be taken to be bound by the law as it was at the time understood".

11. Effect of certificate of sale.—The irregularities if any in the execution proceedings are cured by the certificate of sale.[1] The purchaser's title becomes complete on the issue of the certificate and he is entitled to apply for possession of the property.[2]

12. Certificate if operates as res judicata.—A sale certificate does not operate as *res judicata* inasmuch as there cannot be said to have been any *litigation* as to the title of the property purchased. But persons who are parties to the suit under which the sale took place or their representatives in interest cannot, by virtue of S. 47 question the title of the purchaser.[1] The

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12 All L J 156; 19 Cal L Jour 161: 26 Mad L Jour 89: 1914 Mad W N 118: 16 Bom L R 156 P C.

(3) *Balwant* v. *Hirachand*, (1903) 27 Bom 334 (339): 5 Bom L R 217.

(1878-79) 3 Bom 433 (436): 4 Ind Jur 187; *Eshan Chunder* v. *Nund Cumar*, (1867) 8 Suth W R 239 (240): *Amir Kazim* v. *Darbari Mal*, (1902) 24 All 475 (476): 1902 All W N 145; *Abdulla Abdul Gany* v. *Chatterjee*, 1932 Rang 11 (12): 9 Rang 565: 135 Ind Cas 863.

Note 10.

(1) *Judab Lal Singh* v. *Debi Lal Singh*, (1917) 42 Ind Cas 399 (402): 2 Pat L Jour 725: 3 Pat L W 149: 1919 Pat H C C 426: (1904) 27 Mad 131 (143): 31 Ind App 1: 6 Bom L R 7: 8 Cal W N 186: 8 Sar 568 P C.

Note 11.

(1) *Balkrishna* v. *Masuma Bibi*, (1882) 5 All 112 (157): 9 Ind App 182: 4 Sar 398: 13 Cal L Rep 292. See also *Mahomed Hossein* v. *Kokil Singh*, (1881) 7 Cal 91 (95, 96): 9 Cal L Rep 53; *Saroda Churn* v. *Mahomed Imil*, (1885) 11 Cal 376 (378).

(2) *Kashinath Trimbak* v. *Dumaraj Zuran*, (1893) 17 Bom 228 (229); *Cooverji Hirji* v. *Dewsey*, (1893) 17 Bom 718 (721); *Busapa* v. *Marya*,

Note 12.

(1) *Lakshan Chandra Naskar* v. *Ramdas Mandal*, 1929 Cal 374 (379): 33 Cal W N 705, 49 Cal L Jour 441: 118 Ind Cas 857 F B; *Khushal Panachand* v. *Bhimabai*, (1888) 12 Bom 589 (594); *Swami Rowappa* v. *Kuppusami Iyengar*, (1911) 12 Ind Cas 130 (131): 10 Mad L Tim 240: (1911) 2 Mad W N 342; *Shah Mohammad Yusuf* v. *Lachmi Narain*, (1919) 50 Ind Cas 157 (158): 6 Oudh L J 49: 21 Oudh Cas 100; *Purgan Pande* v. *Dhanpat Tewari*, (1917) 42 Ind Cas 739 (741) Pat [Purchaser not bound by statement in sale certificate as to situation of property purchased]; *Jiwach Raut* v. *Samran Manear*, (1916) 34 Ind Cas 911 (912) Pat [Purchaser suing for possession Defendant pleading that decree was tainted by fraud—*Onus* is on the defendant].

O.21, R.94, Notes 12—16.

rights of third parties are, however, not affected by the Court sale.[2]

13. Limitation.—The provisions of the Limitation Act do not apply to an application for the issue of a sale certificate. The reason is that there is no duty imposed on the purchaser to apply for the certificate. The Court is bound as a matter of course to grant the certificate on the sale becoming absolute, and its function in granting the certificate is *ministerial* and not judicial.[1]

14. Registration of sale certificate.—Under Section 17, Cl. (12) of the Registration Act a certificate of sale is not compulsorily registerable.[1] Under Section 89, Cl. (2) of the same Act the Court should send a copy of the sale certificate to the registering officer.[2]

15. Court-fee on application for sale certificate.—It has been held in the undermentioned cases[1] that an application by the purchaser for the certificate need bear no Court-fee stamp as the rule does not even require the application to be in writing.

16. Appeal.—No appeal lies against an order amending or refusing to amend a sale certificate.[1] In the undermentioned case[2] it was held that an order refusing to grant a certificate in favour of the decree-holder purchaser was not a matter coming under Section 47 and was not appealable.

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(2) *Hasanali* v. *Mian Jan Khan*, (1910) 7 Ind Cas 409 (411): 33 All 45: 7 All L J 893; *Khirode Chandra Ghosh* v. *Janki Das*, (1913) 20 Ind Cas 753 (754) Cal. See also *Nagendra Nath Basu* v. *Parbati Charan Koyal*, (1916) 35 Ind Cas 339 (341, 342): 20 Cal W N 819; *Venkataramana Chariar* v. *Meenakshiwundaram Ayyar*, (1909) 1 Ind Cas 193 (194): 19 Mad L Jour 1. See *Ishan Chandra* v. *Ganesh Chandra*, (1901) 28 Cal 139 (141, 142): 5 Cal W N 419.

Note 13.

(1) *Kylasa* v. *Ramasami*, (1882) 4 Mad 172 (173); *Petition of Kishen Singh*, (1883) All W N 262 (262); *Vithal* v. *Vithojirav*, (1882) 6 Bom 586 (587): 7 Ind Jur 35. But see *Tukaram* v. *Satvaji*, (1880-1881) 5 Bom 206 (208).

Note 14.

(1) See also *Masarat-un-nissa* v. *Adit Ram*, (1883) 5 All 568 (573): 1883 All W N 159; *Husain Begam* v. *Mulo*, (1883) 5 All 84 (85): 1882 All W N 183; *Ghelabhai Bhikaridas* v. *Pranjivan Ichharam*, (1874) 11 Bom H C R 218; *Devidas Jagjivan* v. *Pirjada Begum*, (1884) 8 Bom 377 (380); *Prokash Chunder Das* v. *Tarachand Dass*, (1883) 9 Cal 82 (87): 12 Cal L Rep 1: 5 Shom L R 41 F B; *Abdul Aziz Biswas* v. *Radha Kanto Kobiraj*, (1880) 5 Cal 226 (227): 5 Ind Jur 78; *Ajudhia Pershad* v. *Chandan*, (1903) Pun Re No 9: 36 Pun L R 1903; *Harkisandas Naraindas* v. *Bai Ichha*, (1879-80) 4 Bom 155 (157); *Ramaraja* v. *Arunachala*, (1884) 7 Mad 248 (252): 8 Ind Jur 132 [By registration of certificate purchaser does not acquire priority as against a mortgagee whose mortgage is optionally registerable]; *Narasayya* v. *Jungam*, (1884) 7 Mad 418 (419). (Do).

The following cases under the old and repealed Registration Act *are no longer law.*—Proceedings, 18th November, 1871—(1870-71) 6 Mad H C App 39 (40); *Mulji* v. *Anupram*, (1870) 7 Bom H C A C 136; *Srinivasa Sastri* v. *Seshayyangar*, (1881) 3 Mad 37 (41) F B; In re, *Lakshman*, (1885) 9 Bom 472 (474); *Lalbhai Lakhmidas* v. *Naval Mir Kamaluddin Husen Khan*, (1875) 12 Bom H C R 247; *Padu Malhari* v. *Rakmai*, (1873) 10 Bom H C R 435 (439); *Kanahia Lal* v. *Kali Din*, (1878-80) 2 All 892 (893).

(2) See also *Fatteh Singh* v. *Daropadi*, 1908 Pun Re No 142: 186 Pun W R 1908; *Sirajunnissa* v. *Jan Muhammad*, (1882) All W N 51 (51).

Note 15.

(1) *Hira Ambaidas* v. *Teckchand Ambaidas*, (1889) 13 Bom 670 (671). *As for the stamp requisite for the certificate, see the following cases.*—*Collector of Ahmednagar* v. *Rambhau Tukaram*, 1930 Bom 392 (393): 32 Bom L R 1084: 126 Ind Cas 31 F B [Purchaser to bear stamp expenses]; *In the matter of* Act I of 1879 and in the matter of a reference to the Board of Revenue, (1884) 10 Cal 92 (96): 13 Cal L Rep 164; *Nandram Motiram* v. *Kachabhav*, (1885) 9 Bom 526 (527); *Jwala Prasad* v. *Ram Narain*, (1893) 15 All 107 (108): 1892 All W N 243 [Property sold subject to mortgage—How to be stamped]; *Meer Kaisur* v. *Ebrahim*, (1891) 15 Bom 532 (535), (Do.); *Vishnu Keshav*, In re, (1886) 10 Bom 58 (69), (Do.).

Note 16.

(1) *Mammod* v. *Locke*, (1897) 20 Mad 487 (489): 8 Mad L Jour 7; *Saddo Kunwar* v. *Bansi Dhar*, (1901) 23 All 476 (478): 1901 All W N 156; *Bujha Roy* v. *Ram Kumar*, (1899) 26 Cal 529 (531): 3 Cal W N 374.

(2) *Jayarnath* v. *Kartick Nath*, (1908) 7 Cal L Jour 436 (438).

O.21, R.95, Note 1.

R. 95. [S. 318.] *Where* the *immoveable* property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under *rule* 94, the Court shall, on *the* application *of* the purchaser, order delivery to be made by putting *such* purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

Delivery of property in occupancy of judgment-debtor.

[1877—S. 318; 1859—S. 263. *See* S. 74 and O. 21, R. 35.]

Synopsis.

1. Delivery of possession to purchaser.
2. Purchase of undivided share. See Note 4, Rule 96, infra.
3. Effect of formal possession on limitation. See Rule 35 ante.
4. Successive applications for possession. See Note 4, Rule 97 infra.
5. Limitation for application.
6. Application, if a step-in-aid of execution.
7. Separate suit for possession. See Note 8, infra and Note 19 to S. 47 ante.
8. Procedure under this rule.
9. Appeal. See Note 19 to S. 47 ante.

"And a certificate of sale has been granted." See Note 1, F.-N. (1-a).

"Nature of possession." See Note 1.

"Revision." See Note 8 to R. 97.

1. Delivery of possession to purchaser.—*See* "Procedure under this rule" Note 8, *infra*.

The *holder of a decree* for possession of immoveable property may obtain possession of the property under Rr. 35 and 36. An *Auction-purchaser* to whom a sale certificate has been granted under R. 94, has to apply under this rule or under R. 96, to obtain delivery of possession.[1]

If the property is in the possession of the judgment-debtor, or of some person on his behalf, the purchaser is entitled to *actual* possession under this rule.[1a] If it is in the possession of tenants or other persons entitled to occupy the same, the purchaser is only entitled to *symbolical* possession, under R. 96.

Unless the delivery of possession through Court to the auction-purchaser is effected in one of the modes prescribed under Rules 95 and 96, no

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Order 21, Rule 95—Note 1.

(1) *Arunachallam* v. *Arunachallam*, (1892) 15 Mad 203 (209): 2 Mad L Jour 1 [Delivery of possession follows peremptorily from grant of sale certificate]: *Lal Rajendra Kishore Singh* v. *Bhagwan Singh*, (1917) 39 All 460 (462): 15 All L J 361: 39 Ind Cas 745 (747).

(1-a) *Hur Kishore* v. *Sudoy Chunder*, (1872) 17 Suth W R 80 (80). See *Emperor* v. *Magan*, (1908) 5 Bom L R 977.

O.21, R.95, Notes 1—5.

possession can be deemed to be given.[2] Therefore if a person is dispossessed otherwise than in due course of law as provided by these rules, he may institute a summary suit under S. 9 of the Specific Relief Act to recover possession.[3]

But when once the amin puts the auction-purchaser in possession and the formalities of law are complied with, the delivery is complete,[4] and thereafter the possession of the judgment-debtor or any person becomes that of a trespasser.[5] Therefore if the auction-purchaser is subsequently dispossessed, it will be a cause of action for a regular suit, but no application under these rules is thereafter maintainable.[6]

As to whether the judgment-debtor can file a *suit* where a wrong property is delivered to the auction-purchaser or should only apply under S. 47, *See* S. 47, Note 19, Rr. 91 to 103, are applicable to proceedings under the Chota Nagpur Tenancy Act 6 of 1920. *See* S. 50.

2. **Purchase of undivided share.**—*See* Note 4, R. 96, *infra.*

3. **Effect of formal possession on limitation.**—*See* Note 4, R. 35, *ante.*

4. **Successive applications for delivery of possession.**—*See* Note 4, R. 97, *infra.*

5. **Limitation for application.**—The period of limitation for an application for delivery of possession by a purchaser of immoveable property at a sale in execution of a decree is three years from the date when the sale becomes *absolute. See* Indian Limitation Act, Art. 180).[1] As to when the sale becomes *absolute See* O. 21, R. 92, *ante.* Where the purchaser is a *stranger*, he is not *bound* to apply under this rule, and may institute a separate suit for possession of the property within 12 years from the date when the sale becomes absolute (*see* Indian Limitation Act, Art. 138, and the undermentioned case).[1-a] As to whether a *decree-holder* purchaser can also file a separate suit for possession. *See* Note 19 to S. 47.

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(2) *Salamat Ali* v. *Ali Akbar*, (1920) 55 Ind Cas 646 (649) (Lah).

(3) *Mulluk Putooni* v. *Bharat Chandra Das*, (1908) 12 Cal W N 694 (696).

(4) *Khatoo Bibee* v. *Furukh Ali*, (1866) 6 Suth W R Mis 108 (108); *Ibrahim Sahib* v. *Konammal*, 1923 Mad 25 (26): 43 Mad L Jour 179: 31 Mad L Tim 356: 70 Ind Cas 755.

(5) *Ram Krishna Singh* v. *Emperor*, 1922 Pat 197 (199): 3 Pat L Tim 335: 66 Ind Cas 817.

(6) *Ibrahim Sahib* v. *Konammal*, 1923 Mad 25 (26): 43 Mad L Jour 179: 31 Mad L Tim 356: 70 Ind Cas 755; *Khatoo Bibi* v. *Furukh Ali*, (1866) 6 Suth W R Mis 108 (108); *Srinath Ghosh* v. *Annoda Prosad Roy*, (1897) 1 Cal W N 192 (194); *Piara Ram* v. *Sohawa*, 1928 Lah 910 (911): 109 Ind Cas 561.

Note 5.

(1) *Ranjit Singh* v. *Baldeo Singh*, (1908) 30 All 390 (392): 1908 All W N 162: 5 All L J 516; *Anarjan Bibi* v. *Chandramani Shaha*, 1932 Cal 75 (76): 134 Ind Cas 1188: 54 Cal L Jour 241; *Arunagiri Mudaliar* v. *Uthandu Mudali*, 1912 Mad W N 1136 (1137): 17 Ind Cas 242: 12 Mad L Tim 311; *Neckbar* v. *Prakash Chandra Nag Chowdhari*, 1930 Cal 86 (89): 56 Cal 608: 120 Ind Cas 107; *Mazeem Hossein Mondal* v. *Sarat Kumari Debi*, 5 Ind Cases 89 (90): 14 Cal W N 433: 11 Cal L Jour 357. But see *Balaji Kashinath* v. *Anand Rao*, 1927 Nag 294 (295): 103 Ind Cas 335 [The view that the period is to be reckoned from the date of issue of the sale certificate adopted in the undermentioned cases under the old Limitation Act of 1877 is now no longer law]; *Basappa* v. *Marya*, (1878-79) 3 Bom 433 (436): 4 Ind Jur 187; *Hanmantrav* v. *Subaji*, (1884) 8 Bom 257 (258): 8 Ind Jur 578; *Kashinath Trimbak Joshi* v. *Duming Zuran*, (1893) 17 Bom 228 (229); *Sultan Sahib Markayar* v. *Chidambaram Chettiar*, (1909) 32 Mad 136 (138): 1 Ind Cas 998: 19 Mad L Jour 224: 4 Mad L Tim 350.

(1-a) See *Uma Sankar* v. *Kalka Prasad*, (1884) 6 All 75 (77): 1883 All W N 212; *Lakshminarayana* v. *Ulagammal*, (1915) 28 Mad L Jour 256 (258, 259): 26 Ind Cas 528.

O.21, R.95, Notes 5—8.

An order for delivery of possession is not a decree for possession and therefore cannot be kept alive by periodical applications.[2] Where an application for delivery was made within 3 years of the date when the sale becomes absolute, but delivery was not effected by reason of laches on the part of the purchaser, a second application under this rule more than 3 years after confirmation of sale will be barred; Art. 181 does not apply to such a case.[3] But if the delivery could not be effected owing to causes beyond the control of the purchaser and the application had been closed, it has been held that the second application should be considered to be a revival of the first and consequently is not barred under Art. 180.[4]

6. Application, if a step-in-aid of execution.—Where the decree-holder himself purchases the property in execution, and applies under this rule for delivery of possession, of the property, the question arises whether such an application is a step-in-aid of execution within the meaning of Art. 182, Cl. (5) of the Limitation Act. It has been held by the High Court of Allahabad that there is no difference between an application by decree-holder purchaser and by a third party purchaser, to obtain delivery of *possession* of the property purchased by him, and therefore such an application is *not* a step-in-aid of execution.[1] But it has been held by the High Courts of Calcutta,[2] Bombay[3] and Madras[4] that an application by a decree-holder purchaser under this rule is still an application in execution and therefore a step-in-aid of execution of the decree within the meaning of Art. 182.

7. Separate suit for possession.—*See* Note 8, *infra* and Note 19 to S. 47, *ante*.

8. Procedure under this rule.—It is not obligatory on the purchaser to apply for delivery of possession under this rule; it is open to him to obtain possession out of Court.[1-a] If he is a stranger purchaser, the remedies by way of an application under this rule, and by way of suit are concurrent.[1] He may bring a suit for possession in the first instance,[2] or may apply under

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(2) *Vadlecu Viswasundrarao* v. *Vannamu Paidigadu*, 1926 Mad 385 (385): 50 Mad L Jour 72: 23 Mad L W 472: 91 Ind Cas 485; *Sultan Sahib Markayar* v. *Chidambaram Chettiar*, (1909) 32 Mad 136 (138): 1 Ind Cas 998 (998): 19 Mad L Jour 224: 4 Mad L Tim 350.

(3) *Vadiera Viswasundra Rao* v. *Vannamu Paidigadu*, 1926 Mad 385 (386): 50 Mad L Jour 72: 23 Mad L W 472: 91 Ind Cas 485.

(1) *Thayumaurthu* v. *Odayappan*, (1927) 25 Mad L W 108 (111): 1927 Mad 391: 1927 Mad W N 60: 99 Ind Cas 632; *Nandur Subbayya* v. *Raja Venkataramayya Apparao*, (1918) 7 Mad L W 16 (21): 1918 Mad W N 211: 43 Ind Cas 155 [*Per* Oldfield, J].

Note 6.

(1) *Mohsin Raza Khan* v. *Haidar Baksh*, 1928 All 368 (370): 26 All L J 498: 50 All 670 (41 All 479 dissented from): *Babu Ram* v. *Pearey Lal*, (1919) 50 Ind Cas 143 (144): 41 All 479: 17 All L J 496; *Bhagwathi* v. *Banwari Lal*, (1908) 31 All 82 (104, 107): 6 All L J 71: 1 Ind Cas 416: 5 Mad L Tim 185 F B (19 All 477 dissented from): *Moti Lal* v. *Makund Singh*, (1897) 19 All 477 (479): 1897 All W N 117.

(2) *Suriatoola* v. *Raj Kumar*, (1900) 27 Cal 709 (712, 713): 4 Cal W N 681; *Pran Krishna* v. *Juramoni*, (1909) 13 Cal W N 694 (695): 1 Ind Cas 430.

(3) *Sadashiv* v. *Narayan*, (1911) 11 Ind Cas 987 (989): 35 Bom 452: 13 Bom L R 661.

(4) *Mathon Kandi Kannan* v. *Thayyil Pakkutti Avvulla*, 1927 Mad 288 (288): 52 Mad L Jour 1: 25 Mad L W 61: 1927 Mad W N 8: 99 Ind Cas 677: 38 Mad L Tim 156: 50 Mad 403.

Note 8.

(1-a) *Jadoo Chandra Karmakar* v. *Akrur Chandra Karmakar*, 1930 Cal 586 (587): 51 Cal L Jour 560: 34 Cal W N 1059: 128 Ind Cas 244.

(1) *Harkah Sonar* v. *Gopi Kishen*, 1926 All 120 (121): 89 Ind Cas 134; *Hasan Ammal Bibi* v. *Ismail Moideen*, (1915) 28 Mad L Jour 642 (648): 29 Ind Cas 976: 1915 Mad W N 414; *Kishori Mohun* v. *Chunder Nath*, (1887) 14 Cal 644 (648).

(2) *Hasan Ammal Bibi* v. *Ismail Moideen*, (1915) 28 Mad L Jour 642 (648): 29 Ind Cas 976 (979): 1915 Mad W N 414.

O.21, R.95, Notes 8—9.

this rule and if unsuccessful[3] or if the summary remedy is barred[4] he may institute a regular suit for possession. (*See* Note 7, *ante.*) If however the decree-holder himself is the purchaser *See* Note 19 to S. 47, *ante.* *See also* Note 5 to R. 97, *supra.*

The jurisdiction of the Court to order delivery under this rule exists only if the property is in the occupancy of judgment-debtor, or of some person on his behalf or of some person claiming under a title created subsequent to the attachment of such property. Therefore if the Court is satisfied on *prima facie* evidence that the person in possession of the property is holding it on his own account, it has no option but to dismiss the application under this rule.[5] Thus a prior mortgagee who purchased property in execution of his own mortgage decree and who is in possession, is not a judgment-debtor and cannot be dispossessed by the auction-purchaser under this rule.[6]

9. **Appeal.**—*See* Note 19 to S. 47, *ante.*

O.21, R.96, Notes 1—2.

R. 96. [S. 319.] *Where* the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under *rule* 94, the Court shall, *on the application of the purchaser*, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

Delivery of property in occupancy of tenant.

[1877—S. 319; 1859—S. 264.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Delivery of property in the occupancy of a tenant.
4. Purchase of undivided share.
5. Symbolical delivery.
6. Limitation.
7. Appeal. See Note 19 to S. 47, ante.

Tenant dispossessed—If entitled to sue for possession. See Note 3, Pt. (2).

1. Legislative changes.—

The words "on the application of the purchaser" are new. *See* Note 6, *infra.*

2. Scope of the rule.—This rule provides for cases where the judgment-debtor himself is not entitled to actual possession of the property as where the property is in the occupancy of tenants or other persons entitled

(3) *Ishwar Pershad Gurgo* v. *Jai Narain Giri*, (1886) 12 Cal 169 (173).

(4) *Harkah Sonar* v. *Gopi Kishen*, 1926 All 120 (121): 89 Ind Cas 184; *Sheo Narain* v. *Noor Muhammad*, (1907) 29 All 468 (466): 1907 All W N 131: 4 All L J 434.

(5) *Sobha Ram* v. *Tursi Ram*, 1924 All 495 (498): 22 All L J 626: 5 L R A Civ 488: 46 All 693: 88 Ind Cas 923.

(6) *Gangadhar* v. *Lakshman*, 1930 Bom 221 (223): 32 Bom L R 431: 125 Ind Cas 905.

to occupy the same.' The delivery of possession in such cases has to be made in the manner provided by this rule. *See* R. 35, *ante* and Note 3, *infra.* When once the Court passes an order for delivery of possession under this rule, it has thereafter no jurisdiction to stop the issue of the warrant for delivery and to order an enquiry into any objections subsequently raised in the matter.[1-a]

3. Delivery of property in the occupancy of a tenant.—If the property is in the occupancy of a tenant or other person entitled to occupy the same, the auction-purchaser is only entitled to *symbolical* delivery of possession under this rule.[1] Therefore, where the auction-purchaser *dispossessed* a tenant under a warrant for delivery of possession under R. 95, *ante,* the tenant will be entitled to bring a suit for possession under S. 9 of the Specific Relief Act, as the dispossession could not be said to be in due course of law.[2]

4. Purchase of undivided share.—The holder of a decree for possession of an undivided share in a property may obtain joint possession in the manner provided in R. 35, *ante.* There is no corresponding provision for delivery of joint possession to the *purchaser* of an undivided share in a property. But in such cases possession should be delivered under the provisions of O. 21, R. 95, read with R. 35, sub-R. (2): this rule does not apply to such a case.[1] Where the purchase is of an undivided share in a joint Hindu family, the remedy of the purchaser is only to institute a suit for partition and for possession of the share of the judgment-debtor.[2] Where the judgment-debtor is a co-sharer and is himself in exclusive possession,[3] or where the entire rights of the joint family are sold in auction,[4] the purchaser is entitled to actual possession of the property under R. 95, *ante.*

5. Symbolical delivery.—*See* R. 35, *ante.* Symbolical possession is different from "paper possession" that is, the possession obtained by a party who being entitled to *actual* possession, only obtains delivery of possession on paper, without getting actual possession.[1] *See also* Note 3 above.

6. Limitation.—*See* Note 5 to R. 95, *ante.*

Under S. 319 of the Code of 1882, it was held that it was the duty of the Court to order symbolical delivery of possession and that there was no period of limitation for delivery of possession under that section.[1] The

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Order 21, Rule 96—Note 2.

(1) See *Genuji* v. *Mahadaji*, (1880) Bom P J 92 (92) [Mortgagee in possession of property—Sold in auction].

(1-a) *Hunter* v. *Shafiq-uz-zaman*, 1927 Oudh 304 (304): 1 Luck 226: 103 Ind Cas 695.

Note 3.

(1) *S R M M R M Chettiar Firm* v. *U Ba Lon*, 1927 Rang 127 (128): 6 Bur L Jour 7: 100 Cas 1014; *Govindaswami Pillai* v. *Pethaperumal Chetty*, (1918) 44 Ind Cas 839 (840) (Mad).

(2) *Muluk Patooni* v. *Bharat Chandra Das*, (1908) 12 Cal W N 694 (696).

Note 4.

(1) *Sarvi Begam* v. *Taj Begam*, (1914) 36 All 181 (182): 22 Ind Cas 971: 12 All L J 259; *Hussan Ammal Bibi* v. *Ismail Moideen Rowther*, (1915) 28 Mad L Jour 642 (649): 29 Ind Cas 976: 1915 Mad W N 414; *Thakursi Raisi* v. *Fida Hussain*, 1927 Sind 199 (201): 102 Ind Cas 311; *Mandavilli Rama Rao* v. *Sivanarayana*, (1919) 9 Mad L W 81 (82): 25 Mad L Tim 153: 49 Ind Cas 629.

(2) *Yelumalai Chetty* v. *Srinivasa Chetty*, (1906) 29 Mad 294 (295); *Kallappa* v. *Venkatesh*, (1877-78) 2 Bom 676 (678); *Thakursi Raisi* v. *Fida Hussain*, 1927 Sind 199 (201): 102 Ind Cas 311; *Balaji Anant* v. *Ganesh Janardhan*, (1880-81) 5 Bom 499 (502-505). But see *Indrasa* v. *Sadu*, (1880-81) 5 Bom 505 Note: 1878 Bom P J 735.

(3) *Sudarshan Das* v. *Biraja Sundari Dasi*, (1917) 38 Ind Cas 838 (839) (Cal).

(4) *Cooverji Hiraji* v. *Dewsey Bhoja*, (1893) 17 Bom 718 (721).

Note 5.

(1) *Govindaswami Pillai* v. *Pethaperumal Chetty* (1918) 44 Ind Cas 839 (840) (Mad).

Note 6.

(1) *Harish Chander Roy* v. *Saratchandra Bandopadhya*, (1917) 40 Ind Cas 605 (606) (Cal).

O.21, R.96, Notes 6—7.

insertion of the words "*on the application of the purchaser*" in this rule as well as in R. 95, and the insertion of a new article, *viz.*, Art. 180 in the Limitation Act, 1908, has made it clear that such applications should be made within three years from the date when the sale becomes absolute.

7. **Appeal.**—*See* Note 19 to S. 47, *ante.*

RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER.

O.21, R.97, Note 1.

R. **97.** [Ss. 328, 334.] (1) *Where the holder* of a decree for the possession of immoveable property *or the purchaser of any such property sold in execution of a decree* is resisted or obstructed by any person in *obtaining possession* of *the property, he may make an application* to the Court complaining of such resistance or obstruction.

Resistance or obstruction to possession of immoveable property.

(2) The Court shall fix a day for investigating the *matter* and shall summon the party against whom the application is made to appear and answer the same.

[1877—S. 334; 1859—Ss. 226, 268. *See* O. 21, R. 35.]

Synopsis.

1. Applicability of the rule.
2. "Decree for possession"—Partition decrees.
3. Limitation.
4. Fresh application for delivery if can be made.
5 Remedies of a person obstructed.
6 Order 9 if applies to proceedings under this rule.
7. Appeal.
8. Revision.

"May apply." See Note 4, Pt. (1).

1. **Applicability of the rule.**—An application under this rule is not maintainable, unless it is shown that the decree-holder or the auction-purchaser has applied for delivery of possession or at least, he made an attempt to obtain possession out of Court and has been *obstructed or resisted* in obtaining it.[1] There must, therefore, be some *overt act* of opposition to delivery of possession,[2] though it is not necessary that the person resisting should be *actually present* at the obstruction.[3] Thus the locking of the house by the judgment-debtor amounts to resistance within the meaning of this rule.[4]

Order 21, Rule 97—Note 1.

(1) *Bohra Sobha Ram* v. *Tursi Ram*, 1924 All 495 (498, 500): 22 All L J 626: 5 L R A Civ 488: 46 All 693: 83 Ind Cas 923 F B.

(2) *Bohra Sobha Ram* v. *Tursi Ram*, 1924 All 495 (500, 501): 22 All L J 626: 5 L R A Civ 488: 46 All 693: 83 Ind Cas 923. See also *Kali Kumar* v. *Brahmananda*, (1908) 7 Cal L Jour 98 (99) [Obstruction to Commissioner appointed to make partition and give possession falls under this Rule]. But see *Maung Po Seik* v. *U Nandiya*, 1925 Rang 374 (375): 4 Bur L Jour 178: 92 Ind Cas 667.

(3) *Banjoisi Narasamma* v. *Sarasamman*, 1926 Mad 353 (354): 23 Mad L W 157: 1926 Mad W N 163: 92 Ind Cas 61. But see *T O Bose* v. *Chowdhry*, 1924 Rang 261 (262): 3 Bur L Jour 71: 82 Ind Cas 865 (*Obiter*). But see *Mancharam* v. *Fakirchand*, (1901) 25 Bom 478 (485, 486): 3 Bom L R 58 (*Obiter*).

(4) *Heralal Mohanlal Mutna* v. *Ram Chandra Kundamal*, 1930 Bom 375 (377): 32 Bom L R 619: 125 Ind Cas 703: 54 Bom 479.

It is necessary, before an investigation is made under this rule, that an *application* should be made to the Court by the *decree-holder or auction-purchaser*.[5] The Court cannot order investigation *suo motu*,[6] or on the Amin's or Nazir's report,[7] or on the application of the judgment-debtor,[8] or of third parties.[9] It has, however, been held that the Court may direct investigation under this rule on an *oral* application by the person obstructed.[10] The Court may adjudicate upon questions of *title* between the contending parties in regard to their right to possession and pass orders under Rr. 98 or 99, *infra*.[11] The order passed on such investigation is final subject to the result of the suit under R. 103, *infra*. **O.21, R.97, Notes 1—3.**

The procedure under this rule is *permissive* and not *mandatory*.[12] *See* Notes 3, 4 and 5, *infra*.

This rule applies also to decrees for possession under R. 9 of the Specific Relief Act,[13] but does not apply to proceedings for delivery of possession under the Provincial Insolvency Act[14] or the Mamlatdar's Act[15] (Bombay Act III of 1876).

2. "**Decree for possession**"—**Partition decrees.**—A decree for partition of immoveable property is a decree for possession within the meaning of this rule.[1]

3. **Limitation.**—The period of limitation for an application under this rule is thirty days from the date of the resistance or obstruction (Indian Limitation Act, Art. 167). The resistance or obstruction is not necessarily the *first* resistance or obstruction, and every time the decree-holder or auction-purchaser is obstructed, he obtains a fresh cause of action and he may apply within thirty days of such obstruction.[1] *See* Notes 4 and 5, *infra*.

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(5) *Mt Talia Bibi* v. *Nur Din*, 1928 Lah 672 (673): 108 Ind Cas 614; *Mahabir Prasad* v. *Parma*, (1892) 14 All 417 (419): 1892 All W N 51.

(6) *Mukhi Ram* v. *Basant Singh*, 1931 Lah 686 (687): 132 Ind Cas 844.

(7) *Barkat Ali* v. *Pattu*, 1928 Lah 215 (216): 10 Lah L Jour 68: 106 Ind Cas 491; *Mt Talia Bibi* v. *Nur Din*, 1928 Lah 672 (673): 108 Ind Cas 614.

(8) *Barja Bala* v. *Gurdas Mandal*, (1906) 33 Cal 487 (489): 3 Cal L Jour 293.

(9) *Mahabir Prasad* v. *Parma*, (1892) 14 All 417 (419): 1892 All W N 51; *Sultan Singh* v. *Baij Nath Goenka*, (1908) 12 Cal W N 115 (117).

(10) *Gulab* v. *Chhattan*, 1931 Lah 13 (14): 130 Ind Cas 520. See also *Vishnu Ramachandra* v. *Ramachandra Yeshwant*, (1907) 9 Bom L R 936 (939).

(11) *Mouda Khan* v. *Gori Khan*, (1890) 14 Bom 627 (632). But see *Chinnasamy Pillai* v. *Krishna Pillai*, (1881) 3 Mad 104 (106, 107): 5 Ind Jur 107 [Decision prior to amendment Act of 1879—Enquiry limited to fact of possession].

(12) *Raghunandan Prosad Misra* v. *Ramachandra Munda*, (1919) 49 Ind Cas 150 (153): 1 Pat L Jour 94: 1919 Pat H C C 81 F B; *Meyyappa Chetty* v. *Meyyappan Servai*, 1921 Mad 559 (561): 1921 Mad W N 698: 66 Ind Cas 722; *Ballabhadas* v. *Gulab Singh*, (1920) 57 Ind Cas 177 (180) (Cal); *Madaree* v. *Bulloo Kooeree*, (1870) 2 N W P 450 (451, 452).

(13) *Banjoini Narasamma* v. *Sarasamman*, 1926 Mad 353 (353): 23 Mad L W 157: 1926 Mad W N 163: 92 Ind Cas 61.

(14) *Maddipoti Peramma* v. *Gandrapu Krishnappa*, (1918) 8 Mad L W 136 (139): 1918 Mad W N 479: 24 Mad L Tim 106: 47 Ind Cas 308.

(15) *Kazan Sahib* v. *Maruti*, (1888) 13 Bom 552 (553, 554).

Note 2.

(1) *Gopala* v. *Fernandez*, (1893) 16 Mad 127 (129, 130).

Note 3.

(1) *Ramasekara Pillai* v. *Dharmaraya Goundan*, (1881) 5 Mad 113 (114); *Narain Das* v. *Hazari Lal*, (1896) 18 All 233 (236): 1896 All W N 84; *Baranagore Jute Factory, Co. Ltd* v. *Rajkumar Rai*, (1909) 13 Cal W N 724 (727, 728): 1 Ind Cas 785 (787); *Amma Kovilamma* v. *Palukkuzhu Manakkal*, 1928 Mad W N 236 (236).

O.21, R.97, Notes 4—5.

4. Fresh application for delivery: if can be made.—If the holder of a *decree for possession* applies for delivery of possession, but is resisted or obstructed in obtaining possession, it is not obligatory on him to proceed under this rule; he may either apply again for execution of the decree under Rr. 35 and 36, *ante*[1] or he may institute a regular suit for possession against the persons obstructing if they are third parties.[1-a]

But if an *auction-purchaser* is resisted or obstructed in the delivery of possession and he does not apply for an investigation under this rule within the period prescribed (30 days), is it open to him to apply again under Rr. 95 or 96, and if, again resisted, to apply under this rule? If the first resistance was by the *judgment-debtor or by any person on his behalf*, there is nothing to prevent the purchaser from applying again for delivery of possession under R. 95, within the period of limitation prescribed and the resistance, offered afresh will furnish a fresh cause of action for proceeding under this rule.[2] But if the original obstruction was by *third* parties and not by the judgment-debtor or any person claiming through him, it has been held by the High Court of Allahabad that a second application for delivery of possession under R. 95, is not maintainable.[3] *See* Note 5, *infra*.

5. Remedies of a person obstructed.—*See* Note 3, *ante*.

It is not obligatory on the decree-holder or auction-purchaser to resort to the summary remedy provided under this rule.[1] (*See* Notes 3 and 4, *ante*.) But if he applies under this rule and an order is made on investigation against him, *i.e.*, under R. 99, *infra*, his remedy is only to file a suit under R. 103 within one year from the date of the order to establish his right to the property. The following tabular statement still illustrate the various remedies open to the person obstructed:—

Remedies of a Person Obstructed.

Person obstructed.	Obstruction by whom.	Remedy.
I. Holder of a decree for possession.	*a.* On obstruction by *judgment-debtor* or by person claiming under him.	i. May proceed under Rule 97. ii. May apply again in execution of the decree under Rules 35, 36, *ante* and if obstructed again may apply under Rule 97.

Note 4.

(1) *Ramsekara Pillai* v. *Dharmaraya Goundan*, (1882) 5 Mad 113 (114); *Barangore Jute Factory Co, Ltd* v. *Rajkumar Rai*, (1909) 13 Cal W N 724 (727, 728): 1 Ind Cas 785 (787); *Ammu Kovilamma* v. *Palakkuzhu Manakkal*, *Ammu Kovilamma* v. *Palakkuzhu Manakkal*, (1928) Mad W N 236 (236); *Meyyappa Chetty* v. *Meyyappan Servai*, 1921 Mad 559 (561): 1921 Mad W N 698: 66 Ind Cas 722; *Narain Das* v. *Hazari Lal*, (1896) 18 All 233 (237): 1896 All W N 84; *Hunkur Singh* v. *Madho Lall*, (1874) 21 Suth W R 147 (147). But see *Ghulam Muhammad* v. *Hassan Din*, (1910) 6 Ind Cas 649 (649): 45 Pun W Rep 1910: 44 Pun L R 1910.

(1-a) *Balwant Santararam* v. *Babaji Bin Sambhapa*, (1884) 8 Bom 602 (608): 9 Ind Jur 227. See also *Jugmohun* v. *Buldeo*, (1868) 3 Agra 162.

(2) *Muttia* v. *Appasami*, (1890) 13 Mad 504 (506); *Raghunandan* v. *Ramcharan*, (1919) 49 Ind Cas 150 (153, 155): 4 Pat L Jour 94: 1919 Pat H C C 81 F B; *Muthusamy Goundan* v. *Ethirajalu Naidu*, 1913 Mad W N 179 (179): 16 Ind Cas 432; *Abdul Karim Sahib* v. *Timmaraya Chetty*, (1914) 24 Ind Cas 512 (512) Mad.

(3) *Kesri Narain* v. *Abdul Hasan*, (1904) 26 All 365 (367): 1904 All W N 46: 1 All L J 86; *Vinaykrav Amrit* v. *Devrao Govind*, (1887) 11 Bom 473 (474).

Note 5.

(1) *Raghunendan* v. *Ramacharan Manda*, (1919) Pat H C C 81 (84): 49 Ind Cas 150 (153): 4 Pat L Jour 94.

Remedies of a Person Obstructed.—Contd.

O.21, R.97, Notes 5—8.

Person obstructed.	Obstruction by whom.	Remedy.
	b. On obstruction by *third parties.*	i. May proceed under Rule 97. ii. May apply again in execution of the decree under Rules 35, 36, *ante.* (Note 4). iii. May institute a regular suit for possession. (Note 4).
II. Purchaser in sale in execution.	*a.* On obstruction by *judgment-debtor* or any person claiming under him.	i. May proceed under Rule 97. ii. May apply again for delivery under Rules 95 and 96 (*See* Note 4). iii. May file a suit for possession. But if the *decree-holder* is the purchaser *see* Note 19 to Sec. 47, *ante.*
	b. On obstruction by *third parties.*	i. May proceed under Rule 97. ii. May file a suit for possession (Note 3). *Note.*—According to the Allahabad High Court, a second application for delivery of possession under Rule 95 or Rule 96 is not maintainable.

6. **Order 9 if applies to proceedings under this rule.**—*See* Note 2 to S. 141 and Note 1 to O. 9, R. 9, *ante.*

7. **Appeal.**—*See* Note 19 to S. 47, *ante* and R. 101, *infra.*

8. **Revision.**—If the Court rejects the application under this rule without ordering investigation, the order of the Court is open to revision by the High Court.[1]

O.21, R.98.

R. **98.** [Ss. 329-330.] *Where* the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some *other* person at his instigation, *it shall direct that the applicant be put into possession of the property, and where the applicant is* still resisted or obstructed in obtaining possession, the Court may *also*, at the instance of the *applicant*, *order* the judgment-debtor, or *any* person *acting at*

Resistance or obstruction by judgment debtor.

Note 8.

(1) *Vishnu Ramachandra v. Ramachandra Yeshwant*, (1907) 9 Bom L R 936 (940).

O.21, R.98. *his instigation, to be detained in the civil prison* for a term which may extend to thirty days.

[1877—Ss. 329, 330; 1859—Ss. 227, 228.]

Local Amendments.

ALLAHABAD.

After the words "at his instigation", wherever they occur, *add* the words "or on his behalf", and *after* the words at the end of the rule, "thirty days" *add* the words "(thirty days), and may order the person or persons whom it holds responsible for such resistance or obstructions to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order to pay costs and compensation (*vide* Court's Notification No. 6376|35 (*a*), dated the 12th November, 1929) made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree".

LAHORE.

After the words "at his instigation" where they occur first *add* the following words:—

"or on his behalf."

Add the following proviso:—

"Such detention shall be at the public expense and the person at whose instance the detention is ordered shall not be required to pay subsistence allowance."

NAGPUR.

(*a*) *After* the words "instigation", in both places where it occurs, *insert* the words "or on his behalf"; and,

(*b*) *After* the words "thirty days" *insert* the words:—
", and may order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally, in addition to costs, reasonable compensation to the decree-holder or the purchaser, as the case may be, for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

N.-W. F. P.

In R. 98 *after* the words "at his instigation" wherever they occur *add* the words "or on his behalf", and *after* the words "in the civil prison" *add* the words "at the expense of the Crown".

OUDH.

In Rule 98, *after* the words "at his instigation", wherever they occur, *insert* the words "or on his behalf" and *after* the words "thirty days" at the end of the rule, *add* the words "and may order the person or persons whom it holds responsible for such resistance or objections to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree".

RANGOON.

For Rule 98, the following shall be substituted, namely:—

"98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at

his instigation or on his behalf, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession the Court may also, at the instance of the applicant or of its own motion, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison at the cost of Government for a term which may extend to thirty days."

O.21, R.98, Notes 1—3.

Synopsis.

1. Scope and applicability of the rule.
2. Presidency Small Cause Court.
3. Alienee from judgment-debtor pending attachment.
4. "Just cause."
5. "Is still resisted or obstructed."
6. "In obtaining possession"—Meaning of.
7. Renewal of resistance—Fresh cause of action. See Note 4 to Rule 97, ante.
8. Appeal. See Note 19 to S. 47, ante and R. 10, infra.

1. Scope and applicability of the rule.—In order that this rule might apply, the resistance or obstruction must be *without just cause* and must be by either the judgment-debtor or by some other person at his instigation. No order under this rule can therefore be passed against a person, not the judgment-debtor, unless his resistance was at the instigation of the judgment-debtor,[1] or against a person who was in possession *on his own account* though his resistance was at the instigation of the judgment-debtor[2] inasmuch as, in such case, his obstruction cannot be said to be *without just cause.*

By virtue of S. 146, *ante* an application under this rule can be maintained against any person claiming under the judgment-debtor and bound by the decree such as a tenant[3] or a transferee *pendente lite,*[4] or a subsequent purchaser from the judgment-debtor in execution of a money decree against him.[5] The Court can pass an order under this rule only on an application made to it under R. 97, *ante*, and cannot therefore pass an order under this rule on an application for possession under R. 95, *ante.*[6]

2. Presidency Small Cause Court.—Under S. 48 of the Presidency Small Cause Courts Act, the provisions of the Code of Civil Procedure are made applicable to proceedings under Chapter VII of the Act, and, therefore, the Small Cause Court has power to direct removal of improper obstruction on the part of the judgment-debtor under this rule.[1]

3. Alienee from judgment-debtor pending attachment.—Under R. 95, *ante* the Court may order delivery of possession against a person "claiming under a title created by the judgment-debtor subsequently to the attachment

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Order 21, Rule 98—Note 1.

(1) *Ezra* v. *Gubbay*, (1921) 47 Cal 907 (911, 912): 60 Ind Cas 969 (971).

(2) *Salamva* v. *Marlnaw*, (1892) 16 Bom 711 (Note): 1887 Bom P J 52, *Govinda Nair* v. *Kesava*, (1881) 3 Mad 81 (85): 5 Ind Jur 132.

(3) *Jaffarji* v. *Wigadon*, 1922 Bom 273 (274): 46 Bom 526: 64 Ind Cas 692: 23 Bom L R 1251; *Appa Rao* v. *Venkappa*, 1931 Mad 534 (535): 132 Ind Cas 301.

(4) *Golam Nabi Chapwala* v. *F W Needham*, 1925 Cal 1243 (1244): 85 Ind Cas 1004; *Meenappa Chetty* v. *Meyyappan* 1921 Mad 559 (562): 66 Ind Cas 722: 1921 Mad W N 698; *Kuppana Kaundan* v. *Kumara Kaundan*, (1910) 7 Ind Cas 418 (419): 34 Mad 450: 20 Mad L Jour 961: 8 Mad L Tim 240: 1910 Mad W N 574.

(5) *Manicka Gramaani* v. *Parasuram*, (1920) 59 Ind Cas 894 (895): 12 Mad L W 350: 1920 Mad W N 787.

(6) *Barkat Ali* v. *Fattu*, 1928 Lah 215 (216): 10 Lah L Jour 68: 106 Ind Cas 491.

Note 2.

(1) *Mahomed Ghouse* v. *Mohideen*, 1924 Mad 74 (74): 45 Mad L Jour 66: 73 Ind Cas 985: 18 Mad L W 135: 1923 Mad W N 882.

O.21, R.98, Notes 3—8.

of such property.'' It has been held by the High Court of Madras that this rule should be read along with R. 95, and an order can be made under this rule against such a person, and further that such person is a representative of the judgment-debtor within the meaning of S. 146, *ante*.[1] *See* Note 1, *ante* and *also* Note 2 to R. 102.

4. **''Just cause''.**—This rule applies only to cases where the judgment-debtor or any person at his instigation resists delivery of possession without any *just* cause,[1] and therefore if the auction-purchaser sells the property to one of the judgment-debtors and he resists delivery of possession, the Court cannot order delivery of possession under this rule.[2] But the Court ought to decide the question of the existence or otherwise of just cause, on the evidence before it and not on a consideration that has no basis at all.[3]

5. **''Is still resisted or obstructed''.**—If the judgment-debtor or any person acting at his instigation, again resists delivery of possession after an order for delivery is passed under this rule, the Court has the power to commit such person to prison, on an application by the person obstructed.

6. **''In obtaining possession''—Meaning of.**—The word ''possession'' in this rule is not restricted to actual or *physical* possession but includes also constructive possession or possession in law by receipt of rent or otherwise.[1]

7. **Renewal of resistance—Fresh cause of action.**—*See* Note 4 to R. 97, *ante*.

8. **Appeal.**—*See* Note 19 to S. 47, *ante* and R. 101, *infra*.

O.21, R.99.

R. **99**. [Ss. 331, 335.] *Where the Court is satisfied that* the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall *make an order dismissing the application.*

Resistance or obstruction by *bona fide* claimant.

[1877—Ss. 331, 335; 1859—Ss. 229, 269.]

Note 3.

(1) *Kupanna* v. *Kumara*, (1910) 7 Ind Cas 418 (419): 34 Mad 450: 20 Mad L Jour 961: 8 Mad L Tim 240: 1910 Mad W N 574.

Note 4.

(1) *Rudramma* v. *Nagi*, (1910) 8 Ind Cas 133 (133): 8 Mad L Tim 388: 1910 Mad W N 641; *Muttia* v. *Appasami*, (1890) 13 Mad 504 (507); *Suryanarayana Rao* v. *Balasubramanian*, (1920) 56 Ind Cas 524 (526): 43 Mad 635: 38 Mad L Jour 433: 11 Mad L W 409: 1920 Mad W N 267 [Unmarried sisters are not bound by sale of judgment-debtors interest and cannot be removed from possession].

(2) *Periyaya Ambalam* v. *Arulappan*, 1928 Mad 806 (809): 111 Ind Cas 551; *Rudramma* v. *Nagi*, 1910 Mad W N 641 (642): 8 Mad L Tim 388: 8 Ind Cas 133 (133); *Muttia* v. *Appasami*, (1890) 13 Mad 504 (507).

(3) *Janardhan Missir* v. *Brijnandan Singh*, (1920) 56 Ind Cas 982 (983) (Pat).

Note 6.

(1) *Mancharan* v. *Fakirchand*, (1901) 25 Bom 478 (481, 492, 493): 3 Bom L R 58; *Barjbala Debi* v. *Gurudas Mandli*, (1906) 33 Cal 487 (491, 493): 3 Cal L Jour 298. See also *Chidambara Pattar* v. *Ramaswami Pattar*, (1904) 27 Mad 67 (71): 13 Mad L Jour 467.

Local Amendments.

O.21, R.99, Note 1.

ALLAHABAD.

For the words in brackets "(other than the judgment-debtor)" *read* the words in brackets ("other than the persons mentioned in Rules 95 and 98 hereof").

NAGPUR.

In Rule 99, *for* the word "judgment-debtor" where it occurs in brackets, *substitute* the words "persons mentioned in Rule 95 or 98".

N.-W. F. P.

In R. 99 *for* the words "(other than the judgment-debtor)" *substitute* the words "(other than the persons mentioned in Rules 95 and 98)".

OUDH.

In Rule 99, *for* the words in brackets "(other than the judgment-debtor)" *read* the words in brackets "(other than the persons mentioned in Rules 95 and 98 hereof)".

RANGOON.

For Rule 99, the following shall be *substituted*, namely:—

"99. Where the Court is not so satisfied it shall make an order dismissing the application."

Synopsis.

1. Procedure under the old Code.
2. Scope of the rule.
3. "Person other than the judgment-debtor." See Note 2 to R. 100, infra.
4. "Claiming in good faith to be in possession."
5. "On his own account."
6. Transferee pendente lite. See R. 102, infra.
7. Inherent power to order delivery of possession.
8. Appeal. See Note 19 to S. 47, ante and R. 101, infra.

"Judgment-debtor." See Note 2, Pt. (4) of R. 100, infra.
Possession—Nature of. See Note 4, Pt. (1).

1. Procedure under the old Code.—This rule corresponds to Ss. 331 and 335 of the Code of 1882. S. 331 related to the procedure to be adopted in the case of obstruction to delivery of possession to the *holder of a decree for possession*, and S. 335 related to the case of obstruction to *auction-purchaser*.

Under S. 331, however, the Court had to register the application as a *suit* between the decree-holder as plaintiff, and the claimant as defendant, and to investigate into the claim as if a suit for the property had been instituted by the decree-holder against the claimant. The following cases which were decided under the old Code are no longer of any importance.[1]

Order 21, Rule 99—Note 1.

(1) *Fonnindro Deb* v. *R Jayodishwari Dabi*, (1887) 14 Cal 234 (235); *Sithalakshmi* v. *Vythilinga*, (1885) 8 Mad 548 (551) [S. 331 confers special jurisdiction to try claim below pecuniary value of Court]; *Kahna* v. *Nainan Kutti*, (1890) 13 Mad 520 (522), (Do.); *Kadambini Dasi* v. *Dayaram Das*, (1910) 5 Ind Cas 573 (575): 11 Cal L Jour 478, (Do.); *Muthammal* v. *Chinnana Goundan*, (1882) 4 Mad 220 (225) [Suit under S 331 is not continuation of Original Suit]; *Nasir Ali* v. *Meher Ali*, (1895) 22 Cal 830 (832), (Do.); *Ravlaji Tamaji* v. *Dholapa Raghu*, (1879-80) 4 Bom 123 (125) [Suit is only a continuation of Original Suit]; *Mahbuban* v. *Umrao Begam*, (1882) 8 Cal 720 (721): 11 Cal L Rep 98 [Court-fee payable]; *Lala* v. *Narayan*, (1895) 21 Bom 392 (393) [Appeal lies]; *Jagannath* v. *Parbati*, (1882) All W N 125, (Do.); *Baranagore Jute Factory, Ltd* v. *Raj Kumar* (1909) 1 Ind Cas 785 (787): 13 Cal W N 724 [Refusal to register as plaint appealable]; *Judoonath Singh* v. *Kalee Pershad*, (1870) 14 Suth W R 358 (359): 6 Beng L R App 55 [Question of title should be tried]; *Mt Ehsan Khatoon* v. *Ramnath Sein*, (1871) 15 Suth W R 327 (328): 7 Beng L R App 26, (Do.); *Namdev* v. *Ramchandra*, (1892) 18 Bom 37 (40); *Lala* v. *Narayan*, (1897) 21 Bom 392 (393); *Valliammal* v. *Shanmugam Pillai*, (1910) 6 Ind Cas 285 (285): 7 Mad L Tim 223.

O.21, R.99, Notes 2—5.

2. **Scope of the rule.**—When delivery of property in execution of a decree is resisted, the Court can only deal with the matter on application to remove the obstruction, and only in the manner provided by law. It cannot direct that unless the obstructor filed a suit within a certain time to establish his right, his title to the property should cease.[1] The order passed under this rule is final subject to the result of the suit, if any, under R. 103, *infra*.[2]

3. **"Person other than the judgment-debtor."**—*See* Note 2 to R. 100, *infra*.

4. **"Claiming in good faith to be in possession".**—The word possession in this rule is not restricted to *actual* possession; it includes also *constructive* possession.[1] *See* Note 6 to R. 98, *ante*.

The party resisting delivery of possession should satisfy the Court that he is, in good faith, in possession of the property on his own account or on account of a person not the judgment-debtor.[2] If the obstructor has a good and legal right to obstruct, the fact that he acts at the instigation of the judgment-debtor will not prevent an order being made under this rule in his favour.[3] It has also been held in the undermentioned case,[4] that the words "claiming in good faith to be in possession" do not mean "claiming in good faith to *have a right to be in possession* but mean only that the claimant claims to be in possession as a matter of fact. *See* R. 101, *infra*.

5. **"On his own account."**—The person in possession, resisting delivery of possession may claim to be in possession on his own account, or as tenant of, or on account of some person *other* than the judgment-debtor. Therefore, in execution of a decree against a tenant, a tenant of the tenant, *i.e.* a sub-tenant cannot resist delivery of possession to the landlord.[1] The Calcutta High Court has held that if the lessee granted the sub-lease against a covenant in the lease not to sub-let, the sub-lessee is a trespasser and therefore is a person claiming to be in possession on his own account and that the remedy of the landlord is to file a suit for possession against the sub-lessee.[2] *See* Note 2 to R. 101, *infra*.

Under Hindu Law unmarried sisters are not bound by a decree against their brother, and as they have a right of residence in the family house they

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Note 2.

(1) *Hargolal* v. *Chandu Lal*, 1923 Lah 145 (146): 69 Ind Cas 557.

(2) *Chail Behari Lal* v. *Kidar Nath*, (1919) 51 Ind Cas 787 (790, 791): 93 Pun L R 1920: 51 Pun W R 1919: 1 Lah 57: 2 U P L R (Lah) 7: 1 Lah L Jour 14.

Note 4.

(1) *Mancharam* v. *Fakirchand*, (1901) 25 Bom 478 (480, 481): 3 Bom L R 58.

(2) *Ramaswamy Nadar* v. *Shanmuga Malavarayan*, 1928 Mad 909 (909): 108 Ind Cas 894; *Chinna Vavanan* v. *Chettiappa Chetty*, 1926 Mad 78 (80-81): 48 Mad 767: 22 Mad L W 439: 49 Mad L Jour 432: 91 Ind Cas 16; *Secretary of State* v. *Cherukara*, (1915) 31 Ind Cas 799 (799, 800) Mad; *Harinikal* v. *Shamji*, (1910) 5 Ind Cas 809 (810): 14 Pun Re 1910: 21 Pun W R 1910: 64 Pun L R 1910; *Sundar Doss* v. *Raja Baldeo Singh*, 1907 Pun Re No 118: 192 Pun W R 1907 [Claim being in good faith should be properly enquired into]; *Karunakara Menon* v. *Secretary of State for India*, (1910) 8 Ind Cas 857 (858): 21 Mad L Jour 407: 9 Mad L Tim 166; *Jugal Kishore Marwari* v. *Bejoy Krishna*, (1912) 15 Ind Cas 683 (684): 16 Cal W N 882 [Claimant who claim under R 58 was dismissed cannot obstruct. His remedy is by suit under R 63].

(3) *Govinda Nair* v. *Kesava*, (1881) 3 Mad 81 (85): 5 Ind Jur 132.

(4) *Ezra* v. *Gubbay*, (1921) 60 Ind Cas 969 (971): 47 Cal 907.

Note 5.

(1) *Jaferji* v. *Miyadin*, 1922 Bom 278 (274): 22 Bom L R 1251: 46 Bom 526: 64 Ind Cas 692; *Jai Ram* v. *Nawroji*, 1922 Bom 449 (451): 23 Bom L R 1316: 46 Bom 887: 65 Ind Cas 212.

(2) *Ezra* v. *Gubbay*, (1921) 60 Ind Cas 969 (971): 47 Cal 907.

cannot be removed from possession in execution of a decree against their brother.[3] O.21, R.99. Notes 5—8.

6. **Transferee pendente lite.**—*See* R. 102, *infra*.

7. **Inherent power to order delivery of possession.**—It has been held in the case noted below[1] that the Court can under its *inherent* powers, order delivery of possession to a decree-holder, where the property is in the possession of a *third* person who has no *bona fide* claim to the possession of the property on his own account.

8. **Appeal.**—*See* Note 19 to S. 47, *ante* and R. 101, *infra*.

R. **100.** [S. 332.] (1) *Where* any person other than the judgment-debtor is dispossessed of *immoveable* property *by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.*

O. 21, R. 100, Note 1.

Dispossession by decree-holder or purchaser.

(2) *The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.*

[1877—S. 332; 1859—S. 230.]

Synopsis.

1. Scope of the rule.
2. "Any person other than the judgment-debtor."
3. "Is dispossessed."
4. Dispossession under order of Collector.
5. Nature of investigation under this rule. See R. 101, infra.
6. Limitation.
7. Applicability of O. 9 to applications under this rule. See R. 101, infra.

Appeal. See Note 7, to R. 101 infra.
Dismissal for default or ex parte order under this rule. See Note 6 to R. 101, infra.
Practice. See Note 5 to R. 101, infra.
Revision. See Note 8 to R. 101 infra.
Who may apply under this rule. See Note 2.

1. **Scope of the rule.**—Where, in obtaining possession of property the holder of a decree for possession or the auction-purchaser, as the case may be, *dispossesses* any person other than the judgment-debtor, such person may apply to the Court for a summary investigation of the matter under this rule.[1] It is, however, not *obligatory* on such person to apply under this rule; he may bring a separate suit against the person who dispossessed him, for

(3) *Suriya Narayana Rao Naidu* v. *Balasubramania Mudali*, (1920) 56 Ind Cas 524 (526): 13 Mad 635: 38 Mad L Jour 433: 1920 Mad W N 267: 11 Mad L W 409.

Note 7.

(1) *Radhika Mohan* v. *Gyan Chandra*, (1910) 6 Ind Cas 120 (120, 121): 14 Cal W N 836.

Order 21, Rule 100—Note 1.

(1) *Ambikacharan* v. *Ram Prasad*, 1926 Cal 377 (377): 42 Cal L Jour 578: 30 Cal W N 163: 90 Ind Cas 575; *Gulabbai Gopalji* v. *Jivabhai Ratanji*, (1889) 13 Bom 213 (214); *Sankaran Nambudripad* v. *Pangi Achan*, (1893) 3 Mad L Jour 258 (259) [Third party purchaser should apply under this rule and not by way of restitution]. See also *Govind Baliant* v. *Lakshman Bin Nauda Teli*, (1894) 18 Bom 522 (524).

O. 21, R. 100, Notes 1—2.

possession of the property.[1-a] The Court cannot, however, act under this rule unless there is an *application* of the party dispossessed.[1-b]

Where an application is made under this rule, the Court should register the application,[2] make an investigation therein and should either dismiss the application or pass an order under R. 101, *infra*.[3] It has no jurisdiction to pass a declaratory order under this rule.[4] As to the *scope of the investigation under this rule, see* R. 101, *infra*.

The remedy of the party against whom an order is made under R. 101 is to file a suit under R. 103 to establish his right to the possession of the property.

A third person dispossessed in execution of a decree under S. 9 of the Specific Relief Act can also apply under this rule.[5]

2. "Any person other than the judgment-debtor".—This rule has to be read along with R. 101, *infra*. A judgment-debtor or his representative cannot apply under this rule.[1] As to who are "representatives" see the case cited below[2] and S. 47, Notes 17 and 21, *ante*. The Calcutta High Court[3] has, however, held that the word "judgment-debtor" in this rule does not include any person other than the *actual* judgment-debtor; the question according to that Court, is not whether the applicant is a *representative* of the judgment-debtor but if, he is in possession *on his own account*, and this should be investigated under R. 101. *See* R. 101, *infra*.

A person who is a party to the suit, but against whom no decree has been passed, is not a judgment-debtor and therefore, can apply under this rule.[4] If, however, the decree is binding on him his remedy is to apply under S. 47.[5]

(1-a) *Milkhi Ram* v. *Basant Singh*, 1931 Lah 686 (687): 132 Ind Cas 844; *Protab Chunder Chowdhry* v. *Brojolol Shaha*, (1867) Beng L R Sup Vol 638 (638): 7 Suth W R 253 F B.

(1-b) *Milkhi Ram* v. *Basant Singh*, 1931 Lah 686 (687): 132 Ind Cas 844.

(2) *Thakur Prasad Lal* v. *Sukhlal Singh*, 1924 Pat 698 (700): 5 Pat L Tim 567: 79 Ind Cas 598.

(3) *Ambikacharan* v. *Ram Prosad*, 1926 Cal 377 (377): 42 Cal L Jour 578: 30 Cal W N 163: 90 Ind Cas 575.

(4) *Mahomed Abdul Rahim* v. *Parashram*, 1927 Nag 300 (301): 103 Ind Cas 231.

(5) *Brahma Mayi* v. *Barkat Sirdar*, (1870) 12 Suth W R 25 (25): 4 Beng L R 94 F B. But see *Gobind Chunder* v. *Gobind Ghose*, (1867) 7 Suth W R 171 (172).

Note 2.

(1) *Maharaja Pratap* v. *Sunderbans Koer*, 1923 Pat 76 (82): 3 Pat L Tim 628: 71 Ind Cas 999; *Bhikhia Jha* v. *Brij Bihari Singh*, (1917) 42 Ind Cas 526 (526, 527): 2 Pat L Jour 478: 1 Pat L W 685; *Imdad Ali* v. *Jagan Lal*, (1895) 17 All 478 (481): 1895 All W N 109.

(2) *Appa Rao* v. *Venkappa*, 1931 Mad 534 (535): 132 Ind Cas 301 [Tenants and servants of judgment-debtor are bound by decree]; *Narayanasami* v. *Seshappier*, (1907) 17 Mad L Jour 321 (321) [Mortgagee after attachment is a representative of judgment-debtor]; *Shohari Kurmi* v. *Phani Nath Chowdhury*, 1929 Pat 227 (228): 10 Pat L Tim 242: 117 Ind Cas 808 [Purchaser of non-transferable holding representative of judgment-debtor]. *Dost Muhammad Mulla* v. *Majed Ali Naskar*, 1926 Cal 956 (956): 95 Ind Cas 146 [Purchaser of non-transferable holding representative of judgment-debtor]; *Kanashabhai* v. *Rajagopal*, (1917) 42 Ind Cas 523 (524): 6 Mad L W 568 [Purchaser of non-transferable holding is representative of judgment-debtor]; *Pancharatan* v. *Ram Sahay*, (1918) 48 Ind Cas 969 (969): 3 Pat L Jour 579: 4 Pat L W 129, (Do.). But see *Purna Chandra Kundu* v. *Manobini Devi*, 1927 Cal 156 (157): 53 Cal 918: 99 Ind Cas 718 [Purchaser of non-transferable holding not a representative of judgment-debtor].

(3) *Narayan Bera* v. *Jharu Mandal*, 1928 Cal 792 (794); *Bhim Naik* v. *Chakradhar Maity*, 1930 Cal 348 (348): 34 Cal W N 577: 127 Ind Cas 552.

(4) *Sabhajit* v. *Sriyopal*, (1895) 17 All 222 (225): 1895 All W N 64; *Vasudeva Upadhyaya* v. *Visvaraja Tirthasami*, (1896) 19 Mad 331 (334); *Jathavedan* v. *Kunchun Achan*, (1907) 30 Mad 72 (74): 16 Mad L Jour 433: 2 Mad L Tim 34; *Krishnappa Mudali* v. *Periasami Mudali*, (1917) 40 Mad 964 (966, 967): 21 Mad L Tim 121: 5 Mad L W 369: 32 Mad L Jour 532: 38 Ind Cas 297; *Ghuran Rai* v. *Kali Prasad Singh*, 1927 Pat 404 (405): 102 Ind Cas 446: 8 Pat L Tim 654.

(5) *Govindarajulu Naidu* v. *Chinnathambi Padayachi*, 1928 Mad 1270 (1270): 111 Ind Cas 147.

O. 21, R. 100. Notes 2—5.

Rr. 100 and 101 are not exhaustive and do not include a case where the judgment-debtor himself is in possession on account of some third person and not on his own account. It has been held, however, that in such a case the *third person* is entitled to apply under this rule if the judgment-debtor is dispossessed by the decree-holder or auction-purchaser.[6]

Where the judgment-debtor or his representative is dispossessed of property not included in the decree, his remedy is to apply under S. 47, *ante*.[7]

3. "Is dispossessed".—Unless the applicant is *dispossessed* of the property, he has no cause of action to apply under this rule.[1] The dispossession should be in the course of the delivery of possession[2] and should be proved as a fact.[3] Thus, mere delivery of *symbolical* possession to the decree-holder or auction-purchaser will not amount to dispossession of the party in possession; it must be shown that the applicant was *actually* dispossessed of the property.[4]

Where the dispossession does not take place in the course of the delivery of possession in execution but *subsequent* thereto, this rule has no application, and the remedy of the party aggrieved, is to file a regular suit for possession.[5]

Where a person is in possession of the property by receipt of rent or otherwise, and the tenant in actual possession is dispossessed of the property by the decree-holder or auction-purchaser, the landlord is a person who is *dispossessed* of the property within the meaning of this rule[6], even though the tenant is the judgment-debtor.[7] *See* Note 2, *ante*.

4. Dispossession under order of Collector.—This rule has no application to a case where the decree has been transferred to the Collector for execution under powers conferred on him by the Local Government under S. 70 of the Code. The Court which passed the decree is for the time being *functus officio*, and has no jurisdiction to inquire into a complaint of dispossession under this rule;[1] but as soon as the Collector has *exhausted* all the powers conferred upon him, the Civil Court has jurisdiction to inquire into any matters requiring to be done in execution such as those provided in Rr. 97 to 103 of the Code.[2]

5. Nature of investigation under this rule.—*See* R. 101, *infra*.

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(6) *Mancharam* v. *Fakirchand*, (1901) 25 Bom 478 (493): 3 Bom L R 58.

(7) *Abdul Karim* v. *Islamunnissa Bibi*, (1916) 34 Ind Cas 231 (232): 38 All 339: 14 All L J 191.

Note 3.

(1) *Kalee Narain Singh* v. *Protap Chunder Durooah*, (1869) 12 Suth W R 231 (232, 233).

(2) *Satyanarain* v. *Jinai Sah*, 1929 Pat 553 (554, 555): 117 Ind Cas 634: 10 Pat L Tim 872.

(3) *Neel Madhab* v. *Radha Mohun*, (1865) 3 Suth W R 205 (206).

(4) *Venkatakrishna Rao* v. *Vadrevu Venkappa*, (1904) 27 Mad 262 (268, 270); *Ram Chandra Subrao* v. *Ravji*, (1896) 20 Bom 351 (354) F B; *Ibrahim* v. *Ramjadu*, (1903) 30 Cal 710 (712); *Kinori Lal* v. *Shib Lal*, (1896) 1 Cal W N 343 (344); *The Collector of Bograh* v. *Kristo Indur*, (1869) 11 Suth W R 191 (192): 2 Beng L R A C 301 [Planting a bamboo and making proclamation to occupants is sufficient dispossession].

(5) *Apparao* v. *Venkappa*, 1931 Mad 534 (536): 132 Ind Cas 301; *Atarmoni Dasi* v. *Ramananda Sen Chowdhury*, 1923 Cal 601 (602): 50 Cal 311: 84 Ind Cas 876.

(6) *Brajabala* v. *Gurdas*, (1906) 33 Cal 487 (491, 492): 3 Cal L Jour 293; *Mancharam* v. *Fakirchand*, (1901) 25 Bom 478 (488 & 493): 3 Bom L R 58; *Bhyrub* v. *Sham*, (1871) 15 Suth W R 70 (71); *Asgar Ali* v. *Asgar Ali*, (1873) 20 Suth W R 373 (374).

(7) *Mancharam* v. *Fakirchand*, (1901) 25 Bom 478 (493): 3 Bom L R 58.

Note 4.

(1) *Rugho* v. *Hannati*, (1913) 37 Bom 488 (490): 19 Ind Cas 903: 15 Bom L R 389; *Bandappa* v. *Shankar Rao*, 1924 Nag 309 (311): 78 Ind Cas 580.

(2) *Arjun* v. *Krishnaji*, (1915) 38 Bom 673 (676, 678): 16 Bom L R 637: 26 Ind Cas 266.

O. 21, R. 100, Notes 6—7.

6. Limitation.—The period of limitation for an application under this rule is thirty days from the date of dispossession.[1] *See* Art. 165, Indian Limitation Act, 1908.

7. Applicability of O. 9 to applications under this rule.—*See* R. 101, *infra*.

O. 21, R. 101, Notes 1—2.

R. **101**. [Ss. 332, 335.] *Where the Court is satisfied that the applicant was* in possession *of the property* on his own account or on account of some person other than the judgment-debtor, *it shall direct that the applicant be put into possession of the property.*

Bona fide claimant to be restored to possession.

Synopsis.

1. Procedure under the old Code.
2. "On his own account."
3. Transferee pendente lite. See R. 102, infra.
4. Transfer of decree to Collector. See R. 100, Note 4, ante.
5. Nature of investigation under this rule.
6. Applicability of the provisions of Order 9 to proceedings under this rule.
7. Appeal.
8. Revision.

Burden of proof. See Note 5.
Dispossession of third person. See Notes 2 and 3 to R. 100, ante.
Finality of the order under this rule. See Note 1 to R. 103, infra.
Transferee pendente lite. See R. 102, infra.

1. Procedure under the old Code.—Rules 100 and 101 correspond to Ss. 332 and 335 of the Code of 1882. Section 332 related to the procedure to be adopted in the case of a person dispossessed by the *holder of a decree, for possession*, and S. 335 related to the case of dispossession by the *auction-purchaser*. But under S. 332, the Court had to *examine* the applicant, and on being satisfied that there was probable cause for making the application, had to ascertain on investigation if the following grounds existed:—*Viz.*,

(i) Whether the property was *bona fide* in the possession of the applicant on his own account or on account of some person other than the judgment-debtor.

(ii) Whether the property was not comprised in the decree, and

(iii) If the property was comprised in the decree, whether the applicant was not a party to the suit in which the decree was passed.

If the Court was satisfied that these grounds existed it had to order re-delivery of the property to the applicant.—otherwise it had to dismiss the application.

As to the nature of the investigation under this rule. *See* Note 5, *infra*.

2. "On his own account".—Rules 100 and 101 are not confined, in their application, to cases of *exclusive* possession, but are applicable also to cases where the person dispossessed was in *joint* possession.[1] Therefore, if a co-owner

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Note 6.

(1) *Abdul Karim* v. *Islamunnissa*, (1916) 14 All L J 401 (406): 34 Ind Cas 231: 38 All 389; *Indubhushan Das* v. *Haricharan Mandal*, 1931 Cal 385 (387): 58 Cal 55: 132 Ind Cas 631.

Order 21, Rule 101—Note 2.

(1) *Indubhushan Das* v. *Haricharan Mandal*, 1931 Cal 385 (387): 58 Cal 55: 132 Ind Cas 631.

or a member of an undivided family is dispossessed in execution of a decree against another co-owner or co-parcener, he may apply under this rule to be put in joint possession with the decree-holder or the auction-purchaser,[2] but he cannot claim to be put in possession of *specific portions* of the property, as the Court cannot adjudicate on such questions of title under this rule.[3]

A mortgagee in possession of the property[4] or occupancy tenants,[5] if dispossessed can get back the possession under this rule as they are in possession on their own account, but not a mortgagee or transferee *pendente lite*. *See* R. 102, *infra*. It has been held by the High Court of Patna that an usufructuary mortgagee was *not entitled to object* under O. 21, R. 58 to the attachment of the property of his mortgagor, and that if such an objection is made and disallowed, R. 63 would not operate to debar him from making an application under this rule when he is dispossessed by the purchaser in execution of a decree.[6] It has been held by the High Court of Calcutta[7] that if the claimant was in possession on his own account or on account of some person other than the judgment-debtor, he is entitled to succeed under this rule, though he is a trespasser or has no title to the property.

The Court is not entitled on an application under this rule to investigate into the question of *benami* in order to determine whether the applicant was in possession of the property on his own account.[8]

3. Transferee pendente lite.—*See* R. 102, *infra*.

4. Transfer of decree to Collector.—*See* R. 100—Note 4, *ante*.

5. Nature of the investigation under this rule.—Where a third party applies for re-delivery of property under this rule the question which the Court has to decide is whether the applicant was in possession on his own account or on account of some person other than the judgment-debtor.[1] It cannot reject the application on the ground that originally the applicant had not obtained possession in a lawful manner.[2] The applicant has to prove that he was in possession and was dispossessed in the course of the delivery of possession to the decree-holder or purchaser[3] (*see* Notes 2 and 3 to R. 100, *ante*), the onus

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(2) *Radha Gobind Misra* v. *Raghunatha Misra*, (1913) 18 Cal L Jour 138 (140): 18 Cal W N 695: 20 Ind Cas 253; *Govinda Nair* v. *Kesava*, (1881) 3 Mad 81 (86): 5 Ind Jur 132; *Singh* v. *Ram Prasad*, 1923 Nag 52 (53): 18 Nag L R 206: 68 Ind Cas 171; *Ram Kishun Singh* v. *Damodar Prasad*, 1924 Pat 506 (507): 5 Pat L Tim 107: 75 Ind Cas 856: 83 Ind Cas 599; *Govind Balvant* v. *Lakshuman*, (1894) 18 Bom 522 (524). But see *Cooverji* v. *Dewsey*, (1893) 17 Bom 718 (721).

(3) *Sankar Nath Pand* v. *Madan Mohan Das*, 1910) 5 Ind Cas 298 (302): 14 Cal W N 298: 11 Cal L Jour 61.

(4) *Kedar Nath Bay* v. *Saday Chandra Naidu*, (1914) 19 Cal L Jour 13 (15): 22 Ind Cas 707; *Shafiuddin* v. *Lachan Singh*, (1878-80) 2 All 94 (95); *Sabhajit* v *Sri Gopal*, (1895) 17 All 222 (224, 225): 1895 All W N 64 F B; *Devi Das* v. *Nathu Mal*, (1917) 39 Ind Cas 772 (772): 122 Pun L R 1917 78 Pun W R 1917; *Maung Shwe* v. *Karambu Pillai*, 1928 Rang 127 (127): 6 Rang 122: 110 Ind Cas 701.

(5) *Tallapragada Appa Rao* v. *Kasangi Venkappa*, 1931 Mad 534 (535): 132 Ind Cas 301.

(6) *Biswanath Patra* v. *Lingaraj Patra*, 1922 Pat 408 (408): 1 Pat 159: 70 Ind Cas 306.

(7) *Munna Lal Kshetry* v. *Sasi Bhusan Adhikari*, 1927 Cal 339 (340): 98 Ind Cas 541; *D E D J Ezra* v. *J E Gubbay*, (1921) 60 Ind Cas 969 (971): 47 Cal 907.

(8) *Ram Kishun Singh* v. *Damodar Prasad*, 1924 Pat 506 (507): 5 Pat L Tim 107: 75 Ind Cas 856: 83 Ind Cas 599

Note 5.

(1) *Mancharam* v. *Fakirchand*, (1901) 25 Bom 478 (489): 3 Bom L R 58; *Bhimrao* v. *Martand*, (1918) 45 Ind Cas 102 (104): 14 Nag L R 66. See also *Biram Bevi Ammal* v. *Syed Shumsuddin*, (1910) 21 Mad L Jour 404 (406, 407): 8 Ind Cas 860: (1911) 1 Mad W N 33: 9 Mad L Tim 160.

(2) *Obhoya Churn Dey* v. *Rajendro Coomar Ghose*, (1874) 22 Suth W R 406 (406).

(3) *Neel Maddub* v. *Radha Mohun*, (1865) 3 Suth W R 205 (206).

O. 21, R. 101, Notes 5—7.

lies upon him to prove his right to possession,[4] and it is a serious irregularity to ask the decree-holder or auction-purchaser to begin.[5] The investigation under this rule being a summary one, the Court should confine itself to the question of possession and should not decide questions of title[6] or questions regarding the construction of the decree[7] or the equities of the parties.[8] An unsuccessful applicant under O. 21, R. 58 is not competent to apply under O. 21, R. 100 inasmuch as the order against him will be conclusive against him until a suit is instituted to set aside the order under O. 21, R. 63.[9]

6. **Applicability of the provisions of O. 9 to proceedings under this rule.**—*See* S. 141, Note 2, *ante* and O. 9, R. 1, *ante*, Note 1. If the application under R. 100 is dismissed for *default* or ordered *ex parte*, it has been held by the High Court of Calcutta that the Court may restore the application or set aside the *ex parte* order, as the case may be, under its *inherent* powers.[1]

7. **Appeal.**—If the proceedings relating to delivery of possession under Rr. 97—102 are "between the parties or their representatives", an order passed in such proceedings will fall under S. 47 according to the view of the High Courts of Calcutta and Madras and of the Judicial Commissioner's Court of Sind. *See* Note 19 to S. 47, *ante*, An order under R. 98 against a *stranger* will not fall under S. 47 even according to this view and no appeal will, therefore, lie in such a case.[1] But if the proceedings under this rule are between *parties* to the suit, and an order is passed under this rule, the High Court of Madras has held[2] that the aggrieved party will have only a right of *appeal* under S. 47, *ante*. In the undermentioned case Mr. Justice Odgers observed as follows:—"It was not open to the plaintiffs to proceed at their option, either by a suit or by way of appeal. It is also to be observed that S. 47 expressly bars a suit in contradistinction to R. 103, which says that the order on obstruction proceedings shall be conclusive subject to the result of the suit if any. It has, as far as

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(4) *Mohomed Ausur* v. *Prokash Chunder Sha*, (1867) 8 Suth W R 8 (9); *Woodoy Tara* v. *Abdul Gunee*, (1869) 12 Suth W R 16 (17): 3 Beng L R App 90.

(5) *Tallapragada Appa Rao* v. *Kasangi Venkappa*, 1931 Mad 534 (538): 132 Ind Cas 301.

(6) *Krishnappa Mudaly* v. *Periasamy Mudali*, (1917) 40 Mad 964 (966): 21 Mad L Tim 121: 5 Mad L W 369: 38 Ind Cas 297: 32 Mad L Jour 532; *Kedarnath* v. *Saday Charan*, (1914) 19 Cal L Jour 13 (14): 22 Ind Cas 707; *Periaswamy Pillai* v. *Hyder Hossain*, (1910) 8 Ind Cas 613 (614): 3 Bur L Tim 39. But see *Meer Abdoos Sobhan* v. *Brahma Deo Narain*, (1870) 14 Suth W R 140 (141) [Under the old Code if the application itself is registered as a suit, the question of title should be gone into]; *Nugender Chunder* v. *Ram Comul*, (1865) 3 Suth W R 213 (215), (Do); *Balaram* v. *Govindarav*, 1898 Bom P J 56, (Do.); *Hamidabibi* v. *Bhandin*, 1894 Bom P J 88, (Do.); *Dilbasee Koonwaree* v. *Ganga Pershad*, (1880) 5 Cal 278 (280), (Do.); *Safiuddin* v. *Lochan Singh*, (1878-80) 2 All 94 (95-96), (Do.); *Judoonath Singh* v. *Kalee*, (1870) 14 Suth W R 358 (359, 360): 6 Beng L R App 55, (Do.); *Radha Pyari* v. *Nobin Chandra*, (1870) 13 Suth W R 80 (81, 82): 5 Beng L R 708 F B, (Do.); *Brindabun Chunder Roy* v. *Tarachand Bundopadhaya*, (1873) 20 Suth W R 114 (115): 11 Beng L R 237, (Do.); *Gaya Prasad* v. *Tasadduk Husain*, (1903) 6 Oudh Cas 110 (112).

(7) *Jaisri Lal Pande* v. *Dukhlal Thakar*, 1930 Pat 416 (417): 127 Ind Cas 564.

(8) *Thandavaraya Pillai* v. *Kuppusamy Udayar*, 1926 Mad 1127 (1128): 24 Mad L W 889: 97 Ind Cas 605.

(9) *Bhola Nath Sarkar* v. *Hara Duari Agarwalla*, (1932) 36 Cal W N 1034 (1035).

Note 6.

(1) *Nabu Sahu* v. *Kamdev Maity*, 1928 Cal 179 (180): 47 Cal L Jour 87: 107 Ind Cas 729.

Note 7.

(1) *Dwipal Chandra Bardhan* v. *Jiban Debi*, 1931 Cal 574 (576): 58 Cal 808: 35 Cal W N 286: 133 Ind Cas 335.

(2) *Rukmani Ammal* v. *Narasimha Iyer*, 1921 Mad 612 (614): 41 Mad L Jour 54: 14 Mad L W 85: 1921 Mad W N 487: 63 Ind Cas 730; *Meyyappa* v. *Chidambara*, 1920 Mad W N 562 (564): 39 Mad L Jour 603: 12 Mad L W 278: 61 Ind Cas 349; *Veyindra* v. *Maya*, 1920 Mad W N 299 (300, 301): 43 Mad 696: 39 Mad L Jour 456: 58 Ind Cas 501: 28 Mad L Tim 312. See also *Badmi Seshiah* v. *Katti Chinna*, (1919) 52 Ind Cas 928 (928) Mad.

I know, never been suggested in any case that the procedure under S. 47 and under R. 103 is cumulative''.[3] O. 21, R. 101, Notes 7—8.

See also Note 84 to S. 47.

8. Revision.—As the remedy of the party against whom an order under Rr. 98, 99 or 101 has been passed is to file a suit under R. 103, *infra*. Ordinarily orders passed under these rules are not open to revision.[1] But if the lower Court refused to order investigation[2] or rejected the application on a misconstruction of the law[3] or the lower appellate Court erroneously entertained appeals from orders under those rules[4] or if there are illegalities or material errors in the proceedings in the lower Court[5] the High Court may interfere in revision.

R. **102.** [S. 333.] Nothing in *rules* 99 *and* 101 *shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a* person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was *passed or to the dispossession of any such person.* O. 21, R. 102, Note 1.

Rules not applicable to transferee *pendente lite.*

[1877—S. 333; 1859—S. 231.]

Synopsis.

1 Scope of the rule. 2. Transferee pendente lite.

1. Scope of the rule.—This rule enacts that a transferee *pendente lite* cannot get the benefit of the procedure under Rr. 99 and 101.[1] But such a person can raise all the objections that the judgment-debtor could have raised in execution.[2] A transferee *pendente lite* who pays off a prior *usufructuary* mortgagee and enters into possession of the property, must, however, be considered as standing in the shoes of the usufructuary mortgagee himself and not as being a transferee *pendente lite* under this rule.[3]

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(3) *Pachappa Chetty* v. *Venkatachariar*, 1925 Mad 1198 (1199): 1925 Mad W N 577: 90 Ind Cas 952.

Note 8.

(1) *Bhim Naik* v. *Chakradhar Mady*, 1930 Cal 348 (348): 34 Cal W N 577: 127 Ind Cas 552; *Subbiah* v. *Kadasami*, (1915) 29 Ind Cas 19 (20): 1 Mad L W 995; *Natha Mal* v. *Ambho*, (1911) 10 Ind Cas 183 (186): 129 Pun L R 1911: 240 Pun W R 1911. See also *Sheoraj Singh* v. *Bonwari*, (1884) 6 All 172 (173): 1884 All W N 16: 8 Ind Jur 451.

(2) *Vishnu* v. *Rama Chandra*, (1907) 9 Bom L R 936 (940, 941).

(3) *Ram Kishen Singh* v. *Damodhar Proshad*, 1924 Pat 506 (507): 83 Ind Cas 599: 5 Pat L Tim 107.

(4) *Bai Mani* v. *Ranchodlal*, 1923 Bom 214 (215): 25 Bom L R 147: 72 Ind Cas 256; *Hiralal Mohanlal Mutha* v. *Ramchandra Kundanmal*, 1930 Bom 375 (378): 32 Bom L R 619: 125 Ind Cas 703: 54 Bom 479.

(5) *Indubhushan Das* v. *Haricharan Mandal*, 1931 Cal 385 (386): 58 Cal 55: 132 Ind Cas 631; *Appa Rao* v. *Venkappa*, 1931 Mad 534 (538): 132 Ind Cas 301 [Asking decree-holder to begin his case is a serious irregularity]; *Periaswamy Pillai* v. *Hyder Hoosain*, (1910) 8 Ind Cas 613 (614): 3 Bur L Tim 39 [Since the Court went into the question of title in an investigation under this rule—Revision lay].

Order 21, Rule 102—Note 1.

(1) *Kanakasabai Mudaliar* v. *Rajagopal Naidu*, (1917) 42 Ind Cas 523 (524): 6 Mad L W 568; *Rev. F C L Nelson* v. *Sadananda Swamiar*, (1910) 8 Ind Cas 805 (805): 9 Mad L Tim 136: 10 Mad W N 853; *Midnapore Zemindary Co. Ltd* v. *Kumar Naresh Narain*, (1911) 11 Ind Cas 939 (939): 39 Cal 220: 16 Cal W N 109.

(2) *Rajaratnam* v. *Sheik Hassan Bi*, 1926 Mad 968 (969): 51 Mad L Jour 255: 24 Mad L W 254: 97 Ind Cas 1031.

(3) *Mussamat Fatima* v. *Raza Ali*, 1926 Oudh 610 (611): 2 Oudh W N 778: 99 Ind Cas 219.

O. 21, R. 102, Note 2.

2. Transferee pendente lite.—This rule specifically deals with cases of a "decree for possession of immoveable property." It does not deal with decrees for money in which property has been attached in execution and the judgment-debtor has, during such attachment, transferred his properties. It has been held in the cases cited below that the principle of this rule will apply to such cases also.[1]

See also Note 21 to S. 47 and also Note 3 to R. 98.

O. 21, R. 103.

R. **103.** [Ss. 332, 335.] *Any* party *not being a judgment-debtor* against whom an order is *made under rule* 98, *rule* 99 *or rule* 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be *conclusive*.

Orders conclusive subject to regular suit.

Local Amendments.

ALLAHABAD.

The following rules shall be added to Order 21:—

104. When the certificate prescribed by S. 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record-room.

105. Every attachment of moveable property under Rule 43, of Negotiable Instruments under Rule 51, and of immoveable property under Rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed; in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

106. When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application a certificate from the Sub-Registrar within whose sub-district such property is situated, showing that the Sub-Registrar has searched his book Nos. I and II and their indices for the past twelve years and stating the encumbrances, if any, which he has found on the property.

107. Where an application is made for the sale of land or of any interest in land, the Court shall before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887-I—238-10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question.

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

Note 2.

(1) *Kuppanna Kavundan* v. *Kumara Kavundan*, (1910) 7 Ind Cas 418 (419): 34 Mad 450: 20 Mad L Jour 961: 8 Mad L Tim 240: 1910 Mad W N 574. See also *Sivarama Sastrigal* v. *Somasundara Mudali*, (1905) 28 Mad 119 (122). See also Note 21 to S 47.

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land. O. 21, R. 103.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

108. When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under S. 68, the Court, before ordering sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

109. The certificate of the Sub-Registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry.

No fees are payable in respect of the report by the Collector.

110. The result of the enquiry under Rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its direction adjourn the enquiry, provided that the reasons for the adjournment are stated in writing and that no more adjournments are made than are necessary for the purposes of the inquiry.

111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

112. The costs of the proceedings under Rules 66, 106 and 108 shall be paid in the first instance by the decree-holder, but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

113. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place; and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

114. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

115. When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

O. 21, R. 103.

116. Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

117. If the custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper who shall enter in a register:—

(*a*) the number and description of the animals;

(*b*) the day and hour on and at which they were committed to his custody.

(*c*) the name of the attaching officer or his subordinate by whom they were committed to his custody; and shall give such attaching officer or subordinate a copy of the entry.

118. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under S. 12 of Act No. I of 1871.

And the sums so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under S. 12 of the said Cattle Trespass Act.

119. The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under S. 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

120. The charges herein authorized for the maintenance of the live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and hereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

121. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in Rule 118.

122. For the safe custody of moveable property other than live-stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

123. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

124. The fee for the services of each such person shall be payable in the manner prescribed in Rule 116. It shall not be less than four annas

and shall ordinarily not be more than six annas per diem. The Court may at its discretion allow a higher fee; but if it do so, it shall state in writing its reasons for allowing an exceptional rate. O. 21, R. 103.

125. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him; and on the presentation of such certificate to the Court which ordered the attachment the amount shall be paid to him in the presence of the presiding Judge.

Provided that where the amount does not exceed Rs. 5, it may be paid to the Sahna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

126. When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

127. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments.

128. When any sum levied under Rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

129. The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

130. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notice required by O. 21, Rr. 22, 66, 107.

GARNISHEE ORDERS.

131. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of the execution.

132. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

O. 21, R. 103.

133. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit; and upon the determination of such issue shall pass such order upon the notice as shall be just.

134. Whenever in any proceedings under these rules it is alleged, or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

135. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

136. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised although such order or the judgment may be set-aside or reversed.

137. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction: Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

138. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

139. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by Cl. (1) shall be appealable as orders made in execution.

Illustration.—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

140. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under O. 7 or O. 8 shall apply to all proceedings taken under O. 21 or S. 47.

The following Form shall be used under the provisions of R. 131 of O. 21:—

SUIT No. OF 19 .

Plaintiff,

Versus

Defendant.

To

O. 21, R. 103.

WHEREAS it is alleged that a debt of Rs. is due from you to the judgment-debtor:

Or that you are liable to deliver to the abovenamed judgment-debtor the property set forth in the schedule hereto attached; take notice that you are hereby required on or before the day of 19 to pay into this Court the said sum of Rs. or to deliver, or account to the Amin of this Court for the moveable property detailed in the attached schedule, or otherwise to appear in person or by Advocate, Vakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

"Dated this day of 19 .

Munsif Sub-Judge,

at ."

LAHORE.

Add the following rule:—

104. For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, R. 11, subject to the provisions of O. 7, R. 24, provided that this rule shall not apply to the notice prescribed by R. 22 of this order.

OUDH.

Add the following rules:—

"104. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge on a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

105. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

106. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just.

107. Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable, that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

108. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all

O. 21. R. 103.

cases with respect to the lien, charge or interest, if any, of such third person or other person as to such Court shall seem just and reasonable.

109. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realized although such order of the judgment may be set aside or reversed.

110. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction:

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be sufficient appearance by the firm.

111. The costs of any application under these rules and of any proceedings arising therefrom are incidental thereto, or any order made thereon, shall be in the discretion of the Court.

112. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force, and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by sub-Rule (1) shall be appealable as orders made in execution.

Illustration.—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

113. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under O. 7 or O. 8 shall apply to all proceedings taken under O. 21 or S. 47."

114. The following Form shall be used under the provisions of R. 104 of O. 21:—

EXECUTION CASE NO. OF 19 .

Decree-holder,

Versus

Judgment-debtor.

To

WHEREAS it is alleged that a debt of Rs. is due from you to the judgment-debtor;

Or that you are liable to deliver to the abovenamed judgment-debtor the property set forth in the schedule hereto attached; take notice that you are hereby required on or before the day of 19 , to pay into this Court the said sum of Rs. to deliver, or account to the Nazir of this Court for the moveable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this day of 19 .

Munsif.

Subordinate Judge.

At.

PATNA.

Add the following rule:—

"104. For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, R. 11 subject to the provisions of O. 7, R. 24, provided that this rule shall not apply to the notice prescribed by R. 22 of this order."

Synopsis.

1. Scope of the rule.
2. Suit by decree-holder or auction purchaser under a different right.
3. "Any party against whom an order is made."
4. Order dismissing application under Rule 95.
5. Limitation.
6. Court-fee.

O. 21, R. 103, Note 1.

Right to present possession. See Note 1.

1. Scope of the rule.—This rule declares that any party against whom an order is made under Rr. 98, 99 or 101 may institute a suit to establish his right to the *present possession* of the property.[1] The word "party" refers to a party to the *petition*, and not to the decree under execution.[1-a]

The right of suit under this rule is a statutory one, and the mere fact that a party has failed to prefer a claim under R. 58, *ante* will not debar him from maintaining a suit under this rule.[2] On the other hand, the failure to file a suit under this rule by a party against whom an order is made under the previous rules, will render the order under those rules conclusive against him and his representatives.[3] In this connection it will be useful to compare R. 63, *ante* with this rule. A suit under the former is instituted for the purpose of establishing the right which the plaintiff claims to the ***property*** in dispute, while a suit under this rule is for the purpose of establishing the right which he claims to the *present possession* of the property.[4] Such right to possession may be based on title even without showing that the plaintiff was in actual possession at the date of the order against him.[5] Another point of distinction between R. 63 and this rule is that while under the former even an order *without investigation* will be conclusive, such an order will not be conclusive under this rule.[6] The reason is that under R. 63,

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Order 21, Rule 103—Note 1.

(1) *Hargolal* v. *Chandu Lal*, 1923 Lah 145 (146): 69 Ind Cas 557 [Order not passed under Rr 98, 99 or 101—R 103 does not apply].

(1-a) *Vegindra Muthu Pillai* v. *Maya Nadan*, 1920 Mad W N 299 (299): 13 Mad 696: 39 Mad L Jour 456: 28 Mad L Tim 312: 58 Ind Cas 501. See also *Bhimji Ramachandra* v. *Bhimabai*, 1921 Bom 122 (124): 45 Bom 573: 23 Bom L R 62: 61 Ind Cas 764; *Anjanayya* v. *Samaya*, (1884) 8 Mad 82 (84) [It is unnecessary to sue to have the order *cancelled*]; *Ramasamy* v. *Kolandavelu*, 1922 Mad 63 (63): 1922 Mad W N 121: 15 Mad L W 272: 70 Ind Cas 569 [Decree-holder's own property sold by mistake—obstruction by him for delivery to auction-purchaser—Application by latter allowed for delivery—Decree-holder must sue under this rule]

(2) *Md Hanif* v. *Gulam Nabi*, 1931 Lah 598 (598): 32 Pun L R 390: 132 Ind Cas 201.

(3) *Izzullah Khan* v. *Ghulam Hassan* 1924 Sind 97 (99): 17 Sind L R 63: 80 Ind Cas 994; *Murlidhar* v. *Janti Prasad*, 1932 All 703 (704): 1932 All L J 812: 139 Ind Cas 366; *Ram Ram Patri* v. *Satis Chandra*, (1917) 38 Ind Cas 216 (220) Cal; *Chiol Behari Lal* v. *Kidar Nath*, (1919) 51 Ind Cas 787 (789): 93 Pun L R 1920: 51 Pun W R 1919: 1 Lah 57: 2 U P L R (Lah) 7: 1 Lah L Jour 14; *Achutha* v. *Manmau*, (1887) 10 Mad 357 (361); *Ranganwamy Iyer* v. *Subbaraya Iyer*, 1914 Mad W N 897 (898): 27 Ind Cas 99 [Claim for sole possession—Joint possession ordered—Suit must be filed by claimant]; *K Unni Achan* v. *Kunnikrishnan Nair*, 1924 Mad 602 (602): 19 Mad L W 394: 1924 Mad W N 359: 75 Ind Cas 814 [The pendency of another suit will not prevent the order from becoming conclusive]; *Krishnaji* v. *Vithal*, (1888) 12 Bom 625 (633): 1887 Bom P J 337.

(4) *Lakshman* v. *Dattatraya*, 1929 Bom 379 (380): 53 Bom 668: 31 Bom L R 765: 120 Ind Cas 362, *Chiol Behari* v. *Kidar Nath*, (1919) 51 Ind Cas 787 (789): 1 Lah 57: 93 Pun L R 1920: 51 Pun W R 1919: 2 U P L R (Lah) 7: 1 Lah L Jour 14 [It is not sufficient to show that the summary order is erroneous].

(5) *Lakshman* v. *Dattatraya*, 1929 Bom 379 (380): 53 Bom 668: 31 Bom L R 765: 120 Ind Cas 362; *Thennattil Kallingal Unni Mohidin* v. *Thennattil Kallingal Unni Mohidin's son Pocker*, 1921 Mad 317 (318): 44 Mad 227: 28 Mad L Tim 342: 12 Mad L W 598: 60 Ind Cas 109: 1920 Mad W N 698: 39 Mad L Jour 626. See also *Murlidhar* v. *Janti Prasad*, 1932 All 703 (704): 1932 All L J 812: 139 Ind Cas 366 [Suit contemplated by R 103 is not one under Specific Relief Act (1877), S. 9].

(6) *Sr Nirode Barani* v. *Monindra Narayan*, 1922 Cal 229 (232, 233): 26 Cal W N 853: 35 Cal L Jour 537: 68 Ind Cas 524; *Wamandhar* v. *Kampta Prasad*, 1926 Nag 423 (425): 22 Nag L R 94: 97 Ind Cas 178. See also Note 3, *infra*

O. 21, R. 103, Notes 1—2.

the party against whom *any* order is made should institute a suit under that rule whereas under this rule, only a party against whom an order is made *under Rr.* 98, 99 *or* 101 need institute a suit under this rule, and an order under Rr. 98, 99 or 101 can only be made "*where the Court is satisfied, etc.,*" which can only be on an *investigation* of the question.[7]

Where an order becomes conclusive under this rule, it will bar a suit as well as a defence by the party against whom the order is passed or his representative.[8]

The provisions of Rr. 97 to 103 are of a restrictive nature and strict compliance with them is necessary. If, in a particular case, it is shown that the provisions of any of these rules have not been strictly complied with, the penal consequence of barring the right of suit, cannot legally flow therefrom.[8-a]

A suit instituted under this rule is not a continuation of the summary application, but an independent proceeding governed by the relevant provisions of the Code; it would lie in the Court within the local limits of whose jurisdiction, the property in dispute is situate.[9] The onus of proving subsisting title is *prima facie* on the party who was out of possession[9-a] and it has been held that the mere fact that the other party has been driven to institute a suit under this rule cannot shift that burden on to that party.[10]

Where an auction-purchaser of an undivided share of a co-owner, gets delivery of possession in execution but, on objection by a *party* to the suit, re-delivery is ordered in his favour, and the auction-purchaser thereupon sues for partition of the share purchased by him. such a suit is not governed by either this rule or by Art. 11-A of the Limitation Act, inasmuch as the re-delivery proceedings fall within S. 47.[11]

2. **Suit by decree-holder or auction-purchaser under a different right.**—The cause of action for a suit under this rule is the *adverse order passed under the Rr.* 98, 99 or 101, *ante.* This rule does not therefore apply where the auction-purchaser or the claimant institutes a suit relating to the property in *any other capacity* or based on a cause of action *different* from the adverse order under the Rr. 98, 99 or 101, *ante.*[1]

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(7) *Wamandhar* v. *Kamta Prasad*, 1926 Nag 423 (424): 22 Nag L R 94: 97 Ind Cas 178; *Nirode Boroni* v. *Manindra Narayan*, 1922 Cal 229 (233): 35 Cal L Jour 537: 26 Cal W N 853: 68 Ind Cas 524. See also Note 3, *infra.*

(8) *Azizullah Khan* v. *Ghulam Hussain*, 1924 Sind 97 (99): 80 Ind Cas 994: 17 Sind L R 63; *Achutha* v. *Mammava*, (1886) 10 Mad 357 (361); *Bisan Ram Patri* v. *Satis Chandra Sarma*, (1917) 38 Ind Cas 216 (220) Cal; *Yamajala Sanjeevudu* v. *Nuka Venkadu*, (1918) 45 Ind Cas 24 (25): 23 Mad L Tim 233 [But if order is left unenforced and resister remains in possession plea in defence not barred].

(8-a) *Mt Talia Bibi* v. *Nur Din*, 1928 Lah 672 (674): 108 Ind Cas 614.

(9) *Damul* v. *Shripat*, (1904) 6 Bom L R 301 (302).

(9-a) *Rakhal Chunder Mundul* v. *Watson*, (1888) 10 Cal 50 (55); *Bapuji Rao* v. *Fatesingh Shahaji*, (1898) 22 Bom 967 (969).

(10) *Ramjan* v. *Fakir Mahomed*, 1925 Sind 201 (202): 82 Ind Cas 861.

(11) *Ahmed Kutty* v. *Moidutty*, 1927 Mad 952 (953): 39 Mad L Tim 281: 105 Ind Cas 414.

Note 2.

(1) *See illustrations below:*—*Shunmugam Pillai* v. *Panchali Ammal*, 1926 Mad 683 (684): 23 Mad L W 551: 50 Mad L Jour 681: 95 Ind Cas 209: 49 Mad 596 [Suit for *partition by a purchaser* from a Hindu co-parcener is not barred by a prior decision against him in a suit by him for declaration of his right to possession under O 21, R 103].

Illustrations.

O. 21, R. 103, Notes 2—3.

1. *A* purchased certain property in execution of a decree and took delivery of possession of the property through Court. *B* filed an application under R. 100, but the Court dismissed it on the ground that *B* was not dispossessed and had therefore no cause of action under R. 100. *B* was *subsequently* dispossessed, and he brought a suit for possession, alleging as the cause of action, the *subsequent dispossession*, more than one year after the date of the order under R. 100. It was held that the suit was not barred.[2]

2. In execution of a decree for possession *A* was obstructed by *B*, and an order under R. 98 was passed against *B*. *B* filed a suit to set aside *the decree* on the ground of *fraud* and for delivery of possession as a consequential relief. It was held that since the basis of the claim was distinct and different, and the possession claimed was not present possession but only by way of consequential relief, the suit was not barred.[3]

3. *A* dispossessed *B* in execution of a decree. *B* filed an application under R. 100 and the same was granted. Subsequently *A* became aware of the fact that the judgment-debtor, a tenant. of a non-transferable holding had transferred the holding to the defendants. He thereupon filed a suit in ejectment against the defendant in the *capacity of a landlord*. It was held that the suit was not barred and that the cause of action was not the loss of possession but the fact that the tenant had unlawfully transferred a non-transferable holding to the defendants.[4] Inasmuch as an order under Rr. 98, 99 or 101 is conclusive under this rule only so far as the *present right to possession* is concerned, this rule will not operate so as to bar a party against whom an order has been passed under those rules, from maintaining a suit for *redemption* of property[5] or for enforcing a mortgage lien over the property.[6]

3. "Any party against whom an order is made".—As has been observed in Note 1, *ante*, an order cannot be said to have been made against any party, within the meaning of this rule, unless it was made after *investigation* into the matter.[1] It is also necessary that the Court should have come to a *definite conclusion* on the matter under enquiry; if it declines to give any decision at all on the matter, it will not be conclusive so as to bar a suit instituted more than one year from the date of the order.[2] The mere fact, however, that the investigation is not a *complete* one will not detract from the conclusiveness of the order.[3] Nor, where an application has been rejected *after investigation*, will the mere fact that the Court refers the parties to a regular suit, detract from the conclusive character of the order.[4] It has been

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(2) *Pahal Ghorai* v. *Fazluddin*, 1924 Cal 97 (99) : 38 Cal L Jour 150 : 76 Ind Cas 407.

(3) *Rukmabai* v. *Fakirsa*, 1927 Bom 184 (187) : 51 Bom 158 : 29 Bom L R 230 : 101 Ind Cas 10.

(4) *Lachka Charan Bhakta* v. *Ram Prosad Chatterjee*, 1926 Cal 377 (377) : 30 Cal W N 163 : 90 Ind Cas 575 : 42 Cal L Jour 578.

(5) *Bahram* v. *Narayan*, 1921 Nag 69 (70) : 54 Ind Cas 276 : 17 Nag L R 33 ; *Laganna Nagappa* v. *Ahmad Shah*, 1928 Nag 97 (98) : 23 Nag L R 164 : 105 Ind Cas 427.

(6) *Bhika* v. *Sujat Ali*, (1899) 29 Cal 25 (29).

Note 3.

(1) *Gouri Churn* v. *Sita Patni*, (1910) 14 Cal W N 346 (351) : 5 Ind Cas 710. See also *Yamajala Sanjeevudu* v. *Nakka Venkadu*, (1918) 45 Ind Cas 24 (25) : 23 Mad L Tim 233 ; *Daulat Ram* v. *Gadi Ram*, (1919) 49 Ind Cas 138 (139) : 1919 Pun Re No 1 [The Court has no jurisdiction to direct the person in whose *favour the order* is made to bring a suit to establish his rights].

(2) *Alwar Ayengar* v. *Zelleveger*, (1899) 9 Mad L Jour 175 (176, 177) ; *Meerudin Saib* v. *Rahisa Bibi*, (1903) 27 Mad 25 (26) ; *Mt Talia Bibi* v. *Nur Din*, 1928 Lah 672 (673, 674) : 108 Ind Cas 614 [Consigning application to record-room and directing decree-holder to file suit if necessary]. See also *Anna Kutti Mankondan* v. *Periasamy Kovundan*, (1914) 24 Ind Cas 771 (774) : 15 Mad L Tim 163 : 1 Mad L W 31.

(3) *Alwar Iyengar* v. *Zelleveger*, (1899) 9 Mad L Jour 175 (176).

(4) *Kamalattammi* v. *Renga Iyengar*, (1897) 7 Mad L Jour 310 (311).

O. 21, R. 103, Notes 3—4.

held in the following cases that there is no order *against a party* within the meaning of this rule:—

(1) Where the applicant *withdraws* his application and the Court makes an endorsement on the application that no investigation was made by reason of the withdrawal.[5]

(2) Where the application is dismissed for default of appearance[6] or for non-prosecution[7] without inquiry. But where the Court fixes a day for the enquiry and, on the plaintiff's failure to *produce evidence* in support of the case, dismisses the application in the presence of the parties, it cannot be said to be a dismissal for default without inquiry.[8]

(3) Where the application of the claimant is allowed for default of appearance of the decree-holder.[9]

(4) Where the application is simply dismissed without investigation.[10]

(5) Where the application is rejected on the ground that it has been filed beyond time.[11]

(6) Where the party was a minor and was not properly represented in the proceedings.[11-a]

Where *A* files an application and the same is decided against him, he cannot be said not to be a party "against whom an order has been passed" merely because he is a *benamidar* for another person.[12]

Although R. 101 speaks of an order *directing* the applicant to be put in possession of property, it has been held that an order dismissing an application under R. 100 to be put in possession, is nevertheless an order against the applicant *under* R. 101 for the purposes of this rule, and that the applicant would be bound to file a suit under this rule within one year from the date of the order.[13]

4. Order dismissing application under R. 95.—An order on an application under O. 21, R. 95 dismissing it on the ground that the person in possession was so on his own account and not on account of the judgment-debtor, is not an order under R. 99 dismissing an application complaining of

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(5) *Bhikha* v. *Sakar Lal*, (1880-81) 5 Bom 440 (441).

(6) *Bhimrao* v. *Martand*, (1918) 45 Ind Cas 102 (104): 14 Nag L R 66.

(7) *Sarat Chandra Bisu* v. *Tarini Prosad Pal Chowdry*, (1907) 34 Cal 491 (492, 493): 11 Cal W N 487; *Bhimrao* v. *Martand*, (1918) 45 Ind Cas 102 (104): 14 Nag L R 66.

(8) *Chandi Prosad* v. *Nand Kishore*, (1913) 20 Ind Cas 369 (369) All; *Shagun Chand* v. *Mt Shibbi*, (1911) 8 All L J 626 (628, 629): 10 Ind Cas 401; *Kunj Behari Lal* v. *Kandh Prasad Narain Singh*, (1907) 6 Cal L Jour 362 (365).

(9) *Nabu Sahu* v. *Kamdev Maitz*, 1928 Cal 179 (180): 47 Cal L Jour 87: 107 Ind Cas 729.

(10) *Majjiga Venkatasubba Reddi* v. *Chundi Linga Reddi*, (1917) 41 Ind Cas 640 (640) Mad *Raghunath* v. *Birjanandan*, (1915) 31 Ind Cas 444 (445) Cal.

(11) *Beni Prasad* v. *Lachman Prasad*, (1882) 4 All 131 (134): 1881 All W N 145.

(11-a) *Shidappa Ryawappa* v. *Venkaji Krishna*, (1908) 32 Bom 404 (409): 10 Bom L R 550.

(12) *Venkatachella Asari* v. *Subramaniya Chetty*, (1910) 8 Ind Cas 264 (266): 1910 Mad W N 633: 8 Mad L Tim 377.

(13) *Zepru Talhoo* v. *Hari Supudushet Vani*, (1917) 42 Ind Cas 73 (74): 42 Bom 10: 19 Bom L R 774.

resistance or *dispossession*, and this rule will not apply to such orders.[1] Nor will this rule apply where the decree-holder applying under R. 95 gets possession without any resistance on the part of any one and the party dispossessed is not bound to sue the auction-purchaser within one year under this rule.[2] O. 21, R. 103, Notes 4—6.

5. Limitation.—A suit under this rule is governed by Art. 11-A of the Limitation Act and should be brought within one year of the date of the order *against* the plaintiff.[1] It has been held in the undermentioned case that where an order against a person in possession has remained unexecuted, he is, in a suit against him for possession, not estopped from pleading that plaintiff has no title to the properties.[2] As has been seen in Note 3 above where an order is passed without investigation; or where a suit is filed on a cause of action other than that of dispossession or of resistance or obstruction to delivery of possession, this rule does not apply and consequently Art. 11-A of the Limitation Act also does not apply.[3]

In computing the period of one year prescribed by Art. 11-A, the time taken in revision proceedings cannot be excluded under S. 14 of the Limitation Act.[4]

6. Court-fee.—A plaint in a suit under this rule is chargeable with a fixed fee under Art. 17 of Sch. II of the Court-Fees Act, 1870.[1]

O. 21, R. 106 (Allahabad).

The omission to file a certificate as required by this rule will not entitle the decree-holder to have process issued on his application,—but the application, if it satisfies the requirements of R. 11, *ante*, will not on that account, cease to be one in accordance with law and cannot, therefore, be dismissed.[1]

O. 21, R. 110 (Allahabad).

It is necessary that the result of the enquiry under O. 21, R. 66, should be drawn up by the Judge *in his own handwriting*.[1]

Note 4.

(1) *Sobha Ram* v. *Turni Ram*, 1924 All 495 (498, 500): 22 All L J 626: 5 L R A Civ 488: 46 All 693: 83 Ind Cas 923 F B.

(2) *Bose* v. *Chaudhry*, 1924 Rang 261 (262): 82 Ind Cas 865: 3 Bur L Jour 71.

Note 5.

(1) *Bhikhari Das* v. *Abdullah*, 1922 All 403 (404): 44 All 607: 20 All L J 578: 68 Ind Cas 241, *Syed Ale Muhammad Shah* v. *Ram Narain*, (1917) 39 Ind Cas 797 (798): 15 All L J 120; *Bai Jumna* v. *Bai Ichha*, (1886) 10 Bom 604 (610); *Bhimappa* v. *Irappa*, (1902) 26 Bom 146 (149): 3 Bom L R 594; *Mahadeo Ram* v. *Bibi Chimanji*, (1902) 26 Bom 730 (734): 4 Bom L R 513, *Kumud Charan Roy* v. *Sambhu Chandra Ghosh*, (1925) 90 Ind Cas 827 Cal; *Chail Behari Lal* v. *Kidar Nath*, (1919) 51 Ind Cas 787 (790): 93 Pun L R 1920: 51 Pun W R 1919: 1 Lah 57: 2 U P L R (Lah) 7: 1 Lah L Jour 14; *Muhamod* v. *Ayyappan*, (1899) 9 Mad L Jour 131 (133). See also *Gururappa* v. *Srinivasa Rao*, (1910) 6 Ind Cas 680 (680): 7 Mad L Tim 306; *Ram Singh* v. *Kundan Singh*, 1916: 103 Pun L R 1916; *Rango Vitnal* v. *Rikhiradas*, (1874) 11 Bom H C R 174 [Effect of *Rikhiradas*, (1874) 11 Bom H C R 174 [Effect of suit cannot be got rid of by framing a suit as one for partition]. But see *Maindi Sardar* v. *Goruchand*, (1912) 16 Cal W N 971 (972): 14 Ind Cas 92 [Decided under old Limitation Act, 1877].

(2) *Tanmjula Sanjeevadu* v. *Nakka Venkadu*, (1918) 45 Ind Cas 24 (25): 23 Mad L Tim 233.

(3) See Notes 2 and 3, *ante*. See also *Bhimana Gowd* v. *Siddalingana*, 1927 Mad 898 (900): 39 Mad L Tim 94: 104 Ind Cas 768: 27 Mad L W 188 [Suit for mesne profits not barred].

(4) *Narayan* v. *Hari*, 1930 Bom 505 (506): 32 Bom L R 1186: 128 Ind Cas 621.

Note 6.

(1) See also *Dhondo* v. *Govind*, (1885) 9 Bom 20 (22); *Pirgu Das* v. *Vilayat Khan*, (1900) 22 All 384 (386): 1900 All W N 119.

Order 21, Rule 106 (Allahabad).

(1) *Dharandeo Rai* v. *Jwala Prasad*, 1930 All 188 (189): 1930 All L J 474: 122 Ind Cas 179.

Order 21, Rule 110 (Allahabad).

(1) *Ram Prasad* v. *Shiva Kumar*, (1931) 133 Ind Cas 529 (529): 1932 All 55: 1932 All L J 849.

O. 21, R. 122. Allahabad.

O. 21, R. 122 (Allahabad).

See Note 2, Pt. (3) to S. 122, *ante*.

The action of the attaching officer in handing over the property to a surety is within his lawful powers under R. 122, and upon his action being approved either expressly or impliedly by the Court, the surety becomes the officer of the Court and therefore is liable as a surety for the purposes of S. 145, *ante*.[1]

Order 22.

O. 22. General.

General.

Synopsis.

1. Survey of the order. 2. Applicability of the order.

1. Survey of the order.—This order deals with the creation, assignment or devolution of interest during the pendency of suits. Such creation, assignment or devolution may be brought about by:—

(*i*) The death of a party (Rr. 1 to 6);

(*ii*) His marriage (R. 7);

(*iii*) His insolvency (R. 8); or

(*iv*) other circumstances, such as transfer *inter vivos*, etc. (R. 10).

Death of a party.—If the suit is one in which the "right to sue" does *not* survive, the death puts an end to the suit. If, on the other hand, it is a suit in which the "*right to sue*" survives, the death will *not* put an end to the suit (R. 1). In the latter class of suits, *viz.*, suits which are not put an end to on the death of a party, the following questions arise for consideration, *viz.*:—What is the *procedure* to be followed in such suits on such death? And what are the *consequences* of not following that procedure? The answer to the questions will depend upon (*i*) Who the party is that died: and (*ii*) to whom or against whom has the right survives. From these standpoints the following six alternative cases are possible:—

(1) One of two or more plaintiffs may die and the right to sue may survive to the *surviving plaintiff or plaintiffs alone*.

(2) One of two or more defendants may die and the right to sue may survive against the *surviving defendant or defendants alone*.

(3) One of two or more plaintiffs may die and the right to sue may survive *either* to the surviving plaintiff or plaintiffs *along with third persons or* exclusively to third persons.

(4) A sole plaintiff or sole surviving plaintiff may die in which case the right to sue must, if at all, survive to *persons who are not plaintiffs*.

Order 21, Rule 122 (Allahabad).
(1) *Shakir Husain* v. *Chandoo Lal*, 1931 All 567 (571, 573): 1931 All L J 865: 134 Ind Cas 836 (1926 All 406 overruled).

(5) One of two or more defendants may die and the right to sue may survive *either* against the surviving defendant or defendants *along with third persons or*, exclusively against third persons or

(6) A sole defendant or sole surviving defendant may die in which case the right to sue must, if at all, survive against *persons who are not defendants.*

O. 22, General Notes 1—2.

Rule 2 provides for the *first two* of the above alternatives. R. 3 applies to the *third and fourth;* and R. 4, to the *fifth and sixth* alternatives. R. 5 provides for determining the question as to who is the person to whom or against whom the right to sue survives, in case there should be a dispute about it. The provisions of Rr. 3 and 4 do not apply when the death occurs between the conclusion of the *hearing* of the suit and pronouncement of judgment in it (R. 6).

Marriage.—*See* R. 7.

Insolvency.—Rule 8, deals with the insolvency of a *plaintiff*. The insolvency of a defendant does not fall within R. 8, but comes under R. 10.

The effect of an abatement under the provisions of any of the previous rules is dealt with by R. 9; and sub-R. (2), thereof provides the remedy of the person aggrieved by the abatement. *Other* cases of creation, assignment and devolution are dealt with by R. 10. It will be noted that under this rule *there is no abatement* and even a substitution is within the discretion of the Court.

2. Applicability of the order.—The provisions of the order apply only to cases of creation, transfer or devolution of interest *during the pendency of suit*. Thus there can be no substitution of legal representatives under this order if the party had died before the *institution* of the suit.[1] Nor can the provisions of the order apply if the death occurs *after the suit has been disposed of*. Rule 6 is itself an illustration of this principle.

Applicability to appeals.—By virtue of R. 11 the provisions of this order apply to appeals. But in so applying them the following points should be noted:—

(*i*) Since an appeal is but a continuation of the suit, and the provisions of the order will apply even though the death may have occurred *between* the date of the lower Court's decree and that of the filing of the appeal (*vide* Notes under the several rules).

(*ii*) Though a suit on a personal action will abate on the death of a party during its pendency, yet if the suit is decreed, and, pending an appeal from the decree, the death occurs, the appeal will not abate. The reasons for this distinction have been discussed under Rr. 1, 3, 4 and 11.

Order 22 (General) Note 2.

(1) *The Manager, Encumbered Estates* v. *Thurumal*, 78 Ind Cas 569 (570) Sind.

O. 22, General Note 2.

The word "appeal" in R. 11, does not include appeals before the Privy Council; and the provisions of this order do *not* apply to such appeals. The reason is that judgments and orders of the Privy Council are, in effect, orders of the Sovereign and are of full force and effect despite the death of parties;[2] and Courts in India have no power to treat an order of the Sovereign as a nullity.[3] However, if a party dies after the grant of leave to appeal to the Privy Council and before the transmission of papers to England, the High Court can order substitution of legal representatives to avoid technical objections. But this power exists *not* by virtue of this order and there is no limitation of time for such substitution.[4]

Applicability to execution proceedings.—By virtue of R. 12, the provisions of Rr. 3, 4 and 8 of this order, do not apply to execution proceedings. But an *appeal* against an order made in execution proceedings is not itself a proceeding in execution of a decree or order and R. 12, will not apply thereto.[5]

Applicability to miscellaneous proceedings.—By virtue of S. 141 of the Code, the provisions of this order may be made applicable, whenever possible, to proceedings other than a suit or an appeal. For proceedings arising out of a reference to arbitration *see* the case noted below.[6] A conciliation proceeding under the Deccan Agriculturists' Relief Act (Bombay Act XVII of 1879) pending before a Sub-Judge has been held to be a proceeding in a Civil Court to which the provisions of this order are applicable.[7] But they have been held to be inapplicable to proceedings in a Mamlatdar's Court under the Mumlatdars Act (Bombay Act III of 1876) on the ground that the said Act provides for a summary procedure in certain matters and that by implication the elaborate procedure contained in the Code was not intended to be applied to such proceedings.[8]

Applicability to Revision proceedings.—This order and the theory of abatement contained therein do not apply to applications in revision. The reason is that in revision the High Court acts of its own motion and under its inherent jurisdiction to correct errors and irregularities committed by subordinate Courts; and though notice is usually given to all the parties interested and they are heard, *it is not because any matter in dispute between the parties is sought to be adjudicated upon.*[9]

Where an action, fails under this order, all reliefs or claims incidental to the action also fail. Thus if an appeal abates as regards an injunction

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(2) *Kalyani Pillai* v. *Thiruvenkataswamy Iyengar*, 1924 Mad 695 (695): 47 Mad L Jour 154: 47 Mad 618: 35 Mad L Tim 50: 20 Mad L W 99: 1924 Mad W N 439: 80 Ind Cas 85; *Jadunandan Koer* v. *Ramjivan Lal*, (1909) 4 Ind Cas 454 (456): 10 Cal L Jour 331.

(3) *Deonandan* v. *Janki Singh*, (1920) 56 Ind Cas 322 (324): 1920 Pat H C C 266: 5 Pat L Jour 314: 1 Pat L Tim 325: 2 U P L R 108.

(4) *D R Saklat* v. *Bella*, 1924 Rang 217 (218): 2 Rang 91: 3 Bur L Jour 30: 80 Ind Cas 744; *Jadunandan* v. *Ramjiban*, (1909) 4 Ind Cas 454 (456): 10 Cal L Jour 331.

(5) *Raja of Kalahasti* v. *Jagannadha*, 1932 Mad 574 (575, 576): 1932 Mad W N 597: 36 Mad L W 170: 139 Ind Cas 409.

(6) *Datta* v. *Khedu*, (1911) 11 Ind Cas 935 (936): 33 All 645: 8 All L J 678.

(7) *Narayanadas* v. *Kondi*, (1895) 19 Bom 202 (204).

(8) *Ganpatram Jebhai* v. *Ranchhod*, (1893) 17 Bom 645 (647, 648) [Act III of 1876 (Bom) has been repealed by Act II of 1906 (Bom)].

(9) *Baksho* v. *Piaro*, (1924) 80 Ind Cas 456 (456, 457) Sind.

sought for, the appellant cannot press the appeal so far as the costs incurred by him in the lower Court are concerned.[10] O. 22, General Note 2.

ORDER XXII.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

R. 1. [S. 361.] The death of a plaintiff or defendant shall not cause the suit to abate[17] if the right to sue[3] survives.[4] O. 22, R. 1, Notes 1—2.

No abatement by party's death if right to sue survives.

[1877—S. 361; 1859—S. 99. *See* S. 146.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. "Right to sue—Meaning of."
4. When right to sue survives.
5. Right to sue in personal actions.
6. Suit to establish right to personal office.
7. Right to sue in respect of torts.
8. Right to sue on contracts.
9. Right to sue for pre-emption.
10. Application for leave to sue in forma pauperis.
11. Claim to guardianship.
12. Right to letters of administration.
13. Right to sue in representative actions.
14. Suit under S. 92 of the Code.
15. Suit by or against limited owners or reversioners.
16. Suit under Ss. 14 and 18 of the Religious Endowments Act.
17. Partial abatement.
18. Death of either party pending appeal.
19. Suit or appeal against a dead person.
20. No abatement by reason of death after decree.
21. Appeal and revision.

Death of defendant in account suit—Right to sue whether survives. See Note 4, F.-N. (1).

Death of defendant in an injunction suit—Abatement. See Note 7, Pt. (6).

Death of plaintiff—Suit when abates. See Note 5, Pt. (1); Note 6, Pt. (1) and Note 7, Pt. (1).

Hindu widow or daughter, suit for possession—Whether survives. See Note 4, F.-N. (1).

1. Legislative changes:—

This rule corresponds to S. 361 of the old Code without any change except that the four illustrations which had been given under the old section have been omitted as being unnecessary.[1]

2. Scope of the rule.—Where, during the pendency of a suit, a party dies, the first question to be decided is whether the right to sue survives or not.[2] If it does not, there is an end of the suit. If it does, the suit can be continued, though the *trial* of the suit cannot be proceeded with immediately and without anything more. The reason is, that on the death of a party, the suit is in a state of suspens[2] and its trial cannot be taken up without following the procedure laid down in Rr. 2, 3 or 4 as the case may be.

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(10) *D R Saklat* v. *Bella*, 1924 Rang 217 (218): 2 Rang 91: 3 Bur L Jour 30: 80 Ind Cas 744.

Order 22, Rule 1—Note 1.

(1) See the Report of the Special Committee.

Note 2.

(1) *Ram Din* v. *Raja Rani*, (1912) 17 Ind Cas 101 (105, 106): 8 Nag L R 113.

(2) *Balaramier* v. *Vasudevan*, 1929 Mad 802 (803): 57 Mad L Jour 424: 1929 Mad W N 742: 30 Mad L W 393: 52 Mad 933. 120 Ind Cas 374.

O. 22, R. 1, Notes 2—4.

This order is applicable to proceedings under the Chota Nagpur Tenancy Act VI of 1908. *See* S. 265 (3) of that Act.

3. Right to sue—Meaning of.—The words "right to sue" must be interpreted to mean "right to *seek relief*".[1]

Illustrations.

1. *A* files a suit against *B* for damages. *A* dies during the pendency of the suit. Here *A's* right to sue, as to the survival of which a question might arise, is the *right to claim damages from B* which *A* had at the time of his death.

2. In the above suit suppose *A* gets a decree for damages and *B* appeals against the decree and during the pendency of the *appeal B* dies. Here *B's* "right to sue", about the survival of which a question might arise, is to *have the decree of the Lower Court set aside*, which is a very different thing from *A's* right to *sue*.[2]

3. Suppose in the above case *B's* appeal is allowed and *A* prefers a second appeal and during the pendency thereof *A* dies. Here *A's* "right to sue", about the survival of which a question might arise, is the right to *have restored the benefit of the first Court's decree* in his favour, and not his *original right* to claim damages against *B*.[3]

4. Suppose *A's* suit in the first Court is *dismissed* and *A* appeals and during the pendency thereof he dies, the right to sue will remain the same as the one on which he instituted the suit.[4]

In each of the above cases a person claiming that the right to sue of the deceased plaintiff or appellant has survived to him must show that he asserts the right to the same relief which the deceased plaintiff or appellant asserted at the time of his death.[5]

4. When right to sue survives.—The general rule is that all rights of action and all demands whatsoever existing in favour of or against a person at the time of his death survive to and against his representatives. For illustrations *see* the following cases.[1] There are however exceptions to this general rule. Rights intimately connected with the *individuality* of the

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Note 3.

(1) *Gopal* v. *Ramachandra*, (1902) 26 Bom 597 (603): 4 Bom L R 325; *Sham Chand Giri* v. *Bhajaram Panday*, (1894) 22 Cal 92 (98); *Prasanna Venkatachella* v. *Collector of Trichinopoly*, (1916) 33 Ind Cas 45 (46): 38 Mad 1064.

(2) *Gopal* v. *Ramachandra*, (1902) 26 Bom 597 (607): 4 Bom L R 325.

(3) *Nga Kyett Sein* v. *Mi Kyin Mya*, (1916) 34 Ind Cas 249 (250): 9 Bur L Tim 38: 10 Bur L Tim 8: (1916) 2 U B R 105.

(4) *Gopal* v. *Ramachandra*, (1902) 26 Bom 597 (601, 602): 4 Bom L R 325.

(5) *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee*, (1909) 3 Ind Cas 995 (996): 36 Cal 799.

Note 4.

(1) *Nagendra Nath Palit* v. *Robindra Nath Deb*, 1926 Cal 490 (494): 53 Cal 132: 30 Cal W N 389: 94 Ind Cas 212 [Suit to enforce the right to a pala or worship]; *Denomoyee Dassee* v. *Chooney Money Dassee*, (1899) 4 Cal W N 280 (282, 283) [Reference to arbitration about matters in respect of which the right to sue will survive]; *Venkatasatyanarayana* v. *Venkatarangayya*, (1904) 27 Mad 112 (116): 13 Mad L Jour 311, (Do.) [*Rights in property survive*]; *Denomoyee Dasee* v. *Chooney Money Dassee*, (1899) 4 Cal W N 280 (283); *Gandi Ramasamy* v. *Puramsetti*, (1915) 27 Ind Cas 1001 (1003): 17 Mad L Tim 186: 39 Mad 382 [Suit by a daughter to recover possession as her father's heir—Right to sue survives to her father's brother's heirs]; *Premmoy Chowdhrani* v. *Preonath Dhur*, (1896) 23 Cal 636 (638, 639) [Suit by the heir of a Hindu to recover property from trespassers]; *Nawab-ud-din* v. *Mussamat Kami*, 1901 Pun Re No 12: 77 Pun L R 1901 [Suit to set aside a gift of land]; *Narayana Reddi* v. *Kamakshi Ammal*, (1915) 27 Ind Cas 396 (397): 27 Mad L Jour 674 [Suit for possession of property]; *Dharamsi* v. *Narotam*, (1903) 5 Bom L R 1041 (1044, 1046) [Suit by a minor who on attaining majority, sued to have his rights declared respecting property which by a consent decree and conveyance to which he was no party, his grandmother, father and uncle conveyed to the defendants]; *Mt Jai Kali* v. *Baldeo Singh*, (1919) 50 Ind Cas 883 (884): 17 All L J 576: 41 All 515 [Suit for specific peformance of contract to sell immoveable property]; *Hills* v. *Shokhee Monee Dassee*, (1868) 10 Suth W R 59 (59) [Suit for money received and for account against an agent—Cause of action survives on death of defendant]; *Parbutty* v. *Higgin*, (1872) 17 Suth W R 475 (476) [Suit by a Hindu widow to recover possession of her husband's estate]; *Jadubansi Kuar* v. *Mahapal Singh*, (1916) 32 Ind Cas 104 (107): 38 All 111: 14 All L J 8 [Suit for possession].

deceased will not survive.[2] One aspect of this exception is expressed by the maxim *actio personalis moritur cum persona*—a personal right of action dies with the person. O. 22, R. 1; Notes 4—5.

The general rule and the exception abovementioned have also been recognised by the Legislature in the following enactments dealing with particular classes of cases and they may be carefully referred to as illustrating the principles applicable to the generality of cases.

(1) S. 37 of the Indian Contract Act lays down that "promises bind the legal representatives of the promisor in case of the death of such promisor before performance, *unless a contrary intention appears from the contract.*" Such a contrary intention, will be presumed when the contract is of a nature involving *special skill* or *personal confidence, etc.*

(2) S. 306 of the Indian Succession Act provides that "All demands whatsoever, and all rights to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other *personal* injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

It is the *original party's* rights and disabilities that have to be considered and the mere fact that the legal representative could not, in his individual capacity, have brought a suit for the relief claimed does not cause abatement of the pending suit.[3]

5. Right to sue in personal actions.—In cases of *personal* actions, that is, in actions where the relief sought is *personal* to the deceased the "right to sue" will not survive to his representatives.[1] Thus a suit for damages for breach of a contract of betrothal (except to the extent of the actual expenses incurred when the betrothal was in force)[2] and a suit for dissolution of marriage together with the claim for damages against the co-respondent are suits involving claims of a personal nature which will not survive on the death of either party to his representative. A suit by a Hindu widow under the Dhayabhaga Law for partition in lieu of her maintenance will not survive on her death[4] but if, by an award or a compromise,

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(2) Holland's Jurisprudence, 3rd Edn., p. 271.

(3) *Gul'i* v. *Sawan*, 1924 Lah 45 (46): 4 Lah 72: 74 Ind Cas 146: 5 Lah L Jour 482.

Note 5.

(1) *Balk Puri* v. *Durga*, (1908) 30 All 49 (51): 4 All L J 783: 1908 All W N 6: 3 Mad L Tim 181: *Sharifa* v. *Munekhan*, (1901) 25 Bom 574 (579, 582): 3 Bom L R 167; *Anand Bahadur* v. *Hardil Aziz*, (1919) 52 Ind Cas 545 (546): 87 Pun Re 1919: 35 Pun L R 1920; *Narain Singh* v. *Gurbakhsh Singh*, 1928 Lah 119 (119): 9 Lah 306: 29 Pun L R 399: 107 Ind Cas 281; *Chellmi* v. *Subbanna*, (1917) 42 Ind Cas 860 (861, 862): 41 Mad 442: 1917 Mad W N 792: 22 Mad L Tim 432: 34 Mad L Jour 213 [Suit for partition by minor—Claim by minor is personal to the minor].

(2) *Balubhai Hiralal* v. *Nanalal Bhagubhai*, (1920) 55 Ind Cas 624 (625, 626): 22 Bom L R 143: 44 Bom 446.

(3) *S* v. *S & B*, 1906 Pun Re No 60: 69 Pun L R 1907: 128 Pun W R 1906.

(4) *Tripura* v. *Dakshina*, (1907) 5 Cal L Jour 310 (315): 11 Cal W N 698 See also *Mt Mangtan* v. *Hira Singh*, 1931 Lah 675 (2) (676): 32 Pun L R 712: 135 Ind Cas 44 [Suit by a limited owner for partition of her estate from co-sharers].

O. 22, R. 1, Notes 5—7.

a fixed sum has been awarded to her in lieu of her interest, a suit to recover the sum will be a suit to recover *property* and will survive to her legal representatives.[5] Similarly if what was once a personal claim has matured into a *decree*, the benefit of the decree will survive to the legal representatives.[6]

6. **Suit to establish right to personal office.**—A right to a *personal office* does not survive on the death of the claimant and a suit to establish such a right abates on the death of the plaintiff.[1] But if *emoluments* are attached to the office the right to sue will, on the principles mentioned in Note 4, *ante*, survive and the suit will not abate.[2]

7. **Right to sue in respect of torts.**—The maxim *actio personalis moritur cum persona* is, as a general rule, applicable to actions in respect of torts and, therefore, on the death of either party to such action, the right to sue will be extinguished.[1] Thus the maxim will apply to the following cases:—

(1) Suits for damages for injury to reputation such as defamation[3] malicious prosecution[3] malicious arrest[4] and malicious search.[5]

(2) Suits for damages for obstruction to plaintiff's right of way over defendant's land.[6]

(3) Suits for damages for illegal distraint for cess.[7]

(4) Suits for damages for refusal to deliver the Keys of a temple and to allow worship being performed.[8]

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(5) *Chooney Money Dassee* v. *Ram Kinkur Dut*, (1901) 28 Cal 155 (162-3): 5 Cal W N 242.

(6) *G I P Ry* v. *Ram Adhin*, 1927 All 762 (763): 103 Ind Cas 297; *Kunchuni Nair* v. *Subramania Pattar*, (1910) 5 Ind Cas 758 (759, 760): 33 Mad 162: 7 Mad L Tim 87; *Mt Ram Kuar* v. *Jiwan Singh*, 1921 Lah 52 (53): 2 Lah 189: 83 Pun L R 1921: 63 Ind Cas 540; *Muhammad Husain* v. *Khushalo*, (1887) 9 All 131 (134): 1886 All W N 322 F B; *Subbaraya Mudali* v. *Manikka Mudali*, (1895) 19 Mad 345 (346, 347 and 348) [After decree for partition in minor's suit for partition, right survives].

Note 6.

(1) *Sham Chand* v. *Bhayaram*, (1895) 22 Cal 92 (99); *Gulzar Shah* v. *Sardar Ali Shah*, 1930 Lah 703 (705): 125 Ind Cas 891: 12 Lah 1: 32 Pun L R 197.

(2) *Nagendra Nath Palit* v. *Robindra Nath Deb*, 1926 Cal 490 (494): 53 Cal 132: 30 Cal W N 389: 94 Ind Cas 212.

Note 7.

(1) *United Collieries Limited* v. *Simpson*, 1909 A C 383: 78 L J P C 129: 101 L T 129: 25 T L R 678: 53 Sol J 630.

(2) *Muzaffar Khan* v. *Ghulam Muhammad Khan*, (1915) 28 Ind Cas 455 (456): 1915 Pun Re No 62: 83 Pun L R 1915: 137 Pun W R 1915.

(3) *Ma Shwe Thit* v. *Maung Po Aung*, 1922 U B 7 (7, 8): 65 Ind Cas 66: 4 U B R 73; *Mahtab Singh* v. *Hub Lal*, 1926 All 610 (611 and 613): 24 All L J 796: 48 All 630: 98 Ind Cas 590; *Haridas Ram Das* v. *Ramdas Mathuradas*, (1889) 13 Bom 677 (679, 680); *Motilal Satyanarayan* v. *Har Narayan*, 1923 Bom 408 (408, 409): 25 Bom L R 485: 73 Ind Cas 365: 47 Bom 716; *Ramchode Das* v. *Rukmony Bhoy*, (1905) 28 Mad 487 (488); *Subramaniya Iyer* v. *Venkataramier*, (1915) 31 Ind Cas 4 (5) Mad; *Rustomji Dorabji* v. *Nurse*, 1921 Mad I (3, 7, 8, 11): 44 Mad 357: 40 Mad L Jour 173: 1921 Mad W N 121: 62 Ind Cas 260: 14 Mad L W 200; *Palaniappa Chettiar* v. *Raja Rajeswara Sethupathi* alias *Muthu Ramalinga Sethupathi*, 1926 Mad 243 (243, 244): 50 Mad L Jour 34: 22 Mad L W 858: 92 Ind Cas 366: 49 Mad 208; *Punjab Singh* v. *Ram Autar Singh*, (1919) 52 Ind Cas 348 (351): 4 Pat L Jour 676: 1920 Pat H C C 52. But see *Krishna Behari* v. *Corporation of Calcutta*, (1904) 31 Cal 993 (999, 1000): 8 Cal W N 745 [This is not followed even in Calcutta. See 52 Ind Cas 348 (350) and 1926 All 610 (612)].

(4) *Haridas Ram Das* v. *Ramdas*, (1889) 13 Bom 677 (679, 680).

(5) *Godigi Mareppa* v. *Firm of Marwadi Vannajee Vajanjee*, (1917) 38 Ind Cas 823 (826, 827): 31 Mad L Jour 772: 20 Mad L Tim 303: (1916) 2 Mad W N 280: 4 Mad L W 351.

(6) *Ma Shwe* v. *Maung Po Aung*, 1922 Upp Bur 7 (7, 8): 65 Ind Cas 66: 4 U B R 73.

(7) *Ranmalsingji* v. *Mahashankar*, (1911) 12 Ind Cas 716 (717): 13 Bom L R 1047: 36 Bom 174; *Tummala Nagabushanam* v. *Apparao*, (1912) 17 Ind Cas 226 (227): 12 Mad L Tim 383: 23 Mad L Jour 255: 1912 Mad W N 899.

(8) *Satagopa Ramanuja* v. *Mahabir Dossji*, (1898) 8 Mad L Jour 180 (181, 182).

(5) Suit by *A* for recovery of custody of his minor daughter left in the defendant's custody.[9]

(6) Suit for an injunction restraining defendant from preventing the plaintiff's standing at a particular place in a temple.[10]

Where, however, the tort is one relating to or affecting the *estate* of the deceased, the maxim does not apply and the right to sue will survive to his representatives.[11] Thus it will survive where the tort committed has injured the estate of the deceased[12] or benefited the estate of the wrongdoer.[13] But the injury or the benefit must be the *direct* result of the wrong[14] and the damage caused by the injury must be liquidated and certain.[15]

8. Right to sue on contracts.—A right to sue in respect of a contract will, on the general principles referred to in Note 4, survive to the representatives of the promisee. Thus in a suit on a bond or to enforce specific performance of a contract to sell or recover property, if the plaintiff dies, the right to sue will survive to his legal representatives.[1] The right to sue will survive against the *promisors representatives* unless a contrary intention appears from the contract such as the contract being incapable of being performed by other persons than the deceased. *See* S. 37 of the Contract Act and the illustrations thereto.

9. Right to sue for pre-emption.—Rights of pre-emption are of two different kinds, *viz*:—

(1) Those incidental to the *ownership* of *property;* and

(2) Those which are purely *personal.*

Rights of the former kind will survive while those of the latter kind will not. In deciding therefor whether the right to sue, in pre-emption suits, survives or not, it is necessary to *see* whether the right claimed is one incidental to the *ownership* of property

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(9) *Sharifa* v. *Munekhan*, (1901) 25 Bom 574 (579, 582): 3 Bom L R 167.

(10) *Josiam Thiruvengada* v. *Sami Iyengar*, (1910) 5 Ind Cas 937 (939): 34 Mad 76: 7 Mad L Tim 195: 1910 Mad W N 545: 20 Mad L Jour 760.

(11) *Twycross* v. *Grant*, 4 C P D 40, *Rustomji Dorabji* v. *W H Nurse*, 1921 Mad 1 (9): 44 Mad 857: 40 Mad L Jour 173: 14 Mad L W 200: 1921 Mad W N 121: 62 Ind Cas 260.

(12) See case in foot-note (11) above.

(13) *Brij Nath Sharma* v. *Lakshmi Narain Kaul*, (1932) 137 Ind Cas 217 (218): 1932 Oudh 165: 9 Oudh W N 239; *Nujuf Ali* v. *Patterson*, (1870) 2 N W P 103; *Phillips* v. *Hamfray* (1883) 24 Ch D 439: 52 L J Ch 833: 49 L T 5: 32 W R 6; *Haridas* v. *Ramdas*, (1889) 13 Bom 677 (680); *Peak* v. *Gurney*, (1878) L R 6 H L 377: L R 6 E & I A 412: 4 Ch App 701 Fol; 13 Bom 677 Dist; 9 Bom 378 Ref: 8 Cal 837; 21 All 209; *Rustomji Dorabji* v. *W H Nurse*, 1921 Mad 1 (8): 44 Mad 357: 40 Mad L Jour 173: 14 Mad L W 200: 1921 Mad W N 121: 62 Ind Cas 260; *Tirumala Nagabushanam* v. *Sri Raja Venkatadri Apparao*, (1912) 17 Ind Cas 226 (227): 23 Mad L Jour 255: 1912 Mad W N 899: 12 Mad L Tim 383; *Kishen Bahadur* v. *Ramaswamy Mudaliar*, (1913) 14 Ind Cas 491 (492): 11 Mad L Tim 240; *Nobo Coomar Ghose* v. *Indrodeb*, 1864 Suth W R Mis p 10 (10) [Claim for wasilab (mesne profits) can be enforced against the heirs of the original ejector]; *Ma Shwe Thit* v. *Maung Po Aung*, 1922 Upp Bur 7 (7-8): 65 Ind Cas 66: 4 U B R 73.

(14) *Phillips* v. *Hamfray*, (1883) 24 Ch D 439 (454): 52 L J Ch 833: 49 L T 5: 32 W R 6; *Rustomji Dorabji* v. *W H Nurse*, 1921 Mad 1 (8): 44 Mad 357: 40 Mad L Jour 173: 14 Mad L W 200: 1921 Mad W N 121: 62 Ind Cas 260.

(15) *Phillips* v. *Hamfray*, (1883) 24 Ch D 439 (454): 52 L J Ch 833: 49 L T 5: 32 W R 6; *Rustomji Dorabji* v. *W H Nurse*, 1921 Mad 1 (8): 44 Mad 357: 40 Mad L Jour 173: 14 Mad L W 200: 1921 Mad W N 121: 62 Ind Cas 260; *Peak* v. *Gurney*, (1878) 6 H L 377: L R 6 E & I A 412 4 Ch App 701 Fol; 13 Bom 677 Dist; 9 Bom 313 Ref; 8 Cal 837; 21 All 209.

Note 8.

(1) *Ramkishore* v. *Parameshri*, (1916) 33 Ind Ind Cas 123 (124): 14 All L J 255 [On bond]; *Jai Kali* v. *Baldeo Singh*, (1919) 50 Ind Cas 883 (884): 41 All 515: 17 All L J 576: 1 U P L R 56 [Specific performance]; *Vaman Trimbak* v. *Changi Damoder Shimpi*, 1926 Bom 97 (100): 49 Bom 862: 27 Bom L R 1261: 91 Ind Cas 360, (Do.).

O 22, R. 1, Note 9.

or only a *personal* right. The answer to this question will, in turn, depend upon the origin of the right. It may be founded on Muhammadan Law or on custom or it may have been given by Statute.

Pre-emption under Muhammadan Law.—Under the law applicable to the *Sunni* Muhammadans, the right of pre-emption does not survive on the death of the pre-emptor before decree.[1] Under the law applicable to the *Shafies* the right would appear to survive to the heirs of the pre-emptor on his death before decree.[2] Under the law applicable to other sects of Muhammadans there is a conflict of authority between the Allahabad and Bombay High Courts. The Allahabad High Court holds that the right in such cases is incidental to and arising out of ownership of land and that it therefore survives to the heirs of the pre-emptor though it cannot be transferred.[3] The same view prevails in the Punjab.[4] But according to the Bombay High Court the right is a *personal* one and does not survive to the heirs or other legal representatives of the pre-emptor[5] except in so far as it falls within the provisions of S. 306 of the Indian Succession Act.[6] In Madras where the principle of an absolute transfer of all rights under a sale prevails, a right of pre-emption is not recognised.[7] Except as a matter of custom in some places such as Malabar.[8]

Pre-emption under customary law.—Where the right claimed is one based on a custom, the question of its survival will have to be decided on evidence as to the custom.[9] Generally speaking a right of pre-emption based on *Wazib-ul-arz* is an incident of proprietary possession and will survive unless such survival is expressly excluded by local usage or other specific provisions.[10] In Bombay, however, even a customary right of pre-emption has been held to be a personal one.[11]

Pre-emption under Statute.—Where the right claimed is one conferred by statute, the question whether it survives or not will be governed by the provisions of the particular statute conferring the right. Thus under the Oudh Laws Act (Act XVIII of 1876) the right of pre-emption survives to the

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Note 9.

(1) See *Muhammad* v. *Niamat-un-nissa*, (1897) 20 All 88 (89): 1897 All W N 193.

(2) See *Jiaul Hassan Khan* v. *Sitaram*, (1912) 12 Ind Cas 720 (720): 36 Bom 144: 13 Bom L R 1040 [Contended but not questioned or decided].

(3) *Yusuf Ali* v. *Dal Kuar*, (1898) 20 All 148 (150): 1897 All W N 226; *Kaunsella* v. *Gopal Prasad*, (1906) 28 All 424 (426-427): 1906 All W N 73: 3 All L J 191.

(4) *Fateh Khan* v. *Muhammad*, 1898 Pun Re No 98; *Faquir Ali* v. *Ram Kishen*, 1907 Pun Re No 133: 84 Pun W R 1907: 88 Pun L R 1908 F B.

(5) *Dahyabhai Motiram Bhat* v. *Chunni Lal Kishore Das Pandya*, (1914) 22 Ind Cas 289 (291): 38 Bom 183: 15 Bom L R 1136.

(6) *Jiaul Hussan Khan* v. *Sitaram*, (1911) 12 Ind Cas 720 (720): 36 Bom 144: 13 Bom L R 1040.

(7) *Ibrahim Saib* v. *Muin Mir Udin Saib*. (1870-71) 6 Mad H C R 26 (30-31): 1 Weir 514.

(8) *Krishna Menon* v. *Kesavan*, (1897) 20 Mad 305 (306 and 312) [Not disputed before High Court].

(9) *Parashta Nath Tewari* v. *Dhanai Ojha*, (1905) 32 Cal 988 (990): 9 Cal W N 874; *Jadu Lal Sahu* v. *Janki Koer*, (1908) 35 Cal 575 (592 to 594); *Gordhandas Girdharbhai* v. *Prankor*, (1869) 6 Bom H C A C 263; *Krishna Menon* v. *Kesavan*, (1897) 20 Mad 305 (306 and 312).

(10) *Md Yousuf Ali Khan* v. *Dal Kuar*, (1897) 20 All 148 (151): 1897 All W N 226; *Sheikh Wajid Ali* v. *Sheikh Sahan*, (1909) 3 Ind Cas 820 (824, 827): 31 All 623: 6 Mad L Tim 352: 6 All L J 887; *Malkhan* v. *Kashi*, 1908 All W N 285 (286): 5 All L J 752.

(11) *Dahyabhai Motiram* v. *Chunni Lal Keshoredas*, (1914) 22 Ind Cas 289 (291): 38 Bom 183: 15 Bom L R 1136.

pre-emptor's heirs.[12] It can also be devised though not alienated to a stranger.[13]

O.22, R. 1, Notes 9—10.

10. Application for leave to sue in forma pauperis.—The right to apply for leave to sue in *forma pauperis* is purely a personal one depending upon the pauperism of the petitioner. On his death therefore the right does not survive.[1] Further, the legal representative may, or may not be a pauper.[2] If he is, he may file a fresh application in his own right.[3] If he is not, he has no right to sue in *forma pauperis*.[4]

Where the leave is granted, the plaint gets registered as a suit, and if the plaintiff dies thereafter, his legal representatives can no doubt continue the suit if the right to sue survives. He can further continue the suit *as a pauper* if he is himself a pauper.[5] If he is not a pauper, he should pay the Court-fee, otherwise the suit will be struck off.[6] This power to enquire into the pauperism of a legal representative is no doubt not contained in O. 22[7] but exists in a Court by virtue of its power to dispauper the original plaintiff himself at any stage of the suit. In making an order for or against the legal representatives, however, the Court should first *see* whether he is a legal representative in the capacity of an heir entitled personally or beneficially to the estate of the deceased or whether he is only coming in in a representative capacity having no personal or beneficial interest himself. In the former case, his own property can be taken into account.[8] In the latter case, only the estate of the deceased should be considered and not his individual property.[9]

If a *respondent* in an application for leave to sue in *forma pauperis* dies, there being no suit, O. 22 does not apply. Nor can Ss. 141 or 146 of the Code be invoked for imposing the penalties contained in O. 22, without express provision to that effect. Consequently, the legal representatives of the

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(12) *Fateh Khan* v. *Muhammad*, 1898 Pun Re No 98.

(13) *Mana* v. *Abdul Singh*, (1904) 7 Oudh Cas 158 (159).

Note 10.

(1) *Lalit Mohan Mandal* v. *Satish Chandra Das*, (1906) 33 Cal 1163 (1165): 4 Cal L Jour 234; *Janardhan Vithal* v. *Anant Mahader*, (1883) 7 Bom 373 (376); *Khatijanbai* v. *Nur Mahomed*, 1929 Sind 136 (136): 116 Ind Cas 111; *Farzand Ali* v. *Amir Haider*, (1915) 26 Ind Cas 714 (715): 18 Oudh Cas 64: 1 Oudh L J 709; *Jatindra Nath* v. *Sourindra Nath*, (1921) 64 Ind Cas 63 (64) Cal; *Kaveri Subbaiyah* v. *Yabuian Bala Tirupura Sundara Bonamma*, 1928 Mad 278 (278-279): 1927 Mad W N 886: 27 Mad L W 145: 54 Mad L Jour 582: 51 Mad 697: 110 Ind Cas 318 [1925 Mad 765 dist—Since death after registration as suit]; *Manaji Rajuji Kalewar* v. *Khandoo Baloo*, (1911) 11 Ind Cas 724 (725): 36 Bom 279: 13 Bom L R 577 [Death after registration as suit].

(2) *Lalit Mohan Mandal* v. *Satish Chandra Das*, (1906) 33 Cal 1163 (1168): 4 Cal L Jour 234.

(3) *Farzand Ali Khan* v. *Amir Haider*, (1915) 26 Ind Cas 714 (715): 18 Oudh Cas 64: 1 Oudh L J 709: *Jatendra Nath* v. *Sourindra Nath Jatindra*, (1921) 64 Ind Cas 63 (64) Cal.

(4) In re *Radakrishna Iyer*, 1925 Mad 819 (819-820): 21 Mad L W 550: 88 Ind Cas 91.

(5) In re *Radakrishna Iyer*, 1925 Mad 819 (820): 21 Mad L W 550: 88 Ind Cas 91

(6) *Arumuga Goundan* v. *Subramaniya Goundan*, 1931 Mad 324 (324, 325): 1931 Mad W N 199: 33 Mad L W 446: 131 Ind Cas 828.

(7) *Manaji Rajuji Kalewar* v. *Khandoo Baloo*, (1911) 11 Ind Cas 724 (725): 36 Bom 279: 13 Bom L R 577.

(8) *Arumuga Goundan* v. *Subramaniya Goundan*, 1931 Mad 324 (324, 325): 1931 Mad W N 199: 33 Mad L W 446: 131 Ind Cas 828.

(9) *Venkatanarasayya by his father and guardian Lingarayudu* v. *Achenna*, (1877) 3 Mad 3 (4) [Next friend of minor]; *Sivagami Ammal* v. *Gopalasamy Odayar*, 1925 Mad 765 (765, 766, 767 and 768): 48 Mad L Jour 390: 1925 Mad W N 176: 87 Ind Cas 372: 22 Mad L W 586 [Executor 36 Bom 279 diss]; *Ammakannammal* v. *Damodara Mudaliar*, 1928 Mad 66 (67-68) 109 Ind Cas 258; In re *Mary Amir Bill*, (1884) 7 Mad 390 (391) [Administratrix]; *Perumal Goundan* v. *Venkatasamy Naidu*, (1918) 45 Ind Cas 164 (166): 41 Mad 624: 34 Mad L Jour 121 [Liquidator]; In re *Will of Dadabai*, (1894) 18 Bom 237 (241).

O.22, R.1, Notes 10—15.

deceased respondent can be brought in at any time.[10] *Vide also* Notes under Rr. 3 and 4, *infra*.

11. Claim to guardianship.—An application under the Guardian and Wards Act (VIII of 1890) or otherwise for the appointment of a guardian for the person or property or both of a minor, is not a proceeding *inter partes*. It is the Court's duty to look after the interests of the minor and the parties simply set the Court in motion. The Policy of the law therefore is not to allow such applications to lapse by the death of parties.[1]

Where, however, the application is to enforce the applicant's *personal right* to guardianship the application will abate on the applicant's death.[2] Thus an application which was based on the petitioner's appointment in a testamentary disposition by the minor's father, was held to abate on the petitioner's death on the ground that the claim was a matter of personal preference and trust and would not therefore survive to the representatives of the petitioner.[3]

12. Right to letters of administration.—A right to the grant of letters of administration is a *personal* right and does not survive.[1] The heir can, however, apply afresh[2] where pending an application by an executor for the probate of a will, the executor dies, his widow cannot continue the application by asking for *letters of administration* instead.[3] The reason is that the right asserted by the alleged representative must be the *same* as that asserted by the deceased at the time of his death.

13. Right to sue in representative actions.—*See* O. 1, R. 8, Note 24, for a full discussion and also the undermentioned cases.[1] *See also* O. 30, R. 4.

14. Suit under Section 92 of the Code.—*See* S. 92, Note 30 and the cases cited below.[1]

15. Suit by or against limited owners or reversioners.—*Suit by or against limited owners.*—A limited owner under the Hindu Law is not a mere life-estate holder[1] but represents the entire inheritance in certain circum-

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(10) *Janardhan Vithal* v. *Anant Mahadev*, (1883) 7 Bom 373 (376); *Khatijanbai* v. *Nur Muhammad*, 1929 Sind 136 (136): 116 Ind Cas 111.

Note 11.

(1) *Sami Chetty* v. *Adikalam Chetty*, 1924 Mad 484 (484): 46 Mad L Jour 179: 34 Mad L Tim 15: 1924 Mad W N 222: 47 Mad 459: 84 Ind Cas 613; *Arjan Singh* v. *Gurji*, (1917) 42 Ind Cas 410 (411): 116 Pun L R 1917: 160 Pun W R 1917.

(2) *Mt Sakina Begam* v. *Md Wallidlah Khan*, 1928 Lah 456 (457, 458): 107 Ind Cas 397.

(3) *Gangabai* v. *Khashabai*, (1899) 23 Bom 719 (720 to 722): 1 Bom L R 363.

Note 12.

(1) *Hari Bhusan* v. *Manmatha*, (1919) 51 Ind Cas 76 (76, 77): 45 Cal 862; *Sarat Chandra* v. *Nani Mohan*, (1909) 36 Cal 799: 3 Ind Cas 995.

(2) *Hari Bhusan* v. *Manmatha Nath*, (1919) 51 Ind Cas 76 (77): 45 Cal 862.

(3) *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee*, (1909) 3 Ind Cas 995 (996): 36 Cal 799.

Note 13.

(1) *Rahim Baksh* v. *Channan Din*, (1920) 55 Ind Cas 210: 4 Lah L Jour 511: 1921 Lah 390; *Sankaran* v. *Manakka Sreedhan*, 1925 Mad 894 (895-896): 48 Mad L Jour 691: 90 Ind Cas 346: 23 Mad L W 205; *Keshab Rai* v. *Jyoti Prasad*, 1932 Cal 783 (784): 139 Ind Cas 123: 36 Cal W N 816.

Note 14.

(1) *Chettikulam Prasanna Venkatachella Reddiar* v. *The Collector of Trichinopoly*, (1914) 24 Ind Cas 369 (369, 370, 371): 26 Mad L J 537: 1914 Mad W N 581 [Suit under S 92 of the C P Code by Collector against alienee from trustee —Death of trustee on appeal—No abatement].

Note 15.

(1) *Mohadeay Kooer* v. *Harak Narain*, (1883) 9 Cal 244 (248): 11 Cal L Rep 540: 5 Shome L R 54: 7 Ind Jur 364.

stances.[2] A suit relating to the estate by or against such limited owner is therefore not one on any cause of action *personal* to herself and if she dies pending such suit, the right to sue, will survive to the reversioners.[3] *See also* Note 63 to S. 11, and also Note 5 above. O.22, R.1, Notes 15—16.

Suit by or against reversioners.—A suit by or against a reversioner in respect of the estate of a Hindu widow is one brought or defended in a *representative capacity* and on behalf of all the reversioners.[4] Consequently, on the death, pending suit, of such reversioner, the next reversioner will be entitled to continue the suit or to defend it and there is no abatement.[5] Where, however, on the death of the reversioner, events happen, such as the death of the limited owner, which change the *nature of the relief* to be granted, there can be no continuation of the suit.[6]

Under certain statutes or customary law prevailing in certain places, the right to control or question the alienation made by a collateral is given to the person who will become immediately interested on the death of such collateral. A suit based on such a right can on the death of the plaintiff be continued by the person who becomes so interested on such death.[7] But where the right to question an alienation is, by law, given only to the *descendants* of the alienor, a suit by a descendant cannot be continued by collaterals other than those who can show themselves to be descendants of the person whose acts are questioned.[8]

16. Suit under Ss. 14 and 18 of the Religious Endowments Act.—A suit under S. 14 of the Religious Endowments Act (Act XX of 1863) is a representative suit and on the death of the *plaintiff* any one of the persons interested may get himself substituted and continue the suit without fresh

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(2) *Janaki* v. *Narayanaswamy*, 1916 P C 117 (117): 39 Mad 634: 43 Ind App 207: 14 All L J 997: 18 Bom L R 856: 24 Cal L Jour 309: 20 Cal W N 1323: 31 Mad L Jour 225: 20 Mad L Tim 168: 4 Mad L W 530: (1916) 2 Mad W N 188: 37 Ind Cas 161 P C.

(3) *Premmoy* v. *Preonath*, (1896) 23 Cal 636 (638, 639); *Jadubansi* v. *Mahpal Singh*, (1915) 32 Ind Cas 104 (107): 14 All L J 8: 38 All 111; *Gandi Ramaswamy* v. *Puramatti*, (1915) 27 Ind Cas 1001 (1003): 39 Mad 382: 17 Mad L Tim 186. See, however, *Mt Mangla* v. *Hira Singh*, 1931 Lah 675 (2) (676): 32 Pun L R 712: 135 Ind Cas 44 [Suit by a Hindu widow for *partition* of her estate from co-sharers held to be a suit to enforce only her *personal* rights].

(4) See for full discussion Note 63-A to S 11. See also *Janaki* v. *Narayanaswami*, 1916 P C 117 (118): 39 Mad 634: 43 Ind App 207: 14 All L J 997: 18 Bom L R 856: 24 Cal L Jour 309: 20 Cal W N 1323: 31 Mad L Jour 225: 20 Mad L Tim 168: 4 Mad L W 530: (1916) 2 Mad W N 188: 37 Ind Cas 161 P C.

(5) *Venkatanarayana Pillai* v. *Subbammal*, 1915 P C 124 (126, 127): 38 Mad 406: 42 Ind App 125: 17 Bom L R 468: 21 Cal L Jour 515: 9 Cal W N 641: 28 Mad L Jour 535: 17 Mad L Tim 435: 2 Mad L W 596: 1915 Mad W N 555: 29 Ind Cas 298; *Challagundla Varamma* v. *Madala Gopaladasayya*, (1918) 46 Ind Cas 202 (210): 41 Mad 659: 35 Mad L Jour 57: 24 Mad L Tim 115: 8 Mad L W 62: 1918 Mad W N 461 F B; *Ram Din* v. *Raj Rani*, (1912) 17 Ind Cas 101 (106): 8 Nag L R 113; *Krishnaswamy Iyer* v. *Seethalakshmi Ammal*, (1919) 49 Ind Cas 268 (270 to 272): 9 Mad L W 166: 25 Mad L Tim 116: 1918 Mad W N 888; *Lachman* v. *Bansi Lal*, 1931 Lah 79 (80): 31 Pun L R 973: 131 Ind Cas 98: 12 Lah 275. *The following cases are no longer law in view of the decision in* 1924 P C 124:—*Muthuswamy* v. *Masilamany*, (1910) 5 Ind Cas 42 (49): 33 Mad 342: 7 Mad L Tim 17: 20 Mad L J 49; *Chinna Veerayya* v. *K Lakshminarasamma*, (1912) 15 Ind Cas 213 (213, 214): 37 Mad 406: 11 Mad L Tim 184: 22 Mad L Jour 375: 1912 Mad W N 442; *Gazzala Veerayya* v. *Gazzala Ganamma*, (1912) 16 Ind Cas 839 (841-842): 36 Mad 570: 12 Mad L Tim 188: 23 Mad L Jour 269: 1912 Mad W N 912 [Overruled by 46 Ind Cas 202 F B of five Judges]; *Ramachandra Naidu* v. *Subbaraya Pillai*, (1912) 16 Ind Cas 865 (865): 12 Mad L Tim 664; *Sakyahami Ingle Rao Sahib* v. *Bhavani Bozi Sahib*, (1904) 27 Mad 588 (591); *Punnamma* v. *Perrazu*, (1906) 29 Mad 390 (411): 1 Mad L Tim 183: 16 Mad L Jour 307 F B; *Arunachallam Pilai* v. *Vellayya Pillai*, (1912) 15 Ind Cas 461 (462, 463): 23 Mad L Jour 719: 12 Mad L Tim 199: 1912 Mad W N 897.

(6) *Sat Bharai* v. *Sat Bharai*, (1913) 18 Ind Cas 329 (330-331): 65 Pun Re 1913: 24 Pun W R 1913: 46 Pun L R 1913; *Ramjun* v. *Lachee*, (1886) 1 Agra 49.

(7) *Ram Rakha Mal* v. *Balwant Singh*, 1905 Pun Re No 58: 59 Pun L R 1905: 71 Pun W R 1905; *Umrao Begum* v. *Irshab Husain*, (1896) 21 Cal 997 (1004): 21 Ind App 168: 6 Sar 489: R & J 185 P C.

(8) *Abdulla Shah* v. *Mt Zainab Bibi*, 1931 Lah 293 (294): 13 Lah 116: 134 Ind Cas 771.

O.22, R.1, Notes 16—18.

leave.' But a suit under S. 14 of the Act against the defendant who is a sole surviving member of a committee for his removal *for neglect of duty* is purely a *personal* claim against the defendant and on the death of the latter the right to sue will not survive against his heir.[2]

17. Partial abatement.—An abatment may be total or partial. It may be partial either as regards the *parties* to the suit (Rr. 3 and 4) or as regards the *subject-matter* or reliefs.

The latter kind of partial abatement will arise where there are two or more reliefs claimed in the suit and on the death of a party the "right to sue" survives with respect to some of them and does not with respect to the others.

Illustrations.

1. *A* files a suit against *B*, a trustee, under S. 92 of the Code for the removal of *B* and for the settlement of a scheme pending the suit, *B* dies. The suit will abate as regards the former relief but may be continued as regards the latter.[1]
2. *A* files a suit against *B*, a trustee under S. 92 of the Code, for his removal and for setting aside an alienation of trust property by him to a stranger. Pending the suit *B* dies. The suit abates as regards the first relief but continues as regards the second.[2]

18. Death of either party pending appeal.—A "right to sue" which would have survived had the death of a party occurred during the pendency of a suit, will survive on such death taking place during the pendency of an appeal from the decree in the suit. (*Vide* Notes under R. 4, below).

In cases where it would not have so survived had the death occurred pending the *suit*, the question whether it survives or not if the death occurs pending appeal, will depend upon the *result* of the suit. If the suit has resulted in a *decree in favour of the plaintiff's claim* then the claim will have become perfected by the decree and attached to the estate. Thereafter it becomes a question of benefit to the estate, of the plaintiff which his legal representatives are entitled to uphold, or a detriment to the estate of the defendant which his legal representatives are entitled to try and get rid of; consequently the "right to sue" survives.[1] In such cases the fact that the lower Court's decree has already been executed will not affect the question, since the legal representative can get restitution if he succeeds.[2]

Note 16.

(1) *Alagappa* v. *Muthaiya Chettiar*, (1917) 41 Ind Cas 745 (747): 41 Mad 237: 33 Mad L Jour 178: 1917 Mad W N 740.

(2) *Bhima Raut* v. *Durga Prosad Singh*, (1912) 16 Ind Cas 908 (909): 40 Cal 323: 17 Cal L Jour 183.

Note 17.

(1) *Arumuga Thambiran* v. *Namasivaya*, 1926 Mad 162 (163): 48 Mad 688: 49 Mad L Jour 324: 22 Mad L W 130: 1925 Mad W N 569: 91 Ind Cas 874; *Siva Gnana* v. *Advocate-General*, (1915) 27 Ind Cas 874 (876): 28 Mad L Jour 174: 2 Mad L W 148: 1915 Mad W N 185; *Anand Rao* v. *Ramdass*, 1921 P C 123 (124): 48 Cal 493: 25 Cal W N 794: 13 Mad L W 318: 1921 Mad W N 24: 30 Mad L Tim 194: 17 Nag L R 37: 62 Ind Cas 737: 48 Ind App 12 P C.

(2) *Prasanna Venkatachala* v. *Collector of Trichinopoly*, (1916) 33 Ind Cas 45 (46, 47 and 48): 38 Mad 1064.

Note 18.

(1) *Muhammad* v. *Khusalo*, (1887) 9 All 131 (134): 1886 All W N 322; *Gopal* v. *Ramachandra*, (1902) 26 Bom 597 (602, 603, 604, 605, 607, 608): 4 Bom L R 325; *Paraman Chetty* v. *Sundra Raja*, (1902) 26 Mad 499 (500); *Venkatachella* v. *Collector*, (1916) 33 Ind Cas 45 (45 to 47): 38 Mad 1064; *Venkatachella* v. *Collector*, (1914) 24 Ind Cas 369 (369 to 371): 26 Mad L Jour 537: 1914 Mad W N 581; *Ram Kuar* v. *Jiwan Singh*, 1921 Lah 52 (53): 2 Lah 189: 83 Pun L R 1921: 63 Ind Cas 540; *Mulchand Kalwar* v. *Gobind Singh*, (1921) 59 Ind Cas 939 (939) Pat.

(2) *Gopal* v. *Ramachandra*, (1902) 26 Bom 597 (604 and 608): 4 Bom L R 325.

But if, in the first Court, the result was a *dismissal of the suit*, the plaintiff, in appealing against it is only seeking to enforce the very claim which he unsuccessfully sought to enforce in the suit. The appeal therefore, partakes of the character of the suit and the "right to sue" will not survive on the death of either party.[3] The appeal cannot be continued even in respect of costs or other relief which are merely incidental to the main relief.[4] If the first Court has decreed the suit in part then an appeal by the plaintiff in respect of the part disallowed will partake of the nature of an appeal from a dismissal of the suit.[5] O.22, R.1, Notes 18—19.

If the "right to sue" in an appeal does not survive then the memo. of cross-objections filed by the respondent cannot be heard and must also be dismissed.[6]

19. Suit or appeal against a dead person.—It has been seen in Note 2 to O. 22, *ante* (general) that this order applies only to cases of death during the *pendency of the suit* and not to cases of death occurring *before the institution* of the suit. A suit against a person who is dead at the time of the institution thereof is void and of no legal effect[1] and it is immaterial whether the death was *known* at the time or not.[2] Such a suit cannot be amended into one against his legal representatives.[3] But an *appeal* filed against a dead party can according to the High Court of Madras be amended by bringing in the legal representatives on the record.[4] According to the Sind Judicial Commissioner's Court, however, the Court has no jurisdiction to bring in the legal representative, in such a case[5] although, if the legal representative is already on record in another capacity, the memorandum of appeal

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(3) *Gadigi Mareppa* v. *Firm of Marwadi Vamajee Vajanjee*, (1917) 38 Ind Cas 823 (825, 827): 20 Mad L Tim 303: (1916) 2 Mad W N 280: 31 Mad L Jour 772; *Punjab Singh* v. *Ramautar*, (1919) 52 Ind Cas 348 (350-351): 4 Pat L Jour 676: 1920 Pat H C C 52; *Anand Bahadur* v. *Hardie Aziz*, (1919) 52 Ind Cas 545 (546): 87 Pun Re 1919: 35 Pun L R 1920; *Gulzar Shah* v. *Sardar Ali Shah*, 1930 Lah 703 (705): 125 Ind Cas 891: 12 Lah 1: 32 Pun L R 197; *Gopal* v. *Ram Chandra*, (1902) 26 Bom 597 (601, 602): 4 Bom L R 325 [Obiter]; *Nga Kyet Sein* v. *Mi Kyin Mya*, (1916) 34 Ind Cas 249 (250): 11 U B R 105: 9 Bur L Tim 38: 10 Bur L Tim 8 [Where first Court decreed plaintiff's claim but dismissed by Appellate Court in second appeal, held death does not cause abatement since plaintiff is seeking to restore the decree of first Court in his favour].

(4) *Josiam Thiruvengada* v. *Sami Iyengar*, (1910) 5 Ind Cas 937 (938, 939): 7 Mad L Tim 195: 1910 Mad W N 543: 20 Mad L Jour 760: 34 Mad 76.

(5) *Murugappa Chettiar* v. *Ponnusami*, 1921 Mad 405 (405 and 406): 44 Mad 828: 41 Mad L Jour 304: 13 Mad L W 705: 1921 Mad W N 438: 62 Ind Cas 757; *Muzaffar Khan* v. *Ghulam Muhammad Khan*, (1915) 28 Ind Cas 455 (455-456): 83 Pun L R 1915: 62 Pun Re 1915: 137 Pun W R 1915.

(6) *Murugappa Chettiar* v. *Ponnuswamy*, 1921 Mad 405 (406): 44 Mad 828: 41 Mad L Jour 304: 13 Mad L W 705: 1921 Mad W N 438: 62 Ind Cas 759; *Bhim Sain* v. *Muhammad Ali*, 1929 Lah 807 (808): 120 Ind Cas 9: 31 Pun L R 134: 11 Lah 1.

Note 19.

(1) *Lachhman Singh* v. *Mt Chattar Kaur*, 1927 Lah 663 (664): 103 Ind Cas 767; *Imdad Ali* v. *Jagan Lal*, (1895) 17 All 478 (482): 1895 All W N 109; *Debi Prasad* v. *Mt Bhago*, 1924 Lah 33 (33, 34): 5 Lah L Jour 187: 74 Ind Cas 682; *Veerappa Chetty* v. *Tindal Ponnen*, (1908) 31 Mad 86 (89): 3 Mad L Tim 12: 17 Mad L Jour 551; *Sami Mudaliar* v. *Muthiah Chetty* alias *Veerappa Chetty*, 1923 Mad 212 (214): 16 Mad L W 314: 43 Mad L Jour 293: 1922 Mad W N 597: 69 Ind Cas 465.

(2) *Veerappa Chetty* v. *Tindal Ponnan*, (1908) 31 Mad 86 (86 & 89): 3 Mad L Tim 12: 17 Mad L Jour 551.

(3) *Veerappa Chetty* v. *Tindal Ponnan*, (1908) 31 Mad 86 (89): 3 Mad L Tim 12: 17 Mad L Jour 551; *Ram Pratab Brij Mohan Das* v. *Gouri Shankar*, 1924 Bom 109 (111): 25 Bom L R 7: 85 Ind Cas 464; *Kristadas Law* v. *Kumar Khirada Kanta*, (1919) 51 Ind Cas 160 (160) Cal.

(4) *Gopalakrishnaiya* v. *Lakshmana Rao*, 1925 Mad 1210 (1210): 49 Mad L Jour 590: 49 Mad 18 F B. But see *Mi Ein Zi* v. *Mi Ni*, (1913) 21 Ind Cas 306 (307, 308): (1913) 1 U B R 175.

(5) *Mir Manager Encumbered Estates in Sind* v. *Thanumal*, (1924) 78 Ind Cas 569 (570) Sind: 1924 Sind 92; *Pitambar Das* v. *Bhawanilal*, 1932 Sind 220 (220): 26 S L R 362.

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O.22, R.1, Notes 19—21.

can be amended so as to describe him as the legal representative of the deceased.[5-a]

Where the legal representatives of a party dying subsequent to decree is allowed to file an appeal against the decree without notice to the respondent, the latter can, at the hearing raise the objection that the appellant is not really the legal representative and the appeal will be dismissed if there is no application to bring the right legal representative on record.[6]

20. No abatement by reason of death after decree.—When a suit is decreed, the decree determines and settles the claims of the parties. The claim is perfected by the judgment[1] and the decree is properly capable of transfer, devolution or inheritance like any other property.[2] Hence there is no abatement by death subsequent to the decree.[3] But this principle does not apply to the case of death after a decree dismissing a suit on a *personal* claim (*vide* Note 17, *supra*).

21. Appeal and Revision.—An order refusing an application to add a person as a legal representative and directing abatement of the suit *on the ground that the right to sue does not survive,* is appealable as a decree.[1]

An order *adding* or refusing to add a person as a legal representative of a deceased party may be open to revision under S. 115 of the Code.[2]

O.22, R.2.

Procedure *where* one of several plaintiffs or defendants *dies and* right to sue survives.

R. 2. [S. 362.] *Where* there *are* more plaintiffs or defendants than one, and any of them dies, and *where* the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

[1877—S. 362; 1859—S. 100.]

(5-a) *The Manager Encumbered Estates in Sind v. Tharumal*, 1920 Sind 82 (83): 78 Ind Cas 569 (570).

(6) *Mahalakshmamma* v. *Vemi Reddi*, 1923 Mad 367 (367, 368): 17 Mad L W 8: 44 Mad L Jour 60: 32 Mad L Tim 44: 69 Ind Cas 529.

Note 20.

(1) *Muhammad Hussain* v. *Khushalo*, (1887) 9 All 131 (134): 1886 All W N 322 F B; *Gopal* v. *Ram Chandra*, (1902) 26 Bom 597 (607, 608): 4 Bom L R 325; *Paraman Chetty* v. *Sundara Raja*, (1902) 26 Mad 499 (500); *Narayan* v. *Durgaji*, (1904) 28 Bom 201 (208): 5 Bom L R 945 [In a partition suit a decree granting partition effects a division in status and puts an end to survivorship so that on the death of the plaintiff his heirs get the property by inheritance and can come on record as his L Rs.]; *Subbaraya Mudali* v. *Manika Mudali*, (1896) 19 Mad 345 (347, 348); *Lakshmi Ammal* v. *Alamelu Ammal*, 1924 Mad 309 (310): 45 Mad L Jour 811: 18 Mad L W 874: 1923 Mad W N 839: 79 Ind Cas 325.

(2) *Mulchand Kalwar* v. *Gobind Singh*, (1921) 59 Ind Cas 939 (939) Pat.

(3) *Md Hussain* v. *Khushalo*, (1887) 9 All 131 (134): 1886 All W N 322; *Gopal* v. *Ramachandra*, (1902) 26 Bom 597 (605, 607 and 608): 4 Bom L R 325; *Lakhpati Kuer* v. *Daulat Singh*, 1927 Oudh 156 (157, 158): 4 Oudh W N 235: 101 Ind Cas 174: 2 Luck 464; *Hira Chand* v. *Kastur Chand*, (1894) 18 Bom 224 (226) [No abatement by death during execution proceedings].

Note 21.

(1) *Rampal Singh* v. *Abdul Hamid*, 1928 Oudh 362 (363-365): 5 Oudh W N 633: 110 Ind Cas 826; *Subramaniya Iyer* v. *Venkataramier*, (1915) 31 Ind Cas 4 (4) Mad; *Krishnaswamy* v. *Seethalakshmi*, (1919) 49 Ind Cas 268 (270): 9 Mad L W 166: 25 Mad L Tim 116: 1918 Mad W N 888.

(2) *Jai Kali* v. *Baldeo Singh*, (1919) 50 Ind Cas 883 (884): 41 All 515: 17 All L J 576; *Jadubansi* v. *Mahpal*, (1916) 32 Ind Cas 104 (106): 14 All L J 8: 38 All 111.

Synopsis.

1. Scope.
2. Right to sue surviving to surviving plaintiffs.
3. Right to sue surviving against surviving defendants.
4. "Suit" includes appeals.

O. 22, R. 2, Note 1.

1. Scope.—In order that this rule may apply it is necessary that

(1) There should be *more than one* plaintiff or more than one defendant in the suit: *and*

(2) on the death of one of the plaintiffs or one of the defendants, the right to sue should survive to the surviving plaintiffs *alone* or to the surviving defendants alone, respectively, even though they might have been on the record in *another capacity*.[1]

The word "survive" has not been used in any technical sense. It has been used in its ordinary sense of "outliving". This rule, therefore, applies to cases of every kind of devolution on death.[2] It is not necessary that the survival should be by reason of any circumstance antecedent to the suit.[3]

The word "alone" in the rule means "exclusively", *i.e.*, to the exclusion of other persons.[4] It, however, does not mean that no one else should be entitled to sue or be liable to be sued: it only means that the survivor or survivors should be entitled to sue or be liable to be sued independently of others, *i.e.*, without joining others.[5]

No application is necessary for making the necessary entry under this rule. It is the duty of the Court to do so.[6]

The following points of distinction between this rule and Rr. 3 and 4 may be noted:—

(*i*) There can be no abatement if the facts come within the provisions of this rule:[7] whereas if the facts fall within the provisions of Rr. 3 or 4 and the procedure laid down therein is not adopted the suit will abate.

(*ii*) If the conditions of this rule are satisfied the suit can be proceeded with even if it had been filed against a dead person

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Order 22, Rule 2—Note 1.

(1) *Hafiz-un-nisa* v. *Jawahir Singh*, 1921 Oudh 209 (213): 24 Oudh Cas 374: 66 Ind Cas 24; *Balk Puri* v. *Mt Durga*, (1908) 30 All 49 (51): 4 All L J 783: 1908 All W N 6: 3 Mad L Tim 181; *Suba Gobind Rai* v. *Anar Koer*, 1931 All 349 (349, 350): 1931 All L J 266: 131 Ind Cas 877: 53 All 521 [But the rule does not apply if the survival is to one in the opposite array. Thus one of several defendants preferred second appeal, the other defendants not having joined him. The appellant died but no application was made within 90 days for bringing his legal representatives on record. The co-defendants contended that they were *pro forma* respondents in the second appeal that the right to sue survived to them and that there was no abatement. Held that the co-defendants were not appellants, that O 22, R 2 did not apply and that the appeal abated].

(2) *Lilaram* v. *Tikamdas*, (1929 Sind 225 (226): 119 Ind Cas 537.

(3) *Shyamanand Das* v. *Raj Narain Das*, (1906) 4 Cal L Jour 568 (571, 572): 11 Cal W N 186; *Jhangi Ram* v. *Musst Rupan Bai*, 1927 Lah 501 (503): 102 Ind Cas 436 [If the right to sue survives against the surviving respondents, even, by reason of any cause which arises after the institution of the suit the case would fall within the purview of O 22, R 2].

(4) *Sheo Gopal* v. *Bishen Singh*, 1880 Pun Re No 30.

(5) *Maung Byaung* v. *Mg Shwe Baw*, 1924 Rang 376 (376): 2 Rang 486: 3 Bur L Jour 171: 84 Ind Cas 170.

(6) *Nankoo Ahir* v. *Bhagelu Ahir*, 1929 All 347 (347): 1929 All L J 618: 116 Ind Cas 746; *Lilaram* v. *Tikamdas*, 1929 Sind 225 (226): 119 Ind Cas 537.

(7) *Bhabani Charan* v. *Suchitra Baisnabi*, 1930 Cal 270 (272): 51 Cal L Jour 25: 126 Ind Cas 203; *Nankoo Ahir* v. *Bhagelu Ahir*, 1929 All 347 (347): 1929 All L J 618: 116 Ind Cas 746.

O.22, R.2, Notes 1—3.

along with others who are his legal representatives.[8] Whereas Rr. 3 and 4 will not apply if the party was dead at the time of institution of the suit.

2. Right to sue surviving to surviving plaintiffs.—Where the joint owners of land sue for damages for trespass on the land and pending the suit one of the plaintiffs dies the right to sue survives to the others.[1] Similarly where joint purchasers of property sue for possession and pending the suit one of them dies the right to sue will survive to the others if the purchase is joint and indivisible but not if it is of *distinct* though undivided shares.[2]

As to the survival of the right to sue on the death of a partner in suits by a firm *see* O. 30, R. 4: and as to the survival of such right on the death of plaintiff in a suit under S. 92, of the Code *see* S. 92, Note 30. *See also* the cases cited below.[3]

3. Right to sue surviving against surviving defendants.—Where the defendants are jointly and severally liable to the plaintiff, and one of them dies, his legal representatives need not be brought on record.[1] Thus in the following cases no legal representative of a deceased defendant need be brought on record:—

(1) Suit against several joint tort-feasors.[2]

(2) Suit against persons who have jointly kept the plaintiff out of possession.[3]

(3) Suit on a mortgage executed by the members of a joint Hindu family.[4]

The legal representatives of a defendant who has, before his death, assigned his rights to another defendant, need not be brought on record.[5]

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(8) *Hazari Sher Singh* v. *Mt Mohammadi*, 1929 Lah 440 (440): 30 Pun L R 259: 117 Ind Cas 899.

Note 2.

(1) *Ganpatram Jebhai* v. *Ranchhod Haribhai*, (1893) 17 Bom 645 (647); *Gaur Mohan Das* v. *Ram Roop Mazoomdar*, (1868) 1 Beng L R 42: 10 Suth W R 84.

(2) *Kunjamal* v. *Gaurishankar*, (1906) 3 All L J 30 (35, 37): 1905 All W N 274: 1 Mad L Tim 52.

(3) *Subramania Pillai* v. *Venkatachalam Pillai*, 1929 Mad 524 (525): 115 Ind Cas 831 [Where a Registrar refuses to register a will and a suit is brought by two of the legatees thereunder for registration of the Will, it must be regarded as having been filed in a representative capacity on behalf of all the legatees, so that on the death of one of the legatees, the other is entitled to continue the suit]; *Sunder Singh* v. *Ramnath*, 1926 Lah 167 (168): 7 Lah 12: 27 Pun L R 219: 93 Ind Cas 1013 [The creditor can maintain a suit on behalf of all for setting aside as fraudulent a transfer by the debtor: hence on the death of some of the creditors who were parties originally to such suit the right to sue survives to the others]; *Karm Din* v. *Ismail*, (1881) Pun Re No 109.

Note 3.

(1) *Jwala Prasad* v. *Kopeya Munda*, (1921) 59 Ind Cas 890 (891) Pat; *Maung Mu* v. *Maung Kan Gyi*, 1924 Rang 127 (128): 1 Rang 618: 77 Ind Cas 393; *Ram Prasad Chiman Lal* v. *Anundji & Co*, 1922 Cal 408 (409): 49 Cal 524: 69 Ind Cas 885 [But where a suit was brought against a firm and the alleged sole proprietor died but no steps were taken to bring his legal representative on record, held the suit abated].

(2) *Bishen Das* v. *Ram Labhaya*, (1915) 32 Ind Cas 18 (19): 1915 Pun Re No 106: 187 Pun W R 1915; *Meek* v. *Ishan Chandra*, (1920) 57 Ind Cas 181 (188): 2 U P L R (Pat) 144; *Raja Promode Nath* v. *Secretary of State for India*, 1927 Cal 182 (189): 53 Cal 992: 85 Cal W N 112: 99 Ind Cas 428.

(3) *Dinanath Sahai* v. *Mayawati Kuer*, 1921 Pat 118 (121): 6 Pat L Jour 54: 1921 Pat H C C 69: 2 Pat L Tim 143: 60 Ind Cas 346; *Shama Sunkur Chowdhry* v. *Sreenath Banerjee*, (1869) 12 Suth W R 354 (355); *Salimullah* v. *Sib Sundari*, (1910) 8 Ind Cas 707 (707) Cal [Unless the landlord has colluded with the tenure holders in dispossessing the plaintiff, he cannot be made jointly and severally liable for the mesne profits].

(4) *Shridhar* v. *Madappa*, 1930 Bom 367 (368): 32 Bom L R 698: 127 Ind Cas 334; *Padgaya* v. *Baji*, (1896) 20 Bom 549 (552) [But on the death of the mortgagee in a suit for redemption against him and sub-mortgagee, the right to sue does not survive to the sub-mortgagee alone].

(5) *Moung Khine* v. *Burn*, (1866) 6 Suth W R Ref 2 (3); *Nagesh* v. *Vaman*, 1888 Bom P J 191.

As to the right to sue surviving against the surviving defendants in cases coming under O. 1, R. 8 *see* Note 24 to that rule. O. 22, R. 2, Notes 3—4.

4. **"Suit" includes appeals.**—The word "suit" includes an appeal. (*See* R. 11 below.) This rule will therefore apply also where the right to appeal survives to the surviving appellants *alone* or against the surviving respondents *alone*.[1]

For cases where the right to appeal survives to surviving appellants alone *see* the undermentioned cases[2] and for cases where the right survives against the surviving respondents alone, *see* the cases cited below.[3]

R. 3. [Ss. 363, 365, 366.] (1) *Where one of two or* more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone[5] or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, *on an application*[7] *made in that behalf, shall* cause the legal representative[10] of the deceased plaintiff to be made a party[9] and shall proceed with the suit. O. 22, R. 3.

Procedure *in case of death* **of one of several plaintiffs** *or of sole plaintiff.*

(2) *Where* within the time limited[8] by law no application *is* made *under sub-Rule* (1), the suit shall abate[18] *so far as the deceased plaintiff is concerned*, and, on the application of the defendant, the Court *may* award to *him* the costs[24] which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

[1877—Ss. 363, 365, 366, 364: 1859—Ss. 101, 102.]

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. Rule applies to appeals.
4. Rule does not apply to execution proceedings.
5. Where right to sue survives to persons other than the surviving plaintiff or plaintiffs alone.
6. Death of a pauper applicant.
7. "On an application made in that behalf."
8. Limitation therefor.
9. "Shall cause the legal representative of the deceased plaintiff to be made a party."
10. Legal representative.
11. Two or more legal representatives.

Note 4.

(1) *Karm Din* v. *Ismail*, (1881) Pun Re No 109; *Maung Po* v. *Ma Shwe Ma*, 1925 Rang 95 (96): 2 Rang 445: 84 Ind Cas 992.

(2) *Ram Sewak* v. *Lambar Pande*, (1903) 25 All 27 (28): (1902) 22 All W N 171 [Dissenting from 22 All 222 (223)]; *Chintaman Nilkant* v. *Gangabai*, (1903) 27 Bom 284 (287): 5 Bom L R 90; *Upendra Nath Ghosh* v. *Bhushan Sahana* 1926 Cal 462 (463): 88 Ind Cas 970 [Defendants—Appellants—Common ground—Death of one]; *Nawab* v. *Muhammad Hayat*, (1916) 33 Ind Cas 1006 (1007): 29 Pun W R 1916; *Maung Byaung* v. *Maung Shwe Baw*, 1924 Rang 376 (376): 2 Rang 486: 3 Bur L Jour 171: 84 Ind Cas 170.

(3) *Midnapore Zamindary Co Ltd* v. *Trailokya Nath*, 1924 Cal 562 (563): 51 Cal 110: 81 Ind Cal 501: 40 Cal L Jour 238; *Gopal Das* v. *Mulchand*, 1926 Lah 607 (608): 7 Lah 399: 27 Pun L R 688: 98 Ind Cas 960; *Hafz-un-nisa* v. *Jawahir Singh*, 1921 Oudh 209 (213): 24 Oudh Cas 374: 66 Ind Cas 24; *Gauri Shankar* v. *Manraj*, (1917) 41 Ind Cas 705 (706) 1 Pat L W 198: 1919 Pat H C C 441; *Budha Mal* v. *Bhagwan Das*, 1886 Pun Re No 86; *Kartar Singh* v. *Lal Singh*, 1921 Jour 13 (8) (13): 11 Pun L R 1921: 59 Ind Cas 238: 9 Pun W R 1921.

O. 22, R. 3, Notes 1—2.

12. Wrong person as legal representative. See Note 63-B to S. 11 and Ss. 50, 52.
13. Joint Hindu family and legal representative.
14. Legal representatives of deceased plaintiff or appellant already on record in another capacity.
15. Determination of the question as to legal representative.
16. What pleas may be taken by a legal representative.
17. Minor as legal representative.
18. "The suit shall abate so far as the deceased plaintiff is concerned."
19. Death after preliminary and before final decree.
20. Death after final decree. See Notes to R. 12.
21. Suits under S. 92 of the Code. See Note 30 to S. 92 ante.
22. Suits under O. 1, R. 8 of the Code. See Note 24 to O. 1, R. 8, ante.
23. Effect of abatement on the rights of parties.
24. Award of costs.
25. Revision.
26. Appeal.

Application after time. See Note 8, Pts. (3) and (4) and R. 9, infra.
Death of pro forma plaintiffs. See Note 2, Pt. (3).
Order of abatement, if necessary. See Note 18, Pts. (6) and (7).
Survival to defendant. See Note 5, Pt. (5).
Who can apply. See Notes 7 and 11.

1. Legislative changes.—

1. S. 363 of the old Code dealing with the case of death of *one of several plaintiffs* provided that the Court "*may* cause the legal representative" of the deceased plaintiff to be made a party: S. 365 which dealt with the death of a *sole* plaintiff provided that the legal representative may apply to be brought on the record and "the Court *shall* thereupon enter his name". Under the present rule "the Court, in all cases on an application made in that behalf, *shall* cause the legal representative of the deceased plaintiff to be made a party". *See* Note 7, *infra*.

2. The words "the Court may pass an *order* that the suit shall abate" which occurred in S. 366 of the old Code have been substituted by the words "the suit shall abate".

3. After the words "the suit shall abate" the words "so far as the deceased plaintiff is concerned" have been newly added in order to make it clear that the abatement shall, in the first instance, be only so far as the deceased plaintiff is concerned and not of the whole suit. *See* Notes 18 and 23, *infra*.

2. Scope and applicability of the rule.—In order that this rule may apply, the following conditions must be satisfied:—

1. The death must occur *pending* the suit. Thus the rule does not apply where a plaintiff dies *after decree*.[1]
2. The right to sue must survive to a "legal representative" as defined by S. 2, sub-S. (11).
3. The right to sue must survive either to *other* persons jointly with the surviving plaintiffs or to those *other* persons exclusively.[2]
4. The deceased plaintiff must have been a *necessary party* to the suit. Otherwise, or, if he has no interest in the suit, his legal representatives need not be made parties and the rule will not apply.[3]

Order 22, Rule 3—Note 2.

(1) *Ramanada* v. *Minatchi Ammal*, (1878) 3 Mad 236 (238); *Mt Lakhpati Kuer* v. *Daulat Singh*, 1927 Oudh 156 (157): 4 Oudh W N 235: 101 Ind Cas 174: 2 Luck 464. See Note 5 *infra*.

(2) *Nankoo Ahir* v. *Bhagelu Ahir*, 1929 All 347 (347): 1929 All L J 618: 116 Ind Cas 746.

(3) *Jai Kishen Das* v. *Arya Priti Nidhi Sabha*, 1921 Lah 857 (858): 55 Pun L R 1921; *Bisham-*

The principle of the rule applies to proceedings in revision[4] and to cases before the Deputy Commissioner under the Chota Nagpur Tenancy Act.[5] But it does not apply to proceedings in an application for probate.[6]

As to the applicability of the rule to appeals, *see* Note 3 below.

3. Rule applies to appeals.—The provisions of this rule apply also to appeals (*vide* R. 11, *infra*). Where an appellant dies during the pendency of the appeal and his right of appeal does not survive to the surviving appellant alone, his legal representatives can and should be brought on record;[1] and if no application therefor is made within the prescribed time the appeal will abate so far as the deceased appellant is concerned.[2]

Where two independent appeals were filed against the same decree, one by the plaintiff and the other by one of the defendants, and during the pendency of the appeals, the plaintiff died and his legal representatives were impleaded in his appeal but not in the defendant's appeal, it was held by the High Court of Madras that the latter appeal abated and that the impleading of the legal representative in the plaintiff's appeal would not enure for the benefit of the other appeal.[3]

In applying the rule to appeals the interpretation of the words "right to sue" explained in Note 3 to R. 1 *ante* should be remembered and it will follow that, even in cases where the *suit* would have abated by reason of the right to sue not surviving on the death of the plaintiff the right to *appeal* may survive.[4] *See* Note 3 to R. 1, *ante*.

4. Rule does not apply to execution proceedings.—The provisions of the rule do not apply to execution proceedings[1] (*vide also* R. 12) nor to appeals from orders passed in execution proceedings.[2]

Where, therefore, a decree-holder dies pending execution proceedings, the proper procedure to be followed is that laid down in S. 50 and O. 21, Rr. 16 and 22. But can the legal representative, in such a case, *continue* the pending execution proceedings or should he file a *fresh* application for execution? On this question there is a conflict of authority. The High Court of Cal-

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bar Das v. *Kanshi Parshad*, 1932 Lah 641 (643): 13 Lah 483: 33 Pun L R 842; *Gulsher Khan* v. *Mashuq Ali Khan*, (1914) 22 Ind Cas 929 (930) All.

(4) *Anandamoyi Dasi* v. *Rudra Mahanti*, (1913) 21 Ind Cas 407 (407): 18 Cal L Jour 141.

(5) *Gobind Nath Sahi Deo* v. *Maharaja Pratab Udai Nath Sahi Deo*, 1923 Pat 29 (29): 1922 Pat H C C 363: 1 Pat L R 55: 69 Ind Cas 613: 2 Pat 243: 4 Pat L Tim 367.

(6) *Sachindranath Maity* v. *Bepin Behari Sasmal*, (1931) 35 Cal W N 1028 (1030): 1932 Cal 206.

Note 3.

(1) *Avadu Ammal* v. *Krishnan Chetty*, 1928 Mad 772 (773): 1928 Mad W N 385: 28 Mad L W 351: 55 Mad L Jour 497: 51 Mad 858: 110 Ind Cas 662.

(2) ***Gregor Grant* v. *The Oudh and Rohilkand Railway Company***, 1886 All W N 90 (90 and 91).

(3) *Sankaranarayana Saralaya* v. *Laxmi Hengsu*, 1931 Mad 277 (277): 60 Mad L Jour 267: 33 Mad L W 411: 130 Ind Cas 764.

(4) *Muhammad Hussain* v. *Khushalo*, (1887) 9 All 131 (134): 1886 All W N 822 F B [Whether the legal representative would be able to enforce the whole judgment is a different matter]; *Gopal Ganesh Abhyankar* v. *Ram Chandra Sadashiv*, (1902) 26 Bom 597 (605, 608): 4 Bom L R 325; *Musst Ram Kour* v. *Jiwan Singh*, 1921 Lah 52 (53): 2 Lah 189: 83 Pun L R 1921: 63 Ind Cas 540.

Note 4.

(1) *Dulari* v. *Mohan Singh*, (1881) 3 All 759 (760): 1881 All W N 57; *Gulabdas* v. *Lakshman Narhar*, (1878-79) 3 Bom 221 (222): 4 Ind Jur 34; *Cally Churn Mullick* v. *Bhuggobutty Churn Mullick*, (1880) 5 Cal L Rep 108 (111); *Monmonthanath Mitter* v. *Rakhal Chandra*, (1909) 3 Ind Cas 321 (326): 14 Cal W N 752: 10 Cal L Jour 396; *Bimbadhar Panda* v. *Abdul Zalil*, 1929 Pat 200 (200): 117 Ind Cas 165 [By virtue of O 22, R 12, nothing in R 3, applies to proceedings in execution of a decree or order and therefore a pending execution proceeding does not abate by reason of the death of any of the joint decree holders]; *Shankar Balchand Marwadi* v. *Hiralal Balchand Marwadi*, 1931 Bom 427 (427): 33 Bom L R 858: 134 Ind Cas 730.

(2) *Mohammad Taqi* v. *Fateh Bahadur Singh*, 1929 Pat 565 (567): 10 Pat L Tim 783.

O. 21, R. 3, Notes 4—7.

cutta considers that he *cannot* apply for substitution but should only file a *fresh* application.[3] According to a Full Bench of the High Court of Madras, he can *continue* the pending execution case and need not file any fresh application.[4]

5. **Where right to sue survives to persons other than the surviving plaintiff or plaintiffs alone.**—This rule will apply only where the right to sue does *not* survive, where there are *several* plaintiffs, to the surviving plaintiffs alone[1] but survives either to the surviving plaintiffs jointly with *others*[2] or exclusively to *others*. If the right to sue survives exclusively to the surviving plaintiff *alone* the case is not within this rule[3] but is governed by the provisions of R. 2.

Where the right to sue survives to a *contesting defendant*, the rule cannot apply inasmuch as he cannot continue the suit against himself.[4] The case is, however, different if the defendant on whom the right to sue survives is only a *pro-forma* defendant.[5]

6. **Death of a pauper applicant.**—As already pointed out in Note 10 to R. 1, *supra* the right to apply for permission to sue in *forma pauperis* is a purely *personal* right which does not survive at all. On the death therefore of the petitioner in such an application, this rule will not apply.[1] *See* O. 22, R. 1, Note 10.

7. "**On an application made in that behalf.**"—The Court cannot, under this rule, add a legal representative *suo motu*. An *application* must be made for the purpose under the old Code. Such an application had to be made by the *legal representative* or by a *person claiming to be the legal representative*.[1] This is not now necessary. The application can be made even by a defendant or respondent interested in bringing the legal representative on the record.[2] Where there are several legal representatives it is not necessary that the application need be made by *all* of them.[3] Further, even an appli-

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(3) *Akhoy Kumar Talukdar* v. *Surendra Lal Pal*, 1926 Cal 957 (958): 30 Cal W N 735: 96 Ind Cas 378. See also *Hemendra* v. *Fakir*, 1923 Cal 626 (628): 27 Cal W N 621: 50 Cal 650: 74 Ind Cas 929.

(4) *Venkatachallam Chetty* v. *Ramaswamy Servai*, 1932 Mad 73 (80): 62 Mad L Jour 1: 1931 Mad W N 1209: 34 Mad L W 866: 135 Ind Cas 561: 55 Mad 352 F B [Overruling 50 Mad 1 and referring to 1928 Mad 772].

Cal 1163 (1168): 4 Cal L Jour 234; *Farrajand Ali Khan* v. *Amir Haidar*, (1915) 26 Ind Cas 714 (715): 18 Oudh Cas 64: 1 Oudh L J 709; *Subbiah* v. *Tirupura Sundara Boyamma*, 1928 Mad 278 (278 and 279): 1927 Mad W N 886: 27 Mad L W 445: 54 Mad L Jour 582: 51 Mad 697: 110 Ind Cas 318 [But in such a case the Court may order legal representative to be brought on record and allow him to continue the proceeding by transforming it into a suit by payment of the requisite Court-fee].

Note 5.

(1) *Nankoo Ahir* v. *Bhagelu Ahir*, 1929 All 347 (347): 1929 All L J 618: 116 Ind Cas 746; *Maung Byaung* v. *Maung Shwe*, 1924 Rang 376 (376): 2 Rang 486: 3 Bur L Jour 171: 84 Ind Cas 170.

(2) *Kamalapat* v. *Baldeo*, (1900) 22 All 222 (223): 1900 All W N 24.

(3 *Mahadeo Singh* v. *Talib Ali*, 1928 All 345 (348): 26 All L J 564: 50 All 792 F B.

(4) *Khatija Bi* v. *Babu Sahib*, (1910) 8 Ind Cas 859 (859): 9 Mad L Tim 161.

(5) *Khatija Bi* v. *Babu Sahib*, (1912) 14 Ind Cas 544 (547): 11 Mad L Tim 409.

Note 6.

(1) *Lalit Mohan* v. *Satish Chandra*, (1906) 33

Note 7.

(1) *Mamraza* v. *Subbarama Reddi*, (1909) 2 Ind Cas 479 (480): 19 Mad L Jour 83. See also *Fulvahu* v. *Goculdas*, (1885) 9 Bom 275 (279).

(2) *Kedar Nath* v. *Bismillah*, 1926 All 156 (157): 24 All L J 67: 6 L R A Civ 614: 90 Ind Cas 72.

(3) *Ma Sein Hnyin* v. *C S Lutchuman Chetty*, (1912) 15 Ind Cas 366 (367): 6 L B R 52: 5 Bur L Tim 77 [Where possible all legal representatives should apply to be made parties; but an application by one legal representative is sufficient for him to be made a party]; *Bhikaji* v. *Purushotam*, (1886) 10 Bom 220 (223) [If an application has been made by one of the heirs of the deceased appellant in time the abatement is saved, the respondent is entitled to have the other heirs put on the record. It is not necessary that all of them should have applied within the time].

cation made by a person who is ultimately found not to be a legal representative has been held to be sufficient compliance with the requirements of the rule, if it has been made *bona-fide*.[4] But where *A* applies to be made a party as legal representative and the application states that *B* is not the legal representative, *B* cannot seek to counteract his own failure to apply in time by relying on *A's* application.[5] O. 22, R. 3, Notes 7—9.

Where a party dies after decree, his legal representative can file an appeal against the decree without making a separate application separately applying for impleading him as a party; the appeal itself may be regarded as an application for the purpose.[6]

8. Limitation therefor.—The period of limitation for filing an application to bring the legal representatives on record under this rule is 90 days from the date of the death under Art. 176 of the Limitation Act as amended by Act XXVI of 1920 and this is so even if the death had occurred before the amending Act was passed.[1]

The *onus* is on the applicant to prove that the application is within time.[2]

Where one of the legal representatives has applied in time to be made a party and the application has been granted, the other legal representatives may be brought on the record subsequently.[3] Further, the Court can, for sufficient cause, excuse the delay in filing the application.[4] (*See also* R. 9, *infra.*)

9. "Shall cause the legal representatives of the deceased plaintiff to be made a party."—The Court is bound to implead the legal representatives as parties on an application made in that behalf,[1] unless there is a dispute as to who is the legal representative, in which case, the question should be decided by it under R. 5.[2]

Where an application to add a person as the legal representative of a deceased plaintiff is filed, but the Court, without expressly adding the petitioner as a party allows him to prosecute the suit or appeal, the petitioner will be deemed to have been brought on the record.[3] But the same

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(4) *Mallapragadu* v. *Lingam Viraraghava*, (1910) 7 Ind Cas 514 (515): 20 Mad L Jour 398: 7 Mad L Tim 43.

(5) *Amolaksao* v. *Govind Rao*, (1919) 49 Ind Cas 34 (35): 15 Nag L R 21.

(6) *Radha Rani* v. *Saru*, (1882) 2 All W N 73 (74).

Note 8.

(1) *Vaithinatha* v. *Govindaswami*, 1921 Mad 650 (651): 41 Mad L Jour 65: 13 Mad L W 522: 1921 Mad W N 338: 62 Ind Cas 795; *Vijaya Singh Dattaji Rao* v. *Shivaji Rao*, 1924 Bom 416 (417): 26 Bom L R 378: 80 Ind Cas 761; *Nimba* v. *Janki*, 1923 Nag 166 (167): 71 Ind Cas 176.

(2) *Harnandan* v. *Durga*, 1887 All W N 60 (60).

(3) *Adusupalli Venkata Rao* v. *Marikrutha Ammal*, (1912) 13 Ind Cas 313 (313): 22 Mad L Jour 169: 11 Mad L Tim 19: 1912 Mad W N 9.

(4) *Daya Singh* v. *Buta Singh*, (1916) 38 Ind Cas 7 (8): 1916 Pun Re No 118.

Note 9.

(1) *Janardhan Krishna* v. *Ram Chandra*, (1901) 26 Bom 317 (319): 4 Bom L R 23; *Sinni Ammal* v. *Palaniappa Chettiar*, 1927 Mad 707 (708): 1927 Mad W N 222: 88 Mad L Tim 330: 102 Ind Cas 118 [Impleading legal representatives in a suit arising out of claim petition does not amount to impleading them in second appeal from the decree].

(2) *Oula* v. *Beepathee*, (1894) 17 Mad 209 (211): 3 Mad L Jour 287.

(3) *Namdar Chand* v. *Bansidhar*, (1893) 13 All W N 181 (181).

O. 22, R. 3, Notes 9—10.

result will not follow by the mere fact that *Vakalathnama* is filed by a pleader on behalf of the legal representative.[4]

A Court to which a case has been sent on remand has jurisdiction to act under this rule.[5]

10. Legal representative.—The expression "legal representative" was not defined under the old Code. Under the English Law the primary meaning of the expression is "executor or administrator" though it may, under special circumstances be controlled by the context.[1] The same strict meaning was given to the expression in some cases under the old Code[2] while in other cases a wider meaning was given so as to cover all persons *representing the estate of a deceased person.*[3] The present definition in S. 2, sub-S. 11 of the Code is very wide[4] and gives effect to the latter view. Under that definition the following persons are legal representatives:—

1. A person who, in law, represents the estate of a deceased person.[5]

2. A person who intermeddles with the estate of a deceased.[6]

3. Where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.[7]

(1) *Person who, in law, represents the estate of a deceased person.*—There are certain cases which are governed by the Indian Succession Act, 1925, in which the executor or administrator alone can represent an estate of a deceased person.[8] In such cases they alone are his legal representatives.[9] In cases not governed by the Succession Act there may or may not be an executor or administrator. Where there is an executor or administrator he will be the legal representative of the deceased person; where the will is with regard to *part* of the property of the testator, the executor cannot be his legal representative with regard to the properties of the deceased not dealt

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(4) *Badal Khan* v. *Murtaza*, (1911) 9 Ind Cas 977 (977) All.

(5) *Salabat Singh* v. *Ram Kishan*, (1904) 7 Oudh Cas 17 (18).

Note 10.

(1) *Price* v. *Strange*, 6 Maddison 159; *Dinamoni Chaudhurani* v. *Elahadut Khan*, (1903-04) 8 Cal W N 843 (851).

(2) See *Malangini Dasser* v. *Chooneymoney Dassee*, (1895) 22 Cal 903 (908). See also *Payyath* v. *Thirthrupalli*, (1897) 20 Mad 51 (53): 6 Mad L Jour 241 [Executor was brought on record as legal representative].

(3) *Dinamoni Choudhurani* v. *Elahdut Khan*, (1903-04) 8 Cal W N 843 (858); *Greender Chunder Ghose* v. *Mackintosh*, (1879) 4 Cal 897 (908, 919): 4 Cal L Rep 193: 4 Ind Jur 287 [It includes the heir].

(4) *Ramdin* v. *Rajaram*; (1912) 17 Ind Cas 101 (106): 8 Nag L R 113.

(5) *Paramaswami Aiyangar* v. *Alamu Nachiar Ammal*, (1919) 49 Ind Cas 11 (15): 42 Mad 76: 1919 Mad W N 107: 35 Mad L Jour 632: 9 Mad L W 26 [He need not be necessarily the beneficial owner of that estate].

(6) *Gnanambal Ammal* v. *Veerasami*, (1915) 31 Ind Cas 920 (923): 29 Mad L Jour 698; *Angan Lal* v. *Gadan Mul*, (1884) 10 All 479 (484): 1888 All W N 189; *Laisa Rai* v. *Udit Rai*, 1924 All 717 (718): 75 Ind Cas 114; *Daropadi* v. *Sada Kuar*, (1914) 22 Ind Cas 242 (248): 115 Pun Re 1913: 39 Pun L R 1914; *Shiv Saran Lal* v. *Kesho Prasad Singh*, (1917) 42 Ind Cas 122 (125): 3 Pat L W 302: 1918 Pat H C C 86; *Ratanbai* v. *Narayandas*, 1927 Bom 474 (477): 29 Bom L R 900: 51 Bom 771: 104 Ind Cas 794 [Heirs of intestate Parsi who intermeddle with his estate are his legal representatives].

(7) See under "Representative suits" below.

(8) See S 211 of the Succession Act, 1925. See also *Moosa* v. *Essa*, (1884) 8 Bom 241 (256): 8 Ind Jur 571 [Case under the Probate and Administration Act, 1881, which has now been repealed by the Succession Act, 1925]; *Sukhnandan* v. *Rennick*, (1882) 4 All 192 (195): 1882 All W N 8; *Sidik Muhamed* v. *Saran*, 1925 Sind 2 (3, 4): 76 Ind Cas 314 [In the case of Christians and Parsis "legal representative" means primarily executor or administrator (including one *de son tort*), but in the absence of a will, means heir or next-of-kin].

(9) *Dinamoni* v. *Elahadut*, (1903-04) 8 Cal W N 843 (856). See also *Malapa* v. *Devi*, (1895) 21 Bom 102 (105) [But an administrator, however, appointed under S 10 of Regulation VIII of 1827, without leave being granted him to sue, is not the legal representative nor is he entitled to continue an appeal].

O. 22, R. 3, Note 10.

with by the will.[10] Where there are no executors or administrators, the heir of the legatee will be the legal representative of the deceased person in respect of the property respectively got by them.[11] In other words, the term "legal representative", as defined in this Code only denotes those classes of persons on whom the status of a representative is fastened by *reason of the death* of a person whose estate they are held to represent.[12] But an assignee from the deceased of a certain property is not his legal representative, for he does not get any estate of the deceased by reason of his death.[13] Similarly the Crown getting, by escheat, the property of a person on his death is not a legal representative, as it does not get the estate as *representing* the deceased person but in its *paramount* right[14] so also a zamindar who, on the death of a tenant, gets under the village custom, his interest by escheat is not his legal representative.[15]

(2) *Intermeddlers.*—The term "intermeddle" has been used to mean an intermeddling with the assets of a deceased person in such a way as to denote an assumption of the authority, or an intention to exercise the functions of an executor or administrator.[16] In other words it has been used to mean what is kown as an executor *de-son-tort*.[17] It is therefore essential, in order to constitute a person an intermeddler that there should be an *intention* on his part to act as a legal representative and to *represent the estate* of the deceased.[18] A trespasser or a person who claims a title in himself adversly to the estate of the deceased, cannot, therefore, be an intermeddler within the meaning of the definition.[19] He will, however, be a legal representative if he intends to act as a legal representative and to represent the estate as such. It depends, in each case, upon the particular facts of that case whether he intends to do so.[20] An intermeddler is a legal representative only for the purposes of the procedure in instituting and defending suits, and only to the extent of the property with which he had intermeddled.[21]

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(10) *Nathu Ram* v. *Alliance Bank of Simla*, 1929 Lah 546 (546): 30 Pun L R 326: 116 Ind Cas 558.

(11) *Subbarayudu* v. *Ramadasu*, 1923 Mad 237 (237): 45 Mad 872: 42 Mad L Jour 301: 15 Mad L W 309: 1922 Mad W N 375: 30 Mad L Tim 202: 68 Ind Cas 942 [Legatee]: *Dinomoni* v. *Elahudut Khan*, (1903-04) 8 Cal W N 843 (856) [Heir]: *Mani Lal Rewadal* v. *Bai Ka*[illegible] (1893) 17 Bom 758 (770).

(12) *Bisheshar Dayal* v. *Bajrang Bahadur Singh*, 1929 Oudh 353 (354): 6 Oudh W N 469: 117 Ind Cas 452.

(13) *Mithan Lal* v. *Maya Devi*, 1929 All 441 (441): 1929 All L J 921: 121 Ind Cas 689. See also *Harish Chandra* v. *Chandpore Co.* (1903) 30 Cal 961 (964) [But he may be substituted under R 10, *infra*]. See *Prokash Chandra Das Gupta* v. *Shama Charan Dutt*, 1925 Cal 467 (468): 82 Ind Cas 991.

(14) *Collector of Masulipatam* v. *Cavely Venkata Narainpah*, (1860) 8 Moo Ind App 500 (525, 527): 2 Suth W R P C 59: 1 Sar 752: 1 Suther 417 P C

(15) *Chiranji Lal* v. *Bishwanath*, (1914) 1 Oudh L J 86 (88): 23 Ind Cas 969

(16) Halsbury, Vol 14, p 147.

(17) Halsbury, Vol 14, pp 147 to 151. See also meaning of "*Executor-de-son-tort*" in Wharton's Law Lexicon. See also *Ram Lal* v. *Champa Bai*, (1919) 50 Ind Cas 951 (951) Nag.

(18) Halsbury, Vol 14, pp 147 and 148; *Satya Ranjan Roy* v. *Sarat Chandra Biswas*, 1926 Cal 825 (826): 30 Cal W N 565: 96 Ind Cas 695.

(19) *Satya Ranjan Roy Choudhury* v. *Sarat Chandra Biswas*, 1926 Cal 825 (825): 30 Cal W N 565: 96 Ind Cas 695.

(20) *Chandrika Prasad Singh* v. *Kesho Prasad Singh*, (1918) 48 Ind Cas 704 (704, 705) Pat. See also *Promnno Chunder* v. *Kristo*, (1879) 4 Cal 342 (345, 346): 3 Cal L Rep 154 [Party who takes possession of the estate of a deceased Hindu treated for some purposes as his representative]: *Chuni Lal* v. *Osmond Beeby*, (1903) 30 Cal 1044 (1057), (Do.); *Kusum Bandhu* v. *Ramdayal*, 1924 Cal 362 (362): 69 Ind Cas 179, (Do.); *Muddala Madhavarayudu* v. *Tanikala Subbamma*, (1916) 35 Ind Cas 124 (126): 31 Mad L Jour 222: (1916) 1 Mad W N 233.

(21) *Laisa Rai* v. *Udit Rai*, 1924 All 717 (718): 75 Ind Cas 114.

O. 22, R. 3, Note 10.

(3) *Representative suits.*—In representative suits the legal representative must be a person on whom the estate devolves *on the death* of the party suing or sued. Where, on the death of a trustee, a new trustee is elected or appointed, the latter is not the legal representative of the deceased trustee, inasmuch as the estate did not devolve on him *on the death* of the former trustee, but by virtue of his appointment or election which has no retrospective operation.[22] In a suit by a *Hindu widow* for the benefit of the estate, the estate will devolve on the death of the plaintiff on the next reversioner who will therefore be the legal representative of the plaintiff.[23] In a suit by a *reversioner* in respect of an estate held by a Hindu female, the reversioner plaintiff sues on behalf of the whole reversionary body. In other words, all the reversioners are represented in the suit by the plaintiff reversioner, and on the latter's death, other reversioners may be brought on the record for the purpose of continuing the suit.[23-a] This, however, is not because the succeeding reversioners are legal representatives of the deceased reversioner (for there was no estate vested in him which devolved on his death to the succeeding reversioners), but under the provisions of O. 1, Rr. 8 and 10.[23-b] *See* Note 24 to O. 1, R. 8.

The right to enforce a partnership contract does not vest with the surviving partner *alone*.[24] But though the rights of a deceased partner may devolve on his representative, the right to sue survives to the surviving part-

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(22) *Thirumalai Pillai* v. *Arunachalla Padayachi*, 1926 Mad 540 (541): 92 Ind Cas 520; *Ram Singh* v. *Waryam Singh*, 1924 Lah 251 (251): 5 Lah L Jour 459: 77 Ind Cas 585. See also *Ratnam Pillai* v. *Nataraja Desikar*, 1924 Mad 615 (615): 46 Mad L Jour 341: 19 Mad L W 367: 34 Mad L Tim 31: 1924 Mad W N 861: 84 Ind Cas 200; *Keshab Rai* v. *Jyoti Prosad*, 1932 Cal 783 (784): 36 Cal W N 816: 139 Ind Cas 128 [Suit by Mohunt on behalf of deity]; *Sundaresam Chettiar* v. *Viswanatha Pandara Sannadhi*, 1922 Mad 402 (403): 16 Mad L W 83: 43 Mad L Jour 147: 1922 Mad W N 444: 31 Mad L Tim 66: 45 Mad 703: 72 Ind Cas 103; *Saminatha Pillai* v. *Rajagopala Mudaliar*, 1921 Mad 124 (124): 13 Mad L W 148: 40 Mad L Jour 208: 1921 Mad W N 108: 62 Ind Cas 360 [Where a trustee sued on behalf of a trust impleading his co-trustee as party defendant and the plaintiff died pending suit, the defendant trustee can apply to be transposed as plaintiff to continue the suit. There is no question of abatement and O 22, R 3 is inapplicable]. See however *Mt Moti Bala Debi* v. *Satyanand Thirthaswami*, 1930 All 348 (349): 1930 All L J 836: 123 Ind Cas 376 [Religious endowment—Successor in management is legal representative of previous manager].

(23) *Tribuwan Sundar Kuar* v. *Sri Narain Singh*, (1898) 20 All 341 (343, 344): 1898 All W N 65; *Jadubansi Kuer* v. *Mahapal Singh*, (1916) 32 Ind Cas 104 (107): 38 All 111: 14 All L J 8; *Rikhai Rai* v. *Sheopujan Singh*, (1910) 7 Ind Cas 97 (97): 33 All 15: 7 All L J 960; *Premmoy* v. *Preonath*, (1896) 23 Cal 636 (638): *Musalareddi* v. *Ramayya*, (1900) 23 Mad 125 (133): 9 Mad L Jour 313; *Ramaswamy* v. *Peddamunayya*, (1916) 27 Ind Cas 1001 (1003): 39 Mad 382: 17 Mad L Tim 186; *Amritrao* v. *Sonabai*, 1925 Nag 423 (424): 89 Ind Cas 605; *Musammut Parbutty* v. *Musammut Higgin*, (1872) 17 Suth W R 475 (476); *Musst Lachmi* v. *Amin Chand*, 1893 Pun Re No 97. See *Arunachalam Pillai* v. *Vellayya Pillai*, (1912) 15 Ind Cas 461 (463): 23 Mad L Jour 719: 12 Mad L Tim 199: 1912 Mad W N 897 [Where, however, the suit is in her personal capacity and not as representing the estate, the reversioner is not the legal representative]. See *Rajah Rajeshwara Dorai* v. *Sundara Pandiya Swami*, 1918 P C 156 (158): 42 Mad 581: 46 Ind App 64: 17 All L J 153: 21 Bom L R 885: 29 Cal L Jour 551: 23 Cal W N 549: 36 Mad L Jour 164: 25 Mad L Tim 400: 10 Mad L W 322: 1919 Mad W N 511: 49 Ind Cas 704 P C; *Baij Nath* v. *Sheoraj Singh*, (1919) 53 Ind Cas 761 (763): 22 Oudh Cas 260: 6 Oudh L J 469: 2 U P L R (Oudh) 8 [A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to anything which she may have done herself to the prejudice of these reversionary heirs].

(23-a) *Venkatanarayana* v. *Subbamma*, (1915) 29 Ind Cas 298 (302): 38 Mad 406: 1915 P C 124: 42 Ind App 125: 17 Bom L R 468: 21 Cal L Jour 515: 19 Cal W N 641: 28 Mad L Jour 535: 17 Mad L Tim 485: 2 Mad L W 596: 1915 Mad W N 555. See also *Muthusamy Mudaliar* v. *Masilamani*, (1910) 5 Ind Cas 42 (49): 33 Mad 342: 7 Mad L Tim 17: 20 Mad L Jour 49 [A declaratory suit brought by a reversioner on behalf of himself and all the reversioners was held to be a representative suit].

(23-b) *Krishnaswamy Iyer* v. *Seetha Lakshimi Ammal*, (1919) 49 Ind Cas 268 (270, 272): 9 Mad L W 166: 25 Mad L Tim 116: 1918 Mad W N 888. *See also* the following analogous cases. —*Sivagurunatha* v. *Ramaswamy Iyengar*, (1912) 15 Ind Cas 399 (402): (1912) 1 Mad W N 105: 25 Mad L Jour 630: 11 Mad L Tim 257. See however, *Subramaniya Pillai* v. *Venkatachelam Pillai*, 1929 Mad 524 (525): 115 Ind Cas 831 [Where on refusal by registering officer to register the will, two of the legatees bring a suit for registration, the suit must be regarded as in a representative capacity and on the death of any of the plaintiff the other will be his *legal* representative so far as the right to continue the suit is concerned, though not so far as specific rights of the deceased under the will are concerned. This view, it is submitted is not correct. *See* Note 24 to O 1, R 8].

(24) *Aga Gulam Hussain* v. *Sasson*, (1897) 21 Bom 412 (422).

ners in the absence of any statutory authority to the contrary; the latter may therefore continue the suit as legal representatives of the deceased partner.[25] O. 22, R. 3, Notes 10—11.

It is not necessary that the legal representative should be in actual possession of the assets of the deceased. It is sufficient if he is entitled to the possession thereof, *i.e.*, if he is a person on whom the estate would devolve.[26]

If *A* allows his *benamidar* to sue in *his own name*, he cannot, on the death of *B*, claim to come in as *B's* legal representative.[27] A District Judge taking possession of the assets of a deceased person under S. 64 of the Administrator-Generals Act II of 1874 is not the legal representative of the deceased.[28]

If a legal representative dies, his own legal representatives who have received assets of the previous deceased, will represent him.[29]

11. Two or more legal representatives.—The expression "legal representative" must, where there are more legal representatives than one, be read in the plural.[1] All the High Courts are agreed that, as a general rule, all the legal representatives should be brought on record and that if any of them refuse to join as plaintiffs or appellants they must be made defendants or respondents.[2] Where, however some of them are omitted to be brought on the record, there is a conflict of views as to whether the suit or appeal abates. According to the High Court of Allahabad[3] and the Judicial Commissioner's Court of Sind,[4] it does. According to the High Court of Calcutta "legal representative" means all the representatives of whom the representative applying, *knew or ought to have known*. Where one or more of the legal representatives are unknown or all unwilling to join in the application, a *bona fide* application by all the representatives who are willing to join, will be sufficient compliance with this rule.[5] The High Courts of Bombay[6] Lahore[7] and Madras[8] and the Judicial Commissioner's Court of Nagpur[9] hold that a *bona*

(25) *Gobind Prosad* v. *Chander Sekhar*, (1887) 9 All 486 (490): 1887 All W N 133.

(26) *Ranjit Singh* v. *Mt Narmadi*, 1931 Nag 173 (175): 27 Nag L R 247: 134 Ind Cas 862.

(27) *Doraisamy Thevar* v. *Chidambaram Chettiar*, 1930 Mad 221 (222): 58 Mad L Jour 57: 1930 Mad W N 48: 31 Mad L W 194: 122 Ind Cas 175.

(28) *The District Judge of Azamgarh* v. *Baldeo Prosad*, 1899 All W N 221 (221).

(29) *Jafri Begam* v. *Saira Bibi*, (1900) 22 All 367 (369, 370): 1900 All W N 113.

Note 11.

(1) *Ghamandi Lal* v. *Amir Begam*, (1894) 16 All 211 (212): 1894 All W N 22.

(2) *Fazal Muhammad Khan* v. *Habibullah Khan*, (1913) 20 Ind Cas 366 (367): 11 All L J 719.

(3) *Haidar Husain* v. *Abdul Ahad*, (1908) 30 All 117 (118): 5 All L J 62: 1908 All W N 41: 3 Mad L Tim 207: *Ghamandi Lal* v. *Amir Begam*, (1894) 16 All 211 (212): 1894 All W N 22.

(4) *Sidik Muhammad* v. *Saran*, 1935 Sind 2 (3, 4): 76 Ind Cas 314.

(5) *Fajor Banu* v. *Rohim Bux Bhuiya*, 1929 Cal 26 (27): 32 Cal W N 1020: 115 Ind Cas 184 [But where there was no evidence that if the true legal representative had been informed that the application was to be made he would not have been willing to join it. Held that the suit abated].

(6) *Bhikaji* v. *Purshotam*, (1886) 10 Bom 220 (223).

(7) *Abdul Rahman* v. *Shahabuddin*, (1920) 55 Ind Cas 883 (885): 1 Lah 481: 85 Pun W R 1920 [Death of a Muhammadan appellant—Sons alone had themselves brought on the record as his legal representatives without joining the deceased's widow and daughters—The sons *bona fide* believed that they alone were the legal representatives as the parties were governed by customary law and not by Muhammadan Law; the appeal does not abate]; *Mahomed Hassan* v. *Inayat Hussain*, 1927 Lah 91 (95): 28 Pun L R 3: 100 Ind Cas 418 [But where the interest involved in the suit or appeal cannot be sufficiently represented in the absence of the omitted legal representatives, omission to implead all will be fatal to the suit or appeal].

(8) *Musalu Reddi* v. *Ramayya*, (1900) 23 Mad 125 (132): 9 Mad L Jour 313; *Govindasamy Udaiyar* v. *Annamalai Udaiyar*, 1927 Mad 1071 (1071, 1072) [Where some legal representatives come on the record and they contend that some other persons are not legal representatives even though their contention may be found to be untrue, that would not make the whole of the suit or any portion of the suit abate].

(9) *Narayan* v. *Amrita*, 1923 Nag 101 (102): 18 Nag L R 21: 65 Ind Cas 542.

O. 22, R. 3, Notes 11—13.

fide application by all those representatives who are willing to join is enough and will save the suit or appeal from abatement. In cases where the legal representatives are added after notice to the defendants or respondents and they do not, raise any objection as to there being other legal representatives, even the Allahabad High Court agrees that it is not open to the defendants or respondents to subsequently contend that the suit or appeal has abated by reason of the fact that all the representatives were not brought on record.[10]

12. Wrong person as legal representative.—It is the duty of the defendant to enquire and ascertain who the legal representatives of the deceased plaintiff are.[1] Consequently an objection that any person is not the legal representative of a deceased plaintiff must be taken by them at the earliest possible opportunity and if no such objection is so taken and a person has been impleaded as the legal representative of the deceased plaintiff, it is not, afterwards, open to the defendants to subsequently contend that the true legal representatives have not been brought on record and that therefore the suit must abate.[2]

See Note 63 B to S. 11 and Ss. 50 and 52 and the undermentioned case.[3]

13. Joint Hindu family and legal representatives.—It has been held by the High Courts of Lahore[1] and Bombay[2] that where a co-parcener in a joint Hindu family dies, the survivors are not his legal representatives, inasmuch as they take the estate by *survivorship* and not by *succession*. The High Court of Patna has, on the other hand, held that they are the legal representatives within the meaning of S. 2, sub-S. 11 of the Code.[3]

Where, however, the deceased co-parcener was the *managing member* of the family representing the family, the succeeding managing member is, according to the High Court of Bombay[4] and Madras,[5] a "person who, in law, represents the estate of a deceased person" and is therefore his legal representative. The Oudh Judicial Commissioner's Court has, on this point taken a contrary view.[6] According to the High Court of Calcutta, where the right to sue survives to, or against the surviving co-parceners, it is not necessary to

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(10) *Muhammad Zafaryab Khan* v. *Abdul Razzaq Khan*, 1928 All 532 (533): 26 All L J 820: 50 All 857: 111 Ind Cas 238: L R 9 A 238 (Rev).

Note 12.

(1) *Tej Bhan* v. *Wali Dad*, 1921 Lah 60 (60): 3 Lah L Jour 181: 60 Ind Cas 716: *Meenatchi Achi* v. *Ananthanarayana Iyer*, (1903) 26 Mad 224 (228): 12 Mad L Jour 380.

(2) *Balabai* v. *Ganesh Shankar*, (1903) 27 Bom 162 (182, 186 and 187): 4 Bom L R 980: *Tej Bhan* v. *Wali Dad*, 1921 Lah 60 (60): 3 Lah L Jour 181: 60 Ind Cas 716; *Meenatchi Achi* v. *Ananthanarayana Iyer*, (1903) 26 Mad 224 (228): 12 Mad L Jour 380.

(3) *Manikya* v. *Lakshminarasimha*, (1932) 139 Ind Cas 465 (469): 63 Mad L Jour 319 [Decree against wrong legal representative does not bind the real representative].

Note 13.

(1) *Dwaraka Das* v. *Krishna Krishore*, 1921 Lah 34 (35): 2 Lah 114: 3 Lah L Jour 349: 73 Pun L R 1921: 61 Ind Cas 628.

(2) *Chunilal* v. *Baimani*, (1918) 46 Ind Cas 745 (746): 42 Bom 504: 20 Bom L R 660.

(3) *Idlo Sonar* v. *Jhagru Sahu*, 1925 Pat 123 (124): 3 Pat 853: 85 Ind Cas 25: 6 Pat L Tim 313: 3 Pat L R 97.

(4) *Ganesh Sakharam* v. *Narayana Shriram*, 1931 Bom 484 (489): 55 Bom 709: 33 Bom L R 1144: 134 Ind Cas 961.

(5) *Nagappa Nadar* v. *Karuppiah Nadar*, 1925 Mad 456 (457): 21 Mad L W 21: 86 Ind Cas 178. See also *Subbaraghava Rao* v. *Adinarayana Rao*, 1932 Mad W N 491 (492, 493).

(6) *Ikbal Narain* v. *Ratan Lal*, (1907) 10 Oudh Cas 121 (125, 126); *Sughar Kunwar* v. *Sitapat Ram*, (1917) 39 Ind Cas 135 (137): 4 Oudh L J 92: 20 Oudh Cas 67 [But if the manager of a joint family dies after the institution of a suit and his sons apply within time to carry on the suit it will not abate, irrespective of the fact that some other members of the family are impleaded as parties to the suit beyond the period of limitation].

bring the latter on the record as the legal representatives of the deceased co-parcener.[7]

In the case of a *separated* Hindu[8] or in a suit by a member of a joint Hindu family on a *personal* contract made with him, his *heirs* will be his legal representatives.[9] The institution of a suit for partition by an adult co-parcener effects a division in status. This principle, however, does not apply to a suit on behalf of a minor for partition. Where, in such a case, the minor dies before decree, his heirs are not entitled to continue the suit.[10] After a preliminary decree for partition even the minor plaintiff becomes a divided member, and, on his death, his heirs will be his legal representatives.[11]

14. Legal representatives of deceased plaintiff or appellant already on record in another capacity.—Where the legal representatives of a deceased plaintiff or appellant are already on the record, though in another capacity, an application to bring them in as legal representatives is unnecessary.[1] As whether such an application is necessary in the case of the death of a defendant or respondent, *see* Note 12 to R. 4, *infra*.

15. Determination of the question as to legal representative.—Where a dispute arises as to who is the legal representative, the Court should, under R. 5, determine the question.[1] The effect of such a determination is, however, only limited for the purposes of the suit and is not conclusive of his rights.[2]

16. What pleas may be taken by a legal representative.—When a party dies his legal representative is appointed merely in order that the suit might proceed and a decision arrived at. Only the rights and disabilities of the *original parties* that have to be considered and not those of the legal representatives themselves.[1] All that the representative can therefore do is to take up the suit at the stage at which it was left when the original plaintiff died, and to continue it.[2] He must rely on the same cause of action and on the same title as the deceased plaintiff.[3] It is not open to him to assert his own *individual* or hostile title in the suit.[4] Likewise the defendant is not entitled

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(7) *Chowdhry Shamanand* v. *Rajnarain*, (1906) 1 Cal L Jour 568 (570): 11 Cal W N 186.

(8) *Veerapa* v. *Ramaswamy*, (1904) 27 Mad 106 (109).

(9) *Jai Kali* v. *Baldeo Singh*, (1919) 50 Ind Cas 883 (884): 41 All 515: 17 All L J 576.

(10) *Chelimi* v. *Subbanna*, (1918) 42 Ind Cas 860 (862): 41 Mad 442: 1917 Mad W N 792: 22 Mad L Tim 432: 34 Mad L Jour 213.

(11) *Subbaraya* v. *Manika*, (1896) 19 Mad 345 (346); *Mammareddi Sattirazu* v. *Mammareddi Ammappi*, (1915) 28 Ind Cas 543 (544): 2 Mad L W 325.

Note 14.

(1) *Sardar Shah* v. *Mt Sardar Begum*, 1928 Lah 893 (894): 113 Ind Cas 44; *Sara Khan* v. *Jan Muhammad*, 1928 Lah 43 (44): 106 Ind Cas 313; *Sher Bahadur* v. *Abezar*, 1926 Jour 150 (1): 95 Ind Cas 236 [Letters to Court informing of party's death and the fact that his representatives were on the record already was held sufficient].

Note 15

(1) *Oula* v. *Beepathee*, (1894) 17 Mad 209 (211): 3 Mad L Jour 289.

(2) *Dhapu* v. *Ramautar*, 1923 Nag 209 (209): 70 Ind Cas 209.

Note 16.

(1) *Gulli* v. *Sawan*, 1924 Lah 45 (46): 4 Lah 72: 74 Ind Cas 146: 5 Lah L Jour 482; *Ismail Jolaha* v. *Jayannath*, (1913) 19 Ind Cas 255 (256) (All) [Thus an estoppel affecting a party deceased affects his legal representative also].

(2) *Inaganti Venkatarama Rao* v. *U R R D K Venkatalingama Nayanim*, 1922 Mad 49 (50): 42 Mad L Jour 43: 15 Mad L W 72: 30 Mad L Tim 204: 1922 Mad W N 42: 68 Ind Cas 703.

(3) *Sham Chandgir* v. *Bhayaram Panday*, (1895) 22 Cal 92 (99).

(4) *Inaganti Venkatarama Rao* v. *U R R D K Venkatalingama Nayanim*, 1922 Mad 49 (50): 42 Mad L Jour 43: 15 Mad L W 72: 30 Mad L Tim 204: 1922 Mad W N 42: 68 Ind Cas 703; *Muhammad Naina Marcair* v. *Umman Kani Ammal*, 1930 Mad 593 (593): 127 Ind Cas 127 [The legal representative plaintiff cannot agitate in that suit his own claim against the other plaintiffs in the case].

O. 22, R. 3, Notes 16—18.

to raise against the legal representative any defence other than those which he could have raised against the deceased plaintiff.[5]

17. Minor as legal representative.—A minor is not disentitled to be made a party as the legal representative of a deceased plaintiff; but he must be represented by a next friend.[1]

18. "The suit shall abate so far as the deceased plaintiff is concerned".—If on the death of a plaintiff or appellant, no application to implead his legal representatives is filed within the prescribed time, the suit or appeal will abate.[1] But if such application has been made but rejected the suit or appeal will not abate.[2] It is immaterial that the application was made by a wrong person, if it was made *bona fide*.[3]

The impleading of the legal representative in an interlocutory matter in the suit will be enough to save the suit from abatement.[4] But the impleading of a legal representative in a *cross-appeal* will not save the appeal from abatement.[5]

Under the old section the Court had to pass an *order* that the suit or appeal abated. Under the present rule, however, the abatement takes place automatically and no separate order to that effect is necessary.[6] So that, any decree passed in the suit in disregard or in ignorance of an abatement will, to that extent, be set aside on appeal.[7]

An abatement under this rule will be only so far as the deceased plaintiff is concerned. If it is a case of death of a sole plaintiff the abatement will be of the entire suit.[8] If, on the other hand, it is a case of death of one of two or more plaintiffs the abatement will, *in the first instance*, be only so far as he is concerned.[9] The effect of such abatement on the whole suit or on the rights of the other parties will depend upon the nature of the suit and of the reliefs

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(5) *Subbaraya* v. *Manika*, (1896) 19 Mad 345 (347).

Note 17.

(1) *Ruckmani* v. *Veerasami*, 1924 Mad 813 (814): 47 Mad L Jour 370: 35 Mad L Tim 82: 1924 Mad W N 763: 80 Ind Cas 942.

Note 18.

(1) *Khettro Nath Dey* v. *Gossain Dass Dey*, (1869) 11 Suth W R 543 (543); *Ma Min Thin* v. *Maung Po Win*, (1916) 35 Ind Cas 438 (493): 10 Bur L Tim 27. See also *Radhay Shiam* v. *Nasir Khan*, 1930 Oudh 3 (5): 6 Oudh W N 1002: 123 Ind Cas 855: 5 Luck Cas 241 [If a portion of the plaintiff's claim is admitted by the defendant that portion does not abate].

(2) *Mt Laxmi* v. *Ganpat*, 1921 Nag 23 (24): 17 Nag L R 45: 62 Ind Cas 303.

(3) *Mallaparagadu* v. *Veeraraghava*, (1910) 5 Ind Cas 514 (515): 20 Mad L Jour 396: 7 Mad L Tim 43. But on the death of a benamidar plaintiff, an application by the real owner to be impleaded as legal representative will not save the suit or appeal from abatement]. See *Daulat Rai* v. *Lila Ram*, 1923 Lah 470 (471): 85 Ind Cas 82.

(4) *Gobind Sahu* v. *Zafar Karim*, 1925 Pat 145 (145): 78 Ind Cas 436.

(5) *Shambhu Nath* v. *Mt Ralli*, (1919) 52 Ind Cas 591 (592): 25 Pun W R 1919.

(6) *Churya* v. *Baneshwar*, 1926 All 217 (220): 24 All L J 369: 93 Ind Cas 313: 48 All 334 F B [44 All 459: 1922 All 209 overruled 42 All 540 upheld]; *Tulsi Ram* v. *Municipal Board of Shahjahanpur*, 1930 All 379 (380): 127 Ind Cas 419; *Niaz Ahmed Khan* v. *Parsottam Chandra*, 1931 All 154 (155): 53 All 374: 129 Ind Cas 545: 1931 All L J 153; *Ram Gopal Bhagwan Das* v. *Parmeshri Das*, 1924 Lah 474 (474): 6 Lah L Jour 197: 78 Ind Cas 570; *Ram Gopal* v. *Har Kishen*, 1925 Lah 598 (598): 7 Lah L Jour 517: 88 Ind Cas 478: 26 Pun L R 782; *Qaim* v. *Nura*, 1926 Lah 234 (235): 7 Lah 78: 94 Ind Cas 422: 27 Pun L R 526; *Suppu Nayakan* v. *Perumal Chetty*, (1916) 34 Ind Cas 372 (375): (1916) 1 Mad W N 301: 19 Mad L Tim 364: 30 Mad L Jour 486.

(7) *Nathu* v. *Amrao Singh*, 1929 Lah 119 (120): 10 Lah L Jour 497: 30 Pun L R 13: 117 Ind Cas 665; *Bhairab Charandhara Koley* v. *Kali Chandra Dhara*, (1921) 61 Ind Cas 106 (107) (Cal).

(8) *Bhoyrub Dass* v. *Doman Thakoor*, (1880) 5 Cal 139 (141): 4 Cal L Rep 874.

(9) *Kunjamal* v. *Gourishankar*, (1906) 3 All L Jour 30 (35): 1905 All W N 274: 1 Mad L Tim 52.

claimed (*vide* Note 23, *infra*). Apart from any such effect the abatement will be limited to the extent that the deceased plaintiff is concerned.[10]

O. 22, R. 3, Notes 18—23.

19. Death after preliminary and before final decree.—In suits requiring a preliminary and a final decree can there be an abatement on the ground that no application was filed in time to implead legal representatives on the death of a plaintiff or of a defendant after the preliminary, but before a final, decree? According to the High Court of Allahabad, the suit will abate the reason being that a suit is "pending" till a final decree is passed.[1] The said Court does not accept the position that the principle laid down by the Privy Council in *Lachmi Narain* v. *Balmakund*, I.L.R. 4 Pat. 61 is in any way applicable to such cases.

All the High Courts are agreed on the authority of the said Privy Council decision that the rule does not apply to such cases and that there can be no abatement on death after a preliminary and before a final decree.[2]

20. Death after final decree.—*See* Notes to R. 12.

21. Suits under Section 92 of the Code.— *See* Note 30 to S. 92, *ante*.

22. Suits under O. 1, R. 8 of the Code—*See* Note 24 to O. 1, R. 8, *ante*.

23. Effect of abatement on the rights of parties.—As pointed out in Note 18, *supra*, an abatement under the rule will, *in the first instance* be only so far as the deceased party is concerned and not of the whole suit or appeal.[1]

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(10) *Chandarsang* v. *Khimabhai*, (1898) 22 Bom 718 (721); *Johaga* v. *Bir Chand*, 1928 Lah 787 (738): 29 Pun L R 410: 112 Ind Cas 455; *Natesa Iyer* v. *Annasamy Iyer*, (1901) 25 Mad 426 (428). See also *Sarju Prasad* v. *Ram Sarup*, 1921 All 34 (35): 19 All L J 266: 60 Ind Cas 755.

Note 19.

(1) *Mahabir Singh* v. *Narain Tewari*, 1931 All 490 (497): 1931 All L J 715: 131 Ind Cas 236 F B; *Niaz Ahmed Khan* v. *Parsottam Chandra*, 1931 All 154 (155): 129 Ind Cas 545: 1931 All L J 153: 53 All 374; *Moti Lal* v. *Ram Narain*, (1917) 40 Ind Cas 1006 (1007): 39 All 551: 15 All L J 549; *Jagarnath* v. *Ram Karan*, 1922 All 396 (397): 20 All L J 575: 68 Ind Cas 251; *Ali Bahadur Beg* v. *Rahullah*, 1927 All 272 (272): 25 All L J 175: 100 Ind Cas 288: 49 All 310; *Anmol Singh* v. *Hari Shankar Lal*, 1930 All 779 (782): 1930 All L J 825: 126 Ind Cas 20: 52 All 910; *Bahadur Singh* v. *Nanak*, 1930 Notes 13 (*a*): 1930 All L J 999. See also *Radha Prasad* v. *Lal Sahab*, (1891) 13 All 53 (65): 17 Ind App 150: 5 Sar 600 P C.

(2) *Shridhar Krishna Bhatta* v. *Madappa Ganap Hedge*, 1930 Bom 367 (368): 32 Bom L R 698: 127 Ind Cas 334. See also *Sitaram* v. *Anant*, 1927 Bom 156 (157): 29 Bom L R 241: 101 Ind Cas 129 [Notice issued to heirs before passing of final decree—Objection raised only before execution Court—Omission can be rectified in execution]; *Nazir Ahmad* v. *Tamijaddi*, 1929 Cal 430 (430) [1924 Cal 551 and 1926 Cal 308 held not to be good law]; *Utanka Lal* v. *Tarak Nath*, 1929 Cal 11 (12, 14): 48 Cal L Jour 357: 114 Ind Cas 156 (Quere); *Surendra Keshub* v. *Khetter Krishto*, (1903) 30 Cal 609 (612): 7 Cal W N 517 F B; *Raja Hemandra Lal Singh* v. *Fakir Chandra Datta*, 1923 Cal 626 (628, 629): 27 Cal W N 621: 50 Cal 650: 74 Ind Cas 929 [Compromise decree in mortgage suit—No abatement on death after such decree]. See also *Bhugwan Das Khetry* v. *Nilakanta Ganguli*, (1905) 9 Cal W N 171 (174); *Kissory Lal Choudhury* v. *Raja Sewbar Roula*, (1909) 3 Ind Cas 999 (1000): 13 Cal W N 787; *Rahim Bakhsh* v. *Walaiti Ram*, 1930 Lah 329 (330): 122 Ind Cas 227; *Perumal Pillai* v. *Perumal Chetty*, 1928 Mad 914 (918): 28 Mad L W 164: 55 Mad L Jour 253: 51 Mad 701: 112 Ind Cas 116: 1928 Mad W N 434 F B [1923 Mad 217 and 1924 Mad 786 overruled]; *Bapu* v. *Gulab Chand*, 1929 Nag 142 (144): 116 Ind Cas 657 F B; *Debinath* v. *Bissessar Das*, 1929 Nag 206 (207); *Kalu Ram* v. *Ganu Dia*, 1927 Oudh 561 (561): 4 Oudh W N 1002: 106 Ind Cas 332; *Mussammat Lakhpati* v. *Daulat Singh*, 1927 Oudh 156 (157): 4 Oudh W N 235: 101 Ind Cas 174: 2 Luck 464. See also *Ram Rup* v. *Ghani Ahmad*, 1923 Oudh 156 (157): 71 Ind Cas 162: 9 Oudh L J 624: 9 Oudh and All L R 62; *Mt Bhatia* v. *Abdus Shakur*, 1931 Pat 57 (57): 11 Pat L Tim 796: 129 Ind Cas 84 [Decision in 50 Ind Cas 529 F B held to be not authoritative in view of the Privy Council decision in 4 Pat 61]. But see *Debendra Nath Goswami* v. *Khirode Chandra Bandhopadhya*, (1910) 5 Ind Cas 272 (273) [Application for assessment of mesne profits is not a proceeding in execution but merely a continuation of the original suit]; *Midnapore Zamindary Co. Ltd* v. *Kumar Naresh Narain Roy*, (1911) 11 Ind Cas 939 (940): 39 Cal 220: 16 Cal W N 109, (Do.); *Sir Rameshwar Singh* v. *Ram Charan*, 1932 Pat 327 (329): 11 Pat 538. See also *Kedar Nath Goenka* v. *Tarini Pershad Singh*, 1921 Pat 185 (186): 1921 Pat H C C 158: 2 Pat L Tim 215: 61 Ind Cas 4 [Proceeding of ascertainment of mesne profits under a decree under the Code of 1882, is one in execution and not in the suit and the provisions of O 22, R 3 of the Code of 1908 is inapplicable to such a proceeding].

Note 23.

(1) *Shahzad Singh* v. *Ram Ugrah Singh*, 1930 All 211 (212): 125 Ind Cas 591.

O. 22, R. 3, Note 23.

The effect of this limited abatement on suit or appeal will depend upon the nature of the right or relief claimed in the suit or appeal. If such right or relief is an *indivisible* one existing in all the plaintiffs *jointly* or in or against all the appellants *jointly* the whole suit or appeal, as the case may be, will fail by reason of an abatement with respect to one of them.[2] But if such right or relief is divisible or exists individually in each, an abatement with respect to one or some alone will not cause the entire suit or appeal to fail.[3]

In appeals to which O. 41, R. 4 is applicable, *i.e.*, where the appeal proceeds on grounds common to all the appellants so that any one of them could have prosecuted the appeal without the others, an abatement with respect to one of them will not cause the appeal to fail.[4] But if the nature of the appeal is such that it cannot be heard in the absence of any of the appellants the provisions of O. 41, R. 4 cannot be invoked and the whole appeal will fail.[5]

Where an appeal has abated, the respondent cannot claim its being heard even though he might have filed a memo. of cross-objections. He must file a separate appeal.[6]

As pointed in Note 18, *supra*, a judgment given in ignorance of an abatement is null and void.[7] The remedy of the legal representative in such cases is not to sue again on the same cause of action but to have the suit revived.[8] If not so revived, by an application under R. 9, the abatement becomes final operating as a judgment in favour of the defendant or respondent and can be set up as a defence in any subsequent claim by those claiming under the deceased plaintiff or appellant.[9]

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(2) *Navendra Nath Kuti* v. *Satyadhan Ghoshal*, (1920) 54 Ind Cas 396 (397): 30 Cal L Jour 203; *Ata-Ur-Rahman* v. *Mt Mashkuar-Un-Nissa*, 1926 Lah 474 (476): 94 Ind Cas 300; *Nawab Khan* v. *Amir Chand*, (1932) 33 Pun L R 38 (39); *Mt Umrao Bibi* v. *Ram Kisen*, 1932 Lah 281 (286): 13 Lah 70: 137 Ind Cas 820.

(3) *Narayan* v. *Amrita*, 1923 Nag 101 (102): 18 Nag L R 21: 65 Ind Cas 542; *Krishnabhandu Pal* v. *Brajendra Kumar Shaha*, 1932 Cal 134 (134): 58 Cal 1341: 135 Ind Cas 797; *Mahadeo Singh* v. *Talib Ali*, 1928 All 345 (348, 350): 26 All L J 564: 50 All 792 F B [Suit for preemption 1923 All 211; 1925 All 108 and 1927 All 543 overruled]; *Naminent Chengamma Naidu* v. *N Gangulu Naidu*, 1925 Mad 235 (236): 20 Mad L W 402: 1924 Mad W N 789: 82 Ind Cas 420 [Where one of the appellants (defendants) is dead, the appeal will not abate though his representative is not brought on record, if the remaining appellants are independently entitled to the reliefs sought].

(4) *Ram Sewak* v. *Lambar Pande*, (1902) 25 All 27 (28): 1902 All W N 171; *Ram Lal* v. *Debi Singh*, (1911) 10 Ind Cas 27 (28) All; *Chintamani* v. *Ganga Bai*, (1903) 27 Bom 284 (287): 5 Bom L R 90; *Chairman, Howrah Municipality* v. *Ramsarup*, 1926 Cal 1073 (1074): 95 Ind Cas 726; *Isher Singh* v. *Wir Singh*, 1926 Lah 431 (432): 94 Ind Cas 1000: 8 Lah L Jour 341: 27 Pun L R 759; *Lachman Singh* v. *Mt Chattar Kaur*, 1927 Lah 663 (664): 103 Ind Cas 767; *Somasundaram* v. *Vaithilinga*, (1917) 41 Ind Cas 546 (554): 40 Mad 846: 6 Mad L W 853; *Jang Bahadur* v. *Muhammad*, (1916) 35 Ind Cas 743 (744): 8 Oudh L J 279; *Med Singh* v. *Mt Kabir-Un-Nissa*, (1915) 26 Ind Cas 486 (487): 88 Pun Re 1914: 235 Pun L R 1915; *Niranjan Nath* v. *Afzal Hussain*, (1917) 37 Ind Cas 777 (778): 1917 Pun Re No 49: 24 Pun W R 1917; *Sawan* v. *Mehr Din*, (1918) 45 Ind Cas 963 (964): 108 Pun W R 1918; *Piyare Lal* v. *Chura Mani*, (1918) 46 Ind Cas 50 (52): 84 Pun Re 1918.

(5) *Naimuddin Biswas* v. *Manirudin Lashkar*, 1928 Cal 184 (184, 185): 47 Cal L Jour 82: 32 Cal W N 299: 107 Ind Cas 726; *Ram Lal* v. *Devi Singh*, (1909) 4 Ind Cas 385 (386) All; *Balaram Bal* v. *Kanshya Majhi*, (1919) 53 Ind Cas 548 (549) Cal; *Pulin Behari Roy* v. *Mahendra Chandra Ghosal*, 1921 Cal 722 (724): 34 Cal L Jour 405: 67 Ind Cas 10; *Court of Wards* v. *Madhab Krishna Nandy*, 1928 Cal 824 (824): 110 Ind Cas 871; *Hari Charan Moulik* v. *Kaliappa Chakravarthy*, 1929 Cal 519 (520): 33 Cal W N 359: 56 Cal 622: 119 Ind Cas 814; *Chandulal Rameshwar Das* v. *Khushali Ram*, 1930 Lah 174 (175): 124 Ind Cas 684; *Kirtyanand* v. *Biswanath*, 1927 Pat 44 (44): 7 Pat L Tim 797: 97 Ind Cas 569.

(6) *Jaita* v. *Balu*, (1866) 3 Bom H C R 81.

(7) *Amarasangji Indrasangji* v. *Desai Umed*, 1925 Bom 290 (291): 27 Bom L R 91: 86 Ind Cas 31; *Jhinak Singh* v. *Ambika Prasad*, 1923 All 414 (414): 71 Ind Cas 424.

(8) *Goda Coopooramier* v. *Soondarammal*, (1909) 3 Ind Cas 739 (740): 33 Mad 167: 6 Mad L Tim 271.

(9) *Rahim* v. *Srinivasa*, (1920) 54 Ind Cas 565 (566): 38 Mad L Jour 266: 11 Mad L W 139.

O. 22, R. 3, Notes 24—26.

24. Award of costs.—The provision for the award of costs contained in this rule should not be taken in a restricted sense. The power to award costs in proper cases exists in Courts and this power is not restricted by this rule.[1] The rule only extends or recognises the power in cases of abatement under the rule.

The power can also be exercised by an appellate Court.[2]

25. Revision.—*A* applied to be added as the legal representative of a deceased plaintiff. It was found that *A* was not the legal representative. The Court thereupon, on that application itself, impleaded as legal representative another person who did not seek, and was not sought, to be impleaded. **Held** that the order was liable to revision.[1]

A, applied to be added as the legal representative of a deceased plaintiff. He was directed to file a separate suit to establish his claim as such. Such a suit was not filed. The Court thereupon ordered the first suit to abate. Held that the order of abatement was made without jurisdiction and can be set aside in revision.[2]

26. Appeal.—An order on an application under this rule allowing[1] or refusing to allow[2] a person to be brought on the record as the legal representative of a deceased party is not appealable. The reason is that such an order does not adjudicate upon the *rights of parties* on any point or points in controversy in the suit and is therefore not a *decree*[3] nor is such an order an appealable one under the provisions of S. 104 and O. 43, R. 1. The Judicial Commissioner's Court of Oudh has, however, held that such a matter is an adjudication which conclusively determines the rights of the parties in regard to a matter in controversy in the suit and is therefore a decree which is open to appeal.[4] Under the old Code an order under this rule whether a person should be brought on record as a legal representative of the deceased party was sometimes held to be one under S. 367 of the old Code (corresponding to R. 5 of this order) and was therefore held to be appealable under S. 588,

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Note 24.

(1) *Dantu Peddu* v. *Mollam Balaya*, (1920) 54 Ind Cas 118 (120): 13 Mad 284: 37 Mad L Jour 596: 10 Mad L W 650

(2) *Rajmonee* v. *Chunder Kant Sandel*, (1882) 8 Cal 440 (441, 442): 10 Cal L Rep 437

Note 25.

(1) *Amalaksao* v. *Govindrao*, (1919) 49 Ind Cas 34 (35): 15 Nag L R 21.

(2) *Khurshatbibi* v. *Hasan Khan*, 1883 Bom P J 6 (7).

Note 26.

(1) *Moti Lall* v. *Bishambar Nath*, 1925 All 431 (432): 23 All L J 412: 6 L R (All) Civ 361: 88 Ind Cas 95: 47 All 741.

(2) *Dunichand* v. *Aijaand*, (1915) 28 Ind Cas 687 (688): 13 All L J 381; *Ahmed Ata* v. *Mata Badal Lal*, (1881) 3 All 811 (812): 1881 All W N 92; *Venkatakrishna Reddy* v. *Krishna Reddy*, 1926 Mad 586 (591): 50 Mad L Jour 485: 49 Mad 430: 1926 Mad W N 136: 24 Mad L W 25: 95 Ind Cas 489 F B [43 Mad 812; 58 Ind Cas 498 overruled]; *Lakshmi* v. *Subbarama*, (1915) 29 Ind Cas 142 (144): 39 Mad 488: 2 Mad L W 403: 28 Mad L Jour 491: 1915 Mad W N 327: 29 Ind Cas 142: 17 Mad L Tim 385; *Venkata Seshamma* v. *Ganeswara Rao*, 1924 Mad 622 (623): 16 Mad L Jour 129: 19 Mad L W 113: 1924 Mad W N 58: 79 Ind Cas 860 [Applications by rival claimants for coming on record were made—One application was allowed and the other was dismissed as time barred]; *Ruckmani Ammal* v. *Veerasamy Ayangar*, 1924 Mad 813 (814): 47 Mad L Jour 370: 35 Mad L Tim 82: 1924 Mad W N 763: 80 Ind Cas 912; *Pir Baksh* v. *Jattu Ram*, 1931 Lah 235 (236): 131 Ind Cas 294; *Trilochan Prasad Singh* v. *Bhagwati*, 1924 Oudh 114 (111): 73 Ind Cas 230; *Ram Sarup* v. *Moti Ram*, (1920) 57 Ind Cas 137 (140): 1 Lah 493: 2 Lah L Jour 738.

(3) *Patto Lal* v. *Munshi Lal*, 1932 All 466 (466): 1932 All L J 808; *Ram Sarup* v. *Moti Ram*, (1920) 57 Ind Cas 137 (140): 1 Lah 493: 2 Lah L Jour 738; *Ruckmani* v. *Veerasamy*, 1924 Mad 813 (814): 47 Mad L Jour 370: 35 Mad L Tim 82: 1924 Mad W N 763: 80 Ind Cas 942.

(4) *Rampal Singh* v. *Abdul Hamid*, 1928 Oudh 362 (364): 5 Oudh W N 633: 110 Ind Cas 826 F B.

O. 22, R. 3, Note 23.

Cl. 18 of that Code.[5] Under the present Code there is no appeal from an order under R. 5 and the said cases would, therefore, be no longer law.

An order directing an abatement is not appealable by a person who is not a party to the suit.[6] Nor is an order rejecting an application that the suit might be declared to have abated, open to appeal.[7] It has been held in the undermentioned case that an order of rejection of a petition for substitution under this rule does not *ipso facto* cause the suit to abate.[8]

A decree dismissing the suit will be appealable by a party thereto.[9]

Where a suit automatically abates in the absence of an application under this rule within time, it has been held by the Lahore High Court that an application thereafter for substitution must be deemed to be made under R. 9, *infra* and that an order on such application would be appealable under the provisions of O. 43.[10]

O. 21, R. 4.

Procedure in case of death of one of several defendants or of sole defendant.

R. 4. [S. 368.] (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone,[5] or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf,[6] shall cause the legal representative of the deceased defendant to be made a party[8] and shall proceed with the suit.

(2) Any person so made a party may make any defence[15] appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited[7] by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.[17]

[1877—S. 368; 1859—S. 104.]

Local Amendment.

MADRAS.

Remove the period at the end of sub-R. (3) and *add* the following:—

"except as hereinafter provided."

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(5) *Subbayya* v. *Saminadayyar*, (1895) 18 Mad 496 (497): 5 Mad L Jour 63; *Pandit Ikbul Narain* v. *Pandit Ratan Lal*, (1907) 10 Oudh Cas 121 (125).

(6) *Ram Sarup* v. *Moti Ram*, (1920) 57 Ind Cas 137 (140): 1 Lah 493: 2 Lah L Jour 738 [The decision, however, seems to suggest that a *party* can appeal from such an order]. See also *Hamida Bibi* v. *Ali Husen*, (1895) 17 All 172 (173): 1895 All W N 42; *Venkatakrishna Reddi* v. *Krishna Reddi*, 1926 Mad 586 (591): 50 Mad L Jour 485: 49 Mad 450: 1926 Mad W N 436: 24 Mad L W 25: 95 Ind Cas 489 F B [Question left open].

(7) *Bhagwan Das* v. *Maharajah of Bharatpur*, (1895) 17 All 286 (288): 1895 All W N 78.

(8) *Laxmi* alias *Godi* v. *Ganpat*, 1921 Nag 23 (24): 17 Nag L Rep 45: 62 Ind Cas 803.

(9) *Subbayya* v. *Swaminadayyar*, (1895) 18 Mad 496 (497): 5 Mad L Jour 63. See also *Ram Sarup* v. *Moti Ram*, (1920) 57 Ind Cas 137 (140): 1 Lah 493: 2 Lah L Jour 738.

(10) *Badlu* v. *Mt Naraini*, 1924 Lah 424 (424): 74 Ind Cas 17.

Insert the following as new sub-R. (4):—

O. 22, R. 4 Notes. 1—2.

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity to substitute the Legal Representative of any such defendant who has been declared *ex parte* or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing; and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. Rule applies to appeals.
4. Rule does not apply to execution proceedings. See R. 12.
5. When right to sue survives to persons other than the surviving defendant or defendants.
6. "On an application made in that behalf."
7. Limitation therefor.
8. "Shall cause the legal representative of the deceased defendant to be made party."
9. Two or more legal representatives.
10. Wrong person as legal representative.
11. Joint Hindu family and legal representative.
12. Legal representatives already on record in another capacity. See Note 14 to R. 3.
13. Indian Succession Act and legal representative.
14. Pro forma defendant or respondent.
15. What pleas may be taken by a legal representative.
16. Effect of decree against legal representative of deceased defendant.
17. "The suit shall abate so far as the deceased defendant is concerned."
18. Death after preliminary and before final decree. See Note 19 to R. 3.
19. Decree against a dead person. See also O. 1, R. 10.
20. O. 41, R. 20 and abatement.
21. O. 1, R. 8 and abatement. See Note 24 to O. 1, R. 8.
22. Where suit or appeal abates against deceased defendant or respondent only.
23. When suit or appeal abates against all, as a whole.
24. Inherent power to add legal representative after abatement.
25. Appellate Court and abatement.
26. Award of costs.
27. Rehearing of suit or appeal.
28. Revision.
29. Appeal.

Abatement—Setting aside. See Note 7. Who can apply. See Note 6. Pts. (3) and (4) and Note 24 and R. 9.

1. Legislative changes.

1. Under S. 368 of the old Code, the plaintiff had to make an application specifying the person whom he alleges to be the legal representative of the deceased defendant. It was, however, open to the person to object that he was not the legal representative: The real legal representative could also make the application to have himself impleaded. The present provision is more general in the matter of the application and lays down that "the Court shall, on an application made in that behalf, cause the *legal representative* of the deceased defendant to be made a party." *Vide* under Note 16, *infra*.

2. The words "as against the deceased-defendant" in sub-R. (3) are new.

2. Scope and applicability of the rule.—This rule deals with the death of a defendant in a pending suit. It will be interesting to note the position of this rule in relation to R. 2, on the one hand, and in relation to R. 10 on the other. If a case falls within R. 2, this rule is

O. 22, R. 4 Notes 2—3.

excluded;[1] and if a case falls within this rule, R. 10 will be excluded.[2]

For the application of this rule the following conditions are necessary, *viz.*:—

(1) There must be a *suit* (or an appeal). Thus the rule has been held to be inapplicable to an investigation into an application for permission to sue in *forma pauperis*;[3] and to proceedings by contributors under S. 214 of the Indian Companies Act of 1882.[4]

(2) The death of the defendant must be *pending the suit*. Thus the rule will not apply if such death was either before the institution of the suit[5] or after decree in suit.[6] In the former case, if the deceased was the sole defendant, the suit will have to be dismissed as being against Law.[7] If he was one of two or more defendants, his name will have to be removed from the record and the suit proceeded with against the other defendants, if need be, after an order under O. 1, R. 10.[8]

(3) The right to sue should survive but not against the surviving defendants *alone*. Thus if the right to sue does not survive at all the rule will not apply.[9] And if it it survives against the surviving defendants *alone* R. 2, and not this rule will apply.[10]

3. Rule applies to appeals.—This rule applies also to the case of the death of a respondent in a pending appeal.[1]

Under the old Code it was held by the Allahabad High Court in a number of cases that the provisions of S. 368 were limited to the case of the

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Order 22, Rule 4—Note 2.

(1) *Gopal Das* v. *Mul Chand*, 1926 Lah 607 (608): 7 Lah 399: 27 Pun L R 688: 98 Ind Cas 960.

(2) *Moti Lal* v. *Bishambar Nath*, 1925 All 431 (432): 23 All L J 442: 6 L R A Civ 361: 88 Ind Cas 95: 47 All 741: *Ali Bhahadur Beg* v. *Rafi-Ullah*, 1927 All 272 (272): 5 All L J 175: 100 Ind Cas 288: 49 All 310.

(3) *Janardan* v. *Anant*, (1893) 7 Bom 373 (376).

(4) *Wall* v. *Howard*, (1895) 18 All 156 (158): 1896 All W N 29.

(5) *Veerappa Chetty* v. *Ponnan*, (1908) 31 Mad 86 (88): 3 Mad L Tim 12: 17 Mad L Jour 551.

(6) *Sambasiva* v. *Veera Perumal*, (1905) 28 Mad 361 (362) [Where a defendant dies after an *ex parte* decree against him, his legal representatives cannot apply to set it aside unless plaintiff has clearly brought them on record as legal representatives under S 234 (S 50)].

(7) *Beioy Chand Mahutap Bahadur* v. *Amulya Charan Mitra*, (1914) 24 Ind Cas 112 (113) Cal: *Narendra Bahadur* v. *Gopalsah*, (1913) 20 Ind Cas 506 (506): 17 Cal L Jour 634; *Krista Das Lal* v. *Kumar Kirad Khanta Roy*, (1919) 51 Ind Cas 160 (160); *Mallikarjuna* v. *Pullayya*, (1893) 16 Mad 319 (320); In re, *Arunachallam Chettiar*, (1915) 30 Ind Cas 679 (680): 2 Mad L W 828; *Chithambaram Chettiar* v. *Naravanasamy Iyer*, (1928) Mad W N 240 (241); *Manager, Encumbered Estate, Quad* v. *Tharumal*, (1924) 78 Ind Cas 569 (570) Sind.

(8) *Palamal* v. *Fauja Singh*, 1926 Lah 153 (154): 89 Ind Cas 661: *Roop Chand* v. *Sardar Khan*, 1928 Lah 359 (360): 9 Lah 526: 29 Pun L R 626: 110 Ind Cas 281.

(9) *Rahim Baksh* v. *Channan Din*, (1920) 55 Ind Cas 210 (211): 4 Lah L Jour 511: 1921 Lah 390: *Barindra* v. *Dwijendra*, (1932) 36 Cal W N 1007 (1009).

(10) *Shyamanand* v. *Rajnarain*, (1906) 4 Cal L Jour 568 (570, 571): 11 Cal W N 186; *Jamnadas* v. *Sorabji*, (1891) 16 Bom 27 (28).

Note 3.

(1) *Lakshmibai* v. *Balkrishna*, (1879-80) 4 Bom 654 (655, 656): 5 Ind Jur 481; *Chandarsang* v. *Khimabhai*, (1898) 22 Bom 718 (722); *Rajmoni* v. *Chandra Kant*, (1882) 8 Cal 440 (441): 10 Cal L Rep 437; *Raj Chunder* v. *Ganga Das*, (1904) 31 Cal 487 (494): 1 All L J 145: 8 Cal W N 442: 31 Ind App 71: 14 Mad L Jour 147: 8 Sar 623 P C; *Sheo Gopal* v. *Bishen Singh*, 1880 Pun Re No 30.

death of a respondent, who was a defendant in the Lower Court[2] and held that a defendant-appellant need not apply under the section for impleading the legal representatives of a deceased plaintiff-respondent.[3] This view was subsequently corrected in the said High Court itself.[4] It is now, however, well settled that the rule applies to the case of the death of a respondent whether he was a plaintiff or a defendant in the original suit.[5] The question whether the abatement is partial or total will, in the case of a suit, depend on the nature of the right claimed; but in an appeal it will have to be decided with reference to the nature of the *decree appealed* against.[6] As to this, *see* Notes 22 and 23, *infra*.

O.22, R.4, Notes 3—6.

4. Rule does not apply to execution proceedings—See R. 12.—This rule does not apply to execution proceedings.[1] R. 12 contains a specific declaration to this effect.

5. Where right to sue survives against persons other than the surviving defendant or defendants.—The rule does not apply if the right to sue survives against the surviving defendants *alone*. In other words, it is necessary that the right to sue should either survive to *other* persons alone or to other persons along with the surviving defendants. For some illustrative cases, *see* the following.[1]

6. "On an application made in that behalf."—Under the old Code it was for the plaintiff to bring the proper legal representatives of a deceased defendant on record and he was to choose the representative at his own risk.[1] Even the last paragraph in S. 368 was only subsequently added to the section. Before that addition, it was held that the Court could not except on the application of the plaintiff or the appellant place on record the representative of deceased sole defendant or respondent and that the representative of the deceased defendant or respondent could not apply under the section.[2] Under the present rule it is open to any person interested to apply for the

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(2) *Baldeo* v. *Bismillah*, (1887) 9 All 118 (119): 1886 All W N 305.

(3) *Narain Das* v. *Lajja Ram*, (1885) 7 All 693 (697, 698, 700, 701): 1885 All W N 169.

(4) *Rameshur Singh* v. *Bisheshar Singh*, (1885) 7 All 734 (738): 1885 All W N 217.

(5) *Hem Kunwar* v. *Amba Prasad*, (1900) 22 All 430 (431): 1900 All W N 136; *Vallabagadda Narasimham* v. *Vahkulla Sahib*, (1905) 28 Mad 498 (499): 15 Mad L Jour 404.

(6) *Umrao Singh* v. *Kapuria*, 1930 Lah 651 (653): 31 Pun L R 269: 12 Lah L Jour 82: 128 Ind Cas 53. See also *Surajbalioha* v. *Rambrichoja*, (1933) 141 Ind Cas 239 (240): 13 Pat L Tim 717.

Note 4.

(1) *Shankar Balchand* v. *Hiralal Balchand*, 1931 Bom 425 (427): 33 Bom L R 858: 134 Ind Cas 730; *Mir Khan* v. *Sharfu*, 1923 Lah 560 (563): 5 Lah L Jour 163: 74 Ind Cas 577; *Amolak Ram* v. *Shamu*, (1911) 10 Ind Cas 405 (406): 174 Pun L R 1911: 99 Pun W R 1911.

Note 5.

(1) *Hem Kuar* v. *Ambica Prasad*, (1900) 22 All 430 (433): 1900 All W N 136 [Suit for joint possession decreed—Appeal—One respondent died—Legal representative not brought on record—Held right to appeal does not survive against surviving respondents alone]; *Rajchunder* v. *Ganga Das*, (1904) 31 Cal 487 (494): 1 All L J 145: 8 Cal W N 442: 31 Ind App 71: 14 Mad L Jour 147: 8 Sar 623 P C [Suit for taking accounts and winding up the affair of a partnership—Right to sue does not survive against surviving purchasers alone

If legal representative is not added—Suit cannot proceed against other debts alone and should therefore be dismissed as a whole]; *Gurdas Mal* v. *Kashi Ram* 1921 Lah 160 (161): 3 Lah L Jour 64 [Three defendants were sued jointly as representing the estate of their late father. The Lower Court dismissed the suit and the plaintiffs appealed. During the pendency of the appeal one of the defendants-respondents died and the application to bring his legal representatives on the record was made nearly two years later.

Held that the appeal abated inasmuch as the right to sue did not survive only against the two defendants on the record].

Note 6.

(1) *Maharajah Sir Rameshwar Singh* v. *Srimathi Janeshwari*, (1913) 21 Ind Cas 397 (401): 18 Cal W N 129: 19 Cal L Jour 19; *Kutba* v. *Mt Umri*, 1890 Pun Re No 5.

(2) *Baijavee* v. *Hathi Singh*, (1885) 9 Bom 56 (58); *Rajaram Bhagwat* v. *Jaibai*, (1884) 9 Bom 151 (156); *Sadhu Sarun Singh* v. *Dwarka Singh*, (1882) 12 Cal L Rep 45 (46).

O. 22, R. 4; Notes 6—8.

addition of the proper representative.[3] But even under the present rule, in the absence of a proper application by anybody else, the duty of applying for bringing in the proper legal representatives on record ultimately rests on the plaintiff[4] as the consequence of not applying in time will be the abatement of the suit. Such an application is not obviated by the mere fact that a legal representative has been impleaded in another independent proceeding.[5]

Even under the old Code where the Court was to simply enter the name of the person nominated by the plaintiff, it was held that it had, in some cases, power to add other persons jointly with those nominated by the plaintiff.[6] Under the present Code the Court has power to determine who is the legal representative.

7. Limitation therefor.—Under the Limitation Act of 1877 there was a sharp conflict of opinion on the question as to the period within which an application to implead the legal representatives of a deceased respondent in an appeal had to be filed.[1] Under the present Code such application whether in a suit or in an appeal, to implead legal representatives are governed by Article 177 of the Limitation Act (IX of 1908).[2]

Has the Court power to excuse delay and accept an application made after the period of limitation? It has been held that S. 5 of the Limitation Act does not apply to an application under this rule.[3] But an abatement can be set aside for *sufficient cause under* R. 9, *infra*. So that in such cases the strict procedure would be to declare the suit or appeal to have abated and to allow the plaintiff or appellant as the case may be to apply under R. 9.[4] As to what is sufficient course, *see* R. 9, *infra*.

8. "Shall cause the legal representative of the deceased defendant to be made party".—On the death of a defendant in a suit the Court should

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(3) *Kuppusamy Chetty* v. *Singaravelu Chetty*, 1923 Mad 679 (682): 18 Mad L W 99: 45 Mad L Jour 233: 1923 Mad W N 867: 75 Ind Cas 848.

(4) *Kisan* v. *Yeshwant*, 1932 Nag 144 (146): 28 Nag L R 69. See *Kanai Lal* v. *Ram Nibash*, (1932) 56 Cal L Jour 228 (229).

(5) *Sinni Ammal* v. *Palaniappa Chettiar*, 1927 Mad 707 (708): 1927 Mad W N 222: 38 Mad L Tim 330: 102 Ind Cas 118; *Kanthimathi Ammal* v. *Perumal Kona*, 1925 Mad 777 (777): 48 Mad L Jour 492: 88 Ind Cas 215 [But order that is made bringing the legal representative of the deceased respondent on the record in the memorandum of objections will ensure for the whole of the proceedings including the appeal].

(6) *Athiappa* v. *Aiyanna*, (1885) 8 Mad 300 (303).

Note 7.

(1) *Chajmal Das* v. *Jagadamba Prasad*, (1888) 10 All 260 (262, 264): 1888 All W N 111 (3 years); *Debi Din* v. *Chunna Lal*, (1888) 10 All 264 (266, 267, 269): 1888 All W N 112, F B, (Do.); *Ram Sarup* v. *Ram Sahai*, (1888) 10 All 270 (271): 1888 All W N 114 F B, (Do.); *Lakshmi* v. *Sri Devi*, (1886) 9 Mad 1 (3, 4 and 5), F B [Act 178 applied]; *Khusalbhai* v. *Kabhai*, (1881-82) 6 Bom 26 (30); *Balakrishna Gopal* v. *Joshi Sadashiv Joshi*, (1886) 10 Bom 663 (665); *Soshi Bhusan Chand* v. *Girish Chunder Talukdar*, (1885) 11 Cal 694 (696) [Art 171-B applied]; *Chajmal Das* v. *Jagadamba Prasad*, (1889) 11 All 408 (413 and 415): 1888 All W N 111 [Art 175-C applied—Six months]; *Madhuban Das* v. *Narain Das*, (1907) 29 All 535 (536): 4 All L J 397: 1907 All W N 155, (Do.); *Jamna Das* v. *Sorabji*, (1891) 16 Bom 27 (28), (Do.); *Upendra Kumar* v. *Sham Lal*, (1907) 34 Cal 1020 (1023): 11 Cal W N 1100: 6 Cal L Jour 715, (Do.); *Narasimham* v. *Muhammad Vahizulla*, (1905) 28 Mad 498 (499): 15 Mad L Jour 404, (Do.); *Susya Pillai* v. *Aiyakannu*, (1906) 29 Mad 529 (530): 16 Mad L Jour 475: 1 Mad L Tim 348 [Art 178 applied]; *Arayil Kali Amma* v. *Pelappakara Manakal*, (1910) 5 Ind Cas 420 (421): 34 Mad 292: 7 Mad L Tim 115: 20 Mad L Jour 347: 1910 Mad W N 516.

(2) *Wahid Baksh* v. *Lalta Pershad*, 1924 Lah 316 (318): 73 Ind Cas 387. [But an application for bringing legal representative of a deceased person who was not a defendant or respondent on date of his death is governed by Art 181 and not Art 177]

(3) *Secretary of State* v. *Jawahir Lal*, (1914) 25 Ind Cas 48 (49): 36 All 235: 12 All L J 299; *Shah Muhammad* v. *Karim Illahi*, 1922 Lah 131 (131): 14 Pun W R 1922: 65 Ind Cas 121.

(4) *Dina Nath* v. *Sayad Habib*, 1929 Lah 129 (130): 117 Ind Cas 884: 10 Lah 816 [Application specifically under Rr 4 and 9—Certain circumstances adduced as sufficient cause to excuse delay—Prayer that application be admitted and delay excused under S 5 of the Limitation Act—Held, application was in substance to set aside abatement].

bring the legal representative on the record before proceeding further with it. The suit may be described to be in a state of suspension till then, and no orders excepting formal or processual orders can be passed.[1] If the suit is disposed of without impleading the legal representatives of a deceased party, retrial will be ordered.[2]

O. 22, R. 4, Notes 8—9.

9. Two or more legal representatives.—Supposing that a defendant dies leaving two or more legal representatives the question arises whether all of them should be impleaded and what is the effect of a failure to do so. On this question the Allahabad[1], Bombay[2], Madras[3], Patna[4] and Punjab[5] Courts have held that even if one of them alone is impleaded, he sufficiently represents the estate and the suit does not abate. According to the Lahore High Court a *bona fide* application to bring in all those representatives who can be ascertained by the exercise of due care and industry will save abatement.[6] According to the Rangoon High Court if the person impleaded as a matter of fact represented the estate and no objection as to the want of proper representation is taken at the time, there will be no abatement and the decree will bind the estate.[7] According to the Nagpur view the plaintiff can get relief against the legal representative impleaded though it will not bind the other representatives.[8] The Sind Court has held that all the legal representatives should be brought on record in time, otherwise the suit will abate.[9] But even in that Court an objection that all the representatives have not been brought on record should be taken at the proper time, otherwise the defendants will

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Note 8.

(1) *Sabitri Thakurain* v. *Suraj Mohan*, 1929 Pat 101 (101): 10 Pat L Tim 51: 115 Ind Cas 240 [Examination of witnesses on commission—Death of party pending examination—Commissioner executing commission all the same—Illegal]; *Purushothama Patnaik* v. *Choitana Naiko*, (1902) 12 Mad L Jour 188 (189).

(2) *Monee Lall* v. *Fuzul Hossein*, (1870) 11 Suth W R 337 (338); *Shama Puddoo* v. *Dino Nath*, (1876) 25 Suth W R 108 (108); *Hari Singh* v. *Md Saib*, 1927 Lah 200 (215): 8 Lah 54: 102 Ind Cas 523 [Refusal to bring in legal representative is a denial of natural justice which will make foreign judgment unenforceable]; *Lodian Chetty* v. *Jothi Mahalinga Iyer*, (1915) 28 Ind Cas 83 (84): 39 Mad 386: 2 Mad L W 106: 28 Mad L Jour 138: 1915 Mad W N 291 [But an unsuccessful appellant cannot insist on having a rehearing of the case because it turns out that at the time of hearing, the respondent was dead when the representatives of the deceased themselves do not want it].

Note 9.

(1) *Muhammad Zafaryab* v. *Abdul*, 1923 All 532 (533): 26 All L J 620: 50 All 857: 111 Ind Cas 238.

(2) *Jehrabi Sadula Khan* v. *Bis Miltabi Zahiruddin*, 1924 Bom 420 (421): 26 Bom L R 375: 80 Ind Cas 758.

(3) *Kadir Mohideen* v. *Muthu Krishna Iyer*, (1903) 26 Mad 230 (234): 12 Mad L Jour 368; *Kunhammad* v. *Kutti*, (1889) 12 Mad 90 (91); *Adusupalli Venkata Rao* v. *Marikuthammal*, (1912) 13 Ind Cas 313 (313): 22 Mad L Jour 169: 11 Mad L Tim 19: 1912 Mad W N 9 [Where some of the legal representatives of a deceased respondent are brought on the record in time, there is no bar to bringing the other representatives on the record subsequently]; *Abdulla Sahib* v. *Vageer Beevi Ammal*, 1928 Mad 1199 (1190) [Where one or some only of several legal representatives of a deceased defendant are brought on record in time, there is no abatement and an effective decree can be passed against the estate of the deceased, especially where the others are later on also added as parties though after the prescribed time].

(4) *Shib Dutta Singh* v. *Sheikh Karim Baksh*, 1925 Pat 551 (552): 4 Pat 320: 89 Ind Cas 280: 7 Pat L Tim 186; *Sadu Saran* v. *Nand Kumar*, 1926 Pat 276 (276): 1926 Pat H C C 97: 94 Ind Cas 209: 7 Pat L Tim 746; *Mahabir Singh* v. *Motirani Kuer*, (1917) 38 Ind Cas 782 (783) Pat [But one administrator cannot represent the estate in the absence of the others].

(5) *Khuda Bakhsh* v. *Narain Das*, (1913) 18 Ind Cas 44 (46): 51 Pun L R 1913: 81 Pun W R 1913.

(6) *Mst Begum Jan* v. *Mst Jannat Bibi*, 1927 Lah 6 (7 and 8): 7 Lah 438: 98 Ind Cas 612: 28 Pun L R 287; *Muhammad Hassan* v. *Inayat*, 1927 Lah 94 (95): 28 Pun L R 3: 100 Ind Cas 418.

(7) *Maung Po Mya* v. *Ma Gyan Bon*, 1924 Rang 114 (116): 1 Bur L Jour 272: 4 U B R 150: 72 Ind Cas 205.

(8) *Narayan* v. *Amrita*, 1923 Nag 101 (102): 18 Nag L R 21: 65 Ind Cas 542.

(9) *Sidik Muhammad Shah* v. *Mt Saran*, 1925 Sind 2 (3): 76 Ind Cas 314; *Tulsidas Keshowdas* v. *Ramzan Abdulla*, 1926 Sind 20 (21): 89 Ind Cas 238.

O. 22, R. 4, Notes 9—10.

be estopped from taking it at any subsequent stage.[10] In any event, if some of the legal representatives are specifically dispensed with the suit cannot proceed as against them and if the suit cannot proceed in their absence, the whole suit will abate.[11]

10. Wrong person as legal representative.—An application to implead somebody other than the proper legal representative of a deceased defendant is not valid[1] and a decree obtained against such person will *ordinarily* be not binding on the true representative or on the estate of the deceased defendant.[2] But such a decree will be binding in the following circumstances, *viz*:—

(*i*) That the plaintiff acted *bona fide*.

(*ii*) That the decree obtained is free from fraud or collusion.

(*iii*) That the person wrongly impleaded was so impleaded in a representative capacity and the decree was passed against him as representing the estate of the deceased.

(*iv*) That the plaintiff was not aware of any fact which displaced the apparent title of the person; and

(*v*) That the real legal representative had not intervened during the pendency of the suit.[3]

Thus a decree obtained after impleading a person having a *prima facie* claim to be considered the legal representative of a deceased defendant[4] or after impleading a person who, but for some other facts of which the plaintiff is not aware, would be such legal representative[5] will be binding on the estate. In such cases, however, conditions IV and V must be satisfied that is, the true representatives must not have intervened or applied to be made parties pending the suit[6] and the plaintiff must not, during such pendency, have been otherwise made aware that the person whom he has impleaded is not the true legal representative.[7] Where a wrong person has been impleaded as the legal representative the Court can, on being apprised of the fact of the existence of the legal representative, strike out the former's name and substitute the latter on the record.[8]

See also Note 63-B to S. 11 and Note 14 to S. 50 and Note 4 to 6 of S. 52.

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(10) *Sahijram* v. *Bhambhomal*, 1930 Sind 147 (148): 124 Ind Cas 377. See also (1932) 36 Cal W N 1138 (1142 and 1143).

(11) *Ali Mea* v. *Nana Gazi*, (1917) 41 Ind Cas 430 (431) Cal.

Note 10.

(1) *Muhammad Junaid* v. *Aulia Bibi*, (1921) 42 All 497 (504): 18 All L J 613: 61 Ind Cas 947.

(2) *Premraj* v. *Javar Mal*, (1913) 18 Ind Cas 381 (382): 15 Bom L R 41; *Vuppalapatti Venkattappa* v. *Thovagunta Viraraghavayya*, (1915) 29 Ind Cas 6 (6) Mad; *Laisa Rai* v. *Udit Rai*, 1924 All 717 (718): 75 Ind Cas 114.

(3) *Sanna Govappa* v. *Sanna Govappa*, 1929 Mad 482 (485): 30 Mad L W 778: 120 Ind Cas 65; *S R M A R Ramasamy Chettiar* v. *Oppilamani Chetti*, (1909) 4 Ind Cas 1059 (1060): 33 Mad 6: 19 Mad L Jour 671: 6 Mad L Tim 269. See, however, *Manikyanayanim Varu* v. *Lakshminarasimha*, 1933 Mad 43 (48): 63 Mad L Jour 319: 139 Ind Cas 465 [Decree against wrong legal representative not in possession of estate is bad though no fraud].

(4) *Athiappa* v. *Aiyanna*, (1884) 8 Mad 300 (303); *Mt Kaniz Abbas* v. *Lala Bala Din*, 1925 Oudh 330 (334): 12 Oudh L J 87: 2 Oudh W N 34: 28 Oudh Cas 177: 87 Ind Cas 892; *Janaki* v. *Dhanu*, (1891) 14 Mad 454 (457). See also *Sundar Lal* v. *Baldeo Singh*, 1932 Lah 426 (427): 33 Pun L R 501: 138 Ind Cas 151.

(5) *Kolaremuthu Amma* v. *Madhavi Amma*, 1928 Mad 243 (244, 245): 1927 Mad W N 894: 108 Ind Cas 409; *G Khushaldas & Sons* v. *Rajamanicka*, 1930 Mad 930 (936): 1930 Mad W N 994: 32 Mad L W 862: 60 Mad L Jour 97: 129 Ind Cas 469.

(6) *Cheraj Ali* v. *Nawab Khaje Habibulla*, 1931 Cal 782 (785): 53 Cal L Jour 421: 134 Ind Cas 311.

(7) *Erara* v. *Sidramappa*, (1897) 21 Bom 424 (439, 449, 455) F B.

(8) *Sadhu* v. *Dwarka*, (1883) 12 Cal L Rep 45 (46); *Munshi Ram* v. *Musammat Misri*, (1915) 27 Ind Cas 598 (599): 70 Pun L R 1915: 9 Pun W R 1915.

11. Joint Hindu family and legal representative.—When the deceased defendant is a member of a joint Hindu family it must be shown, before the other members can be impleaded as legal representatives, that *prima facie* the deceased had an estate which survived to the other members.[1] O. 22, R. 4, Notes 11—14.

12. Legal representatives already on record in another capacity.—*See also* Note 14 to R. 3.

It may be taken as fairly well settled that where the legal representatives of a deceased defendant are already on the record in the suit though in another capacity no application is necessary under this rule to implead them as legal representatives, and the suit will not abate by reason of the absence of such an application.[1] It is enough if the plaintiff at some time or other during the hearing of the suit, states the fact and gets it noted on the record.[2] Where, however, only *some* of the legal representatives are on the record but not all, it has been held by the Patna High Court that an application is necessary under this rule and that in its absence the suit will abate.[3] According to the High Court of Madras the legal representative already on the record may sufficiently represent the estate, the suit will not abate by reason of the absence of an application under this rule and the decree passed in the suit will bind the estate.[4]

13. Indian Succession Act and legal representative.—Where the deceased is governed by the Indian Succession Act, his legal representatives are his executors or administrators and not his heirs.[1] Even though no representation is taken out for his estate, the plaintiff cannot, on that ground, add his heirs as legal representatives.[2] The only course open to the plaintiff will be to move the Court to have an administrator appointed.[3] *See also* Note 10 to R. 3.

14. Pro-forma defendant or respondent.—Where the deceased defendant or respondent *had no interest* in the litigation, the rule does not apply

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Note 11.

(1) *Rangathammal v. Venkatachariar*, 1930 Mad 575 (576): 127 Ind Cas 237.

Note 12.

(1) *Gopal Das v. Mulchand*, 1926 Lah 607 (608): 98 Ind Cas 960: 7 Lah 399: 27 Pun L R 688 [Dissenting from 1926 Lah 171. *Kartar Singh v. Lal Singh*, 1921 Jour 13 (3): 11 Pun L R 1921: 59 Ind Cas 238: 9 Pun W R 1921: *Achuthan Nair v. Manavikraman*, (1927) 51 Mad 347 (348): 1929 Mad 172: 54 Mad L Jour 675: 27 Mad L W 422: 109 Ind Cas 372. *Mohamad Naina Marakayar v. Sheik Marakayar* (1914) 28 Ind Cas 925 (925) Mad. *Hafiz Hasan v. Jagdhar* 1921 Oudh 209 (213): 24 Oudh Cas 171: 60 Ind Cas 24; *Md Mohsin v. Md Abid*, 1927 Oudh 531 (532): 4 Oudh W N 407: 101 Ind Cas 826. *Manager, Encumbered Estate in Sind v. Thanumal*, (1924) 78 Ind Cas 569 (570) Sind; *Liluram v. Tikamdas*, 1929 Sind 225 (226): 119 Ind Cas 537. See however *Sher Bahadur v. Abezar*, 1926 Jour 150 (1): 95 Ind Cas 236 [Letter to Registrar mentioning death and fact that legal representatives were already on record Subsequent payment of Court fee—Abatement, setting aside—Limitation Act, S 5—Death of respondent—Appellants diligent—Letter written within time to the Deputy Registrar mentioning his death and informing the Court that the legal representatives were already on the record may be treated as sufficiently complying with the necessity for a formal application]. See also *Sundar Lal v. Baldeo Singh*, 1932 Lah 426 (427): 33 Pun L R 501: 138 Ind Cas 151.

(2) *Achuthan Nair v. Manavikraman*, 1929 Mad 172 (172): 51 Mad 347: 54 Mad L Jour 675: 27 Mad L W 422: 109 Ind Cas 372; *Dandoo Ma v. Karnam Ghowdappa*, 1930 Mad 579 (581): 125 Ind Cas 486.

(3) *Lilo Sonar v. Jhagru Sahu*, 1925 Pat 123 (124): 3 Pat 853: 85 Ind Cas 25: 6 Pat L Tim 313: 3 Pat L R (Civ) 97: *Basist Narain Singh v. Mednath Das*, 1928 Pat 250 (252, 253): 7 Pat 285, 9 Pat L Tim 153: 108 Ind Cas 552.

(4) *Kunhi Kulanda Beari v. Kunhipakki*, 1930 Mad 69 (71 and 72): 30 Mad L W 862: 57 Mad L Jour 712: 124 Ind Cas 298.

Note 13.

(1) *Framji v. Adarji*, (1894) 18 Bom 337 (342).

(2) *Barnett Bros, Ltd v. E Fowle*, 1925 Rang 186 (187): 3 Bur L Jour 347: 3 Rang 46: 85 Ind Cas 325.

(3) *Framji v. Adarji*, (1894) 18 Bom 337 (342): *Barnett Bros, Ltd v. E Fowle*, 1925 Rang 186 (187): 3 Bur L Jour 347: 3 Rang 46: 85 Ind Cas 325.

O. 22, R. 4, Notes 14–16.

and the failure to bring his legal representatives on the record within time will not cause the suit or appeal to abate.[1] Thus there will be no abatement for failure to bring in the legal representative of a deceased defendant or appellant, who was only a *pro-forma* defendant or appellant[2] or who was not a proper or necessary party to the suit or appeal.[3]

15. What pleas may be taken by a legal representative.—*See also* Note 16 to R. 3 and Note 7 to S. 50. A legal representative must continue the litigation on the *cause of action sued upon* and cannot set up a new or individual right.[1] He cannot set up a plea open to him personally.[2] Short of this he can take up any plea which may be appropriate to his character as legal representative.[3] Thus he can rely on anyone of the alternative defences of the deceased[4] even though it may not have been raised by him specifically.[5] But he cannot take up a new and inconsistent plea[6] or a plea contrary to the one taken up by the deceased.[7]

16. Effect of decree against legal representative of deceased defendant.—*See also* Notes 63 and 63-B to S. 11, Note 14 to S. 50 and Notes 5 and 6 to S. 52.

A decree obtained against the legal representative of a deceased defendant is binding on the estate. If the person against whom the decree has been obtained is a limited owner, such as a Hindu widow, the question whether the decree is or is not binding on the reversioner will depend upon the question whether the suit was one which affects the *whole inheritance* or only on a cause of action *personal* to the widow.[1] In the latter case the

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Note 14.

(1) *Mohesh Chandra Misra* v. *Srimati Nistrani Dasya*, 1923 Cal 382 (384): 27 Cal W N 449: 77 Ind Cas 576; *Subasini Dasi* v. *Habu Ghosh*, 1926 Cal 247 (248): 89 Ind Cas 100; *Madhusudan Chakravarti* v. *Satish Chandra Nag*, 1926 Cal 512 (513): 91 Ind Cas 620; *Prasanna Venkatachalla Reddiar* v. *Collector of Trichinopoly*, (1916) 33 Ind Cas 45 (47): 38 Mad 1064 [The test to decide whether a right survives is whether the result of the adjudication will affect the deceased party]; *Thakur Das* v. *Daulat Ram*, 1926 Lah 189 (189): 26 Pun L R 825: 91 Ind Cas 32 [The only point in dispute in the case did not affect the deceased defendant].

(2) *Alla Bakhsh* v. *Madho Ram*, (1901) 23 All 22 (24): 1900 All W N 183; *Ambika Prasad* v. *Jhinak Singh*, 1923 All 211 (213): 45 All 286: 21 All L J 91: 71 Ind Cas 321: 4 L R A Civ 92; *Krishna Kumar Deb* v. *Abdul Chandra Ghose*, 1924 Cal 998 (1001): 39 Cal L Jour 612: 84 Ind Cas 79; *Zeida* v. *Raja*, 1923 Lah 350 (351): 84 Ind Cas 113; *Lekha* v. *Bhani*, 1923 Lah 647 (647): 79 Ind Cas 182; *Ram Lubahaya* v. *Kartar Singh*, 1925 Lah 651 (652): 7 Lah L Jour 466: 26 Pun L R 827: 92 Ind Cas 261: *Raghubar Dial* v. *Ramchandar*, 1927 Lah 779 (779): 28 Pun L R 386: 103 Ind Cas 419.

(3) *Mohan Sardar* v. *Hem Chandra Mandal*, 1929 Cal 648 (649); *Ali Hussain* v. *Bur Shah*, 1926 Lah 444 (444): 27 Pun L R 82: 97 Ind Cas 819; *Mt Bhagan* v. *Buta Mal*, 1927 Lah 418 (419): 9 Lah L Jour 174: 102 Ind Cas 280: 28 Pun L R 330; *Punjab National Bank, Ltd* v. *Sundar Singh*, 1929 Lah 673 (674): 118 Ind Cas 901; *Devat Ram* v. *Lachu Mal*, 1930 Lah 477 (478): 31 Pun L R 81: 127 Ind Cas 865; *Bishambar Das* v. *Kanshi Parsad*, 1932 Lah 641 (642): 13 Lah 483: 33 Pun L R 842; *Sarbati* v. *Zaminpal*, (1933) 141 Ind Cas 87 (88) All.

Note 15.

(1) *Laxman Rao Bhonsley* v. *Narain*, 1927 Nag 162 (163): 99 Ind Cas 160.

(2) *Gunnam Akkamma* v. *Nune Venkatapathi*, 1925 Mad 59 (59): 75 Ind Cas 623; *Sanwal* v. *Bismillah*, (1897) 19 All 480 (482): 1897 All W N 115; *Liladhar* v. *Chaturbhuj*, (1899) 21 All 277 (279): 1899 All W N 64; *Hira* v. *Parameshar*, (1899) 21 All 356 (358): 1899 All W N 100; *Udit Narayan* v. *Jasoda Sahun*, (1918) 46 Ind Cas 469 (470): 27 Cal L Jour 576 [But after a widow's death the reversioner was clothed with the full rights of a proprietor as the heir of a last male owner and could re-open the matters settled against the widow].

(3) *Mt Moti Bala Debi* v. *Satyanand Thirtha Swami*, 1930 All 348 (349): 1930 All L J 336: 123 Ind Cas 376.

(4) *Balmukund Kesurdas* v. *Bhagwan Das Kasardas*, (1913) 19 Ind Cas 401 (403): 15 Bom L R 209.

(5) *Senchu Rama Naidu* v. *Annapurani Ammal*, (1915) 30 Ind Cas 79 (79) Mad.

(6) *Haridas Roy* v. *Girindra Mohan Bakshi*, 1921 Cal 343 (344): 33 Cal L Jour 301: 25 Cal W N 192: 63 Ind Cas 92.

(7) *Kozikot Patinhare Kovilagath Thambatti Thamburathi* v. *Sankara Menon*, 1924 Mad 245 (246): 73 Ind Cas 376.

Note 16.

(1) *Jotendro Mohan Tagore* v. *Jogul Kishore*, (1881) 7 Cal 357 (366): 9 Cal L Rep 57.

decree is not binding on the reversioners.[2] Whereas in the former case, *i.e.*, when the decree has been fairly and properly obtained against the widow in her representative capacity, it is binding on the reversioners.[3] Where the person against whom the decree has been obtained is not the legal representative of the deceased, it has been held by the Bombay High Court, that the decree is not binding on the persons rightly entitled to the estate, even though the plaintiff acted under a *bona fide* mistake and was not aware of the existence of the true legal representative.[4] However this may be, where the legal representative stands by and allows a stranger to enter into possession of the property, a decree obtained *bona fide* against the latter will be binding on the former.[5] Moreover if the Court has *decided* that a person is the proper legal representative and passes a decree against him it is binding on the estate even though it may subsequently turn out that he is not the proper legal representative.[6]

O. 22, R. 4, Notes 16—17.

17. **"The suit shall abate so far as the deceased defendant is concerned".**—If a sole defendant dies and his legal representative is not brought on the record within time, the suit abates.[1] But if one of several defendants or appellants dies and his legal representative is not brought on record within time, the suit or appeal will, in the first instance, abate not in its entirety but only so far as the deceased defendant or respondent is concerned.[2] But such abatement may under certain circumstances result in the whole suit or appeal failing.[3] On this subject, *see* Note 22 below. Under the old Code a specific order of abatement was necessary and it was held that such an order ought not to be passed without notice to the plaintiff.[4] Under the present Code, however, the abatement takes place automatically and no separate order therefor is necessary.[5]

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(2) *Braja Lal Sen* v. *Jiban Krishna Roy*, (1899) 26 Cal 285 (299, 300).

(3) *Tribhuwan Sundar* v. *Sri Narain Singh*, (1898) 20 All 341 (343, 344): 1898 All W N 65; *Ram Kishore* v. *Kally Kanto*, (1881) 6 Cal 179 (482): 8 Cal L Rep 1; *Sotish* v. *Nilcomul*, (1885) 11 Cal 45 (51, 52): *Chunder Coomar Roy* v. *Gonesh Chunder Das*, (1886) 13 Cal 283 (291); *Premmoy* v. *Preonath Dhur*, (1896) 23 Cal 636 (638): *Dinanoni* v. *Elahadul*, (1904) 8 Cal W N 843 (846): *Brojo Nath Pal* v. *Juggeswar Bagchi*, (1909) 1 Ind Cas 62 (64): 9 Cal L Jour 346; *Musala Reddi* v. *Ramappa*, (1900) 23 Mad 125 (133): 9 Mad L Jour 313.

(4) *Pukhraj* v. *Jamsetji*, 1927 Bom 63 (66 and 67): 50 Bom 802: 28 Bom L R 1382: 100 Ind Cas 185.

(5) *Uma Sundari* v. *Nittyanund Shaha Rai*, (1878) 3 Cal L Rep 157 (158).

(6) *Malkarjun* v. *Narhari*, (1901) 25 Bom 337 (347): 27 Ind App 216: 5 Cal W N 10: 2 Bom L R 927: 10 Mad L Jour 368: 7 Sar 739 P C.

Note 17.

(1) *Ram Prosad* v. *Anudhji & Co*, 1922 Cal 108 (109): 49 Cal 524: 69 Ind Cas 885; *Wahid Bakhsh* v. *Lalta Pershad*, 1924 Lah 316 (317): 73 Ind Cas 387 [And no failure by the persons concerned to object to action taken on an application presented after expiry of such time would alter the fact of abatement]. *Sheo Chand Misra* v. *Sita Ram Misra*, 1927 All 331 (332): 100 Ind Cas 482 [Where a respondent died pending an appeal and his legal representative was not brought on record within the time allowed by law, the appeal abates as against the respondent irrespective of the fact, that the appellant was not aware of the death of the respondent]; *Wali Muhammad* v. *Mahlu*, 1925 Lah 124 (125): 5 Lah 429: 6 Lah L Jour 360: 86 Ind Cas 592 [An order under R 8 of O 1 will not prevent the abatement]: *Shib Datta Singh* v. *Karim Bhaksh*, 1925 Pat 551 (551, 552): 4 Pat 320: 89 Ind Cas 280: 7 Pat L Tim 186 [But where an appellant applies within time for the substitution of such of the heirs of a deceased respondent as he *bona fide* believes to be in existence, the appeal does not abate]; *Vathiar Venkatachariar* v. *Ponnappa*, (1918) 45 Ind Cas 959 (961): 7 Mad L W 614.

(2) *Chandarsang* v. *Khimabai*, (1898) 22 Bom 718 (721); *Farhat Husain* v. *Muhammad Ibrahim Ilh*, (1910) 5 Ind Cas 325 (327).

(3) *Bai Full* v. *Adesang*, (1902) 26 Bom 203 (206): 3 Bom L R 786.

(4) *Brij Indar Singh* v. *Kanshiram*, 1917 P C 156 (160): 1917 Mad W N 811: 6 Mad L W 692: 22 Mad L Tim 362: 45 Cal 94: 33 Mad L Jour 486: 44 Ind App 218: 104 Pun Re 1917: 15 All L J 777: 19 Bom L R 866: 26 Cal L J 572: 22 Cal W N 160: 127 Pun L R 1917: 126 Pun W R 1917: 3 Pat L W 313: 42 Ind Cas 13 P C.

(5) *Churya* v. *Baneshwar*, 1926 All 217 (220): 21 All L J 369: 93 Ind Cas 313: 48 All 334 F B: *Qaim* v. *Nura*, 1926 Lah 234 (234, 235): 7 Lah 73: 94 Ind Cas 422: 27 Pun L R 526; *Kirpa Ram* v. *Bhagat Chand*, 1928 Lah 746 (747): 112 Ind Cas 5; *Hari Saran Singh* v. *Syed Muhammad Ershad Hossein*, 1925 Pat 162 (164): 2 Pat L R Civ 279: 85 Ind Cas 1010. But see *Gajrati* v. *Sital*, 1922 All 209 (210): 44 All 459: 66 Ind Cas 551 [Overruled in 1926 All 217 F B].

O. 22, R. 4, Notes 17—19.

Where a suit abates it is, so to speak "dead or at an end"[6] and a decree passed in the face of such abatement is a nullity so far as the legal representative is concerned.[7]

18. Death after preliminary and before final decree.—*See* Note 19 to R. 3, and the undermentioned case.[1]

19. Decree against a dead person, see also O. 1, R. 10.—A decree passed *against a dead person* without impleading his legal representatives, is a nullity.[1] This does not mean that a party who was heard and against whom a decree has been passed on the merits can take advantage of the death of another party and claim a rehearing on the merits.[2] In an Allahabad case the plaintiff obtained an *ex parte* decree against a defendant who had been dead before the decree, but of whose death plaintiff had no knowledge. It was held that on the decree being held inexecutable the plaintiff may apply to have the case re-opened after impleading the legal representatives.[3]

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(6) *Jyotish Chandra Sen* v. *Harchandra Saha*, 1928 Cal 234 (235): 47 Cal L Jour 282: 109 Ind Cas 164 [Attachment before judgment—Death of defendant before decree—Heirs not impleaded—Abatement—Application to implead heirs and restore suit ordered—Effect—Attachment not revived].

(7) *Barkat Rai* v. *Ghulam Fatima*, 1921 Lah 219 (220): 5 Lah L Jour 1: 70 Ind Cas 929; *Piyara Lal* v. *Mazhar Khan*, 1922 Lah 78 (78): 64 Ind Cas 359: 16 Pun L R 1922; *Debi Prosad* v. *Mt Bhago*, 1924 Lah 33 (34): 5 Lah L Jour 187: 74 Ind Cas 682; *Anwar-ul-Haq* v. *Nazar Abbas*, 1925 Lah 494 (494): 6 Lah 313: 88 Ind Cas 865: 26 Pun L R 474; *Md Ali* v. *Allah Ditta*, 1931 Lah 73 (74): 122 Ind Cas 562; *Drupad Chandra Naskar* v. *Bindumoyi Dasi*, 1926 Cal 1053 (1054): 43 Cal L Jour 606: 97 Ind Cas 209 [Party dying during suit—Representative not substituted—Estate of the party is not bound by the decision—Application for leave to appeal by representative does not bind the estate]; *Amir Khan* v. *Howna Ram*, 1925 Lah 37 (38): 76 Ind Cas 6 [A co-decree-holder had died before the decision of the lower appellate Court and his legal representatives had not been brought on the record, held, no decree could have been passed *qua* his share in the land in dispute therefore he or his heirs need not have been impleaded as respondents to the second appeal]; *Gade Seshamma* v. *Bulusu Venkata Suryanarayana*, (1914) 22 Ind Cas 260 (261): 14 Mad L Tim 485: 38 Mad 643: 1914 Mad W N 61 [When a suit has abated against a particular defendant, by reason of his legal representatives not having been brought on record within the time limited by law and when the plaintiff, thereupon withdraws his suit with permission to bring a fresh suit, such permission will only empower him to bring the suit against those defendants, on record on the date of the withdrawal and not against those who have ceased to be on record or the legal representatives of a defendant, who was dead at the time of the withdrawal and whose representatives had not been brought on the record].

Note 18.

(1) *Shivashanker* v. *Kamakhya Narayan*, 1933 Pat 27 (28): 13 Pat L Tim 692 [Death of defendant after preliminary decree in suit for mesne profits—No abatement].

Note 19.

(1) *Rajchunder* v. *Gangadas*, (1904) 31 Cal 487 (494): 1 All L J 145: 8 Cal W N 442: 31 Ind App 71: 14 Mad L Jour 147: 8 Sar 623 P C; *Lalji Sahai* v. *Sukh Lal*, 1896 All W N 91; *Sripat Narain* v. *Tirbeni*, (1918) 45 Ind Cas 21 (22): 40 All 423: 16 All L J 327; *Ambika Prasad* v. *Jhinak Singh*, 1923 All 211 (218): 21 All L J 91: 71 Ind Cas 321: 45 All 286: 4 L R (All) Civ 92; *Jadu Nandan Ram* v. *Parsotam Ginning Co, Ltd*, 1930 All 636 (637): 1930 All L J 941: 128 Ind Cas 899; *Imamuddin* v. *Sadarat*, (1910) 5 Ind Cas 897 (898): 32 All 301: 7 All L J 228; *Qutub Ali* v. *Dwarka Das*, (1904) 24 All W N 44 (45); *Janardhan* v. *Ramchandra*, (1902) 26 Bom 317 (319): 4 Bom L R 23; *Vishvanath* v. *Lallu*, (1909) 4 Ind Cas 137 (138): 11 Bom L R 1070; *Vishram* v. *Ganu*, 1883 Bom P J 5; *Maung Ba* v. *Hato Nagat*, (1911) 11 Ind Cas 782 (782): 4 Bur L Tim 164; *Ma Min Thin* v. *Mg Po*, (1916) 35 Ind Cas 438 (438): 10 Bur L Tim 27; *Roop Narain Singh* v. *Ramayee Singh*, (1879) 3 Cal L Rep 192 (193); *Narendra Bahadur* v. *Gopal Shah*, (1913) 20 Ind Cas 506 (506): 17 Cal L Jour 634; *Anandamoyee* v. *Rudra*, (1918) 21 Ind Cas 407 (407): 18 Cal L Jour 141; *Subramaniya* v. *Vaithinatha*, (1915) 31 Ind Cas 198 (198): 38 Mad 682; *Sami Mudaliar* v. *Muthiah Chetty*, 1923 Mad 212 (214): 16 Mad L W 314: 43 Mad L Jour 293: 1922 Mad W N 597: 69 Ind Cas 465; *Sesamma* v. *Peda Venkatrao*, 1924 Mad 713 (714): 34 Mad L Tim 196: 19 Mad L W 608: 47 Mad L Jour 235: 1924 Mad W N 633: 80 Ind Cas 397; *Sheikh Farid* v. *Kulsam*, (1912) 16 Ind Cas 688 (688): 1912 Mad W N 825; *Amanat Khan* v. *Miyan Khan*, (1920) 55 Ind Cas 498 (499): 7 Oudh L J 20; *Bai Nihal Singh* v. *Chait Singh*, 1886 Pun Re No 31; *Abdul Rahman* v. *Krishnamal*, (1911) 11 Ind Cas 869 (870): 247 Pun L R 1911: 161 Pun W R 1911; *Topanram* v. *Tekchand*, (1912) 15 Ind Cas 832 (833): 5 Sind L R 260; *Representative of Girendro Nath* v. *Hurronath*, (1868) 10 Suth W R 455 (456); *Monee Lall* v. *Kazul*, (1870) 14 Suth W R 337 (338); *Shama Puddo* v. *Dina Nath*, (1876) 25 Suth W R 108 (108); *Ram Sarup* v. *Narain Das*, 1923 All 141 (144): 20 All L J 1008: 69 Ind Cas 944: 45 All 198: 4 L R (All) Civ 34 [But a decree passed against *A* as the legal representative of *B* is not against a deceased person, although *A* was brought on the record as *B's* representative long after the priod of Limitation had expired]; *Phul Kuer* v. *Najmunnissa*, 1930 Pat 473 (475): 11 Pat L Tim 361: 125 Ind Cas 779 [And a decree passed on the death of a guardian without appointing a fresh guardian is not void but voidable at the instance of the minor defendant].

(2) *Suryanarayana* v. *Joga Rao*, 1930 Mad 719 (720): 123 Ind Cas 607: 32 Mad L W 647. See also *Krishna Das* v. *Kalitara*, (1918) 44 Ind Cas 80 (82): 22 Cal W N 289; *Nathuni Narayan* v. *Arjun Gir*, 1925 Pat 434 (434): 4 Pat 187: 87 Ind Cas 47: 6 Pat L Tim 526.

(3) *Qutab Ali* v. *Dwarka Das*, 1904 All W N 44 (45).

Where some alone of several defendants had been dead the others may object to the execution on the ground that the decree is inexecutable in the absence of the legal representatives of the deceased defendants.[4] Where an objection had been taken to the passing of a preliminary decree on the ground of death of one of the defendants and same has been disallowed, the final decree cannot be granted afterwards.[5] O. 22, R. 4, Notes 19—22.

A decree passed by the Privy Council is an order of the Sovereign, and even if passed against a deceased respondent without impleading his legal representatives, it is not a nullity.[6]

20. O. 41, R. 20 and abatement.—R. 20 of O. 41, does not override the provisions of O. 22 and will not prevent an abatement.[1]

21. O. 1, R. 8 and abatement.—*See* Note 24 to O. 1, R. 8.

22. When suit or appeal abates against deceased defendant or respondent only.—As under R. 3, an abatement under this rule will in the first instance be only so far as the deceased defendant or respondent is concerned.[1] If the deceased was the sole defendant or respondent the abatement puts an end to the suit. But if he is one of many defendants or respondents the effect of the partial abatement on the whole suit or appeal will depend upon the nature of the suit or appeal. If, on account of the partial abatement, it becomes, for any reason, impossible to proceed with the suit or appeal to its final conclusion the entire suit or appeal will fail. But if the suit or appeal can proceed to a final adjudication in the absence of the legal representatives of the deceased defendant or respondent the partial abatement will not affect the rest of the suit or appeal.[2] Such a final adjudication is possible in cases where the interest of the deceased defendant or respondent can be separated from those of the others. In such cases a decree can be given against the latter without affecting the rights of the legal representatives of the former.[3] In such cases therefore the abatement will not result in a total failure of

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(4) *Bhaya Jagdeo Nath Sah Deo* v. *Maharajah Pratap Udainath*, 1924 Pat 339 (340): 1923 Pat H C C 374: 75 Ind Cas 321. See also *Abdul Aziz* v. *Lakshimi Chandra Majumdar*, 1923 Cal 676 (677): 37 Cal L Jour 494: 75 Ind Cas 545.

(5) *Ram Sarup* v. *Narain Das*, 1923 All 111 (111): 20 All L J 1008: 69 Ind Cas 944: 45 All 198: 4 L R A Civ 34.

(6) *Sri Chandra Chur Deo* v. *Mt Shyam Kumari*, 1932 Pat 261 (262): 11 Pat 445: 139 Ind Cas 397; *Dinanandan* v. *Janki Singh*, (1929) 56 Ind Cas 322 (324): 5 Pat L Jour 314: 1 Pat L Tim 325: 1929 Pat H C C 266: 2 U P L R (Pat) 108; *Gopalakrishnamma* v. *Venkataratnam*, 1927 Mad 1088 (1089): 53 Mad L Jour 226: 39 Mad L Tim 29: 26 Mad L W 72: 1927 Mad W N 426: 103 Ind Cas 618.

Note 20

(1) *Maniadra* v. *Bhagabati*, 1926 Cal 335 (336): 30 Cal W N 45: 90 Ind Cas 980; *Surajmal* v. *Phyarkhan*, 1931 Nag 184 (186): 27 Nag L R 229: 134 Ind Cas 679.

Note 22.

(1) *Nazir Khan* v. *Mangli*, (1912) 14 Ind Cas 535 (536): 231 Pun L R 1912: 220 Pun W R 1912; *Subkaran Singh* v. *Raghubans*, (1915) 26 Ind Cas 523 (524): 1 Oudh L J 581; *Kali Dayal* v. *Nagendra*, (1920) 54 Ind Cas 822 (825): 30 Cal L Jour 217: 24 Cal W N 44.

(2) *Shankarbhai* v. *Moti Lal*, 1925 Bom 122 (123): 26 Bom L R 1217: 49 Bom 118: 85 Ind Cas 197; *Joy Gobind* v. *Monmotha Nath*, (1906) 33 Cal 580 (582); *Krishnabandhu Pal* v. *Brajendra Kumar Shaha*, 1932 Cal 134 (135): 58 Cal 1341: 135 Ind Cas 797; *Srinivasachari* v. *Gnanaprakasa*, (1907) 30 Mad 67 (68): 2 Mad L Tim 36; *Lajja Ram* v. *Shambu Nath*, 1923 Lah 252 (252): 5 Lah L J 14: 79 Ind Cas 462; *Zainab Bibi* v. *Rohila*, (1917) 39 Ind Cas 277 (278): 1917 Pun Re No 23.

(3) *Wahid* v. *Puran*, 1925 All 108 (115): 22 All L J 991: 6 L R A Civ 39: 47 All 100: 85 Ind Cas 66; *Faqira* v. *Hardewa*, 1928 All 172 (175, 176 and 177): 26 All L J 217: 50 All 559 F B; *Haibat Shah* v. *Bohra Tarachand*, 1931 All 235 (236): 132 Ind Cas 31: 1931 All L J 902; *Nandoo Singh* v. *Baljit Singh*, 1924 Lah 93 (94): 5 Lah L J 203: 69 Ind Cas 495; *Rachhir Saran* v. *Mt Sohan Devi*, 1925 Lah 381 (385): 6 Lah 233: 7 Lah L J 149: 86 Ind Cas 1: 26 Pun L R 100: *Bishan Singh* v. *Indar*, 1930 Lah 709 (710): 125 Ind Cas 620; *Narayan* v. *Dhudabai*, 1925 Nag 299 (301): 21 Nag L R 38: 92 Ind Cas 663.

O. 22, R. 4, Note 22.

the suit or appeal. Thus in the following cases, abatement as regards the deceased was held not to affect the rest of the suit or appeal:—

(1) Where the suit is for the recovery of a specific sum of money from the deceased defendant and for a specific sum from each of the other defendants.[4]

(2) Where the suit relates to distinct plots of land in the hands of the several defendants including the deceased defendant,[5] or where it relates to specified shares[6] or to shares which are ascertained or ascertainable.[7]

(3) Where the liability sought to be enforced against the defendants is *joint and several*.[8] Thus the liability of co-promisors is joint and several[9] as also the liability of a surety.[10] In suits to enforce such liability the suit does not abate *in toto* on the death of one of the promisors or the surety as the case may be. The liability of joint wrong doers or tort feasors is joint and several and the suit or appeal will abate only so far as the deceased defendant is concerned.[11] On the same principle a suit for ejectment of trespassers will abate only so far as the deceased defendant is concerned and may be proceeded with against the rest.[12] The same principle applies to suits for rent against fixed-rate tenants[13] or joint holders of a holding[14] as their liability is likewise joint and several.

In short, therefore, the test to see whether the suit or appeal abates as a whole or only in part is to find out if the suit could, in the first instance, have been instituted and prosecuted with the deceased defendant left out.[15] In other words, if separate suits are maintainable against the defendants

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(4) *Maung Mu* v. *Maung Kan Gyi*, 1924 Rang 127 (128): 1 Rang 618: 77 Ind Cas 393; *Waleya-tunnissa Begum* v. *Chalakhi*, 1931 Pat 164 (168): 12 Pat L Tim 28: 10 Pat 341: 132 Ind Cas 100.

(5) *Sarat Kamini Dasi* v. *Chaitanya Chandra Prohoraj*, 1923 Cal 289 (290): 67 Ind Cas 290; *Gopika Raman* v. *Atul Singh*, 1926 Cal 193 (203): 85 Ind Cas 678; *Tara Prasanna* v. *Ranjit Lal*, 1926 Cal 252 (254): 85 Ind Cas 553; *Sat Narain* v. *Sri Kishen Das*, 1926 Lah 264 (266): 93 Ind Cas 612: 7 Lah 376.

(6) *Mahant Darshan Das* v. *Bikaramajit Rai*, 1926 All 128 (129): 23 All L J 938: 6 L R (All) Civ 587: 89 Ind Cas 953: 48 All 81; *Lajja Ram* v. *Shambu Nath*, 1923 Lah 252 (252): 5 Lah L Jour 14: 79 Ind Cas 462; *Sat Narain* v. *Sri Kishen Das*, 1926 Lah 264 (266): 93 Ind Cas 612: 7 Lah 376; *Madho* v. *Mehro*, 1930 Lah 33 (34): 124 Ind Cas 338; *Khudu Baksh* v. *Vir Bhan*, 1931 Lah 486 (487): 12 Lah 318: 132 Ind Cas 837: 32 Pun L R 683.

(7) *Jalal* v. *Bahawali*, 1927 Lah 783 (784): 9 Lah L Jour 136: 28 Pun L R 241: 102 Ind Cas 304; *Sant Singh* v. *Gulab Singh*, 1928 Lah 572 (575): 10 Lah 7: 30 Pun L R 453: 114 Ind Cas 417; *Baldeo Singh* v. *Bamji Das*, 1930 Lah 126 (127): 124 Ind Cas 675.

(8) *Sarjabai* v. *Danraj*, 1925 Nag 239 (240): 8 Nag L J 9: 86 Ind Cas 11.

(9) *The Firm of Gurudas Ramkotiram* v. *Bhagwan Das*, 1922 Lah 182 (183): 68 Ind Cas 815; *Nathuni Narain Singh* v. *Arjungir*, 1925 Pat 434 (434, 435): 4 Pat 187: 87 Ind Cas 47: 6 Pat L Tim 526.

(10) *Mehdi Hussain* v. *Sughara Begam*, (1903) 25 All 206 (208): 1903 All W N 15.

(11) *Mt Phillo* v. *Gopi*, 1924 Lah 348 (349): 72 Ind Cas 670; *Gajo Singh* v. *Amrit Narain*, 1921 Pat 350 (351): 2 Pat L Tim 284: 60 Ind Cas 722.

(12) *Perla Perumal* v. *Pichan*, (1910) 8 Ind Cas 268 (269): 21 Mad L Jour 574: 1910 Mad W N 791: 9 Mad L Tim 275. See also *Manak Chand Singh* v. *Khubi*, 1928 All 555 (555).

(13) *Abdul Aziz* v. *Basdeo Singh*, (1912) 17 Ind Cas 89 (90): 34 All 604: 10 All L J 183.

(14) *Jwala Prasad* v. *Kopeya Munda*, (1921) 59 Ind Cas 890 (891) Pat. See also *Rai Kashi Nath Singh* v. *Kallas Singh*, 1925 Pat 480 (481): 4 Pat 53: 89 Ind Cas 236: 7 Pat L Tim 124; *Kesho Prosad* v. *Shamnandan*, 1926 Pat 504 (505): 5 Pat 233: 1926 Pat H C C 81: 7 Pat L Tim 628: 94 Ind Cas 28; *Official Trustee* v. *Adhar Bera*, 1926 Jour 122 (5) (128): 94 Ind Cas 30.

(15) *Ratan Lal* v. *Jaideo*, 1924 Nag 128 (128): 75 Ind Cas 820.

severally, then the abatement will be only in part in spite of the other defendants having been impleaded in the same suit.[16]

O. 22, R. 4, Notes 22—23.

23. When suit or appeal abates against all, as a whole.—Where the absence of the legal representatives of the deceased from the record renders it impossible to proceed with the suit or appeal as against the rest, the suit or appeal will fail *in toto*.[1] Such impossibility may arise from the suit or appeal becoming imperfectly constituted for want of necessary or essential parties;[2] or from the undesirable possibility of having two inconsistent or contradictory decrees in one and the same suit;[3] or from the futility of proceeding further in a matter in which the decree if given, cannot be effectually executed by reason of the outstanding right of the legal representative of the deceased.[4]

On the above principles the non-impleading of the legal representatives of a deceased defendant will result in total failure of the suit or appeal in the following cases:—

(1) Where the interests of the defendants in the suit are *joint and indivisible* so that the interest of the deceased defendant can-

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(16) *Karam Khan* v. *Mast Ali Khan*, 1927 Lah 851 (852): 28 Pun L R 148: 100 Ind Cas 839.

Note 23.

(1) *Hem Kunwar* v. *Amba Prasad*, (1900) 22 All 480 (481): 1900 All W N 136; *Raj Chunder* v. *Ganga Das*, (1904) 31 Cal 487 (494): 1 All L J 145: 8 Cal W N 442: 31 Ind App 71: 14 Mad L Jour 147: 8 Sar 623 P C; *Chandreswar Prasad Narain Singh* v. *Dharamjit Narain Singh*, (1907) 5 Cal L Jour 393 (397): 11 Cal W N 504; *Midnapore Zamindari Co* v. *Amulia Nath Roy Chowdhury*, 1926 Cal 893 (894): 43 Cal L Jour 401: 95 Ind Cas 649: 53 Cal 752; *Surajmal* v. *Phyarkhan*, 1931 Nag 184 (186): 27 Nag L R 220: 134 Ind Cas 679.

(2) *Sant Singh* v. *Gulab Singh*, 1928 Lah 572 (575 & 582): 10 Lah 7: 114 Ind Cas 417: 30 P L R 453 F B; *Daya Ram Ojha* v. *Ram Narain*, 1925 All 623 (624): 85 Ind Cas 563; *Narain Das* v. *Sheo Din*, 1926 All 234 (235): 24 All L J 300: 91 Ind Cas 859: 48 All 251; *Ram Dei Misrain* v. *Jurawan Misir*, 1930 All 762 (764 & 767): 1930 All L J 857: 128 Ind Cas 8; *Azimuddin Mandal* v. *Tara Sankar Ghose*, (1918) 47 Ind Cas 638 (639): 28 Cal L Jour 201; *Sriram Chandra Naick* v. *Hridoy Nath Gupta*, (1919) 51 Ind Cas 409 (409): 29 Cal L Jour 461; *Kali Dayal* v. *Nagendra*, (1920) 54 Ind Cas 822 (825): 30 Cal L Jour 217: 24 Cal W N 44; *Nanak Chand* v. *Ram Chand*, 1922 Lah 101 (102): 4 Lah L J 189: 77 Ind Cas 176; *Rikhi Ram* v. *Durga Das*, 1926 Lah 216 (216): 91 Ind Cas 558; *Shah Muhammad* v. *Karam Ilahi*, 1922 Lah 131 (131): 14 Pun W R 1922: 65 Ind Cas 121; *Maula Bux* v. *Chanan Mal*, 1926 Lah 332 (332): 8 Lah L Jour 134: 27 Pun L R 250: 94 Ind Cas 563; *Ata-Ur-Rahman* v. *Mashkur-un-nisa*, 1926 Lah 474 (476): 94 Ind Cas 300; *Seshan Pattar* v. *Yakkuath*, (1910) 9 Ind Cas 940 (940): (1911) 1 Mad W N 148: 9 Mad L Tim 356; *Sheikh Farid* v. *Kulsum Bibi*, (1912) 16 Ind Cas 688 (688): 1912 Mad W N 825; *Ganjulu Naidu* v. *Naminent Chengamma*, 1925 Mad 237 (238): 47 Mad L Jour 871: 85 Ind Cas 397; *Marappa Goundan* v. *Subramaniya Iyer*, 1926 Mad 379 (380): 91 Ind Cas 991; *Muthuvijaya Raghunatha* v. *Swaminathan Chettiar*, 1932 Mad 212 (213): 35 Mad L W 105: 1932 Mad W N 152: 137 Ind Cas 319; *Kesho Prosad Singh* v. *Muhammad*, 1931 Pat 17 (18): 9 Pat 693: 128 Ind Cas 119; *Inayat* v. *Ganga*, (1916) 32 Ind Cas 829 (831): 1916 Pun Re No 3: 260 Pun W R 1915; *Shive Bin* v. *Ma Thein*, (1905-1906) 3 L B R 168 (169); *Ma Zan Nyein* v. *Maung Kyaw Zan*, 1923 Rang 258 (260): 1 Rang 189: 74 Ind Cas 1027; *Hadu* v. *Lala*, (1913) 21 Ind Cas 951 (958): 41 Pun Re 1915: 15 Pun L R 1914: 16 Pun W R 1914.

(3) *Sarup Singh* v. *Sant Singh*, 1926 Jour 121 (4): 96 Ind Cas 932; *Bikramajit Rai* v. *Darshan Das*, 1925 All 141 (141): 22 All L J 1033: 5 L R A Civ 747: 82 Ind Cas 26; *Darshan Das* v. *Bikaramajit Rai*, 1926 All 128 (130): 23 All L J 938: 6 L R A Civ 587: 89 Ind Cas 953: 48 All 81; *Sheo Chand Misra* v. *Sita Ram Misra*, 1927 All 331 (332): 100 Ind Cas 482; *Sita Ram* v. *Roshan Lal*, 1927 All 776 (777): 100 Ind Cas 563; *Kalidayal* v. *Nagendra*, (1920) 54 Ind Cas 822 (826): 24 Cal W N 44: 30 Cal L Jour 217: *Sheikh Dendoo* v. *Sheikh Sachoo*, 1924 Cal 399 (399): 72 Ind Cas 2; *Manindra Chandra* v. *Bhagabati*, 1926 Cal 335 (335): 30 Cal W N 45: 90 Ind Cas 986; *Chandra Kumar Guha* v. *Elahi Buksha*, 1926 Cal 667 (668): 92 Ind Cas 616; *Mahomed* v. *Abdulla*, 1928 Lah 869 (870); *Mt Umrao* v. *Ram Kishen*, 1932 Lah 281 (286): 13 Lah 70: 137 Ind Cas 820; *Ram Datta* v. *Shaman*, 1932 Lah 624 (626): 139 Ind Cas 683: 33 Pun L R 919; *Surajmal* v. *Pyarkhan*, 1931 Nag 184 (186): 27 Nag L R 220: 134 Ind Cas 679; *Raghunath Das* v. *Shah Durga Prasad*, 1930 All 369 (371): 129 Ind Cas 371 [No question of contradictory decree arises in this case. Hence partial abatement only].

(4) *Muhammad Wajid Ali Khan* v. *Puran Singh*, 1929 P C 58 (60): 49 Cal L Jour 141: 1929 All L J 85: 56 Mad L Jour 304: 29 Mad L W 423: 33 Cal W N 318: 56 Ind App 80: 1929 Mad W N 220: 114 Ind Cas 601: 51 All 267; *Darshan Das* v. *Bikaramjit Rai*, 1926 All 128 (129): 23 All L J 938: 6 L R A Civ 587: 89 Ind Cas 953: 48 All 81; *Midnapore Zamindary Co* v. *Ishan Chandra Chowdhury*, 1924 Cal 346 (346): 72 Ind Cas 479; *Neyajaddin* v. *Akamat Ali*, 1925 Cal 411 (412): 79 Ind Cas 385; *Maula Bux* v. *Chanan Mal*, 1926 Lah 332 (332): 8 Lah L Jour 134: 27 Pun L R 250: 94 Ind Cas 563; *Srinivasalu Chetty* v. *Palamkula Guravaya*, 1927 Mad 505 (506): 52 Mad L Jour 460: 1927 Mad W N 170; 38 Mad L Tim 332: 101 Ind Cas 655; *Tej Narain* v. *Dal Ram*, 1922 Pat 606 (607): 1 Pat 699: 1 Pat L R 103: 4 Pat L Tim 170: 69 Ind Cas 624: 1923 Pat H C C 207.

O. 22, R. 4, Note 23.

not be separated from those of the rest[5] such as the interests in a pre-emption suit[6] but not the rights arising from a sale in distinct shares.[7]

(2) Where a decree appealed from is joint and indivisible.[8] But a decree cannot be said to be joint and indivisible merely because it is on one sheet of paper.[9] The interest awarded in the decree must in *substance* be joint and indivisible.[10]

In this connection the following distinction between a suit and an appeal should be noted. In a suit the nature of the abatement will depend upon the relief involved.[11] If the plaintiff set up a joint and indivisible right and the defendants set up a separate or separable right the point should be decided before deciding the nature of the abatement.[12] In an appeal, however, the nature of the abatement will have to be decided not upon the nature of the right involved in the suit but upon the nature of the relief *awarded by the decree* appealed against.[13] Thus, if the decree awarded

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(5) *Bahadur Singh* v. *Nanak*, (1930) Notes 13 (a): 1930 All L J 999; *Sarat Kamini Dasi* v. *Chaitanya Chandra Prohoraj*, 1923 Cal 289 (290): 67 Ind Cas 290; *Sardara* v. *Allayar*, 1923 Lah 132 (133): 73 Ind Cas 604; *Kala Singh* v. *Havil*, 1927 Lah 28 (28): 95 Ind Cas 549; *Bhala Singh* v. *Udham Singh*, 1927 Lah 87 (88): 8 Lah L Jour 575: 28 Pun L R 52: 99 Ind Cas 970; *Miran Baksh* v. *Allah Wasaya*, 1929 Lah 256 (256): 118 Ind Cas 437.

(6) *Wajid Ali* v. *Puran Singh*, 1925 All 108 (115): 22 All L J 994: 6 L R A Civ 39: 47 All 100: 85 Ind Cas 66; *Shabbar Hussain* v. *Abbas Ali*, 1926 All 152 (152): 23 All L J 935: 6 L R A Civ 567: 90 Ind Cas 324; *Imam Uddin* v. *Sadarat Rai*, (1910) 5 Ind Cas 897 (898): 32 All 301: 7 All L J 228.

(7) *Bishen Singh* v. *Karam Ilahi*, (1931) 132 Ind Cas 895 (896) Lah: 1930 Notes 28-A: 32 Pun L R 7.

(8) *Gajraj Tewari* v. *Bhagirathi Pande*, 1924 All 95 (96): 74 Ind Cas 14; *Bikramjit Rai* v. *Dharsan Das*, 1925 All 141 (141): 22 All L J 1033: 5 L R A Civ 747: 82 Ind Cas 26; *Sheo Chand* v. *Sita Ram Misra*, 1927 All 331 (332): 100 Ind Cas 482; *Shri Chand* v. *Bansidhar*, (1932) 135 Ind Cas 245 (246): 1932 All L J 219; *Bejoy Gopal* v. *Umesh Chandra*, (1902) 6 Cal W N 196 (197); *Tarin Dafadar* v. *Kholejannessa*, (1906) 10 Cal W N 981 (982); *Basir Sheikh* v. *Fazle Karim Biswas*, (1915) 28 Ind Cas 703 (704): 19 Cal W N 290; *Azimuddin* v. *Tara Sankar*, (1918) 47 Ind Cas 638 (639): 28 Cal L Jour 201; *Monmohan* v. *Bidhu*, (1918) 46 Ind Cas 309 (310): 28 Cal L Jour 268; *Narendra* v. *Satyadhan*, (1920) 54 Ind Cas 396 (897): 30 Cal L Jour 203; *Gol Asmater Khatun* v. *Habibulla*, (1921) 64 Ind Cas 49 (50) Cal; *Arjan Mirdha* v. *Kali Kumar Chakerbutty*, 1923 Cal 294 (294): 68 Ind Cas 194; *Fatta* v. *Sikandar*, (1920) 56 Ind Cas 927 (928): 2 Lah L Jour 442: 2 U P L R (L) 112; *Sardari Lal* v. *Ram Lal*, (1920) 57 Ind Cas 199 (200): 1 Lah 225: 1 Lah L Jour 225; *Raushan Ram* v. *Sheran Khan*, (1920) 57 Ind Cas 259 (260): 2 Lah L Jour 5; *Gurdas Mal* v. *Kashi Ram*, 1921 Lah 160 (161): 3 Lah L Jour 64; *Wali* v. *Mohammed Khan*, 1922 Lah 34 (35): 65 Ind Cas 725: 4 Lah L Jour 221; *Anwar-ul-Haq* v. *Nazar Abbas*, 1925 Lah 494 (494): 6 Lah 313: 88 Ind Cas 865: 26 Pun L R 474; *Haji* v. *Janum*, 1926 Lah 137 (138): 89 Ind Cas 162; *Gurditta Mal* v. *Muhammad Khan*, 1926 Lah 37 (38): **7 Lah L Jour 544**: 90 Ind Cas 41: 26 Pun L R 832; *Md Hassan* v. *Haji*, 1927 Lah 860 (860): 28 Pun L R 9: 101 Ind Cas 328; *Ponnambala Muthan* v. *Mahadeva Pattar*, (1916) 35 Ind Cas 697 (698): (1916) 2 Mad W N 117; *Muthuvijaya Raghunatha* v. *Swaminathan Chettiar*, 1932 Mad 212 (213): 85 Mad L W 105: 1932 Mad W N 152: 137 Ind Cas 319; *Laxmanlal* v. *Narayan*, 1929 Nag 358 (360): 121 Ind Cas 654; *Ram Gobind Singh* v. *Shashi Sekhar Prasad Singh*, 1925 Pat 517 (518): 1925 Pat H C C 153: 88 Ind Cas 959: 6 Pat L Tim 849; *Daroga Singh* v. *Raghunandan Singh*, 1925 Pat 590 (591): 6 Pat L Tim 451: 88 Ind Cas 669; *Basiet Narain Singh* v. *Modnath Das*, 1928 Pat 250 (253): 7 Pat 285: 9 Pat L Tim 153: 108 Ind Cas 552; *Mir Nawab* v. *Hardeo*, (1911) 12 Ind Cas 871 (871): 60 Pun Re 1911: 238 Pun W R 1911: 42 Pun L R 1912; *Khuda Bakhsh* v. *Mathra Das*, (1913) 18 Ind Cas 182 (183): 62 Pun Re 1913: 85 Pun L R 1913: 89 Pun W R 1913; *Gauhar Khan* v. *Sher Muhammad Khan*, (1913) 18 Ind Cas 256 (256): 107 Pun L R 1913: 84 Pun W R 1913; *Fateh* v. *Bhanju Ram*, (1917) 41 Ind Cas 730 (731): 96 Pun Re 1917: 49 Pun W R 1917; *Jamna* v. *Sarjit*, (1919) 52 Ind Cas 510 (511): 67 Pun Re 1919: 90 Pun L R 1919.

(9) *Umrao Singh* v. *Kapuria*, 1930 Lah 651 (653): 31 Pun L R 269: 12 Lah L Jour 82: 128 Ind Cas 53.

(10) *Narain Das* v. *Sheo Din*, 1926 All 234 (235): 24 All L J 800: 91 Ind Cas 859: 48 All 251; *Karam Khan* v. *Mast Ali Khan*, 1927 Lah 851 (852): 28 Pun L R 148: 100 Ind Cas 839; *Krishnabandhu Pal* v. *Brajendra Kumar Shaha*, 1932 Cal 134 (135): 58 Cal 1841: 135 Ind Cas 797 [One of several tenants can institute a suit under S. 104-H, B T Act for getting a declaration that he was an occupancy raiyat and that the entry in a record of rights on the basis that he was tenure-holder was wrong. Consequently the failure to implead in time the legal representatives of one of the plaintiff-respondents in time does not have the effect of rendering the entire appeal bad].

(11) *Sarat Kamini* v. *Chaitanya Chandra Prohoraj*, 1923 Cal 289 (289): 67 Ind Cas 290; *Ram Dei Misrain* v. *Jurawan Misir*, 1930 All 762 (764, 767): 1930 All L J 857: 129 Ind Cas 8.

(12) *Sarat Kamini Dasi* v. *Chaitanya Chandra Prohoraj*, 1923 Cal 289 (290): 67 Ind Cas 290.

(13) *Umrao Singh* v. *Kapuria*, 1930 Lah 651 (653): 31 Pun L R 269: 12 Lah L Jour 82: 128 Ind Cas 53.

joint possession the abatement will affect the whole appeal even though the plaintiff had asked for separate possession in the plaint.[14] Even in cases where the plaintiff *could have* asked for a joint and several relief, if he chooses to ask for a joint relief and on dismissal of the suit he files an appeal, the appeal will abate *in toto* on the death of one of the defendants-respondents, if his legal representatives are not brought on the record in time.[15] O. 22, R. 4, Notes 23—27.

24. Inherent power to add legal representative after abatement.—Even after a suit or appeal has abated the Court has inherent power to add the legal representatives of the deceased-defendant or appellant in proper cases.[1] The proper procedure in such cases would be to just declare that the suit had abated, then to set the abatement aside for valid reasons and then add the legal representatives and proceed with the suit or appeal.[2] It should, however, be noted that such a course will not be adopted unless very strong grounds are made therefor.[3]

25. Appellate Court and abatement.—The Court to appoint the legal representative of a deceased defendant or respondent will be the Court in which the suit or appeal was pending when the death took place.[1] Similarly the Court to declare an abatement will be the Court in which the suit or appeal was pending when the abatement took place.[2] Where, however, such Court proceeds to a decision on the merits in spite of an abatement that has taken place, the appellate or second appellate Court as the case may be may set aside the decision and either declare the abatement[3] or remand the matter for disposal according to Law.[4]

26. Award of costs.—If a suit abates on the ground that the legal representatives of a deceased defendant are not impleaded within time, there is no provision in the rule entitling the legal representatives to come to Court and ask for costs.[1]

27. Rehearing of suit or appeal.—Where a decree is passed against a deceased respondent without impleading his legal representatives, it is competent for the Court to entertain an application for impleading the legal

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(14) *Arjan Mirdha* v. *Kali Kumar Chakerbutty*, 1923 Cal 294 (294): 68 Ind Cas 194.

(15) *Chandra Kumar Guha* v. *Elahi Bukaha*, 1926 Cal 667 (668): 92 Ind Cas 616; *Chet Ram* v. *Mel Haicha*, 1926 Jour 93 (3): 26 Pun L R 797: 92 Ind Cas 35; *Kali Narain* v. *Haran Chandra*, (1921) 62 Ind Cas 714 (715) Cal [Suit for damages against several joint wrongdoers—Suit dismissed—Plaintiff appeals—One of the wrongdoers (respondents) dies, his representative must be made a party, if not, it is open to the plaintiff-appellant to prosecute his appeal only against some of the wrongdoers (respondents) at his choice]; *Srikanta Mandal* v. *Jotirmoyi Devi*, 1926 Jour 89 (2): 94 Ind Cas 253, (Do.); *Jogesh Chandra* v. *Bama Sundari*, (1916) 34 Ind Cas 138 (141) Cal [Where a suit brought against several joint promisors is dismissed, the plaintiff cannot appeal against some only, releasing his claim against the others].

Note 24.

(1) *Lakmichand* v. *Kachubhai*, (1911) 11 Ind Cas 559 (560): 35 Bom 393: 13 Bom L R 517.

(2) *Lakshmi Bai* v. *Yeshwant*, 1922 Bom 449 (449): 47 Bom 92: 24 Bom L R 909: 75 Ind Cas 283.

(3) *Paru* v. *Variangatil Raman Menon*, (1905) 28 Mad 359 (360). See also *Ramakrishna* v. *Narasimha*, 1932 Mad 527 (527): 36 Mad L W 169: 139 Ind Cas 574 [Where deceased respondent's legal representative himself applies to be brought on record, he may be impleaded and abatement set aside even without an application by him for setting aside abatement].

Note 25.

(1) *Promoda Nath Roy* v. *Abdul Majid*, (1919) 53 Ind Cas 480 (480) Cal; *Tikam Singh* v. *Likhi Singh*, 1929 All 319 (320): 115 Ind Cas 610.

(2) *Amarsangji* v. *Desai Umad*, 1925 Bom 290 (291): 27 Bom L R 91: 86 Ind Cas 31. See also *Muktaram Rakhit* v. *Gomasta Mahato*, 1928 Cal 654 (656): 47 Cal L Jour 623: 112 Ind Cas 225.

(3) *Miran Bakhsh* v. *Allah Wasaya*, 1929 Lah 256 (256): 118 Ind Cas 437.

(4) *Shaikh Fared Sahib* v. *Kulsam Beebi*, (1912) 16 Ind Cas 688 (688): 1912 Mad W N 525; *Tota Ram* v. *Kundan*, 1928 Lah 784 (786, 787): 112 Ind Cas 704. See also *Inayatullah* v. *Gopal Narain*, (1901) 24 All W N 187 (187).

Note 26.

(1) *Sivaprakasam* v. *Palaniappa*, (1912) 15 Ind Cas 369 (370): 22 Mad L Jour 439: 1912 Mad W N 382: 11 Mad L Tim 202.

O. 22, R. 4, Notes 27—29.

representatives and to re-open and rehear the suit or appeal.[1]

28. **Revision.**—No revision lies from an order that a deceased plaintiff's legal representatives are not necessary parties to an application to set aside an *ex parte* decree.[1]

29. **Appeal.**—Under the old Code an order of abatement was appealable, not as a decree but as an order under S. 588 (18).[1] Under the present Code, where the facts fall within the four corners of the rule an order of abatement thereunder is not open to appeal. The only remedy is that provided by R. 9. But when the *suit is dismissed* as having abated and the propriety of the dismissal on the ground is questioned an appeal will lie as if from a decree.[2] Thus, where on abatement of a suit so far as the deceased is concerned, the Court dismissed the whole suit an appeal would lie.[3] No appeal lies from an order bringing in certain persons as legal representatives of a deceased defendant.[4]

O. 22, R. 5, Note 1.

R. **5**. [S. 367.] *Where a question* arises as to *whether any person is or is not* [the legal representative][3] of a deceased plaintiff *or a deceased defendant, such question* [*shall be* determined][4] by the Court.

Determination of question as to legal representative.

[1877—S. 367; 1859—S. 103.]

Local Amendment.

MADRAS.

Add the following as a proviso to R. 5 of O. 22:—

"Provided that an appellate Court before determining it, may direct any Lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question."

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Legal representative. See Note 10 to R. 3.
4. "Shall be determined." See also S. 50, ante.
5. "By the Court."
6. Objection as to representative character.
7. Effect of order under this rule.
8. Power of Court to correct its own order.
9. Suit to establish title as legal representative.
10. Appeal.
11. Revision.

Determination obligatory. See Notes 4 and 6, Pt. (1) and Note 1, Para. 1.

Wrong order—Remedies against. See Note 6, Pt. (3); Note 8; Note 9, Pt. (1); Note 6 to S. 105 and Note 11.

Note 27.

(1) *Khalil Ahmad Khan* v. *Khatir Zaman Khan*, 1927 Oudh 221 (221): 1 Luck Cas 60: 101 Ind Cas 841: 2 Luck Cas 592.

Note 28.

(1) *Shamsher Narain Singh* v. *Muhammad Sle*, 1926 Pat 29 (30): 90 Ind Cas 329.

Note 29.

(1) *Mehdi Husain* v. *Sughra Begam*, (1903) 25 All 206 (207): 1903 All W N 15.

(2) *Suppu Naicken* v. *Perumal Chetty*, (1916) 34 Ind Cas 372 (373): 30 Mad L Jour 486: 1916 Mad W N 301: 19 Mad L Tim 364; *Barju Biswal* v. *Kunja Behari Mahapatra*, 1931 Pat 353 (353): 10 Pat 471: 133 Ind Cas 767: 12 Pat L Tim 909.

(3) *Niranjan Nath* v. *Afzal Hussain*, (1916) 34 Ind Cas 822 (823) F B: 128 Pun Re 1916: 111 and 176 Pun W R 1916: 146 Pun L R 1916; *Udmi* v. *Hira*, (1921) 60 Ind Cas 111 (113): 1 Lah 582: 2 Lah L Jour 762.

(4) *Moti Lal* v. *Bishambhar Nath*, 1925 All 431 (432): 23 All L J 442: 6 L R A Civ 361: 88 Ind Cas 95: 47 All 741.

O. 22, R. 5, Notes 1—5.

1. Legislative changes—

1. Under S. 367 of the old Code the Court had the *option* of either determining who is the legal representative of a deceased party or of staying the suit until the question has been determined in a separate suit.[1] Under the present rule the Court *shall* determine the question and has no option in the matter.
2. The words "at or before the hearing" which occurred in the old section have been omitted.
3. The provisions of the old section, in terms, applied only to the case of the death of a *plaintiff*.[2] But the present rule will apply to the case of the death of a *plaintiff* as well as to the case of the death of a *defendant*.

2. Scope of the rule.—As has been observed in Note 1 above, where a dispute as to who is the legal representative arises, it is the duty of the Court under this rule to decide it.[1] The decision, however, should be limited for the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property.[2]

The rule applies to appeals[3] but not to execution proceedings.[4]

3. Legal representative.—*See* Note 10 to R. 3.

4. "Shall be determined"—See also S. 50, ante.—*See* Notes 1 and 2 above. For the purpose of determining as to who is the legal representative, the Court must, when necessary, hold an enquiry in which evidence may be adduced[1] and must come to a conclusion as to who is the legal representative according to the rights of the parties.[2] It cannot simply make all the claimants parties without making any such enquiry.[3] A lengthy or elaborate enquiry is, however, unnecessary for the purpose[4] and where there is no dispute as to his being the legal representative, the mere fact that no steps were taken to have him declared as such, does not vitiate the decision in the case.[5]

5. "By the Court."—The "Court" here means the Court before whom the question as to who is the legal representative arises. It will be the trial

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Order 22, Rule 5—Note 1.

(1) *Ballabh Das* v. *Narain Das*, 1885 All W N 7 (7); *Venulapati Mamraza* v. *Mungumadi Subbarama Reddi*, (1909) 2 Ind Cas 479 (479): 19 Mad L Jour 83; *Har Narain Singh* v. *Kharag Singh*, (1887) 9 All 447 (451): 1887 All W N 89; *Har Narain* v. *Tulsi Ram*, 1894 Pun Re No 66 [Old Code, S 368]; *Charanjit Mal* v. *Mt Mitho*, 1888 Pun Re No 29, (Do.); *V Mamraza* v. *Subbarama Reddy*, (1909) 2 Ind Cas 479 (480): 19 Mad L Jour 33, (Do.).

(2) *Sir Rameshwar Singh* v. *Janeshwari*, (1913) 21 Ind Cas 397 (401): 18 Cal W N 129: 19 Cal L Jour 19. See also *Muhammad* v. *Khushalo*, (1888) 10 All 223 (232): 1888 All W N 98 F B.

Note 2.

(1) *Raoji Bhikaji* v. *Anant Laxman*, (1918) 46 Ind Cas 750 (751): 20 Bom L R 671: 42 Bom 535; *Valsala Bai* v. *Sambhaji*, (1918) 47 Ind Cas 757 (758): 20 Bom L R 902: 43 Bom 168 [Even though it might have primarily passed an order bringing some person on record as legal representative]; *Subramania* v. *Muthu Vaithilinga*, (1918) 44 Ind Cas 987 (988): 1918 Mad W N 198; *Laxmi* v. *Ganpat*, 1921 Nag 23 (24): 17 Nag L R 45: 62 Ind Cas 303; *Taja* v. *Devi Ditta*, 1921 Jour 27 (3): 4 Lah L Jour 314.

(2) *Balabai* v. *Ganesh*, (1903) 27 Bom 162 (169): 4 Bom L R 980.

(3) *Muhammad* v. *Khushalo*, (1888) 10 All 223 (224): 1888 All W N 98 F B.

(4) *Abidunnissa* v. *Aminunnissa*, (1876-77) 2 Cal 327 (336): 4 Ind App 66: 3 Sar 677: 1 Ind Jur 172: 3 Suth 871 P C.

Note 4.

(1) *Paramasami Ayyangar* v. *Alamu Nachiar Ammal*, (1919) 49 Ind Cas 11 (13): 35 Mad L Jour 632: 9 Mad L W 26: 42 Mad 76: 1918 Mad W N 107; *Vanjinathayyar* v. *Vaithinathier*, (1912) 16 Ind Cas 798 (799) Mad; *Nagappa Nadar* v. *Karuppiah Nadar*, 1925 Mad 456 (457): 21 Mad L W 21: 86 Ind Cas 178.

(2) *Nagappa Nadar* v. *Karuppiah Nadar*, 1925 Mad 456 (457): 21 Mad L W 21: 86 Ind Cas 178.

(3) *Taja* v. *Devi Ditta*, 1921 Jour 27 (3): 4 Lah L Jour 314; *Har Narain* v. *Kharag Singh*, (1887) 9 All 447 (451): 1887 All W N 89 [This was so even under the old Code]; *Muhammad Hussain* v. *Khushalo*, (1888) 10 All 223 (239): 1888 All W N 98 F B, (Do.); *Vithu* v. *Bhima*, (1891) 15 Bom 145 (147), (Do.).

(4) *Goor Bachan Singh* v. *Gian Singh*, 1922 Lah 175 (176); *Charanjit Mal* v. *Musst Mitho*, 1888 Pun Re No 29

(5) *Hira Ram* v. *Nand Ram*, 1922 All 223 (226): 20 All L J 226: 41 All 407: 66 Ind Cas 114.

O. 22, R. 5, Notes 5—9.

Court, when the question arises in the suit: or the appellate Court, if the question arises in appeal. An appellate Court cannot delegate their powers to the trial Court. All that it can do is direct the trial Court to take evidence on the question and remit the same. The *decision* must be by the appellate Court.[1] This principle has in Madras been embodied in a rule framed by the High Court as a proviso to this rule.

6. **Objection as to representative character.**—The procedure laid down in this rule should be followed not only when two or more persons claim in opposition to each other but also when the representative character of a person who alone claims is denied by the other side.[1]

The objection should, however, be taken at the earliest possible moment.[2] But when the legal representative is appointed without notice to the other side, the latter can at the hearing raise objection to the representative character of the person so appointed.[3]

7. **Effect of order under this rule.**—An order under this rule will enable the person to represent the estate in the suit and will make an adjudication therein binding on the estate.[1] To this extent and in this sense it is final.[2] The mere admission of a person as legal representative for the purpose of further prosecution of the suit will not, however, conclusively establish his right to do so if his legal position is one of the main or vital issues in the suit itself.[3] Further, as has been seen in Note 2 above, an order appointing a person as a legal representative for the suit will not have the effect of deciding that he is the *heir* of the deceased party.[4]

8. **Power of Court to correct its own order.**—As already pointed out in Note 6, *supra*, where a person has been appointed legal representative without notice to the other side, the latter can afterwards object to the representative character of that person and the Court can after enquiry correct the order already passed.

9. **Suit to establish title as legal representative.**—The object of the rule is merely to take away the option contained in the old section and make it

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Note 5.

(1) *Mt Chandmani* v. *Kartick Singh*, 1922 Pat 197 (197): 3 Pat L Tim 380: 65 Ind Cas 131; *Narayana Bharatigal* v. *Ittuli Amma*, (1917) 39 Ind Cas 893 (898) Mad.

Note 6.

(1) *Subbayya* v. *Saminadayyar*, (1895) 18 Mad 496 (497): 5 Mad L Jour 63; *Hanwant Singh* v. *Ram Gopal*, (1908) 30 All 348 (351): 5 All L J 363: 1908 All W N 139.

(2) *Raja of Ramnad* v. *Sundara*, (1919) 49 Ind Cas 704 (707): 17 All L J 153: 36 Mad L Jour 164: 23 Cal W N 549: 29 Cal L Jour 551: 25 Mad L Tim 400: 21 Bom L R 885: 1919 Mad W N 511: 42 Mad 581: 10 Mad L W 322: 46 Ind App 64: 1918 P C 156 P C.

(3) *Pulchur Mahalakshmamma* v. *Vemi Reddi*, 1923 Mad 367 (368): 17 Mad L W 8: 44 Mad L Jour 60: 32 Mad L Tim 44: 69 Ind Cas 529.

Note 7.

(1) *Maung Po Mya* v. *Maung Gyan Bon*, 1923 Rang 114 (116): 1 Bur L Jour 272: 4 U B R 150: 72 Ind Cas 205; *Zamindar of Bhadrachalam* v. *Raja Venkatadri Appa Rao*, 1922 Mad 457 (477): 16 Mad L W 369: 1922 Mad W N 532: 43 Mad L Jour 486: 31 Mad L Tim 221: 46 Mad 190: 70 Ind Cas 689 F B [Where a person who is not the legal representative is in fact brought on record as such and the Court allows the wrong representative to be brought on record and to continue the litigation, the benefit of that litigation may be taken advantage of by the proper legal representative and the representative on record will be accountable to him].

(2) *Mahomed Zafaryab Khan* v. *Abdul Razaq Khan*, 1928 All 532 (538): 26 All L J 820: 50 All 857: 111 Ind Cas 238; *Lakshmibai* v. *Balkrishna*, (1879-80) 4 Bom 654 (656): 5 Ind Jur 481 [Persons so introduced as legal representative of deceased respondent may or may not be the real legal representative of the deceased respondent].

(3) *Mt Dhapu* v. *Ram Autar*, 1923 Nag 209 (209): 70 Ind Cas 209; *Parsotam* v. *Janki*, (1906) 28 All 109 (111): 1905 All W N 206; *Balabai* v. *Ganesh*, (1908) 27 Bom 162 (169): 4 Bom L R 980.

(4) *Nihal Devi* v. *Kishore Chand*, (1910) 6 Ind Cas 999 (1037): 97 Pun Re 1910: 142 Pun W R 1910: 11 Pun L R 1911; *Maung Po Mya* v. *Maung Gyn Bon*, 1923 Rang 114 (116): 1 Bur L Jour 272: 4 U B R 150: 72 Ind Cas 205.

obligatory on the Court to decide the question. It confers no exclusive jurisdiction. Nor is an order under the rule a decree. A suit to establish the status denied by an order under this rule, is not barred.[1] In such a suit it is enough for the plaintiff to establish his legal representative character with respect to the property concerned in the main suit.[2] But with respect to such property he must not only show that the deceased was capable of transmitting the rights to him but also that he stepped into the shoes of the deceased with respect thereto.[3] O. 22, R. 5, Notes 9—11.

10. Appeal.—*See also* Note 26 to R. 3, *ante*. An order under S. 367 of the old Code (corresponding to this rule) was appealable as an order, under S. 588, Cl. 18 of that Code.[1] Under the present Code no appeal lies from such an order either as a decree or as an appealable order.[2]

But an objection to an order under this rule can under S. 105 of the Code, be a valid ground of attack in an appeal from the decree, *see* Note 6 to S. 105 last paragraph.

11. Revision.—If a Court simply adds a legal representative without holding an enquiry into the dispute and deciding it, it acts with material irregularity in the exercise of its jurisdiction and a revision will lie.[1]

R. 6. [New.] *Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.* O. 22, R. 6.

No abatement by reason of death after hearing.

[R. S. C., O. 17, R. 1, last portion.]

Note 9.

(1) *Laxmi* v. *Ganpat*, 1921 Nag 23 (24): 17 Nag L R 45: 62 Ind Cas 303. But see *Raj Bahadur* v. *Narayan Prasad*, 1926 All 439 (439, 440): 24 All L J 546: 94 Ind Cas 157: 48 All 422.

(2) *Sivabaglathatchi* v. *Muthukumara Pillai*, (1911) 9 Ind Cas 603 (604): 9 Mad L Tim 103 [The decision in this suit would operate as *res judicata* as regards the plaintiff's right to represent in the appeal].

(3) *Thiruvambala Desikar* v. *Chinna Pandaram*, (1917) 34 Ind Cas 57 (63): 30 Mad L Jour 274: (1916) 2 Mad W N 43: 4 Mad L W 306: 40 Mad 177 [Defendant may, in a suit by a person to establish himself as a legal representative, prove that the deceased had no rights to transmit].

Note 10.

(1) *Sankali* v. *Muridhar*, (1890) 12 All 200 (202): 1890 All W N 23. See also *Musst Patraj Kuar* v. *Bhaiya Jankl Parshad*, (1906) 9 Oudh Cas 354 (356); *Pandit Ikbal Narain* v. *Pandit Ratan Lal*, (1907) 10 Oudh Cas 121 (125).

(2) *Sital Prasad* v. *Bajrangi*, (1912) 13 Ind Cas 70 (71) Cal; *Ram Sarup* v. *Moti Ram*, (1920) 57 Ind Cas 137 (140): 1 Lah 493: 72 Pun W R 1920: 2 Lah L Jour 738; *Sahdev Singh* v. *Vidyawati*, 1926 Lah 181 (181): 91 Ind Cas 166; *Samsarisva* v. *Pathamma*, (1913) 20 Ind Cas 950 (951): 14 Mad L Tim 176: 1913 Mad W N 673: 25 Mad L Jour 279; *Subbaramania* v. *Muthu*, (1918) 44 Ind Cas 987 (988): 1918 Mad W N 198; *Venkata Seshamma* v. *Gunneswara Rao*, 1924 Mad 622 (623): 46 Mad L Jour 129: 19 Mad L W 113: 1924 Mad W N 58: 79 Ind Cas 860; *Brij Mohan* v. *Ram Milan*, (1913) 20 Ind Cas 898: (899): 16 Oudh Cas 350; *Lalta Singh* v. *Lackhmi Kuar*, 1926 Oudh 158 (159): 2 Oudh W N 857: 91 Ind Cas 366; *Tarachand* v. *Janki*, (1917) 38 Ind Cas 833 (834): 13 Nag L R 32.

Note 11.

(1) *Nagappa Nadar* v. *Karuppiah Nadar*, 1925 Mad 456 (457): 21 Mad L W 21: 86 Ind Cas 178; *Rukmani* v. *Veerasami*, 1924 Mad 813 (815): 47 Mad L Jour 370: 35 Mad L Tim 82: 1924 Mad W N 763: 80 Ind Cas 942.

O. 22, R. 6, Notes 1—2.

Synopsis.

1. Scope and applicability of the rule.
2 No abatement by reason of death after hearing.

1. Scope and applicability of the rule.—This rule is new and embodies an exception to the principle that the Court has no jurisdiction to pass a decree for or against a dead man.[1] It is based on the principle that a judgment pronounced at any time after the conclusion of the hearing shall be construed to be operative as if it had been delivered on the day on which the hearing was closed.[2]

Even under the old Code it had been generally held that the death of a party after the hearing but before pronouncement of the judgment will not make the judgment invalid.[3] The Punjab High Court, however, took a different view.[4] This rule gives effect to the former class of decisions.

For the application of the rule, it is immaterial whether the death is or is not brought to the notice of the Court.[5]

Where, however, the legal representative brought on the record is under a legal disability and no guardian or next friend is appointed to act for him, the decree is a nullity as against him and the rule cannot be invoked to validate the same.[6]

The principle of the rule will apply to proceedings in arbitration.[7]

2. No abatement by reason of death after hearing.—The principle of the rule will not apply unless the "hearing" had been *concluded* before the death.[1] Thus the rule will not apply where the party died on the day fixed for the hearing but before the hearing.[2]

The "hearing" contemplated by the rule is such a hearing as is provided for by O. 18 and includes arguments; and where anything remains to be done or furnished by either party as a basis of consideration which is to end in the judgment and decree capable of execution, the "hearing" cannot be said

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Order 22, Rule 6—Note 1.

(1) *Topan Ram Nathu Ram* v. *Tek Chand*, (1912) 15 Ind Cas 832 (833): 5 Sind L R 260.

(2) *Narna* v. *Anant*, (1894) 19 Bom 807 (809); *Raja Gour Chandra* v. *Raja Mukunda Deb*, (1905) 9 Cal W N 710 (719); *Raghunatha* v. *Venkatesa*, (1903) 26 Mad 101 (102): 12 Mad L Jour 435; *Kalu Ram* v. *Gaya Din*, 1927 Oudh W N 1002: 106 Ind Cas 561 (561): 4 Oudh W N 1002: 106 Ind Cas 332; *Bishen Das* v. *Ram Labhya*, (1916) 32 Ind Cas 18 (19): 106 Pun Re 1915: 187 Pun W R 1915.

(3) *Chetan Charan Das* v. *Balbhadar*, (1899) 21 All 314 (315, 316): 1899 All W N 86; *Narna* v. *Anant*, (1895) 19 Bom 807 (809); *Ramacharya* v. *Ananthacharya*, (1897) 21 Bom 314 (319); *Surendra* v. *Doorga*, (1884) 19 Cal 513 (538): 19 Ind App 108: 6 Sar 150 P C; *Baikunta Nath* v. *Salimulla*, (1907) 6 Cal L Jour 547 (555): 12 Cal W N 590; *Raghunatha* v. *Venkatesa*, (1903) 26 Mad 101 (102): 12 Mad L Jour 435.

(4) *Mrs Bates* v. *Mr Prestage*, (1898) Pun Re No 20 [Decree for or against person dying after hearing but before judgment is bad and must be set aside]; *Bhai Nihal Singh* v. *Chait Singh*, (1886) Pun Re No 81 [Under the old Code judgment without legal representative on death after hearing and before judgment is not void but may be irregular].

(5) *Ma Kin Nyun* v. *Ma Tin*, (1918) 44 Ind Cas 620 (621): (1917) 3 U B R 46.

(6) *Mt Champi* v. *Tara Chand*, 1924 All 892 (893): 46 All 744: 22 All L J 665: 5 L R (All) Civ 502: 82 Ind Cas 516.

(7) *Tegha* v. *Ram Singh*, 1924 Lah 725 (727): 79 Ind Cas 67; *Hara Krishna* v. *Ram Gopal*, (1910) 6 Ind Cas 170 (172): 14 Cal W N 759.

Note 2.

(1) *Vishvanath* v. *Lallu*, (1909) 4 Ind Cas 137 (137, 138): 11 Bom L R 1070.

(2) *Amanat Khan* v. *Miyan Khan*, (1920) 55 Ind Cas 498 (499): 7 Oudh L J 20. But see *Goda Ooopurama Ayyar* v. *Sundarammall*, (1909) 3 Ind Cas 739 (740): 33 Mad 167: 6 Mad L Tim 271 [In this case there was nothing on record to show the fact and time of death].

to have been concluded under the rule.[3] Thus the rule will not apply if the party died before the completion of arguments.[4] O. 22, R. 6, Note 2.

R. 7. [S. 369.] (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone. O. 22. R. 7, Note 1.

Suit not abated by marriage of female party.

(2) *Where* the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

Synopsis.

1 Scope of the rule.

1. **Scope of the rule.**—*A* died pending suit and his wife was brought on the record as his legal representative. The suit was decreed against her. Pending appeal, she married again. The lower Court's decree was confirmed in appeal and the decree was sought to be executed against the second husband. It was held that this was not a case where the husband was liable for the debts of the wife and that the decree could not be executed against the second husband.[1]

R. 8. [S. 370.] (1) [The insolvency of a plaintiff] in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not *cause* the suit *to abate*, unless such assignee or receiver declines to continue the suit *or* (*unless for any special reason the Court otherwise directs*) to give security for the costs thereof within such time as the Court may *direct*. O. 22, R. 8.

When plaintiff's insolvency bars suit.

(2) *Where* the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the

Procedure where assignee fails to continue suit or give security.

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(3) *Mantramalata* v. *Ambar Singh*, (1918) 43 Ind Cas 161 (163, 164): 14 Nag L R 71; *Jungli Lal* v. *Laddu Ram Marwari*, (1919) 50 Ind Cas 529 (533): 4 Pat L Jour 240: 1919 Pat H C C 105 F B. See also *Hassanand* v. *Nandiram*, 1930 Sind 259 (260): 128 Ind Cas 675: 25 Sind L R 107.

(4) *Janardhan* v. *Ramchandra*, (1902) 26 Bom 317 (319): 4 Bom L R 23; *American Baptist Foreign Mission Society* v. *Amalana Dhuni Pattabiramayya*, (1918) 48 Ind Cas 859 (861) Mad [Where a party to a suit had died after the arguments had only been partly heard, a judgment pronounced afterwards without his legal representatives having been brought on record is a nullity].

Order 22, Rule 7—Note 1.

(1) *Bindabun Chunder* v. *Mackintosh*, (1868) 9 Suth W R 442 (443).

O. 22, R. 8, Notes 1—2.

Court may *make an order* dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

[1877—S. 370; 1859—S. 106.]

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. Applicability of the rule to appeals.
4. Applicability of the rule to execution proceedings.
5. "Insolvency" must be existing.
6. Plaintiff's insolvency. See Note 2, above.
7. Defendant's insolvency. See Note 2, above.
8. Insolvency of pauper applicant.
9. Suit instituted after adjudication.
10. Limitation.
11. Costs payable by plaintiff prior to insolvency.
12. Costs of successful defendant.
13. Cause of action arising after insolvency.

Security. See Note 11.

1. Legislative changes:—

1. The word "bankruptcy" which occurred in paragraphs 1 and 2 of the old S. 370 has been omitted.
2. The words "[appointed under S. 351]" which occurred in paragraph 1 of the old section have been omitted.
3. The words " shall not bar the suit" have been changed into "shall not cause the suit to abate".
4. The words "(unless for any reason the Court otherwise directs)" occurring in the present sub-R. (1) are new.
5. The word "order" at the end of paragraph 1 of old section has been changed into "direct".
6. The words "may dismiss the suit and award to the defendant, etc." which occurred in para. 2 of the old section have been changed into "may make an *order* dismissing the suit and awarding to the defendant, etc."

2. Scope and applicability of the rule.—This rule applies were the *plaintiff* in a pending suit becomes insolvent. It does not apply where the *defendant* becomes an insolvent.[1] In the latter case the procedure to be followed is governed by the provisions of R. 10, *infra*.[1] There must have been an *actual* insolvency in which an assignee or receiver is appointed; the rule has no application to a case where there has been merely an *application* for a declaration of insolvency and a vesting order is made.[2]

On the insolvency of the plaintiff the only person entitled to continue the suit is the Official Receiver or Assignee. The insolvent has no right to do so.[3] Nor can any person claiming to have derived title under him continue the suit especially if he had not taken any steps to assert his interests till then.[4]

Order 22, Rule 8—Note 2.

(1) *In re, Hunt Monnet & Co* v. *Kholagar*, (1864) 1 Bom H C R 251 (257) [He may apply to stay the suit under S 49 of the Indian Insolvency Act]; *Ramchandra* v. *Shripati*, 1929 Bom 202 (204): 31 Bom L R 357: 118 Ind Cas 252 [Defendant to a suit adjudicated—Decree in suit against him—He is entitled to appeal].

(2) *Ramchandra* v. *Shripati*, 1929 Bom 202 (204): 31 Bom L R 357: 118 Ind Cas 252.

(3) *Buran Sheriff Sahib* v. *Venkatrama Ayyar*, (1928) 109 Ind Cas 589 (589): 1928 Notes 27(c).

(4) *Surendra Nath Dutta* v. *Tripura Pada Bhatta Charjee*, 1928 Cal 215 (215): 32 Cal W N 304: 109 Ind Cas 282.

O. 22, R. 8, Notes 2—5.

It is only the *individual right* of the insolvent in the suit that is affected by his insolvency. Thus the adjudication of the guardian of a minor party does not debar him from continuing to act as guardian.[5]

On the insolvency of the plaintiff the Court should not straightaway dismiss the suit but should give *notice* to the Official Receiver or the Official Assignee as the case may be, in whom the property of the insolvent vests to appear and state whether he wishes to continue the suit.[6] If he expresses his wish to do so, it will be necessary to make an order directing him to give security for costs within a specified time.[7] But the order to give security can only be after notice to the Receiver and after he expresses his willingness to continue the suit. Thus where on the plaintiff's adjudication the Court straightaway passed an order that the Official Assignee should give security for costs within a time and should be made a party within a further time and that in default the suit should be set down for dismissal it was held that such an order was irregular.[8] A time should be fixed within which to give security.[9]

Where the Receiver declines to continue the suit or appeal, or to give security, the suit or appeal will abate, even without an application for dismissal by the other side.[10]

This rule does not apply to suits or proceedings under the Agra Tenancy Act (III of 1926), *see* Sch. 2, list 1.

3. Applicability of the rule to appeals.—The provisions of the rule apply to appeals.[1]

4. Applicability of the rule to execution-proceedings.—The rule does not apply to execution proceedings. A judgment-debtor cannot object to execution being taken against him on the ground of the decree-holder's insolvency. But the Receiver or the insolvency Court can step in and get the fruits of the execution handed over to him.[1]

5. "Insolvency" must be existing.—The rule does not as has been seen in Note 2 above, apply unless an adjudication has *actually* taken place.[1] Where a suit is instituted or continued by the Receiver and pending that the adjudication is annulled the Receiver can nevertheless continue the suit unless the property is diverted from him and re-vested in the quandom insolvent.[2]

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(5) *Asa Nand* v. *Bishan Singh*, 1930 Lah 205 10 Lah 208. (205): 125 Ind Cas 186.

(6) *Official Assignee of Rangoon* v. *Chidambaram*, 1920 Mad W N 704 (706, 707): 12 M L W 551: 61 Ind Cas 300.

(7) *Kissen Gopal Karnani* v. *Sukalal Karnani*, 1927 Cal 76 (77): 31 Cal W N 22: 53 Cal 844: 98 Ind Cas 781.

(8) *Ibrahim Bin* v. *Abdur Rahiman*, (1875) 12 Bom H C R 257 [But if the Official Assignee having notice of the order, does not give security, he will not be entitled to further notice of the setting down of the suit for dismissal]. See also *Lekhraj Chuni Lal* v. *Sham Lal*, (1892) 16 Bom 404 (406, 407).

(9) *Heer Lal* v. *Carapiet*, (1870) 13 Suth W R 431 (432).

(10) *Mul Chand Ganga Bishen* v. *Downie & Co, Ltd.* 1928 Lah 596 (597): 110 Ind Cas 910:

Note 3.

(1) *Mul Chand* v. *Downie & Co, Ltd.* 1928 Lah 596 (597): 10 Lah 208: 110 Ind Cas 910; *Heer Lal* v. *Carapiet*, (1870) 13 Suth W R 431 (432); *Manohar Lal* v. *Diwan Singh*, (1913) 18 Ind Cas 922 (922) All.

Note 4.

(1) *Faqir Muhammad Khan* v. *Pirdad Khan*, 1924 Lah 615 (616): 75 Ind Cas 844; *Asa Nand* v. *Bishan Singh*, 1930 Lah 205 (205, 206): 125 Ind Cas 186.

Note 5.

(1) *Ramchandra* v. *Shripati*, 1929 Bom 202 (204): 31 Bom L R 357: 118 Ind Cas 252; *Amrita Lal* v. *Rakhali Das*, (1899) 27 Cal 217 (219): 4 Cal W N 294.

(2) *Haji Sajan* v. *N O Macleod*, (1908) 32 Bom 321 (336): 10 Bom L R 178.

O. 22, R. 8, Notes 6—12.

6. **Plaintiff's insolvency.**—*See* Note 2, above.

7. **Defendant's insolvency.**—*See* Note 2, above.

8. **Insolvency of pauper applicant.**—The rule does not apply to the adjudication of a petitioner pending his application for permission to sue in *forma pauperis*. Such an application cannot be dismissed on the ground of the adjudication.[1] If the petitioner is adjudicated after he obtains leave to sue in *forma pauperis*, the Receiver can come in and continue the suit in the same way as the insolvent could have done.[2]

9. **Suit instituted after adjudication.**—After adjudication the insolvent has no right over property which has vested in the Receiver. In respect of such property therefore he has no right to institute a suit and a suit so instituted cannot be continued by the Receiver under this rule.[1] Suppose the plaintiff was adjudicated pending a suit, has he got the right to appeal against a decree in the suit? Yes, according to the Bombay High Court.[2] The High Court of Madras has, on the other hand, held that he cannot.[3]

10. **Limitation.**—There is no limitation for the receiver to appear and apply, on the adjudication of the plaintiff for being allowed to continue the suit.[1]

11. **Costs payable by plaintiff prior to insolvency.**—If the receiver elects to continue the suit he must give security only for the costs already incurred up to the time of his electing to continue the suit and not for *subsequent costs* as to which he will be personally liable.[1] The order for furnishing the security must be passed at the time of the receiver electing to continue the suit and not afterwards.[2] An order that the receiver need not furnish security is not appealable.[3]

12. **Costs of successful defendant.**—In England the executors and trustees in Bankruptcy containing a suit filed by the bankrupt will be personally liable for all costs from the beginning of the suit.[1] In India, however,

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Note 8.

(1) *Chidambaram* v. *Kother*, (1925) Mad 791 (791): 48 Mad L Jour 491: 87 Ind Cas 720.

(2) *Muhammad Zaki* v. *Municipal Board of Mainpuri*, (1918) 47 Ind Cas 577 (577): 16 All L J 440.

Note 9.

(1) *Ramasami* v. *Pavadai*, (1914) 23 Ind Cas 813 (813) Mad.

(2) *Ramchandra* v. *Shripati*, 1929 Bom 202 (204): 31 Bom L R 357: 118 Ind Cas 252.

(3) *Hari Rao* v. *Official Assignee*, 1926 Mad 556 (556, 557): 50 Mad L Jour 358: 23 Mad L W 599: 1926 Mad W N 364: 94 Ind Cas 642: 49 Mad 461 F B; *Palaniandi Chetty* v. *Kalyanarama Ayyar*, 1926 Mad 1214 (1214): 97 Ind Cas 486. But see *Kondapalli Talireddi* v. *Ramachandra Rao*, 1921 Mad 402 (403): 13 Mad L W 616: 62 Ind Cas 854: 1921 Mad W N 535.

Note 10.

(1) *Khunni Lal* v. *Rameshar*, 1922 All 361 (362): 43 All 621: 19 All L J 685: 64 Ind Cas 52: 3 L R (All) 40.

Note 11.

(1) *Gulam Hussain* v. *Piarally Abdulla Dossal and Sons*, 1926 Bom 533 (534): 28 Bom L R 1074 97 Ind Cas 797.

(2) *Venusami Ayyangar* v. *Varadaraja Ayyar*, 1927 Mad 511 (511, 512): 100 Ind Cas 440.

(3) *O Jordon* v. *Maung Ba Chit*, 1931 Rang 286 (286): 9 Rang 478: 134 Ind Cas 750.

Note 12.

(1) *Boynton* v. *Boynton*, (1878) 4 App Cas 738 (735) (Referred in 20 Bom 167); *Cook* v. *Hathway*, L R 8 Eq 612 (Ref in 20 Bom 167); *Borneman* v. *Wilson*, (1884) 28 Ch D 53 (55): 54 L J Ch 631: 51 L T 728: 33 W R 141 (C A) (Ref in 20 Bom 167); *Watson* v. *Holliday*, (1882) 20 Ch D 780 (785): 51 L J Ch 906: 46 L T 878: 30 W R 747: affirmed (1883) 48 L T 545: 52 L J Ch 543: 31 W R 536 (C A) (Ref 20 Bom 167); *Dinelle Chancery Practice* P 1175, 6th Ed.

such personal liability extends only for the costs incurred after the receiver comes on the record.[2] O. 22, R. 8, Notes 12—13.

13. Cause of action arising after insolvency.—Where the suit is filed in respect of a cause of action arising after adjudication the insolvency is by itself no ground for demanding security for costs.[1]

Effect of abatement or dismissal.

R. 9. [Ss. 371, 372-A.] (1) *Where* a suit abates or is dismissed under this *Order*,[3] [no fresh suit shall be brought on the same cause of action.] O. 22, R. 9, Note 1.

(2) *The plaintiff or the* person claiming to be the legal representative of *a* deceased *plaintiff or the assignee or the receiver in the case of an* insolvent plaintiff may apply[5] for an order to set aside the abatement[4] or dismissal; and if it *is* proved that he was prevented by any sufficient cause[8] from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the [1] Indian Limitation Act,[7] 1877, shall apply to applications under *sub-rule*[2].

[1877—S. 371.]

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. No fresh suit shall be brought on the same cause of action.
4. Setting aside abatement.
5. Who may apply under this rule.
6. Minor and abatement.
7. Limitation.
8. "Sufficient cause."
9. Formal order of abatement, if necessary before setting aside abatement.
10. Cause of action in the revived suit.
11. Substitution without setting aside abatement.
12. Remand.
13. Appeal.
14. Letters Patent Appeal.
15. Revision.

1. Legislative changes:—

This rule embodies the provisions of Ss. 371 and 372-A of the old Code—sub-Rr. (1) and (2) correspond to S. 371 and sub-R. (3) corresponds to S. 372-A.

The following changes between the rule and the above sections of the old Code may be noted:—

1. "The plaintiff or any person claiming to be the legal representative of a deceased plaintiff or the assignee or receiver in the case of an insolvent-plaintiff" have been substituted for "but the person claiming to be the legal representative of the deceased or bankrupt or insolvent-plaintiff".
2. The words "applicable to appeals" which occurred in S. 372-A, have been omitted.

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(2) *Gulam Hussain* v. *Plarally Abdulla Dossal and Sons*, 1926 Bom 532 (534): 28 Bom L R 1074: 97 Ind Cas 797.

Note 13.

(1) *Murray* v. *Eastern Bengal Mahajan Co.*, (1918) 48 Ind Cas 622 (623): 46 Cal 156: 22 Cal W N 1018.

O. 22, R. 9, Notes 2—3.

2. Scope and applicability of the rule.—The rule is a disabling one and should therefore be strictly construed.[1] Its application is limited to abatement or dismissal under one or other of the rules of this order and does not extend to abatement on account of some other cause.[2] Thus an application under sub-R. (2) cannot be made when the abatement is by reason of the fact that the right to sue does not survive.[3]

The rule does not apply to proceedings before the High Court on reference under S. 66 (2) of the Income-Tax Act.[4]

3. No fresh suit shall be brought on the same cause of action.—An abatement under R. 3 or 4 bars a fresh suit on the *same cause of action*.[1] If the fresh suit is, however, on a different cause of action[2] or if the plaintiff in the latter suit does not claim under a devolution of interest from the plaintiff in the former suit[3] the suit is not barred by this rule. Where the legal representatives of a deceased plaintiff applied to be brought on record, but on the objection of the defendant, the Court disallowed the application and dismissed the suit and the legal representatives thereupon filed a fresh suit on the same cause of action it was held that it was not open to the defendants to object the suit on the ground that it was barred under this rule.[4]

The dismissal of a suit for failure to deposit the costs of service of summons on the proposed legal representatives will not bar a fresh suit.[5]

It has been held by the High Court of Bombay that the bar under this rule has not got the same effect as *res judicata* and that it does not extinguish the right.[6] The High Court of Madras has held, distinguishing the Bombay decision, that an order of abatement operates as a judgment in favour of the defendant and that if it is not vacated by an application under this rule, it is conclusive of the defendant's rights to the property.[7]

Order 22, Rule 9—Note 2.

(1) *Lachman* v. *Bansilal*, 1931 Lah 79 (80): 31 Pun L R 973: 131 Ind Cas 98: 12 Lah 275.

(2) *Ram Sarup* v. *Moti Ram*, (1920) 57 Ind Cas 137 (140): 1 Lah 493: 2 Lah L Jour 738: 72 Pun W R 1920.

(3) *Subramania Iyer* v. *Venkataramaier*, (1915) 31 Ind Cas 4 (4) Mad: *General Trading Co, Kahuta* v. *Nihal Singh*, 1925 Lah 208 (208): 78 Ind Cas 22.

(4) *Maharaja of Dharbanga* v. *Commissioner of Income-tax*, 1930 Pat 81 (82): 9 Pat 240: 126 Ind Cas 633: 11 Pat L Tim 799.

Note 3.

(1) *Goda Coopuramier* v. *M Soonduramma*l, (1909) 3 Ind Cas 739 (740): 33 Mad 167: 6 Mad L Tim 271 [The legal representatives of a plaintiff after whose death a suit is dismissed cannot sue on the same cause of action and for the same relief on the allegation that the decree was a nullity]; *Raja Shanker Pratap Singh* v. *Motilal*, 1928 Nag 220 (221): 109 Ind Cas 387 [Nor can the fresh suit be brought on the ground that in the former suit the Court acted under some other provision of law ignoring the abatement]; *P Raman Menon* v. *M Srikumaran Nambudri*, (1881) 3 Mad 31 (32) [Suit abated under Code of 1859. New suit brought while Code of 1877 was in force. Held Code of 1859 did not provide for prohibiting a new suit on abatement of the old suit. The prohibition under Code of 1877 cannot affect an abatement under the old Code. So new suit was not barred].

(2) *Ram Charan* v. *Tulshi Ram*, 1929 All 306 (307, 308): 1929 All L J 492: 119 Ind Cas 562.

(3) *Lachman* v. *Bansilal*, 1931 Lah 79 (80): 31 Pun L R 973: 131 Ind Cas 98: 12 Lah 275 [Where a reversioner sued challenging an alienation and he having died the suit abated and subsequently another reversioner sued on the same cause of action, held, that the later suit was not barred]; *Ramchandra* v. *Shripatrao*, (1916) 33 Ind Cas 771 (772): 40 Bom 248: 18 Bom L R 33 [*A*, a member of a joint Hindu family, sues *B* for redemption of a mortgage of ancestral property, but not on a representative capacity. *A* dies. *A's* heirs are not brought on the record, and the suit abates. Subsequently *A's* son and grandsons institute another suit for redemption of the same mortgage. The second suit is not barred].

(4) *Arunachalam* v. *Vellaya*, (1919) 52 Ind Cas 465 (465): 9 Mad L W 345: 25 Mad L Tim 360.

(5) *Bessessur Bhugut* v. *Murli Sahu*, (1883) 9 Cal 163 (165): 11 Cal L Rep 409.

(6) *Jayasingh* v. *Gopal*, (1904) 6 Bom L R 638 (639).

(7) *Rahim-un-nissa Begam* v. *Srinivasa Ayyangar*, (1920) 54 Ind Cas 565 (566): 11 Mad L W 139: 38 Mad L Jour 266.

4. Setting aside abatement.—The remedy provided for in sub-R. (2) applies where the suit has abated under R. 3 or 4[1] or where it has been dismissed under R. 8.[2] O. 22, R. 9, Notes 4—7.

An order setting aside an abatement should be passed only after notice to the other side. If it is passed without notice, the other side can raise their objections to the order at the hearing of the suit or appeal.[3]

5. Who may apply under this rule.—If the abatement was under R. 3, the application under this rule may be made by the legal representatives of the plaintiff. But a legal representative cannot apply under this rule if he had already applied to be brought on record within time and his application had been dismissed.[1] If the abatement is under R. 4, the plaintiff may make the application. If the suit has been dismissed under R. 8, the receiver or assignee in insolvency may apply.

Where there are more plaintiffs or appellants than one, each one of them can make the application.[1-a]

The reversioners or anyone of them can apply to set aside an abatement caused by the death of the widow-plaintiff.[2]

The legal representative of a respondent wishing to bring himself on the record need not apply to set aside an abatement of the appeal.[3]

6 Minor and abatement.—Where an application made on behalf of *A*, a minor, to be brought on the record in the place of *B*, the deceased plaintiff, is dismissed and *A* thereafter makes a second application, it can, in proper cases, be treated as an application under this rule for setting aside the abatement.[1]

7. Limitation. -Under Art. 177 of the Limitation Act, 1908, an application to set aside abatement should be filed within sixty days from the date of the abatement.[1] If the petitioner was prevented by any sufficient cause from making the application within the said period the delay in filing the application may be excused under S. 5 of the Limitation Act.[2] If no applica-

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Note 4.

(1) *Brij Indar Singh* v. *Kanshiram*, 1917 P C 156 (160): 45 Cal 94: 33 Mad L Jour 486: 22 Mad L Tim 362: 6 Mad L W 592: 126 Pun W R 1917: 15 All L J 777: 19 Bom L R 866: 3 Pun L W 313: 26 Cal L Jour 572: 104 Pun Re 1917: 1917 Mad W N 811: 22 Cal W N 169: 127 Pun L R 1917: 42 Ind Cas 43: 44 Ind App 218 P C.

(2) *Amrita Lal Mukerjee* v. *Rukhali Dassi Debi*, (1900) 27 Cal 217 (219): 4 Cal W N 294 [But a person in respect of whose property a vesting order was made on an application to declare him an insolvent, but the proceedings in insolvency are subsequently annulled and he is not declared an insolvent, is not an insolvent, so as to make the rule applicable, and to treat a dismissal for default as an order under this rule].

(3) *Mir Mahaboob Hussain Sahib* v. *Mir Sara juddin Sahib Bahadur*, 1928 Mad 1148 (1149). See also *Sham Sunder Madan Gopal* v. *Fatteh Chand*, 1926 Lah 422 (423): 8 Lah L Jour 451: 27 Pun L R 638: 94 Ind Cas 243.

Note 5.

(1) *Laxmi* v. *Ganpat*, 1921 Nag 23 (24): 17 Nag L R 15: 62 Ind Cas 303.

(1-a) *Sadhusaran* v. *Nandkumar*, 1926 Pat 276 (277): 7 Pat L Tim 746: 1926 Pat H C C 97: 94 Ind Cas 209.

(2) *Ram Kunwar* v. *Badri Singh*, 1926 Jour 175 (2): 3 Oudh W N 949: 98 Ind Cas 1068.

(3) *Ramakrishna* v. *Narasima*, 1932 Mad 527 (527): 36 Mad L W 169: 139 Ind Cas 574.

Note 6.

(1) *Vijayasingh* v. *Shivajirao*, 1924 Bom 416 (416): 26 Bom L R 378: 80 Ind Cas 761.

Note 7.

(1) *Lakshmichand* v. *Kachubai*, (1911) 11 Ind Cas 559 (560): 35 Bom 393: 13 Bom L R 517: *Fatch* v. *Bhanju Ram*, (1917) 41 Ind Cas 730 (731): 1917 Pun W R 49: 1917 Pun Re No 96: *Srimati Priya Sundari Dasya* v. *Golapdi Sheik*, (1919) 51 Ind Cas 534 (535) Cal [And not six months after death of plaintiff].

(2) *Secretary of State* v. *Jwahir Lal*, (1914) 25 Ind Cas 48 (49): 36 All 235: 12 All L J 299; *Lakshmichand* v. *Behari Lal*, 1932 All 459 (460): 1932 All L J 18: 135 Ind Cas 159: 54 All 280; *Janakinath Singha Roy* v. *Nirode Baran Roy*, 1926 Cal 175 (175, 176): 90 Ind Cas 811 [When an application is put in to set aside abatement, a Court should first investigate if the party was lawfully prevented from making the application

O. 22, R. 9, Notes 7—8.

tion is made within sixty days or within the extended time under S. 5 of the Limitation Act, the abatement becomes final and conclusive.[3]

8. "**Sufficient cause.**"—An applicant for setting aside an abatement must show that he had sufficient cause for not taking timely steps to continue the suit.[1] As a matter of practice such cause must be alleged in the petition. It is, however, not legally necessary to do so; all that is necessary is that he should satisfy the Court that there was sufficient cause.[2] The question as to what is sufficient cause depends upon the facts and circumstances of each case.[3] The test to be adopted in determining it is to see whether the mistake or carelessness was real and unintentional and no damage has been done to the other side that cannot be repaired by costs or otherwise, or whether the negligence was culpable or the applicant *mala fide* or irrepairable injury would result to the other side by the granting of the application; in the former case the application must be granted.[3-a] In the latter case, it must be dismissed.[4] In the following cases an abatement was set aside under this rule on the ground of sufficient cause:—

(1) Where, by virtue of an order of the Court, the petitioner *bona fide* believed that no separate application was necessary to implead the legal representatives.[5]

(2) Where the legal representatives of a deceased appellant *bona fide* believed that the co-appellants were prosecuting the appeal and challenging the entire decree.[6]

(3) Where the petitioner was a Government servant and has sent the necessary papers to the vakil but the papers were received by the latter on the last day of limitation after the rising of the Court.[7]

Can ignorance of *law* be pleaded as a sufficient cause for the purposes of this rule? On this question it has been held that while mere ignorance of

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in time and whether in the circumstances he was entitled to the benefit of S 5]. See also *Lachmi Narain* v. *Muhammad Yusuf*, (1921) 59 Ind Cas 903 (904): 42 All 540: 18 All L J 688; *Badri Nath* v. *Raja Ram*, 1932 All 698 (699): 1932 All L J 883.

(3) *Qaim* v. *Nura*, 1926 Lah 234 (235): 7 Lah 73: 94 Ind Cas 422: 27 Pun L R 526; *Shankarbhai Manorbhai* v. *Motilal Ramdas*, 1925 Bom 122 (123): 26 Bom L R 1217: 49 Bom 118: 85 Ind Cas 197.

Cas 594 (595): 21 Oudh Cas 68; *Haji* v. *Janum*, 1926 Lah 137 (138): 89 Ind Cas 162. See also *Ajudhia Parshad* v. *Imam-ud-din*, 1928 Lah 230 (232): 71 Ind Cas 587; *Gurdit Singh* v. *Sawan Mal*, 1926 Jour 91 (2): 97 Ind Cas 142: 8 Lah L Jour 331.

(3-a) *Madhab Gobinda Roy* v. *Bhubaneswar Trigunait*, 1927 Pat 410 (410): 8 Pat L Tim 269: 101 Ind Cas 910 [Appellant acting diligently—Delay excused]. See also *Kartar Singh* v. *Ralia*, (1922) 67 Ind Cas 306 (307): 2 Lah L Jour 44: 77 Pun L R 1922.

Note 8.

(1) *Gopal Lal* v. *Kerani Gope*, (1915) 28 Ind Cas 803 (803) Cal; *Sarat Chandra* v. *Maihar Stone and Lime Co, Ltd.*, 1922 Cal 335 (336, 337): 49 Cal 62: 67 Ind Cas 917; *Ram Prasad* v. *Anandji*, 1922 Cal 408 (409): 49 Cal 524: 69 Ind Cas 885; *Qaim* v. *Nura*, 1926 Lah 234 (235): 7 Lah 73: 94 Ind Cas 422: 27 Pun L R 526; *Daya Singh* v. *Buta Singh*, (1916) 38 Ind Cas 7 (8): 118 Pun Re 1916; *Subbaraya* v. *Govindasami*, 1925 Mad 494 (495): 21 Mad L W 220: 86 Ind Cas 905 [Where no explanation is furnished for the delay of over six months in taking proceedings to set aside an abatement of suit an order excusing such delay is without jurisdiction].

(2) *Kirparam* v. *Bhagat Chand*, 1928 Lah 746 (747): 112 Ind Cas 5.

(3) *Mahmad Askari* v. *Lalu*, (1918) 45 Ind

(4) *Ramachandran* v. *Sabapathi Mudaliar*, 1928 Mad 404 (406): 54 Mad L Jour 234: 27 Mad L W 756: 108 Ind Cas 288.

(5) *Bhari* v. *Khanun*, (1919) 50 Ind Cas 422 (423): 20 Pun Re 1919 [Court had made an order allowing the parties on record to represent all the persons interested under O 1, R 8, C P Code]: *Tofa Lal* v. *Moinuddin Mirza*, 1925 Pat 765 (770): 4 Pat 448: 1925 Pat H C C 345: 7 Pat L Tim 431: 93 Ind Cas 129.

(6) *Chandra Kumar* v. *Sandhyamoni*, (1909) 2 Ind Cas 412 (413): 36 Cal 418: 13 Cal W N 338.

(7) *Dr Sadiq Ali* v. *Anwar Ali*, 1923 All 44 (47): 20 All L J 801: 45 All 66: 70 Ind Cas 805.

law without anything more, will not constitute "sufficient cause" for the purposes of this rule,[8] it cannot be laid down as an inflexible rule that it can never be a sufficient cause for excusing the delay.[9] Thus where the original period of limitation prescribed had been shortened by an amending Act and, in ignorance thereof the application was made after the expiry of the shorter period, it was held that there was sufficient cause.[10] O. 22, R. 9, Note 8.

On the question whether the fact that the applicant under this rule, was ignorant of the *death of the party* whose legal representatives had to be brought on the record, would constitute a sufficient cause for setting aside an abatement, it has been held that if the ignorance is due to carelessness or want of diligence on the part of the petitioner it will not constitute a sufficient cause.[11] Where on the other hand, it is not due to any want of reasonable diligence on his part, or it is due to events beyond his control it will constitute sufficient cause.[12] Thus, where the ignorance was due to the fact that the applicant was herself a pardanashin lady[13] or that the deceased was a pardanashin lady,[14] or that the applicant lived far away from the place where the deceased lived.[15] the abatement was set aside.

The negligence or forgetfulness of an agent especially appointed to look after the suit or appeal is not a sufficient cause to set aside an abatement.[16] But the *collusion* of the agent with the opposite side, will be a sufficient ground

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(8) *Ohajmal Das* v. *Jagadamda Prasad*, (1889) 11 All 408 (414, 415): 1888 All W N 111; *Fatta* v. *Sikandar*, (1920) 56 Ind Cas 927 (928): 2 Lah L Jour 442: 2 U P L R (Lah) 112; *Alladitta* v. *Ziadat*, 1885 Pun Re No 39; *Karamchand* v. *Lehna*, (1912) 15 Ind Cas 708 (709): 1912 Pun L R 204: 1912 Pun W R 257: 1 Pun L R 1912 Sup; *Hadu* v. *Lala*, (1915) 21 Ind Cas 951 (952): 1915 Pun Re No 41: 1914 Pun L R 15: 1914 Pun W R 16; *Inant* v. *Ganga*, (1916) 32 Ind Cas 829 (830, 831): 3 Pun Re 1916: 260 Pun W R 1915; *Gurmuck Singh* v. *Kanshi Ram*, (1915) 27 Ind Cas 681 (683): 53 Pun L R 1915: 253 Pun W R 1915 [Ignorance of law combined with carelessness is not]; *Walayat Khan* v. *Must Malan*, 1922 Lah 30 (30): 5 Lah L Jour 119; *Nandu* v. *Bhuwanoo*, 1929 Nag 74 (75): 117 Ind Cas 282; *Janganath* v. *Rae Madho Parshad*, (1900) 3 Oudh Cas 13 (16).

(9) *Ghulam Shah* v. *Mallick Muzaffar*, (1886) Pun Re No 81; *Amir Bux* v. *Dula*, 1889 Pun Re No 43.

(10) *Kariappa Fakirappa* v. *Tantappa*, 192: Bom 40 (40): 70 Ind Cas 832; *Niaz Ahmed Khan* v. *Abdul Latif*, 1923 Lah 475 (475): 83 Ind Cas 807; *Vaithinatha Aygar* v. *Govindasami Udayar*, 1921 Mad 650 (651): 1921 Mad W N 338: 41 Mad L Jour 65: 13 Mad L W 522: 62 Ind Cas 795.

(11) *Munshi Ram* v. *Radhakishen*, 1924 Lah 461 (461, 462): 6 Lah L Jour 192: 80 Ind Cas 694; *Hajt* v. *Jaoun*, 1926 Lah 137 (138): 89 Ind Cas 162; *Gobind Prasad* v. *Ganga Prasad*, (1914) 24 Ind Cas 275 (276) Oudh: *Chuni Lal* v. *Kala Khan*, 1922 Lah 61 (61): 4 Lah L Jour 171: 67 Ind Cas 596: 34 Pun W R 1922; *Surat Chand Sarkar* v. *Maihar Stone and Lime Co. Ltd*, 1922 Cal 335 (336, 337): 49 Cal 62: 67 Ind Cas 917; *Muhamad Askari* v. *Lalu*, (1918) 45 Ind Cas 594 (595): 21 Oudh Cas 68; *Nant Bakah* v. *Nabban Saheb*, 1925 Oudh 306 (307): 81 Ind Cas 585; *Mahanth Ramperkash Das* v. *Kunj Lal*, 1924 Pat 126 (127): 4 Pat L Tim 567: 79 Ind Cas 414; *Phulwati* v. *Maheshwari Prosad Singh*, 1924 Pat 607 (607): 5 Pat L Tim 319: 75 Ind Cas 909; *Mir Nawab* v. *Hardeo*, (1911) 12 Ind Cas 871 (871): 60 Pun Re 1911: 42 Pun L R 1911: 238 Pun W R 1911; *Muhammad Subhan Bakhsh* v. *Abdul Rahman Khan*, (1915) 30 Ind Cas 717 (718): 81 Pun W R 1915: 155 Pun L R 1915; *Thakur* v. *Narain Singh*, (1915) 31 Ind Cas 697 (697): 12 Pun W R 1916; *Arur Singh* v. *Todar Mal*, (1919) 49 Ind Cas 501 (503): 22 Pun W R 1919. See also *Anmol Singh* v. *Hari Shankar Lal*, 1930 All 779 (783): 1930 All L J 825: 126 Ind Cas 20: 52 All 910; *Sardara* v. *Allahyar*, 1923 Lah 132 (133): 73 Ind Cas 604 [No reason shown as to what prevented ascertainment of death—Delay not excused]; *Sinniammal* v. *Palaniappa Chetty*, 1927 Mad 707 (707): 1927 Mad W N 222: 38 Mad L Tim 330: 102 Ind Cas 118.

(12) *Daya Singh* v. *Buta Singh*, (1916) 38 Ind Cas 7 (8): 118 Pun Re 1916; *Lakshmi Chand* v. *Bihari Lal*, 1932 All 459 (460): 1932 All L J 18: 135 Ind Cas 159: 54 All 280; *Lilo Sonar* v. *Jhagru Shahoo*, 1925 Pat 123 (124): 3 Pat L R 97: 6 Pat L Tim 318: 3 Pat 853: 85 Ind Cas 25. See also *Ganan* v. *Baksha*, 1887 Pun Re No 42.

(13) *Durga Devi* v. *Shiv Ram*, 1932 Lah 148 (149): 32 Pun L R 822: 135 Ind Cas 607.

(14) *Hira Saran Singh* v. *Syed Md Erudat Hussain*, 1925 Pat 162 (164): 2 Pat L R 279: 85 Ind Cas 1010; *Nathsahai* v. *Imam Reza*, 1924 Pat 319 (320): 74 Ind Cas 912.

(15) *Tirath Ram* v. *Muhammad Abdul Rahim Shah*, 1923 Lah 546 (547): 73 Ind Cas 616; *Jawala Ram* v. *Hari Kishen Singh*, 1924 Lah 429 (429): 5 Lah 70: 80 Ind Cas 690; *Sayed Muhammad Mohsin* v. *Saiyed Muhammad Abid*, 1926 Jour 158 (4): 91 Ind Cas 560; *Dadu* v. *Kadu*, 1907 Pun Re No 113: 194 Pun W R 1907: *Allahyar* v. *Thakar Das*, (1918) 44 Ind Cas 9 (10): 24 Pun L R 1918: 46 Pun W R 1918; *Raghu Nath Rai* v. *Radha Kishan*, 1929 Lah 634 (635): 119 Ind Cas 759.

(16) *Tarini Kumar Dutt* v. *Gopeswar Pal Chowdhury*, (1910) 7 Ind Cas 391 (392): 12 Cal L Jour 615.

O. 22, R. 9, Notes 8—9.

for setting aside the abatement.[17] Where the applicant gave instructions in time to her vakil to bring on record the legal representatives, but owing to a mistake of the vakil in failing to notice the change effected in the period prescribed for such an application, the application was not filed in time it was held that the delay should be excused.[18]

The fact that succession to the estate of the deceased is in doubt or is in dispute will not be a sufficient cause for not filing an application in time.[19]

Where an application, to add legal representatives, is filed after the period of limitation has expired, the Court may either first set aside the abatement by getting an application filed for the purpose and then substitute the legal representatives,[20] or in exceptional cases, even treat the application as one to set aside the abatement and pass necessary orders thereon.[21] Where such an application is allowed without objection, the time will be deemed to have been extended and the legal representatives to have been properly brought on the record.[22] Where the lower Court has considered all the circumstances and has decided that there is no sufficient cause[23] or has extended the time for substitution[24] the appellate Court will not interfere with the decision.

Where an application has been made under this rule within time a *bona fide* mistake therein can be corrected after the limitation period.[25]

9. Formal order of abatement, if necessary before setting aside abatement.—In cases under the old Code it was held that when a formal order of abatement had not been passed, the proper procedure on an application to revive the suit was to pass first an order of abatement and then an order setting aside the abatement.[1]

Under the present Code an abatement takes place automatically without any order and such abatement can be set aside on application under this rule even where no formal order declaring the abatement has been passed.[2] *See* Note 11.

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(17) *Shiba Prasad Jana* v. *Hati Maity*, (1919) 53 Ind as 585 (586) Cal.

(18) *Vaithinatha Ayyar* v. *Govindasami Udayar*, 1921 Mad 650 (651): 1921 Mad W N 338: 41 Mad L Jour 65: 13 Mad L W 522: 62 Ind Cas 795.

(19) *Gopal Lal* v. *Kerani Gope*, (1915) 28 Ind Cas 803 (804) Cal; *Kayroon Bee* v. *The Administrator-General of Madras*, (1915) 31 Ind Cas 38 (40, 41): 2 Mad L W 948; *Kandasami Chetty* v. *Muruqappa Chetty*, (1915) 26 Ind Cas 472 (474): 16 Mad L Tim 547. But see *Akhtar Husain* v. *Qudrat Ali*, 1924 Oudh 83 (84): 26 Oudh Cas 244: 73 Ind Cas 215 [But the fact that the legal representatives were minors who would not have obtained execution without obtaining a succession certificate is sufficient reason to execuse the delay].

(20) *Ram Protab Chowdhry* v. *Lal Chand*, (1905) 9 Cal W N 369 (370).

(21) *Satish Chandra Bhattacharjee* v. *Sri Jogannessa Bibi*, 1924 Cal 633 (634): 39 Cal L Jour 434: 51 Cal 690: 78 Ind Cas 958: 28 Cal W N 559: 83 Ind Cas 438.

(22) *Charan Singh* v. *Ram Dayal Lal*, 1925 Lah 599 (599): 26 Pun L R 204: 87 Ind Cas 632.

(23) *Komarasami Chetty* v. *Sundara Mudaliar*, 1926 Jour 87 (8): 23 Mad L W 212: 92 Ind Cas 724.

(24) *Gopi Mal* v. *Panna Lal*, 1924 Lah 339 (342): 72 Ind Cas 424.

(25) *Ali Nabi* v. *Habibunnissa*, 1927 Oudh 170 (172): 4 Oudh W N 328: 100 Ind Cas 802.

Note 9.

(1) *Fulavahu* v. *Gokuldas Valabdas*, (1885) 9 Bom 275 (278, 279); *Ram Protap* v. *Lal Chand*, (1904) 9 Cal W N 369 (370).

(2) *Churya* v. *Rameshwar*, 1926 All 217 (220): 93 Ind Cas 313: 24 All L J 369: 48 All 334 F B. But see *Musst Gujrati* v. *Sital Misser*, 1922 All 209 (210): 44 All 459: 66 Ind Cas 554; *Tulsi Ram* v. *Municipal Board, Shahjahanpur*, 1930 All 379 (380): 127 Ind Cas 419: [1922 All 209 diss]; *Vijayasingh* v. *Shivajirao*, 1924 Bom 416 (417): 26 Bom L R 378: 80 Ind Cas 761 [If no formal order, application for substitution may, in suitable cases, be taken as one to set aside abatement]; *Nand Ram* v. *Mt Ralli*, 1927 Lah 865 (865): 26 Pun L R 650: 105 Ind Cas 556 [One of the defendants in a suit died and his legal representatives were not brought on the record in time. The Court passed an order that the suit abated as against him and also decided

10. Cause of action in the revived suit.—When a suit is revived under this rule it must be continued on the *same cause of action;* no new cause of action can be introduced into it.[1] O. 22, R. 9, Notes 10—13.

11. Substitution without setting aside abatement.—Strictly speaking, where an abatement has taken place, it should first be set aside before a substitution of the legal representative is ordered.[1] This rule is strictly applied in the Patna High Court.[2] In Bombay[3] and Allahabad[3-a] a more liberal interpretation is adopted and the substitution of legal representatives without first setting aside the abatement has been held to be a mere irregularity which does not vitiate the decision In a Calcutta case where such substitution was ordered without objection by the other side it was held that the decision cannot, in an appeal from the final order, be objected to on that ground.[4]

An application for substitution may, in substance, be treated as an application to set aside abatement.[5] This, however, should not be done when the merits of the case are against the petitioner.[6]

12. Remand.—Where an Appellate Court finds that there was an abatement in the lower Court, it should not proceed to set aside the abatement but should remand the case for disposal under this rule.[1]

Where an Appellate Court finds that the lower Court's refusal to set aside abatement is wrong and remands the application for rehearing the remand is not a final order.[2]

13. Appeal.—No appeal lies from an order *setting aside* an abatement.[1] Under the Code of 1877 there was no appeal even from an order *refusing to set aside* an abatement. But under the Code of 1882 as well as the present Code

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at the same time that this partial abatement resulted in the total abatement of the suit. Held, that though that portion of the order which decided that the suit had abated *in toto* may be a decree, the order declaring the partial abatement was one which could be set aside on an application under O 22, R 9, C P Code].

Note 10.

(1) *Umrao Begum* v. *Irshad Hussain*, (1894) 21 Cal 997 (1005): 21 Ind App 163: 6 Sar 469. R & J 135 P C; *Sham Chand* v. *Bhagwan*, (1895) 22 Cal 92 (99).

Note 11.

(1) *Romesh Chandra Das* v. *Anthony Pacheco*, (1915) 29 Ind Cas 470 (471) Cal.

(2) *Mt Bibee Khozaima* v. *The Official Liquidator of the Kayastha Trading and Banking Corporation*, 1923 Pat 117 (118): 2 Pat 168: 84 Ind Cas 1001.

(3) *Lakshmibai* v. *Yeshwant*, 1922 Bom 449 (449): 47 Bom 92: 75 Ind Cas 283: 24 Bom L R 909; *Sitharam* v. *Anant*, 1927 Bom 150 (156): 29 Bom L R 214: 101 Ind Cas 129.

(3-a) *Badri Nath* v. *Raja Ram*, 1932 All 698 (699): 1932 All L J 883.

(4) *Jogunnessa Bibi* v. *Satish Chandra Bhattacharjee*, 1924 Cal 633 (634): 28 Cal W N 559: 39 Cal L Jour 431: 51 Cal 690: 83 Ind Cas 438.

(5) *Lachmi Narain* v. *Muhammad Yusuf*, (1921) 59 Ind Cas 903 (904): 42 All 510: 18 All L J 688; *Badlu* v. *Mt Narain*, 1924 Lah 424 (424): 74 Ind Cas 17; *Kirparam* v. *Bhagatchand*, 1928 Lah 746 (747): 112 Ind Cas 5.

(6) *Seshamma* v. *Veeranki Peda Venkata Rao*, 1924 Mad 713 (714): 34 Mad L Tim 196: 19 Mad L W 608: 1924 Mad W N 633: 80 Ind Cas 379: 47 Mad L Jour 235; *Janakinath Singha Ray* v. *Niroddaran Ray*, 1930 Cal 422 (424): 57 Cal 148: 124 Ind Cas 817.

Note 12.

(1) *Amarsangji* v. *Desai*, 1925 Bom 290 (291): 27 Bom L R 91: 86 Ind Cas 31.

(2) *Mumtaz-ud-daula* v. *Skinner*, 1925 All 263 (264): 23 All L J 12: 6 L R (All) 175: 86 Ind Cas 161: 47 All 335.

Note 13.

(1) *Nidha Lal* v. *Collector of Bulandshar*, (1916) 35 Ind Cas 209 (210): 14 All L J 610; *Mahomed Nurul Amin* v. *Mondhar Soran Deb Mohanta*, 1925 Cal 473 (474): 40 Cal L Jour 588: 85 Ind Cas 100: 29 Cal W N 675: 52 Cal 472 [An order setting aside an abatement cannot be questioned in an appeal from the decree]; *Seshamma* v. *Venkata Rao*, (1924) 80 Ind Cas 397 (399): 34 Mad L Tim 196: 19 Mad L W 608: 47 Mad L Jour 15: 1924 Mad W N 633: 1924 Mad 713 (715) [An order setting aside abatement passed without jurisdiction is liable to revision]; *Hem Kanta Ghosh* v. *Manoj Prova Singha*, 1926 Cal 444 (445): 87 Ind Cas 173 [Order setting aside abatement without considering the limitation for making application for setting aside is liable to revision].

O. 22, R. 9, Notes 13—15.

an appeal is allowed from such an order.[2] But no such appeal will lie when there has been no application to the Court to set aside the abatement.[3] An order refusing to set aside an abatement in an appeal cannot be appealed against.[4] *See also* Note 14.

14. Letters Patent Appeal.—The Allahabad[1] and Calcutta[2] High Courts have held that an order of *a single judge* setting aside an abatement in an appeal is a "judgment" within the meaning of Cl. 10 of the Letters Patent (Cl. 15 of the Letters Patent of the Calcutta High Court) and that therefore a Letters Patent appeal is competent from such an order.

An order setting aside an abatement passed by a *Division Bench* of the High Court, cannot, according to the Madras High Court, be set aside by another Bench of the High Court. The remedy is by way of review.[3]

15. Revision.—Generally speaking no revision lies from an order under this rule.[1] But where the order is passed without jurisdiction[2] or without adverting to the bar of limitation involved[3] a revision will lie.

O. 22, R. 10.

R. **10.** [S. 372.] (1) In (other cases of an *assignment*,[4] *creation*[8] or devolution[9] of any interest[5] *during the pendency of a* suit),[13] the suit may, (by leave of the Court,[18] be continued by or against the person to *or upon* whom such interest has come *or devolved*.

Procedure in case of assignment *before final order in suit.*

(2) *The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule* (1).

[1877—S. 372. *See* S. 146.]

Synopsis.

1. Legislative changes.
2. Scope and applicability of the rule.
3. Other cases of assignment, creation or devolution of interest pending suit.
4. Assignment of interest.
5. "Interest."
6. Trial Court can bring assignee on record pending an appeal.
7. Transfer of decree.
8. Creation of interest.

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(2) *Benode Mohini* v. *Sharat Chander*, (1882) 8 Cal 837 (841): 10 Cal L Rep 449: 7 Ind Jur 26; *Badhu* v. *Naraini*, 1924 Lah 424 (424): 74 Ind Cas 17; *Raghbir Saran* v. *Mst Sohan Devi*, 1925 Lah 456 (456): 26 Pun L R 32: 86 Ind Cas 104.

(3) *Thakar Das* v. *Parmanand*, (1911) 13 Ind Cas 963 (968): 1911 Pun Re No 95: 262 Pun W R **1911.**

(4) *Akkas Mia* v. *Abdul Aziz*, 1929 Cal 532 (533): 33 Cal W N 881: 49 Cal L Jour 538.

Note 14.

(1) *Sadiq Ali* v. *Anwar Ali*, 1923 All 44 (46): 45 All 66: 20 All L J 801: 70 Ind Cas 805.

(2) *Sarat Chand Sarkar* v. *Maihar Stone and Lime Co, Ltd*, 1922 Cal 835 (835): 49 Cal 62: 67 Ind Cas 917.

(3) *Muruga Chetty* v. *Rajasami*, (1915) 30 Ind Cas 669 (672): 29 Mad L Jour 574: 2 Mad L W 813: 18 Mad L Tim 327: 1915 Mad W N 701.

Note 15.

(1) *Gaeble* v. *Ramayi Ammal*, (1914) 24 Ind Cas 781 (781): 1 Mad L W 232; *Bhupal Kurmi* v. *Pearey Lal*, (1921) 63 Ind Cas 230 (230) All; *Shivashankar* v. *Kamakhya Narayan*, 1933 Pat 27 (28): 13 Pat L Tim 692.

(2) *Seshamma* v. *Veeranki Peda Venkata Rao*, 1924 Mad 713 (715): 34 Mad L Tim 196: 19 Mad L W 608: 47 Mad L Jour 235: 1924 Mad W N 633: 80 Ind Cas 397.

(3) *Hem Kanta Ghosh* v. *Monoj Prova Singha*, 1926 Cal 444 (445): 87 Ind Cas 178.

9. Devolution of interest.
10. Insolvency of defendant.
11. Representative suits. See Note 9, supra.
12. Annulment of order of adjudication.
13. "During the pendency of the suit."
14. Application under this rule when to be made.
15. Execution proceedings.
16. Laches.
17. No new suit.
18. "By leave of Court."
19. Effect of adding new parties under this rule.
20. Appeal.
21. Letters Patent appeal.
22. Limitation.

No application—Effect of. See Note 2, Pt. (2) and Note 9, Pt. (10) and Note 14, Pts. (3).

Sub-Rule (2). See Note 8, Pts. (3) and (4).

Personal actions. See Note 9, Pt. (11) and Note 10, Pts. (3).

1. Legislative changes.—

1. The words "given either with the consent of all parties or after service of notice in writing upon them and hearing their objections, if any", which occurred in the old section have been omitted.
2. The words "or devolved" in the present sub-R. (1) are new.
3. The words "either in addition to or in substitution for the person from whom it has passed, as the case may be" which occurred in the old section, have been omitted.
4. Sub-R. (2) is new.

2. Scope and applicability of the rule.—The rule is an enabling one.[1] It is based on the principle that the trial of a suit cannot be arrested merely by reason of a devolution of the interest of a party in the subject-matter of the suit: that the person acquiring the interest may continue the suit with the leave of the Court: but that if he does not choose to do so the suit may be continued with the original party and the person acquiring the interest will be bound by, or can have the benefit of, the decree as the case may be.[2]

The rule applies to appeals in cases where the devolution takes place pending appeal.[3] It applies equally to cases of devolution of the interest of the *plaintiff* or of the *defendant*[4] and to the case of appellants as well as that of the respondents.[5]

In order that this rule may apply,

1. There must be an *assignment, creation* or *devolution* of an interest in the subject-matter of the suit.[6]

Order 22, Rule 10—Note 2.

(1) *Akula Paradesi* v. *Dhelli Jagannadha Rao*, (1905) 28 Mad 157 (160).

(2) In the matter of the Petition of *Sarat Chandra Singh*, (1915) 26 Ind Cas 410 (412): 20 Cal L Jour 107.

(3) *Gokal Chand* v. *Sarat Chandra*, (1896) 18 All 285 (287): 1896 All W N 45; In the matter of the Petition of *Durga Prasad*, (1900) 22 All 231 (232, 233): 1900 All W N 79; *Rajaram* v. *Jibai*, (1885) 9 Bom 151 (156, 157).

(4) *Kristokumar Das* v. *Girish Chandra Poddar*, (1915) 27 Ind Cas 704 (705) Cal.

(5) In the matter of *Sarat Chandra Singh*, (1896) 18 All 285 (287): 1896 All W N 45.

(6) *Currimbhoy & Co. Ltd* v. *L A Creet*, 1930 Cal 113 (126, 127): 50 Cal L Jour 208: 57 Cal 170: 123 Ind Cas 250; *Maharaja Kesho Prasad Singh* v. *Lal Brijmohan Lal*, (1917) 38 Ind Cas 154 (156): 2 Pat L Jour 199: 1 Pat L W 355; *Rudra Nath Tewari* v. *Bhujanga Prasad Singh*, 1930 Pat 145 (146): 8 Pat 900: 122 Ind Cas 235.

O.22, R.10, Notes 2—3.

2. Such assignment, creation or devolution of interest must be by, or from, a *party* to the suit and not a stranger.[7] Thus an assignee from the *heir* of a deceased plaintiff who was himself not brought on the record, cannot apply under this rule.[8]

3. The person to whom the assignment, creation or devolution of interest takes place must be arrayed on the same side in the suit as the person from whom it has passed.[9]

The rule is a residuary one governing cases *which are not provided for by the previous rules* of the order[10] so that if any of these other rules apply to the facts of a particular case the effect of that rule cannot be got rid of by a resort to this rule.[11] Where, however, there are two devolutions, *viz.*, one by the death of a party (coming under Rr. 3 and 4) and the other, by a transfer of his interest (prior to his death), the transferee has the right to be impleaded under this rule and the death of the plaintiff cannot take away the right.[12]

It should be noted that there is no abatement under this rule.[13]

3. **Other cases of assignment, creation or devolution of interest pending suit.**—As has been seen in Note 2 already this rule provides for all cases not falling within the scope of the previous rules of the order, such as rules 2, 3, 4, 7 and 8.[1] The words "other cases, etc." mean cases other than those specifically provided for in the preceding rules.[2] Those words were in one case held to indicate that the rule did not apply to a case of death.[3] But such a restricted interpretation does not appear to be warranted by the rule. It would seem to apply even to cases of death if such cases do not fall within the provisions of Rr. 3 or 4, *ante*.[4]

As illustrations of "other cases of assignment, creation or devolution of interest" falling within this rule may be mentioned cases of transfer *inter vivos*[5] or cases where a mortgagee party in a suit releases the property to the

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(7) *Lakshmi Achi* v. *Subbarama Ayyar*, (1915) 29 Ind Cas 142 (144): 39 Mad 488: 2 Mad L W 103: 28 Mad L Jour 491: 1915 Mad W N 327: 17 Mad L Tim 385 [A widow of the deceased testator cannot apply to be brought on record as the "legal representative" on the death of the executors who instituted the suit]; *Ammaya Pillai* v. *Narayana Chetty*, 1925 Mad 487 (488): 21 Mad L W 125: 86 Ind Cas 187.

(8) *Kalian Kutti* v. *K T Karnavan*, 1925 Mad 1166 (1166): 87 Ind Cas 402.

(9) *Radha Prasad Singh* v. *Rajendra Kishore Singh*, (1883) 5 All 209 (212): 1882 All W N 220.

(10) *Sahdev Singh* v. *Vidyawati*, 1926 Lah 181 (182): 91 Ind Cas 166.

(11) *Dakoju* v. *Ramadasu*, 1923 Mad 237 (237): 42 Mad L Jour 301 (302): 30 Mad L Tim 202: 15 Mad L W 309: 45 Mad 872: 1922 Mad W N 375: 68 Ind Cas 942; *Chunaghat Kalliam Kutti Amma* v. *Kallingal Tarwad Karnavan*, 1925 Mad 1166 (1167): 87 Ind Cas 402. See also *Ali Bahadur Beg* v. *Rafiullah*, 1927 All 272 (272): **25 All L J 175: 100 Ind Cas** 288: 49 All 310.

(12) *Prokash Chandra* v. *Shama Charan*, 1925 Cal 467 (468): 82 Ind Cas 991 [The two devolutions are distinct. Where this is so the predominant right under one devolution cannot be defeated by the right under the other].

(13) *Mithan Lal* v. *Maya Devi*, 1929 All 444 (446): **27 All L J 921: 121 Ind Cas** 689.

Note 3.

(1) *Macleod* v. *Kisson*, (1906) 30 Bom 250 (258): **6 Bom L R 995.**

(2) *Bhugwan Das Khettry* v. *Nilakanta Ganguli*, (1905) 9 Cal W N 171 (178).

(3) *Jamnadas Chhabildas* v. *Sorabji Kharsedji*, (1892) 16 Bom 27 (28).

(4) *Bhugwan Das Khettry* v. *Nilakanta Ganguli*, (1905) 9 Cal W N 171 (178).

(5) *Muthiah Chettiar* v. *Krishnadoss Varu*, 1921 Mad 599 (603): 44 Mad 919: 41 Mad L Jour 316: 14 Mad L W 287: 1921 Mad W N 649: 69 Ind Cas 337 F B; *Jhangi Ram* v. *Rupan Bai*, 1927 Lah 501 (504): 102 Ind Cas 436 [Where owing to an arrangement in the form of a sale or partition the interest of the deceased respondent vested in the surviving respondent, the appeal may, by leave of Court, continue against the surviving respondent].

mortgagor.[6] Wherein a suit is instituted against a widow for recovery of debt due by her husband and, pending the suit she gives birth to a posthumous son, the son can be brought on the record under the principle of this rule.[7] Where a suit was instituted against the G.I.P. Railway and pending the suit the line was taken over by the Government, it was held that the Government should be made a party under this rule.[8] But there is no "assignment, creation or devolution of interest" by a company going into liquidation.[9] O.22, R.10 Notes 3—6.

4. Assignment of interest.—As pointed in Note 3, *supra* a transfer *inter vivos* such as a sale[1] or any other kind of transfer will come within the rule. It is also not necessary that such transfer should be direct.[2]

5. "Interest."—A right to maintain a suit,[1] the right to recover mesne profits given by a decree[2] and the rights and interests of a *putnidar*[3] are "*interests*" within the meaning of the rule. But the interest must be an interest in the *subject-matter* of the suit[4] or one which is vitally affected by the suit.[5] For instances where the rule was held not to apply on this ground, *see* the cases cited below.[6] The word "interest" includes also a portion of the interest.[7]

6. Trial Court can bring assignee on record pending an appeal.—Where the suit is pending, the mere fact that an appeal is filed from an interlocutory order made in the suit will not deprive the Court of the first instance of its jurisdiction to implead parties under this rule.[1]

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(6) *Rudra Nath Tewari* v. *Bhujanga Prasad Singh*, 1930 Pat 145 (146): 8 Pat 906: 122 Ind Cas 255.

(7) *Baluk Nath* v. *Jugal Kishore*, 1926 All 285 (286): 92 Ind Cas 551: 24 All L J 281.

(8) *G I P Railway* v. *Mahadev Ram*, 1926 All 585 (586): 24 All L J 726: 96 Ind Cas 351.

(9) *National Stores* v. *Ramasaran*, 1926 Nag 303 (303): **9 Nag L J 40: 94** Ind Cas 380.

Note 4.

(1) *Krishnier* v. *Subramania Iyer*, 1924 Mad 648 (648): 84 Ind Cas 122: 46 Mad L Jour 868: 34 Mad L Tim 114: 1924 Mad W N 364; *Sadhu Sah* v. *Hamid Husain Khan*, (1902) 5 Oudh Cas 91 (92); *Ahmedbhoy* v. *Fullebhoy Cassumbhoy*, (1884) 8 Bom 323 (334, 335): 8 Ind Jur 680 [A mortgagee whose security was created prior to the suit and who made a further advance on the same security after the institution of the suit and agreed to buy the property after the termination of the suit was allowed to continue the defence when the mortgagor expressed his intention of abandoning it].

(2) *Prasanna Kumar Panja* v. *Ashutosh Roy*, (1913) 20 Ind Cas 685 (688): 18 Cal W N 450; *Mirza Sadiq Hussain* v. *Mahomed Karim*, 1922 Oudh 289 (290): 9 Oudh L J 156: 70 Ind Cas 53: 25 Oudh Cas 319 [Deed of gift by pre-emptor of his property which gave him right to pre-empt along with the right to continue the pending suit for pre-emption creates an assignment within the meaning of the rule]

Note 5.

(1) *Viswanathanand Devasthanam* v. *Kandaliana Nadar*, 1928 Mad 246 (248): 1927 Mad W N 713: 108 Ind Cas 101.

(2) *Hari Prasad Misser* v. *Kodo Marya*, (1917) 37 Ind Cas 998 (999): 1 Pat L J 427: 3 Pat L W 392.

(3) *Wilson* v. *Government*, (1869) 12 Suth W R 122 (123).

(4) *The Arbuthnot Industrials, Ltd* v. *Muthu Chettiar*, (1908) 31 Mad 464 (466): 4 Mad L Tim 190.

(5) *Harihar* v. *Gendilal*, (1918) 43 Ind Cas 811 (812) Cal.

(6) *Harish Chandra Tewary* v. *Chandpore Co*, (1903) 30 Cal 961 (964) [Where after a decree for money against it a company has assigned all its properties with liabilities, the assignee cannot be proceeded against as no property in suit has been assigned to him]; *Chandmall* v. *Ranee Soondery*, (1895) 22 Cal 259 (265) [In a suit on mere money claim the insolvency of defendant creates no assignment of interest within the meaning of this rule]; *Amrita Rao* v. *Sonabai*, 1925 Nag 423 (426): 89 Ind Cas 605 [Suit by widow for partition of widow's estate. The widow dying no devolution of interest in the suit on the adopted son].

(7) *Muthiah Chettiar* v. *Govindadoss Krishnadoss*, 1921 Mad 599 (600, 603, 605): 14 Mad 919: 1921 Mad W N 649: 69 Ind Cas 337: 14 Mad L W 287: 41 Mad L Jour 316 F B.

Note 6.

(1) *Bhogilal* v. *Duranha*, 1923 Bom 303 (309): 25 Bom L R 308: 75 Ind Cas 743.

O.22, R.10, Notes 7—9.

7. **Transfer of decree.**—The rule has no application to the transfer of the decree in the suit.[1]

8. **Creation of interest.**—A lease created pending a suit for possession and mesne profits is a creation of interest and the lessee can be made a party to the suit under this rule.[1] Where, however, the lease was created after a decree for possession and mesne profits and pending proceedings in ascertainment of the mesne profits, the lessee cannot be impleaded.[2]

Under the old Code an attaching creditor of the decree pending appeal therefrom could not claim to be impleaded in the appeal.[3] But in view of the present sub-R. (2) he can. But even under the present rule, a person who has attached property has been held not entitled to come in, in a mortgage suit regarding the attached properties.[4]

An adoption does not create an interest within the meaning of the rule.[5]

9. **Devolution of interest.**—Where a suit is brought by or against a person in a representative character and a devolution of the representative interest takes place, the rule that is applicable is not rule 3 or rule 4 but rule 10, whether such devolution is by virtue of the death of the person or for any other cause.[1] Thus it will apply to a public trust which is represented at different stages of a suit by different representatives.[1-a] When a trustee dies or retires[2] or is removed from office[3] and another is appointed in his place the estate "devolves" on the new trustee within the meaning of this rule. The fact that the original trustee was wrongly appointed as trustee will not make any difference.[4]

The following are illustrations of other cases of such devolution of interest:—

1. One of four *Uralans* of a Malabar *Devaswam* sued for redemption of a *Kanom*. The other *Uralans* had been made party defendants. One of three latter died pending suit. Held it was a case of devolution under this rule.[5]

Note 7.

(1) *Collector of Muzafarnagar* v. *Hussaini Begum*, (1896) 18 All 86 (87): 1895 All W N 232.

Note 8.

(1) *Ramkumar Lal* v. *Mukund Sahi*, (1917) 38 Ind Cas 237 (238): 1 Pat L Jour 596: 1917 Pat 34: 2 Pat L W 424.

(2) *Manindra Chandra Nandi* v. *Ram Lal Bhagat*, 1922 P C 304 (307): 31 Mad L Tim 131: 27 Cal W N 29: 36 Cal L Jour 542: 16 Mad L W 905: 4 U P L R (P C) 88: 20 All L J 988: 24 Bom L R 1215: 4 L R P C 1: 49 Ind App 220: 68 Ind Cas 973: 1 Pat 581: 4 Pat L Tim 1: 43 Mad L Jour 589 P C.

(3) *Chail Behari* v. *Rahmal Das*, (1898) 20 All 38 (39): 1897 All W N 194.

(4) *Bruel & Co, Bombay* v. *Keshco Rao*, 1926 Nag 67 (68): 89 Ind Cas 446.

(5) *Ganpat Rao* v. *Laxmi Bai*, (1918) 43 Ind Cas 64 (69): 15 Nag L R 24.

Note 9.

(1) *Keshab Rai* v. *Jyoti Prasad*, 1932 Cal 783 (784): 36 Cal W N 816: 139 Ind Cas 123.

(1-a) *Sundaresam Chetty* v. *Viswanath*, 1922 Mad 402 (403): 45 Mad 703: 43 Mad L Jour 147: 1922 Mad W N 444: 16 Mad L W 83: 31 Mad L Tim 66: 72 Ind Cas 103.

(2) *Thirumalai Pillai* v. *Arunachala Padayachi*, 1926 Mad 540 (541): 92 Ind Cas 520.

(3) *Ajaz Hossain* v. *Altaf Hossain*, 1928 Cal 651 (653).

(4) *Ratnam Pillai* v. *Nataraja Desikar*, 1924 Mad 615 (615): 46 Mad L Jour 341: 19 Mad L W 367: 34 Mad L Tim 31: 1924 Mad W N 361: 84 Ind Cas 200.

(5) *V Sekhara Menon* v. *Parameswaran Nambudri*, 1930 Mad 881 (883): 1930 Mad W N 705: 32 Mad L W 261: 59 Mad L Jour 714: 53 Mad 790: 128 Ind Cas 451.

2. The manager of an undivided Mitakshara family files a suit as manager of the family and dies pending suit. The succeeding manager can come in under this rule.[6] **O.22, R.10, Notes 9—10.**

3. The manager of an encumbered estate under the Chota Nagpur Encumbered Estates Act (VI of 1876) files a suit on behalf of the estate. Pending the suit the estate is released and restored to the owner. The owner can come in under this rule.[7]

4. A Receiver appointed in a suit files a suit on behalf of the estate. Pending suit he is discharged and another Receiver is appointed in his place. The latter can come in under this rule.[8]

5. A suit was instituted claiming a right of pre-emption and for possession of property as against the vendor. Pending the suit the vendor's rights devolved on another person under another decree. The latter *person* can be impleaded as defendant under this rule.[9]

In cases of devolution other than by death, it should be noted that if the person on whom the estate devolves does not bring himself on record the decree passed in the suit will be binding on him.[10]

Where the cause of action is purely a *personal* one there can be no devolution of interest.[11] An adoption creates no devolution of interest within the meaning of this rule.[12]

10. Insolvency of defendant.—The rule applies also to the devolution of interest by operation of law.[1] The insolvency of a defendant will cause a devolution of his estate on the Official Receiver or the Official Assignee as the case may be. But the question whether, on the adjudication of a defendant pending suit, the Receiver in insolvency can come in under this rule will depend upon the "interest" involved in the suit[2]. If it is a suit *in personam* such as for instance a mere money suit, no interest devolves on the Receiver or Assignee and he cannot come in under this rule.[3] But if it is a suit relating to the "estate," such as a suit to enforce a mortgage, the Receiver or Assignee is

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(6) *Beefraj* v. *Bhyro Persad*, (1896) 23 Cal 912 (912).

(7) *Sourindra Mohun Tagore* v. *Sreemoni Debi*, (1901) 28 Cal 171 (175, 176): 5 Cal W N 307.

(8) *Bepin Behari* v. *Bonnerjee*, 1921 Cal 422 (423): 26 Cal W N 361: 70 Ind Cas 104.

(9) *Lakha Ram* v. *Jhindu*, 1887 Pun Re No 29.

(10) *Bepin Behari* v. *Bonnerjee*, 1921 Cal 422 (423): 26 Cal W N 361: 70 Ind Cas 104; *Sivakasi Viswanathaswami Devasthanam* v. *Koodalinga Nadar*, 1928 Mad 246 (248): 1927 Mad W N 743: 108 Ind Cas 401.

(11) *Bheema Raut* v. *Durga Prosad*, (1912) 16 Ind Cas 908 (909): 40 Cal 323: 17 Cal L Jour 183 [Suit against sole surviving member of committee appointed under S 3 of Religious Endowments Act—Death of member—Newly appointed members of committee, not to be substituted—Cause of action purely personal]; *Har Narain Das* v *Gajraj Singh*, 1930 Oudh 51 (52): 119 Ind Cas 366 [*A*, the acknowledged Zamindar, at the time sued for arrears of rent. Subsequently it was held in a suit that *B* and not *A* was the Zamindar. *B* cannot continue the suit for arrears of rent under this rule. But if he is allowed to do so without objection the objection cannot be taken in appeal].

(12) *Gaupatrao* v. *Laxmi Bai*, (1918) 43 Ind Cas 64 (69): 15 Nag L R 24.

Note 10.

(1) *Miller* v. *Budh Singh*, (1891) 18 Cal 43 (44).

(2) *Puninthavelu Mudaliar* v. *Bhashyam Ayyangar*, (1902) 25 Mad 406 (413, 421, 423): 12 Mad L Jour 282.

(3) *Chandmull* v. *Ranee Soondery*, (1895) 22 Cal 259 (266); *Jethalal Kalianji* v. *Gangaram Naoomal*, (1915) 29 Ind Cas 30 (31): 8 Sind L R 325; *Uttamchand* v. *Nago*, 1933 Nag 6 (9): 28 Nag L R 340.

O.22, R.10, Notes 10—14.

entitled to come in and should be impleaded.[4] If in such cases the Receiver or Assignee refuses to defend the suit, the insolvent cannot on that ground defend it.[5] If, however, the suit is of such a nature that it can go on without the insolvent defendant, the Receiver need not be made a party.[6]

See also Note 14 to O. 34, R. 1.

11. Representative suits.—*See* Note 9, *supra*.

12. Annulment of order of adjudication.—Where, pending a suit instituted by the Official Assignee, the adjudication is annulled without any conditions, the *quandom* insolvent is entitled to be substituted as plaintiff under this rule.[1]

13. "During the pendency of the suit."—The rule does not apply unless the assignment, creation or devolution of interest takes place *during the pendency of the suit*. Thus it does not apply, if the assignment, creation or devolution of interest takes place *before the suit is instituted*.[1] Where, however, the suit has been instituted it is pending so long as the final decree has not been passed in it; the rule is thus applicable to cases of assignment, creation or devolution of interest, after the preliminary and before final decree.[2] In fact the Courts which hold Rr. 3 and 4 do not apply to cases of death after the preliminary decree, hold that this rule applies to such cases.[3]

There is considerable doubt as to whether this rule authorises the addition of a party to the suit after decree:[4] and the rule has been held not to apply to cases of assignment of interest between the date of the decree and the date of the filing of the appeal, though the assignee can be joined in the appeal.[5] Similarly where a decree has been amended the question whether the rule is applicable to cases of assignment, etc., of interest between the original and the amended decree has been left undecided.[6]

14. Application under this rule when to be made.—The rule provides for a *continuation* of the suit by the assignee or other person on whom the

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(4) *Kala Chand* v. *Jagganath*, 1927 P C 108 (109, 111): 54 Ind App 190: 54 Cal 595: 52 Mad L Jour 734: 29 Bom L R 882: 31 Cal W N 741: 101 Ind Cas 442: 45 Cal L Jour 544: 25 All L J 621: 1927 Mad W N 485: 39 Mad L Tim 5: 26 Mad L W 268, P C.

(5) *Tribhuvandas* v. *Abdullally*, (1915) 28 Ind Cas 506 (507): 17 Bom L R 209: 39 Bom 568.

(6) *Prince Victor N Narayan* v. *Bhairabendra Narayan Deb*, 1930 Cal 388 (390): 34 Cal W N 53: 125 Ind Cas 851.

Note 12.

(1) *Raja Sajan* v. *N C Macleod*, (1908) 32 Bom 321 (334): 10 Bom L R 178.

Note 13.

(1) *The Equitable Trust Co* v. *Hafiz Mohammad Halim and Co*, 1928 All 120 (123): 25 All L J 985: 108 Ind Cas 699; *Golap Khan* v. *Bhola Nath Marik*, (1910) 7 Ind Cas 481 (482): 12 Cal L Jour 545; *Krishna Ayyar* v. *Subramania Ayyar*, 1924 Mad 648 (649): 46 Mad L Jour 368: 34 Mad L Tim 114: 1924 Mad W N 364: 84 Ind Cas 122 [Court auction held before suit—Sale confirmed pending suit—Held sale dates back—So no transfer pending suit—R 10 does not apply].

(2) *Ohuni Lal* v. *Abdul Ali Khan*, (1901) 23 All 331 (334, 335, 338): 1901 All W N 91; *Lakshan Chunder* v. *Nikhunjamoni*, 1924 Cal 188(189): 80 Ind Cas 538: 27 Cal W N 755; *Bapu* v. *Gulabchand*, 1929 Nag 142 (144): 116 Ind Cas 657 F B; *Shankar* v. *Kutubuddin*, 1930 Nag 212 (213): 123 Ind Cas 473.

(3) *Tularam* v. *Tukaram*, 1921 Nag 32 (33, 34): 17 Nag L R 81: 64 Ind Cas 307.

(4) *Raghunath Das* v. *Sundar Das Khetri*, 1914 P C 129 (131): 42 Cal 72: 18 Cal W N 1058: 1 Mad L W 567: 27 Mad L Jour 150: 16 Mad L Tim 353: 1914 Mad W N 747: 18 Bom L R 814: 20 Cal L Jour 555: 13 All L Jour 154: 24 Ind Cas 304: 41 Ind App 251 P C; *S V Sitaramaswamy* v. *D Lakshmi Narasamma*, (1918) 48 Ind Cas 840 (841): 8 Mad L W 21: 41 Mad 510.

(5) *Narain Singh* v. *Deputy Commissioner, Partabgarh*, (1917) 38 Ind Cas 511 (511, 512): 20 Oudh Cas 31.

(6) *Narayana Ayyar* v. *Biyari Bivi*, 1923 Mad 57 (58): 1922 Mad W N 731: 16 Mad L W 623: 69 Ind Cas 977: 32 Mad L Tim 98: 43 Mad L Jour 559.

interest has devolved. Therefore, on the one hand, an application under the rule can be made at any time when the suit is pending.[1] On the other it cannot be made after a final decree has been passed.[2] O.22, R.10, Notes 14—16.

The fact that the assignee made no application when the suit was pending will not, however, debar him from filing an appeal from the decree as a person claiming under the party within the meaning of S. 146.[3] An application under this rule may also be made to the appellate Court during the pendency of an appeal from the decree.[4]

15 Execution proceedings.—There is a conflict of views on the question whether the rule applies to execution proceedings. On the one hand, the facts that the rule relates to assignment before the final order in the suit, that it relates to assignments *pending suit* and that it provides for a continuation of the *suit*, have been relied on for holding that the rule does not apply to execution proceedings. On the other hand the fact that Rule 12 makes no mention of this rule as one of these not applicable to execution has been relied upon for holding that by implication, this rule applies to execution proceedings also. The former view prevails in Allahabad[1] and Calcutta.[2] In Patna the applicability of the rule to such proceedings has been doubted.[3] In Madras the corresponding section of the old Code was held not to apply to execution proceedings.[4] A Full Bench of the High Court, however, held by a majority that the present rule was applicable to execution proceedings.[5] But this decision has been explained away in later cases which have held the rule inapplicable to execution proceedings.[6]

16. Laches.—This rule vests in the Court a discretion in the matter of allowing the suit to be continued by or against the assignee; and the permission may be refused on sufficient grounds. Thus, delay or laches will be a ground for refusing permission under this rule.[1]

Note 14.

(1) *Kader Bux Patwari* v. *Salimuddi Hazi*, 1930 Cal 267 (269): 50 Cal L Jour 543: 126 Ind Cas 401; *Muhammad Masih Ullah Khan* v. *Jaroobai*, (1915) 27 Ind Cas 771 (772): 37 All 226: 13 All L J 307 [In suits requiring a preliminary and a final decree the application can be made at any time before the final decree]; *Surendra Keshub Roy* v. *Khetter Kristo Mitter*, (1903) 30 Cal 609 (611): 7 Cal W N 517. (Do.)

(2) *Sitaramaswami* v. *D Lakshmi Narasimma*, (1917) 48 Ind Cas 840 (841): 41 Mad 510: 8 Mad L W 21; *Genaram* v. *Hanmant Rao*, 1926 Bom 406 (408): 28 Bom L R 761: 96 Ind Cas 853. *Cunningham Sircar* v. *Fred Stephens*, 1931 Cal 51 (51): 57 Cal 1143: 130 Ind Cas 907; *Subba Pillai* v. *Ranganwami*, (1917) 40 Ind Cas 846 (847): 1917 Mad W N 306, *Srinivasa Ayyangar* v. *Pratapa Simha Rajah Saheb*, 1926 Mad 244 (245): 22 Mad L W 860: 49 Mad L Jour 704: 91 Ind Cas 820.

(3) *Sitaramaswami* v. *D Lakshmi Narasimma*, (1917) 48 Ind Cas 840 (842): 41 Mad 510: 8 Mad L W 21.

(4) *Rajani Kanta Roy* v. *Raju Jyoti Prasad*, 1924 Cal 90 (91): 27 Cal W N 710: 75 Ind Cas 255.

Note 15.

(1) *Goodall* v. *The Mussouri Bank Ltd*, (1888) 10 All 97 (106): 1887 All W N 238. See also *Nader* v. *Khazan*, 1930 All 604 (604): 128 Ind Cas 398: 1930 All L J 1279 [Not decided].

(2) *Midnapore Zemindari Co. Ltd* v. *Kumar Naresh Narain*, (1911) 11 Ind Cas 939 (940): 39 Cal 220: 16 Cal W N 109. But see *Hem Chandra Banerjee* v. *Annapurna Debi*, 1932 Cal 423 (425): 36 Cal W N 93: 138 Ind Cas 64 [Held doubtful].

(3) *Mt Gulab Kuer* v. *Syed Mohamed Zaffar*, 1921 Pat 180 (181): 6 Pat L Jour 358: 2 Pat L Tim 619: 62 Ind Cas 30.

(4) *Arbuthnot's Industrials Ltd* v. *Muthu Chettiar*, (1908) 31 Mad 464 (466): 4 Mad L Tim 190.

(5) *Muthia Chettiar* v. *Lodd Govinda Doss*, 1921 Mad 599 (601, 603, 607): 44 Mad 919: 41 Mad L Jour 316: 14 Mad L W 287: 1921 Mad W N 649: 69 Ind Cas 337.

(6) *Mayankutti* v. *Bipputhumma*, 1927 Mad 824 (824): 26 Mad L W 161: 39 Mad L Tim 92: 104 Ind Cas 420: 53 Mad L Jour 512: 1927 Mad W N 790

Note 16.

(1) *Lakshan Chunder Dey* v. *Nikunjamoni Dasi*, 1924 Cal 188 (189): 27 Cal W N 755: 80 Ind Cas 538; *Allah Jawayya* v. *Lajpat Rai*, 1925 Lah 571 (575): 7 Lah L Jour 392: 26 Pun L R 764: 94 Ind Cas 926; *Harihar Prosad* v. *Gendi Lal*, (1918) 43 Ind Cas 811 (812) Pat.

O.22, R.10, Notes 17—20.

17. **No new suit.**—So long as no final decree has been passed the assignee can carry on the suit and cannot in disregard thereof, file a new suit for the same relief.[1] And where an assignee is added in a pending suit the suit merely continues as against him and does not become a new suit.[2]

18. **"By leave of Court".**—An assignee under this rule is not entitled to continue the suit as a *matter of right*. The leave of Court must first be obtained. The granting of the leave is, however, discretionary with the Court[1]. The assignee has the option of either getting impleaded or keeping quiet if he considered his interests already protected.[2]

The leave should not be given without *notice* to the party concerned.[3] While the admission of assignment by such party is sufficient for giving the leave,[4] it should not be refused merely because the assignment is challenged.[4] In such cases the Court should go into the question of the truth or validity of the assignment.[5] But where, in addition to the assignment being disputed, there has been long delay in making the application, leave may be refused.[6]

19. **Effect of adding new parties under this rule.**—As already pointed out (in Note 17, *supra*) the suit only *continues* against the assignee. He will be entitled to continue the further proceedings from that date but is bound by all orders passed upto that date.[1] Similarly after the assignee is impleaded the assignor, though on record, will be concluded by all legal and *bona fide* proceedings taken by or against the assignee.[2]

Generally speaking the assignee will not be allowed to set up a case inconsistent with the one set up by his assignor. But, in cases of institutions represented at different stages by different representatives, the Court has a discretion to allow amendments and new pleas in order to avoid multiplicity of suits.[3]

20. **Appeal.**—Under the old Code there was a conflict of opinion regarding the appealability of an order granting or refusing permission under this rule.[1] This is no longer of any interest as the present O. 43, R. 1 (*l*)

Note 17.

(1) *Gocool Chunder* v. *Administrator*, (1879) 5 Cal 726 (731): 5 Cal L Rep 569.

(2) *Chunni Lal* v. *Abdul Ali Khan*, (1901) 23 All 331 (335): 1901 All W N 91.

Note 18.

(1) *Prince Victor N Narayan* v. *Kumar Bhairabendra Narayan Deb*, 1930 Cal 388 (390): 34 Cal W N 53: 125 Ind Cas 851; *Ittunan Panikkar* v. *Narayana Bharattkal*, 1928 Mad 607 (608): 109 Ind Cas 789: 1928 Mad W N 746; *Lakshan* v. *Nikunjamoni*, 1924 Cal 188 (189, 190): 27 Cal W N 755: 80 Ind Cas 538 [But the application as a rule be allowed to avoid multiplicity of litigation].

(2) *Banke Behari* v. *Raghubar Dayal*, 1930 All 380 (381): 122 Ind Cas 189: 1930 All L J 1034.

(3) *Ajant Singh* v. *Sundar Mal*, (1912) 16 Ind Cas 567 (568): 17 Cal W N 862.

(4) *Kristo Kumar Das* v. *Girish Chandra Poddar*, (1915) 27 Ind Cas 704 (705) Cal; *Enday Ali* v. *Benodini Dutt*, (1919) 51 Ind Cas 233 (234): 29 Cal L Jour 362; *Ram Lal* v. *Bhoop*, 1925 Oudh 143 (143): 80 Ind Cas 631.

(5) *Surendra Narain Deb* v. *Nityendra Narain*, 1926 Cal 173 (174): 90 Ind Cas 267; *Rajaranee Dassee* v. *Debendra Nath*, (1899) 3 Cal W N 754 (756).

(6) *Allah Jawaya* v. *Lajpati Rai*, 1925 Lah 574 (575): 7 Lah L Jour 392: 26 Pun L R 764: 94 Ind Cas 926.

Note 19.

(1) *Policherla Veeraraghava Reddi* v. *Cherla Subba Reddi*, (1919) 58 Ind Cas 428 (433, 434): 43 Mad 37: 37 Mad L Jour 449: 26 Mad L Tim 339: 10 Mad L W 281: 1919 Mad W N 699.

(2) *Vidya Sankar* v. *Vidya Narasinha*, 1927 P C 57 (59, 60): 1927 Mad W N 347: 54 Ind App 111: 51 Bom 442: 4 Oudh W N 428: 101 Ind Cas 20: 31 Cal W N 649: 25 Mad L W 791: 29 Bom L R 839: 45 Cal L Jour 420: 52 Mad L Jour 466 P C.

(3) *Sunderesam* v. *Viswanatha*, 1922 Mad 402 (403): 72 Ind Cas 103: 16 Mad L W 88: 43 Mad L Jour 147: 1922 Mad W N 444: 31 Mad L Tim 66: 45 Mad 703.

Note 20.

(1) *Raynor* v. *The Mussoorie Bank Ltd*, (1885) 7 All 681 (687): 1885 All W N 204; *Indo Mall*

gives a right of appeal from an order granting as well as from an order refusing such leave.[2] In fact an appeal is the only remedy of a party aggrieved by such order.[3] O.22, R.10, Notes 20—22.

Where an order purports to be passed under this rule an appeal will lie, even though, on the facts, the order was improper.[4] But where the order is not one under this rule at all no appeal will lie.[5]

21. Letters Patent Appeal.—An order refusing the application of an assignee of the plaintiff under this rule is a "judgment" within the meaning of S. 15 of the Letters Patent.[1]

22. Limitation.—The right to make an application under this rule is a right which accrues from day to day. There is, therefore, no limitation for application which can, therefore, be made at any time.[1]

Before the insertion of sub-S. (2) to S. 22 of the Limitation Act of 1908, there was a conflict of opinion as to whether the section applied to parties added under this rule. One view was that it did.[2] Another view was that it did not.[3] The insertion of sub-S. (2) in S. 22 of the Limitation Act now makes it clear that that section does not apply to parties added under this rule.

R. 11. [S. 582.] *In the application of this Order to appeals*, so far as may be, the word "plaintiff" shall be held to include *an* appellant, the word "defendant" a respondent, and the word "suit" an appeal. O.22, R.11.

Application of Order to appeals.

Local Amendments.

BENGAL.

Add the following:—

"Provided always that where an appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person

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v. *Gaya Prasad* (1896) 19 All 142 (143): 1897 All W N 7, *Motaram* v. *Kundan Lal* (1900) 22 All 380 (381): 1900 All W N 125, *Lej Singh* v. *Chabeli Ram*, (1902) 24 All 342 (346): 1902 All W N 84; *Jannat Bibi* v. *Sheikh Jhau*, (1902) 24 All 532 (537): 1902 All W N 112, *Lalit Mohan* v. *Shebock Chand*, (1899) 4 Cal W N 403 (404), *Sourindra Mohan Tagore* v. *Sirumoni Debi*, (1901) 28 Cal 171 (174): 5 Cal W N 307, *Wasit Sahib Nur* v. *Mahamadji*, 1903 Pun Re No 57: 129 Pun L R 1903.

(2) *Jadunath* v. *Mucuri Mohun*, 1934 Cal 594 (594): 37 Cal W N 296: 144 Ind Cas 507.

(3) *Midnapore Zamindary Co. Ltd* v. *Naresh Narain Roy*, 1927 Cal 844 (844): 54 Cal 710: 104 Ind Cas 842; *Pandurang Ramchandra* v. *Hanu*, 1927 Nag 307 (308): 103 Ind Cas 644.

(4) *Muthiah* v. *Govind*, 1921 Mad 599 (600, 607): 44 Mad 949: 1921 Mad W N 619: 41 Mad L Jour 316: 14 Mad L W 287: 69 Ind Cas 337.

(5) *Pramatha Nath Roy* v. *Dinamani Choudhrani*, (1916) 32 Ind Cas 858 (860): 20 Cal W N 552; *Srimati Bibi Jan Bibi* v. *Abdul Jabbar Daftary*, (1916) 36 Ind Cas 417 (421) Cal; *Krishna Ayya* v. *Subramania Ayyar*, 1921 Mad 648 (649): 46 Mad L Jour 368: 34 Mad L Tim 111: 1924 Mad W N 364: 84 Ind Cas 122.

Note 21.

(1) *Commercial Bank of India, Ltd* v. *Subju Saheb*, (1901) 24 Mad 252 (254).

Note 22.

(1) *Kedarnath* v. *Harachand*, (1882) 8 Cal 420 (421); *Surendra Keshab Roy* v. *Khetter Kristo Mitter*, (1903) 30 Cal 609 (612): 7 Cal W N 517; *Rajani Kanta Roy* v. *Raja Jyoti Prasad*, 1924 Cal 90 (91): 27 Cal W N 710: 75 Ind Cas 255; *Tularam* v. *Tukaram*, 1921 Nag 32 (33, 34): 61 Ind Cas 307: 17 Nag L R 81; *Mt Lakhpati Kuer* v. *Daulat Singh*, 1927 Oudh 156 (158): 4 Oudh W N 235: 101 Ind Cas 174: 2 Luck 464.

(2) *Harak Chand* v. *Deonath Sahay*, (1898) 25 Cal 409 (412); *Sheikh Abdul Rahman* v. *Sheikh Umr Ali*, (1907) 34 Cal 612 (617, 618): 11 Cal W N 521: 7 Cal L Jour 486: 2 Mad L Tim 312 P B; *Syed Mohamed* v. *Phul Kuar*, (1910) 5 Ind Cas 115 (116) Cal

(3) *Sugut Singh* v. *Imrit Tewari*, (1880) 5 Cal 720 (724): 6 Cal L Rep 62; *Fateh Muhammad* v. *Said Ahmed*, 1907 Pun Re No 3: 3 Pun L R 1908: 1906 Pun W R Vol I, page 153.

O.22, R.11, Note 1.

deceased under O. 41, R. 14 (3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party."

MADRAS.

In O. 22, *after* R. 11, *add* the following as R. 11-*A*:—

11-A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a *quasi*-judicial act within the meaning of section 128 (2) (*i*) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications presented out of time shall be posted before a Judge for disposal.

Synopsis.

1. Scope of the rule.
2. Abatement of appeals in personal actions.
3. Appeal by several defendants on grounds common to all.
4. Death of one of two representatives suing or sued in a representative capacity. See Note 24 to O. 1, R. 8.
5. Suit under S. 92, C.P.C., appeal by surviving plaintiff. See Note 30 to S. 92, ante.
6. Guardian cases—Abatement of appeal.
7. Appellate Court's power to declare abatement of suit.
8. Appeal in suit for waqf property.
9. Death during pendency of appeal in the Privy Council.
10. Limitation for application for substitution.

Abatement of appeal against deceased party only. See Note 1 and R. 4, ante.

Application of order of appeals. See Note 1.

1. Scope of the rule.—The effect of this rule is to make the provisions of the previous rules applicable, as far as may be, to appeals.[1] *See also* notes under the various rules. A decree passed without impleading the legal representatives of a party who died pending appeal is a nullity.[2] Further, the result of not impleading the legal representative of a deceased party pending appeal in time will be to cause an abatement of the appeal so far as that party is concerned.[3] The fact that in another independent appeal from the

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Order 22, Rule 11—Note 1

(1) *Raj Chunder Sen* v. *Ganga Das Seal*, (1904) 31 Cal 487 (494): 1 All L J 145: 8 Cal W N 442: 31 Ind App 71: 14 Mad L Jour 147: 8 Sar 623 P C; *Paru* v. *Variangattil Raman*, (1905) 28 Mad 359 (360); *Kartar Singh* v. *Lal Singh*, (1921) 59 Ind Cas 238 (239): 1921 Jour 13 (3): 11 Pun L R 1921: 9 Pun W R 1921; *Maung Po* v. *Ma Shwe Ma*, 1925 Rang 95 (96): 2 Rang 445: 84 Ind Cas 992 [Rule 2 applies]; *Sitharam Dattaji* v. *Anant Hari Kamat*, 1927 Bom 156 (157): 29 Bom L R 244: 101 Ind Cas 129 [Rule 3 applies]; *Jaita Bin* v. *Balu*, (1866-67) 3 Bom H C R 81, (Do.); *Gurdas Mal* v. *Kashi Ram*, 1921 Lah 160 (161): 3 Lah L Jour 164 [Rule 4 applies]; *Basist Narain Singh* v. *Modnath Das*, 1928 Pat 250 (252): 7 Pat 265: 9 Pat L Tim 153: 108 Ind Cas 552, (Do.); *Mir Nawab* v. *Hardeo*, (1911) 12 Ind Cas 871 (871): 1911 Pun Re No 60: 238 Pun W R 1911: 42 Pun L R 1912, (Do.); *Athiappa* v. *Ayanna*, (1885) 8 Mad 300 (303) [Rule 5 applies]; *Chandra Kumar Majhi* v. *Sandhyamoni*, (1909) 2 Ind Cas 412 (413): 36 Cal 418: 13 Cal W N 338 [Rule 9 applies[. See also *Md Ismail* v. *Manohar Das*, 1922 All 113 (114): 20 All L J 214: 65 Ind Cas 838 [No appeal lies against an order declaring that an appeal had abated]; *Rajaram Bhagwat* v. *Jibai*, (1885) 9 Bom 151 (157) [Rule 10 applies]. See also *Parman Nand* v. *Salig Ram*, 1926 Lah 329 (330): 93 Ind Cas 367.

(2) *Janardhan* v. *Ram Chandra*, (1902) 26 Bom 317 (319): 4 Bom L R 23.

(3) *Bai Full* v. *Adesang*, (1902) 26 Bom 203 (206): 3 Bom L R 736; *Sheo Chand* v. *Sita Ram*, 1927 All 331 (332): 100 Ind Cas 482; *Arjan Mirdha* v. *Kali Kumar*, 1923 Cal 294 (294): 68 Ind Cas 194; *Sheikh Dendoo* v. *Shaikh Sachoo*, 1924 Cal 399 (400): 72 Ind Cas 2; *Gopika Raman Roy* v. *Atal Singh*, 1926 Cal 193 (203): 85 Ind Cas 678; *Sardara* v. *Allayar*, 1923 Lah 132 (133): 73 Ind Cas 604; *Muthuvijaya Raghunatha* v. *N A Swaminathan Chettiar*, 1932 Mad 212 (213): 35 Mad L W 105: 1932 Mad W N 152: 137 Ind Cas 319; *Ram Gobind Singh* v. *Shashi Sekhar Prasad Singh*, 1925 Pat 517 (518): 1925 Pat H C C 153: 88 Ind Cas 959: 6 Pat L Tim 849; *Ma Zan Nyein* v. *Maung Kyaw Zan*, 1923 Rang 258 (260): 1 Rang 189: 74 Ind Cas 1027; *Sarup Singh* v. *Sant Singh*, 1926 Jour 121 (4): 96 Ind Cas 932; *Fateh* v. *Bhanju Ram*, (1917) 41 Ind Cas 730 (731): 96 Pun Re 1917: 49 Pun W R 1917.

same decree the legal representatives have been impleaded will not be enough.[4] But where the legal representative has, of his own accord, come on record, no further application by the appellant is necessary.[5] There will be no abatement when the deceased is only a *pro forma* respondent.[6] This rule, and consequently the provisions of the previous rules, do not apply when the devolution of interest takes place before the filing of the appeal, *i.e.*, after the decree in the suit and before the appeal is filed.[7]

O.22, R.11; Notes 1—3.

The rule has been held to be inapplicable to an application under S. 21-A of the Punjab Alienation of Land Act.[8]

2. Abatement of appeals in personal actions.—As a general rule the right to appeal in a *personal* action does not survive on the death of either party.[1] But there are certain personal claims like a claim for damages with respect to which a suit and an appeal will stand on different footings. So long as such claims remain unconverted into a decree as, for instance, where the suit to enforce the claim is dismissed and there is an appeal against the dismissal the appeal will abate on death of the party.[2] But if the suit has been *decreed* and the appeal is against the decree, the death of either party will not cause abatement of the appeal.[3] The principles underlying the above have been discussed, in Rr. 1, 3 and 4, *supra*. If the suit is decreed in the lower Court, but set aside in first appeal and the death takes place pending a second appeal, there will be no abatement.[4] The reason is that the claim having once been converted into a decree the fact that the decree has been set aside in first appeal will not affect the survival of the right.

3. Appeal by several defendants on grounds common to all.—Where the appeal is by several appellants on a ground common to all of them and one of them dies and his legal representatives are not impleaded within time, the entire appeal can nevertheless proceed as a whole. The reason is that there is an abatement only so far as the deceased is concerned. But from the nature

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(4) *Sankaranarayana Saralaya* v. *Laxmi Hengsu*, 1931 Mad 277 (277): 60 Mad L Jour 267: 33 Mad L W 411: 130 Ind Cas 764.

(5) *Venkatachariar* v. *Ponnappa Iyengar*, (1918) 45 Ind Cas 959 (961): 7 Mad L W 614.

(6) *Alla Baksh* v. *Madho Rao*, (1901) 23 All 22 (25): 1900 All W N 183; *Ram Labhaya* v. *Kartar Singh*, 1925 Lah 651 (652): 7 Lah L Jour 466: 26 Pun L R 827: 92 Ind Cas 261; *Thakur Das* v. *Daulat Ram* 1926 Lah 189 (189): 26 Pun L R 825: 91 Ind Cas 32; *Roshan Din* v. *Ram Chander*, 1927 Lah 779 (779): 28 Pun L R 786: 103 Ind Cas 419; *Chettikulam Panchayat Venkatachalla Reddiar* v. *The Collector of Trichinopoly*, (1914) 24 Ind Cas 369 (370): 26 Mad L Jour 537: 1914 Mad W N 581.

(7) *Collector of Muzaffarnagar* v. *Hasan Jan Begum*, (1896) 18 All 86 (87): 1895 All W N 242; *Parman Nand* v. *Salig Ram*, 1926 Lah 329 (330): 93 Ind Cas 367; *Ramanada* v. *Muthu Lakshmi*, (1881) 4 Mad 236 (238).

(8) *Secretary of State for India* v. *Amar Singh*, 1930 Lah 775 (775): 126 Ind Cas 411: 11 Lah 706: 32 Pun L R 190.

Note 2.

(1) *Anand Bahadur* v. *Hardil Aziz*, (1919) 52 Ind Cas 545 (546): 1919 Pun Re No 87: 35 Pun L R 1920.

(2) *Gadigi* v. *Marvadi*, (1917) 38 Ind Cas 823 (825): 31 Mad L Jour 772: 20 Mad L Tim 303: (1916) 2 Mad W N 280: 4 Mad L W 351; *Sakunhani* v. *Bhavani*, (1904) 27 Mad 588 (591); *Josiam* v. *Swami Iyengar*, (1910) 5 Ind Cas 937 (938): 7 Mad L Tim 195: 1910 Mad W N 543: 20 Mad L Jour 760 [The appellant cannot sue to sustain the appeal for costs alone]; *Balubhai Hiralal* v. *Nanalal Bhagubhai*, (1920) 55 Ind Cas 624 (625, 626): 44 Bom 446: 22 Bom L R 143 [Suit for damages for breach of contract of marriage. Suit dismissed. Appeal by plaintiff. Pending appeal, plaintiff dies—Appeal abates—It was assumed however that the right of appeal in respect of the amount of pocket expenses incurred while the contract was in execution could be proceeded with].

(3) *Gopal* v. *Ram Chandra*, (1902) 26 Bom 597 (598): 4 Bom L R 325; *Paraman Chetty* v. *Sundararaja Naick*, (1903) 26 Mad 499 (500).

(4) *Nga Kyet Sein* v. *Mi Kyin Mya*, (1916) 34 Ind Cas 249 (250): (1916) 2 U B R 105: 10 Bur L Tim 8.

O. 22, R. 11, Notes 3—10.

of the appeal any one of the appellants can get a reversal of the *whole* decree.[1]

4. Death of one of two representatives suing or sued in a representative capacity.—*See* Note 24 to O. 1, R. 8.

5. Suit under S 92, C.P.C.—Appeal by surviving plaintiff.—*See* Note 30 to S. 92, *ante*.

6. Guardian cases—Abatement of appeal.—Where the right to guardianship is based on a *personal* preference, the appeal relating to such right will abate on the death of the party.[1] Otherwise not.[2]

7. Appellate Court's power to declare abatement of suit.—When the sole respondent dies in appeal and the appellant claims to be his legal representative, it is not the suit but the appeal that abates and it is the appellate Court that should declare the abatement.[1]

8. Appeal in suit for waqf property.—Certain persons sued in their capacity as followers of a Shrine for a declaration that certain property was *waqf* property. They succeeded in the suit and there was an appeal against the decree. Pending appeal one of the plaintiffs respondents died: *Held* that appeal did not abate.[1]

9. Death during pendency of appeal in the Privy Council.—The judgment of the Privy Council is an order of the Sovereign. O. 22 of the Code has no application to appeals before the Privy Council. Consequently, on the death of a party, in an appeal pending before the Privy Council no question of impleading legal representatives or of limitation therefor arises[1] and the judgment given without impleading legal representatives is not, on that ground, a nullity.[2]

10. Limitation for application for substitution.—Under the old Code and the old Limitation Act there was a good deal of controversy as to the article of the Limitation Act applicable to applications for substitution under the section corresponding to this rule.[1] But this is now of no practical importance as the limitation for all applications under this rule is specifically provided for in Articles 176 and 177 of the Limitation Act, 1908 under which the application should now be filed within 60 days of the death of the party.

Note 3.

(1) *Dhuttaloor Subbayya* v. *Padiyantam Subbayya*, (1907) 30 Mad 470 (472): 17 Mad L Jour 119: 2 Mad L Tim 104 F B; *Ram Sewak* v. *Lambar Pande*, (1903) 25 All 27 (28): 1902 All W N 171; *Chandarsang* v. *Khimabai*, (1898) 22 Bom 718 (721); *Chintaman* v. *Gangabai*, (1903) 27 Bom 284 (286): 5 Bom L R 90; *Ram Lal* v. *Devi Singh*, (1911) 10 Ind Cas 27 (28) All; *Piyare Lal* v. *Churamani*, (1918) 46 Ind Cas 50 (52): 84 Pun Re 1918.

Note 6.

(1) *Gangabai* v. *Khasha Bai*, (1899) 23 Bom 719 (722): 1 Bom L R 363.

(2) *Arjan Singh* v. *Gujri*, (1917) 42 Ind Cas 410 (411): 116 Pun L R 1917: 160 Pun W R 1917.

Note 7.

(1) *Sundar Pande* v. *Kumari*, (1919) 50 Ind Cas 935 (935): 41 All 283: 17 All L J 306.

Note 8.

(1) *Rahim Baksh* v. *Chanan Din*, (1920) 55 Ind Cas 210 (211): 4 Lah L Jour 511: 1921 Lah 390.

Note 9.

(1) *Jadunandan Koer* v. *Ramjibanlal*, (1909) 4 Ind Cas 454 (456): 10 Cal L Jour 331.

(2) *Deonandan* v. *Janki*, (1920) 56 Ind Cas 322 (324): 5 Pat L Jour 314: 1 Pat L Tim 325: 1920 Pat H C C 266: 2 U P L R (Pat) 108.

Note 10.

(1) *See the following cases:—Debi Din* v. *Chunna Lal*, (1888) 10 All 264 (267 and 269): 1888 All W N 112 F B; *Madhubandas* v. *Narain Das*, (1907) 29 All 535 (536): 4 All L J 397: 1907 All W N 15; *Balakrishna Gopal* v. *Bal Jhoshi Sadashiv*, (1886) 10 Bom 663 (665); *Shoshi Bhusan* v. *Girish Chunder*, (1885) 11 Cal 694 (696); *Udit Narain Singh* v. *Harogouri Prosad*, (1886) 12 Cal 590 (593) F B; *Upendrakumar Chakravarti* v. *Sham Lal Mandal*, (1907) 34 Cal 1020 (1022, 1023): 11 C W N 1100: 6 Cal L Jour 715; *Vakkalogadda Narasihham* v. *Vahizulla Shaib*, (1905) 28 Mad 498 (499): 15 Mad L Jour 404; *Hafiz Ghulam Muhammad Khan* v. *Mohun Lal*, 1884 Pun Re No 133; *Dasounda Singh* v. *Kanhya Lal*, 1886 Pun Re No 103; *Gaman* v. *Baksha*, 1887 Pun Re No 42.

Application of Order to proceedings.

R. **12.** [New.] *Nothing in rules* 3, 4 *and* 8 *shall apply to proceedings in execution of a decree or order.*

O.22, R.12, Note 1.

Local Amendment.

ALLAHABAD.

At the end of the rule *add* the words.—

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

Synopsis.

1. **Execution proceedings.**

Ascertainment of mesne profits. See Pt. (16).
Proceedings between preliminary and final decrees—If proceedings in execution. See Pt. (15).

1. Execution proceedings.—This rule is new. Under the old Code there was a great difference of opinion as to whether the provisions relating to abatement contained in the previous rules applied to execution proceedings, though in several cases it was held that they did not[1] the present rule affirms the view expressed in those cases.[1-a]

It should be noted that the only provisions specified as not applicable to execution proceedings are those contained in Rr. 3, 4 and 8 and that, even as to these it is only in respect to the *abatement* of the proceedings that those rules do not apply.[2] In other words the rule cannot be interpreted to mean that no substitution can be made in execution proceedings[3] and the Judicial Committee have specifically laid down that such substitution can be made.[4] On the death, therefore, of a decree-holder, pending an execution proceeding, can his legal representative get himself substituted and carry on the proceedings or should he file a separate execution application? The Bombay[5] and Calcutta[6] High Courts have held that he can continue the proceedings and

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Order 22, Rule 12—Note 1.

(1) *Dulari* v. *Mohan Singh*, (1881) 3 All 759 (765): 1881 All W N 57; *Goodal* v. *Mussoorie Bank*, (1888) 10 All 97 (106): 1887 All W N 288; *Stowell* v. *Ajudhia Nath*, (1884) 6 All 255 (259): 1884 All W N 67; *Chail Behari* v. *Rahmat Das*, (1898) 20 All 38 (39): 1897 All W N 194; *Gulab Das* v. *Lakshman*, (1878-79) 3 Bom 221 (222): 4 Ind Jur 34; *Aba* v. *Dhondu*, (1895) 19 Bom 276 (281); *Net Lall* v. *Kureem Bux*, (1896) 23 Cal 686 (689); *Harish Chandra* v. *Chandpore Co*, (1903) 30 Cal 961 (964); *Ramasami* v. *Bhagirathi*, (1883) 6 Mad 180 (181); *Krishnayya* v. *Unnissa*, (1892) 15 Mad 399 (400); *Alagirisamy* v. *Venkatachallapathy*, (1908) 31 Mad 77 (79): 17 Mad L Jour 506; *Arbuthnot Industrials* v. *Muthu Chariar*, (1908) 31 Mad 464 (466): 4 Mad L Tim 190.

(1-a) See also *Shankar Balchand Marwadi* v. *Harilal Balchand Marwadi*, 1931 Bom 425 (427): 33 Bom L R 858: 134 Ind Cas 730.

(2) *Bimbadhar Panda* v. *Abdul Zalil*, 1929 Pat 200 (200): 117 Ind Cas 165; *Hem Chandra Bannerjee* v. *Annapurna Debi*, 1932 Cal 423 (424, 425): 36 Cal W N 93: 138 Ind Cas 64 [*Quaere*, whether R 10 of O 22 is applicable to execution proceedings!].

(3) *Venkatachallam Chetti* v. *Ramaswamy Servai*, 1932 Mad 73 (76): 62 Mad L Jour 1: 1931 Mad W N 1209: 34 Mad L W 866: 135 Ind Cas 561: 55 Mad 352 F B; *Bhagwandas* v. *Jugal Kishore*, (1920) 57 Ind Cas 610 (611): 42 All 570: 18 All L J 735. See also *Doraisamy* v. *Chidambaram*, 1924 Mad 130 (132): 47 Mad 63: 45 Mad L Jour 413: 18 Mad L W 577: 1923 Mad W N 817: 33 Mad L Tim 25: 75 Ind Cas 46 [It is desirable to bring them on the record]; *Ramanand* v. *Hajit*, 1924 Pat 507 (508): 5 Pat L Tim 233: 75 Ind Cas 863, (Do.).

(4) *Jang Bahadur* v. *Bank of Upper India, Ltd. Lucknow*, 1928 P C 162 (164): 5 Oudh W N 502: 26 All L J 681: 48 Cal L Jour 23: 32 Cal W N 790: 109 Ind Cas 417: 55 Ind App 227: 28 Mad L W 25: 3 Luck Cas 314: 30 Bom L R 1373: 55 Mad L Jour 545: 1928 Mad W N 863 P C.

(5) *Kacharabhai Lehrabhai* v. *Kacharbhai Vadilal*, 1931 Bom 423 (423): 33 Bom L R 818: 134 Ind Cas 720.

(6) *Monmotho Nath Mitter* v. *Rakhal Chandra Tewary*, (1909) 3 Ind Cas 324 (326, 327): 14 Cal W N 752: 10 Cal L Jour 396.

O.22, R.12, Note 1.

that he need not present a separate execution application. According to the Madras High Court, the legal representative can be substituted under S. 146 and O. 21, R. 16 and be allowed to *continue* the application.[7] The Oudh Chief Court, however, hold the view that the old application cannot be continued and that the only remedy of the representative is to file a fresh execution application.[8] Where such substitution is allowed there is no fixed time within which the application should be made.[9] But such an application for substitution will not be made a step-in-aid of execution.[10]

There is a conflict of opinion as to the applicability of this rule to *appeals* against orders in *execution*. It has been held by the High Court of Madras[11] that an appeal against an order made in execution proceedings is not itself a proceeding in execution of a decree or order, that this rule does not apply to appeals against orders made in execution proceedings and that such appeals are subject to the same rules in regard to abatement as any other appeals. The High Court of Lahore[12] and Patna[13] and Judicial Commissioner's Court of Nagpur[14] have, on the other hand, held, that this rule applies to such appeals. Proceedings after preliminary decree are not proceedings in execution and this rule will not apply to such proceedings.[15] Under the old Code, proceedings for the ascertainment of mesne profits were proceedings in execution and therefore this rule applied to such proceedings.[16] Under the present Code, however, the position is different.

An application to set aside a sale is not a proceeding in execution for after the sale and the subsequent deposit of the sale amount the execution is complete. Consequently this rule does not apply to such applications.[17]

As to the applicability of R. 8 to execution proceedings, *see* the undermentioned case.[18] *See also* the notes to various rules of this order as to the applicability thereof to execution proceedings.

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(7) *Venkatachellam Chetty* v. *Ramaswamy Servai*, 1932 Mad 73 (82): 62 Mad L Jour 1: 1931 Mad W N 1209: 34 Mad L W 866: 135 Ind Cas 561: 55 Mad 352 F B [1927 Mad 184 overruled]; *Venkatalakshamma* v. *Seshagiri Rao*, 1931 Mad 303 (308 and 313): 1931 Mad W N 48: 33 Mad L W 359: 131 Ind Cas 610: 60 Mad L Jour 628.

(8) *Jang Bahadur* v. *Bank of Upper India, Ltd, Lucknow*, 1925 Oudh 448 (448): 12 Oudh L Jour 146: 2 Oudh W N 73: 87 Ind Cas 21: 28 Oudh Cas 330.

(9) *Peare Lal* v. *Jhabba Lal*, 1925 All 66 (67): 5 L R A Civ 668: 82 Ind Cas 604.

(10) *Baij Nath* v. *Ram Bharos*, 1927 All 165 (167): 25 All L J 249: 49 All 509 F B; *Akhoy Kumar* v. *Surendra*, 1926 Cal 957 (958): 30 Cal W N 735: 96 Ind Cas 378.

(11) *Rajah of Kalahasti* v. *Jagannadha Rayanigar*, 1932 Mad 574 (575, 576): 1932 Mad W N 597: 36 Mad L W 170: 139 Ind Cas 409: 63 Mad L Jour 827; *Avadai Ammal* v. *Krishnan Chetty*, 1928 Mad 772 (772): 1928 Mad W N 385: 28 Mad L W 351: 55 Mad L Jour 497: 51 Mad 858: 110 Ind Cas 662.

(12) *Mir Khan* v. *Sharfu*, 1923 Lah 560 (563): 5 Lah L Jour 163: 74 Ind Cas 577. See also *Baksh Ali Sirkar* v. *Sarat Chandra Roy Choudhury*, (1918) 46 Ind Cas 911 (913) Cal. See however *Barkat Rai* v. *Gulam Fatima*, 1921 Lah 219 (220): 5 Lah L Jour 1: 70 Ind Cas 929.

(13) *Mahomed Taqi* v. *Fateh Bahadur Singh*, 1929 Pat 565 (568): 10 Pat L Tim 763 F B.

(14) *Mt Sarjjabai* v. *Dhanraj*, 1925 Nag 239 (240): 8 Nag L J 9: 86 Ind Cas 11.

(15) *Mahabir Singh* v. *Narain Tewari*, 1931 All 490 (497, 499): 1931 All L J 715: 134 Ind Cas 236 F B; *Bhutnath Jana* v. *Tara Chand Jana*, 1921 Cal 551 (552): 33 Cal L Jour 115: 25 Cal W N 595: 59 Ind Cas 177; *Tulsidas Keshowdas* v. *Ramzan Abdullah*, 1926 Sind 20 (21): 89 Ind Cas 238; *Raja Hemendra Lal Singh* v. *Fakirchand Datta*, 1923 Cal 626 (629) [But where in a mortgage suit the parties may by compromise dispense with a preliminary decree and get a final decree then R 12 will apply and no abatement].

(16) *Kedar Nath Goenka* v. *Anant Prasad Singh*, 1925 P C 117 (117): 48 Mad L Jour 482: 1925 Mad W N 313: 88 Ind Cas 482: 2 Oudh W N 355: 30 Cal W N 361: 41 Cal L Jour 389: 6 Pat L Tim 366: 27 Bom L R 848: 4 Pat 507: 52 Ind App 188: 22 Mad L W 7 P C; *Kedar Nath Goenka* v. *Tarini Prasad Singh*, 1921 Pat 185 (186): 1921 Pat H C C 158: 2 Pat L Tim 245: 61 Ind Cas 4.

(17) *Gobind Nath* v. *Udai Nath*, 1923 Pat 29 (29 and 30): 1922 Pat H C C (Sup) 363: 1 Pat L R 55: 69 Ind Cas 613: 2 Pat 243: 4 Pat L Tim 367.

(18) *Faquir Muhammad Khan* v. *Pir Dad Khan*, 1924 Lah 615 (616): 75 Ind Cas 844.

ORDER XXIII.

O. 23, R. 1.

WITHDRAWAL AND ADJUSTMENT OF SUITS.

Withdrawal of suit or abandonment of part of claim.

R. 1. [S. 373.] (1) At any time after the institution of *a* suit[10] *the plaintiff may, as against all or any of the defendants,*[21] *withdraw his suit or abandon part of his claim.*

(2) *Where* the Court is satisfied—

(*a*) that *a* suit must fail by reason of some formal defect, [25] or

(*b*) that there are other sufficient grounds[26] for *allowing the plaintiff to institute* a fresh suit for the subject-matter of *a* suit or part *of a claim*,

it may, on such terms as it thinks fit,[31] grant *the plaintiff permission*[27] to withdraw from *such* suit or abandon *such* part of *a* claim with liberty *to institute* a fresh suit[29] in respect of the subject-matter of *such* suit or *such* part *of a claim*.

(3) *Where* the plaintiff withdraws from a suit, or abandons part of *a* claim, without *the* permission[35] *referred to in* sub-*rule* (2), he shall be liable for such costs as the Court may award and shall be precluded from *instituting any* fresh suit[32] *in respect of such subject-matter*[33] *or such part of the claim.*

(4) Nothing in this *rule* shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

[1877—S. 373; 1859—S. 97. *See* S. 11, O. 2, R. 2.]

Synopsis.

1. Legislative changes.
2. Scope, object and applicability of the rule.
3. Applicability of rule to appeals.
4. Suits in Rent Courts.
5. Probate proceedings.
6. Execution proceedings.
7. Insolvency proceedings.
8. Application for final decree.
9. Set-off.
10. "At any time after institution of suit."
11. Power of appellate Court to allow withdrawal from suit.
12. Withdrawal of suit by plaintiff-appellant.
13. Withdrawal of suit by plaintiff-respondent.
14. Withdrawal of application for execution.
15. Withdrawal of application for entering up satisfaction of decree.
16. Withdrawal of application for withdrawal of suit.
17. Withdrawal of suit on behalf of minor.
18. Withdrawal of suit by pauper plaintiff.
19. Withdrawal of suit by some of several plaintiffs—Sub-R. (4).
20. Withdrawal of suit by vakil.
21. "As against all or any of the defendants."
22. Effect of permission.

O. 23, R.1, Notes 1—2.

23 Withdrawal from suit pending arbitration.
24. Withdrawing from suit after suit has abated against some of the defendants.
25. "Formal defect."
26. "Other sufficient grounds."
27. "May grant permission."
28. Form of permission.
29. Dismissal of suit with liberty to bring a fresh suit.
30. Liberty to withdraw two suits in order to bring a consolidated suit.
31. "On such terms as it thinks fit."
32. Fresh suit must be between the same parties.
33. Same subject-matter.
34. Additional relief in fresh suit.
35. Effect of withdrawal without permission.
36. Erroneous order granting permission.
37. Effect of reversal of order granting permission.
38. Power of Court of Small Causes to allow withdrawal.
39. Appeal.
40. Letters Patent Appeal.
41. Revision.

Abandonment of part of a claim and effect. See Note 26, F.-Ns. (14) and (15); also Note 11, Pt. (4); also Note 13; Note 19, Pt. (2) and Note 21, Pts. (1) and (2).
Cases not allowed to be withdrawn. See Note 10, Pts. (3) to (5).
Consent of defendant—Effect on withdrawal without permission. See Note 35, Pt. (3).
Court-fee. See Note 28, Pt. (9).
Grant of permission and res judicata. See Note 3, Pt. (3) and Note 22, Pt. (1).
Grant of permission not open to question subsequent suit. See Note 36, Pt. (1).
"Non-suit" in India. See Note 26, Pt. (1).
Notice to other side. See Note 27, Pt. (2).
Permission—Availability to one suit alone. See Note 27, Pt. (3).
Permission express or implied. See Note 28, Pt. (1).
Permission outside terms of this rule. See Note 26, Pts. (1-a) and (1-b).
Withdrawal of appeal in case of cross-objections. See O. 41, R. 22, Notes.
Withdrawal of appeal in the absence of cross-objections. See Note 3, F.-N. (1).
Withdrawal of suit after compromise. See Note 10, F.-N. (3).
Withdrawal of suit after preliminary decree, when defendant objects. See Note 10, Pts. (4) and (5).
"Withdrawal of suit" and "withdrawal from suit"—Distinction. See Note 2.

1. Legislative changes.—

Under the law before the Code of 1859, the Court's leave was not necessary for bringing a fresh suit where a suit had been withdrawn by the plaintiff.[1] S. 97 of the Code of 1859, gave power to the Court to permit a suit to be withdrawn with the liberty to sue afresh, if it was satisfied that there were sufficient grounds for such a course. The words as to the suit failing by reason of some formal defects were first introduced in the Code of 1877.

2. Scope, object and applicability of the rule.—The law as to the withdrawal of suits as enacted in the present rule is as follows:—

(*a*) A plaintiff can withdraw a suit as a matter of right without the permission of the Court. But in this case he shall be precluded from suing again on the same cause of action. He cannot withdraw a suit reserving to himself a right to bring a fresh suit.[1]

Order 23, Rule 1—Note 1.
(1) *Vinayak* v. *Janardhan*, (1870) 7 Bom H C R A C 23.

Note 2.
(1) *U E Maung* v. *P A R P Chettiar Firm*, 1928 Rang 273 (274): 6 Rang 494.

(*b*) A plaintiff may, in the circumstances mentioned in sub-R. 2, be *permitted by the Court to withdraw* from a suit with liberty to sue afresh on the same cause of action.[2] O. 23, R. 1, Notes 2—5.

The rule does not apply to *alternative claims* on the same cause of action.[3]

3. Applicability of rule to appeals.—The present rule applies also to appeals and an appellate Court can therefore allow the withdrawal of an appeal with liberty to bring a fresh appeal or suit.[1] The High Court may allow a second appeal to be withdrawn.[2] The effect of the withdrawal without liberty of an appeal is to make the decree of the lower Court *res judicata* and the only executable decree in the case.[3]

4. Suits in Rent Courts.—The rule does not apply to suits under the Bengal Tenancy Act, which is a complete Code in itself.[1] Nor will the withdrawal without permission of an application under S. 105 of the Act or of a suit under S. 106 of the Act bar a fresh suit in the Civil Court in respect of its subject-matter. The meaning of sub-R. (2) of O. 23, R. 1 is that the plaintiff shall be precluded from bringing a fresh suit in *that* or in any Court of *similar* or *co-ordinate jurisdiction*.[2]

But the rule applies to suits under North West Provinces Rent Act, 1851, inasmuch as the Rent Courts under that Act are governed by the Code in those matters on which the Act is silent.[3]

5. Probate proceedings.—The rule does not apply to applications for probate, inasmuch as S. 55 of the Probate and Administration Act (now S. 268 of the Succession Act of 1925) which provides that the provisions of the Civil Procedure Code should apply to proceedings for probate is limited by the words "so far as circumstances of the case permit".[1]

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(2) *Ram Autar Saha* v. *Gulab Chaudhri*, (1910) 6 Ind Cas 700 (701) All. See also *Lakshmanan Chetty* v. *Muthaya Chetty*, (1921) 62 Ind Cas 833 (839): 40 Mad L Jour 126: 29 Mad L Tim 189 [Obiter].

(3) *Flora Sassoon* v. *Ardeshir*, 1926 Bom 189 (192): 28 Bom L R 126: 98 Ind Cas 358. But see *K Kalidas Ghia* v. *Chhotalal Motichand*, 1924 Bom 119 (127): 25 Bom L R 1037: 77 Ind Cas 275: 48 Bom 259

Note 3.

(1) *Ram Pershad Ojha* v. *Bhurosa Koonwar*, (1868) 9 Suth W R 328 (328); *Gopala* v. *Hira Singh*, (1908) 119 Pun W R 403; *Kalyan Singh* v. *Rahmu*, (1901) 23 All 130 (132, 133): *Kanhaya Lal* v. *Partab Chand*, (1931) 132 Ind Cas 194 (195): 1931 Notes 8 (c): 1931 All L J 232, (Do.); *Kareem Bee* v. *Begum Bee*, (1866-67) 3 Mad H C 368 (369) [Appeal cannot be withdrawn without the permission of the Court].

(2) *Pandu* v. *Devji*, (1883) 7 Bom 287 (289).

(3) *Seetharam* v. *Mt Chhotkai*, (1909) 3 Ind Cas 61 (63): 5 Nag L R 88; *Vythilinga* v. *Vijayath Ammal*, (1883) 6 Mad 43 (47): 6 Ind Jur 516; *Chudasama* v. *Mahant Ishwaragar*, (1891) 16 Bom 243 (248); *Patloji* v. *Ganu*, (1891) 15 Bom 370 (373, 374): 1890 Bom P J 836; *Deoki* v. *Jwala Prasad*, 1928 All 679 (679): 50 All 608: 26 All L J 407: 108 Ind Cas 564. See also *Vishvanath* v. *Lallu Kabia*, (1909) 4 Ind Cas 137 (138): 11 Bom L R 1070 [Decree in favour of dead person without L R—Void—Appeal and withdrawal—Defendant—Appellant not thereby estopped from pleading in executability].

Note 4.

(1) *Beer Chunder* v. *Tarinee Churn*, (1869) 11 Suth W R 46 (46); *Roma Nath* v. *Joy Kishen*, (1869) 11 Suth W R 3 (4); *Golam Md* v. *Shibendra Pada Bannerjee*, (1908) 35 Cal 990 (995): 12 Cal W N 893; *Mokunda Ballav Kar* v. *Bhogaban Chunder Das*, (1894) 21 Cal 514 (516, 517, 518); *Radha Madhub* v. *Lukhinarain*, (1894) 21 Cal 428 (430); *Modhoo Soodhun* v. *Panth Couree*, (1867) 7 Suth W R 302 (302); *Dogal Chunder Ghose* v. *Dwarka Nath*, (1862-64) W R P B 47: 1 Hay 347: Marsh 118: 1 Ind Jur O S 41. See however, Ss 37 (2) and 147 of the Bengal Tenancy Act VIII of 1885.

(2) *Altap Ali* v. *Sheikh Mohatap*, (1911) 9 Ind Cas 4 (4) Cal [Suit under S 106 of the Act]; *A B Chiodith* v. *Tulsi Singh*, (1913) 18 Ind Cas 130 (130): 40 Cal 428: 17 Cal W N 467 [Application under S 105 of the Act]. But see *Sasi Kanta Acharjya* v. *Salim Sheikh*, 1923 Cal 624 (626): 50 Cal 626: 27 Cal W N 987: 74 Ind Cas 1001; *Jonarden* v. *J Barclay*, (1900) 5 Cal W N (S N) cxl.

(3) *Madho Prakash* v. *Murli Manohar*, (1883) 5 All 406 (414): 1883 All W N 92.

Note 6.

(1) *Jugeshwar Nath Sahai* v. *Jagathari Prasad*, (1917) 40 Ind Cas 345 (346): 2 Pat L

O. 23, R. 1, Notes 6—10.

6. Execution proceedings.—The rule does not apply to execution proceedings[1] including claim proceedings[2] as is made clear by R. 4, *infra*. The undermentioned cases holding the contrary view are no longer good law.[3]

7. Insolvency proceedings.—This rule read with S. 141, *supra* applies to proceedings in insolvency.[1]

8. Application for final decree.—Where an application for final decree is withdrawn it does not preclude a second application for the same purpose.[1] The reason is that O. 23, R. 1 applies only where a *suit* or part of a *suit* is withdrawn.

9. Set-off.—It is doubtful whether a defendant claiming a set-off can be allowed to withdraw his claim for set-off with liberty to sue again for the amount which formed the subject-matter of such claim.[1]

10. At any time after institution of suit.—Sub-R. 1 provides that *at any time* after the institution of a suit a plaintiff can withdraw his suit. As a general rule, a plaintiff can do this of his own accord and the order of the Court is not necessary for the purpose.[1] But the withdrawal must be made *before* judgment is passed in the case.[2] A plaintiff cannot also be allowed to withdraw his suit so as to deprive the defendant of any rights that may have accrued to him. Thus, where, in a partition suit, the defendant has become entitled under S. 3 of the Partition Act, to purchase the plaintiff's share at a valuation to be fixed by the Court,[3] or where a preliminary decree has been passed in such a suit,[4] or in a suit for accounts,[5] the

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Jour 585: 1917 Pat H C C 192: 5 Pat L W 230. See *Pakiam* v. *Innasi*, (1896) 19 Mad 458 (460). See also *Sarada Kanta Das* v. *Gobinda Mohan Das*, (1910) 6 Ind Cas 912 (916, 917): 12 Cal L Jour 91; *Gauri Mal* v. *Veroo Mal*, 1932 Lah 290 (291): 132 Ind Cas 224 (224) [Permission held implied in this case.] [67 Ind Cas 1002: 2 Lah L Jour 242, fol.].

Note 6.

(1) *Musst Jusodha Devi* v. *Lachman Das*, 1892 Pun Re No 37; *Lakshmi* v. *Atchenna*, (1892) 15 Mad 240 (241): 1 Mad L Jour 750; *Radha Kishen* v. *Radha Pershad*, (1891) 18 Cal 515 (518); *Bunko Behary* v. *Nil Madhub*, (1891) 18 Cal 635 (639); *Wajihan* alias *Alijan* v. *Bishwanath*, (1891) 18 Cal 462 (466); *Thakur Prasad* v. *Fakirullah*, (1895) 17 All 106 (111, 112): 22 Ind App 44: 5 Mad L Jour 3: 6 Sar 526 P C; *Lodd Govindass* v. *Ramdass Kishundoss*, (1912) 17 Ind Cas 752 (752): 24 Mad L Jour 88: 1912 Mad W N 1245; *Palaniandi Pillai* v. *Papathi Ammal*, (1914) 22 Ind Cas 76 (76, 77): 1914 Mad W N 159: 15 Mad L Tim 100.

(2) *Subaramien* v. *Ponnusawmy*, (1870) 5 Mad H C 298 (303); *Supal Pandey* v. *Sukkhu Koiri*, (1907-1908) 4 L B R 75 (75). See *Chitnavis* v. *Nathu Sao*, 1925 Nag 2 (6): 20 Nag L R 106: 7 Nag L J 170: 79 Ind Cas 1002.

(3) *Sarju Prasad* v. *Sita Ram*, (1888) 10 All 71 (78): 1888 All W N 1; *Fakir Ulla* v. *Thakur Prasad*, (1890) 12 All 179 (185): 1890 All W N 53; *Ram Narain* v. *Bakhtu Kuar*, (1894) 16 All 75 (77): 1893 All W N 219; *Mahtab Kuar* v. *Sham Sundar Lal*, 1888 All W N 272 (273); *Kuar Sen* v. *Chattar Singh*, 1891 All W N 92 (93); *Qaabul Singh* v. *Sanwal Das*, 1891 All W N 124 (125).

Note 7.

(1) *Haidar Shah* v. *Jamna Das*, (1895) 17 All 156 (161): 1895 All W N 43.

Note 8.

(1) *Latchayya* v. *Suryaprakasa Rao*, 1928 Mad 1165 (1166): 115 Ind Cas 825.

Note 9.

(1) *Nawbut Pattak* v. *Mahesh Narayan Lal*, (1905) 32 Cal 654 (663): 1 Cal L Jour 364.

Note 10.

(1) *Mahant Biharidasji* v. *Parshotamdas Ramadas*, (1908) 32 Bom 345 (347): 10 Bom L R 293.

(2) *Indoor Subbarami* v. *Nelatur Sundararaja*, (1915) 31 Ind Cas 312 (314): 1915 Mad W N 1021: 18 Mad L Tim 460; *Ram Ohurn* v. *R Harvey*, (1868) 2 B L R S N 11 (b): 10 Suth W R 373 (374); *Jakoob Ali Khan* v. *Rura Mal*, 1875 Pun Re No 65; *Muthu Chettiar* v. *Govindaswami Naidu*, 1929 Notes 26 (a): 116 Ind Cas 823.

(3) *Umrao Singh* v. *Umraosingh*, (1918) 47 Ind Cas 905 (906): 16 All L J 584. See also *Tukaram Mahadu* v. *Ramachandra Mahadu*, 1925 Bom 425 (427): 27 Bom L R 921: 49 Bom 672: 89 Ind Cas 984 [Compromise effected—Subsequent withdrawal by plaintiff is not permissible].

(4) *Palampetiyan Nelukulathil Unni Moyan* v. *Palampetiyan Nelukulathil Katiyamma*, (1912) 14 Ind Cas 259 (260): 1912 Mad W N 494: 11 Mad L Tim 390; *Surampalli Rama Murthi* v. *Surampalli Reddi*, (1921) 60 Ind Cas 144 (144): 12 Mad L W 563 [After withdrawal by plaintiff Court can transpose parties under Order 1, Rule 10 and proceed with the suit]. See also *Tukaram*

plaintiff cannot be permitted to terminate the suit by withdrawing it. Where, in such cases, the plaintiff desires to withdraw the suit, the proper course is to transpose the plaintiff as defendant and the defendant as plaintiff and proceed with the suit.[5-a] O. 23, R. 1, Notes 10—11.

Where in a scheme suit under S. 92 of the Code the plaintiff applies to withdraw the suit and it appears that its object is to prevent the Court from deciding the suit on the merits, the Court can under O. 1, R. 10 transpose some of the defendants as plaintiffs and proceed with the suit notwithstanding the withdrawal of the suit.[6]

A plaintiff who withdraws a suit under Sub-R. 1 must do so unconditionally. He cannot abandon the suit and at the same time ask for a decision on the merits of the case.[7] He is also liable to pay such costs as the Court orders him to pay.[8] But the payment of the costs cannot be made a *condition precedent* to his withdrawing the suit.[8-a] As to costs in a wife's suit for dissolution of marriage which is withdrawn by her, *see* the undermentioned case.[8-b]

A withdrawal under sub-R. 1 may be in any form. Where the plaintiff enters into a compromise with the defendant but does not communicate the terms of the compromise to the Court, he should be held to have withdrawn his suit under this sub-rule.[9] Similarly, when a suit is dismissed at the request of the parties on a petition of compromise being filed, the dismissal operates as a withdrawal of the suit under this sub-rule.[10]

11. Power of Appellate Court to allow withdrawal of suit.—A Court of appeal has power, in a proper case, to grant permission to withdraw a suit with liberty to file a fresh suit,[1] though such power should be used very

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Mahadu v. *Ramachandra Mahadu*, 1925 Bom 425 (426): 27 Bom L R 921: 49 Bom 672: 89 Ind Cas 984 [In a partition suit each party is in the position of plaintiff and one plaintiff cannot alone withdraw under sub-Rule 4].

(5) *Devi Chand* v. *Parbhu Lal*, 1926 All 582 (583): 24 All L J 694: 96 Ind Cas 67. See also *Tommenidi Adeyya* v. *Chilukuri Venkatarayudu*, (1914) 23 Ind Cas 392 (393): 1914 Mad W N 155: 15 Mad L Tim 245.

(5-a) *Debichand* v. *Parbhu Lal*, 1926 All 582 (583): 24 All L J 694: 96 Ind Cas 67.

(6) *Mahomed Sirajuddin* v. *Shah Ghulam Jailani*, (1921) 59 Ind Cas 235 (237): 12 Mad L W 25: 30 Mad L Tim 31.

(7) *Hardeo* v. *Narbadi*, (1909) 3 Ind Cas 572 (573): 5 Nag L R 121.

(8) *Indoor Subbarami Reddy* v. *Nelatur Sundararaja Aiyangar*, (1915) 31 Ind Cas 312 (314): 1915 Mad W N 1021: 18 Mad L Tim 460; *Yeshwant* v. *Gangadhar*, 1927 Nag 399 (400): 105 Ind Cas 733; *Ram Bharos* v. *Rampal Singh*, 1925 Oudh 699 (699): 2 Oudh W N 901: 91 Ind Cas 111 [The Court is not bound to order costs against plaintiff]. But see *Brass* v. *Tiruvengada*, (1862-63) 1 Mad H C 247 (247) [Under the Code of 1859 he was not liable to pay any costs].

(8-a) *Haidar Shah* v. *Janna Das*, (1895) 17 All 156 (161): (1895) All W N 43.

(8-b) *K M Butt* v. *F C K Butt*, (1898) 25 Cal 222 (229): 2 Cal W N 37.

(9) *Gul Kandi Lal* v. *Manni Lal*, (1901) 23 All 219 (220): 1901 All W N 66; *Allah Baksh* v. *Niamat Ali*, 1892 All W N 53 (53).

(10) *Mahomed Ali Khan* v. *Shujat Ali Khan*, (1918) 46 Ind Cas 913 (916) Nag; *Sheikh Hassan* v. *Gauri Shankar*, (1920) 58 Ind Cas 271 (271): 1919 Pun Re No 129: 115 Pun L R 1919 [Plaint returned for amendment—Plaintiff applying for dismissal of suit—Suit dismissed—Fresh suit barred].

Note 11.

(1) *Ratan Lal* v. *Md Hamidullah Khan*, 1921 All 65 (66): 19 All L J 47: 60 Ind Cas 899; *Tewari Gajraj Singh* v. *Sri Thakurji Maharaj*, 1924 All 260 (260): 74 Ind Cas 894; *Sheikh Hasan Ghulam Mohidin* v. *Mahomed Ali*, 1921 Bom 278 (280): 45 Bom 206: 59 Ind Cas 210: 22 Bom L R 1183 [Dissenting from a contrary view expressed in 10 Ind Cas 813]; *Nishi Kanta Sarkar* v. *Umar Lal Sarkar*, 1925 Cal 711 (712): 41 Cal L Jour 186: 86 Ind Cas 1029; *Afzal Begum* v. *Akbari Khanam*, (1915) 37 All 326 (328): 13 All L J 444: 28 Ind Cas 857; *Chhanubhai Mansukh* v. *Dahyabhai Govind*, (1920) 57 Ind Cas 530 (531): 44 Bom 598: 22 Bom L R 771; *Balide Kanappa* v. *Pragada Papayya*, (1917) 37 Ind Cas 414 (419): 40 Mad 259: 1917 Mad W N 217 (246): 5 Mad L W 558: 32 Mad L Jour 477: 21 Mad L Tim 82 F B [Overruling 25 Ind Cas 388 (391)]; *Bombay City Bank* v. *Maonjee Hurrudoss*, Bourke A O C 99; *Dayal Singh* v. *Uttam Kuar*, (1909) 1 Ind Cas 604 (607): 21 Pun Re 1909: 32 Pun L R 1909:

O. 23, R. 1, Notes 11—13.

cautiously.[2] A contrary view, however, has been taken by the Sind Judicial Commissioner's Court.[3] But it is submitted that this (the latter) view cannot be supported, seeing that in one case, even the Privy Council on an appeal allowed the suit with reference to a portion of the subject-matter to be withdrawn with liberty to sue again.[4] But the appellate Court has no power to allow a suit to be withdrawn *before the appeal has been admitted.*[5] So also where a suit is dismissed and the appeal from the decree of dismissal is also dismissed, the appellate Court cannot as part of the same order allow the suit to be withdrawn with liberty to sue again.[6]

12. Withdrawal of suit by plaintiff-appellant—A plaintiff-appellant is not entitled as a matter of right to withdraw his suit and he will not be permitted to do so if the effect of allowing him to withdraw it would be to deprive the defendant of the benefit of the lower Court's adjudication in his favour.[1]

13. Withdrawal of suit by plaintiff-respondent.—A plaintiff-respondent is not entitled, as a matter of right, to withdraw his suit pending the appeal but the Court may, in the exercise of its discretion, allow him to do so. A plaintiff sued the Government and some ryots, claiming a certain channel as his private property and praying for an injunction restraining interference with his rights. A decree was passed in the suit in plaintiff's favour. Against this decree the Government did not appeal but the ryots appealed. Then the plaintiff sought to withdraw his suit against the ryots being satisfied with a decree against the Government. *Held,* that he could not be allowed to do so as the decree against the Government considerably

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27 Pun W R 1909; *Manglia* v. *Jagannath,* 1926 Nag 444 (445): 95 Ind Cas 424; *Krishnan Somayajipad* v. *Vataratte Raman Nair,* 1929 Mad 36 (37): 114 Ind Cas 557; *Pyari Lall* v. *Hem Chandra.* (1912) 14 Ind Cas 719 (720): 16 Cal W N 730; *Akimannessa* v. *Bepin Behari,* (1916) 32 Ind Cas 499 (500): 20 Cal W N 544: 22 Cal L Jour 397; *Genda Mal* v. *Pirbhu Lal,* (1895) 17 All 97 (98): 1895 All W N 17; *Ganga Ram* v. *Data Ram,* (1885) 8 All 82 (84): 1886 All W N 6; *Gregory* v. *Doola Chand,* (1870) 14 Suth W R (O C) 17 (22); *Afzal Begam* v. *Abhari Khanam,* (1915) 28 Ind Cas 857 (858): 37 All 326: 13 All L J 444; *Afzal Shah* v. *G Lachmi Narain,* (1917) 42 Ind Cas 856 (857, 858): 40 All 7: 15 All L J 809; *Sheikh Hasan* v. *Mahomed Ali,* (1921) 59 Ind Cas 210 (212): 1921 Bom 278: 45 Bom 206: 22 Bom L R 1183; *Khatton Koonwar* v. *Hurdoot Narain,* (1873) 20 Suth W R 163 (163, 164); *Chhanubhai* v. *Dahyabhai,* (1920) 57 Ind Cas 530 (531): 22 Bom L R 774: 44 Bom 598; *Juggurnath Deb Nazir* v. *Moheboollah,* (1872) 17 Suth W R 164 (165). See *Veera Reddy* v. *Akka Reddy,* (1915) 28 Ind Cas 487 (487) Mad [In this case, the question was left open].

(2) *Kamta Prasad* v. *Ram Ratan Puri,* 1926 All 548 (549): 6 L R A Civ 323: 88 Ind Cas 294; *Baliram* v. *Ganpat,* (1918) 47 Ind Cas 906 (907) (Nag) [Now case set up in second appeal—Leave to withdraw with liberty to sue will not be given].

(3) *Mahomed Yakub* v. *Radhibai,* (1918) 47 Ind Cas 817 (817): 12 Sind L R 14 [Following 10 Ind Cas 813 which has been dissented from in 1921 Bom 278]; *Rasoolbux* v. *Allahbux,* (1919) 51 Ind Cas 579: 13 Sind L R 72, (Do.).

(4) *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka,* 1915 P C 24 (27): 42 Cal 897: 42 Ind App 79: 13 All L J 501: 17 Bom L R 442: 21 Cal L Jour 412: 19 Cal W N 481: 28 Mad L Jour 583: 17 Mad L Tim 321: 2 Mad L W 355: 1915 Mad W N 559: 28 Ind Cas 699 P C.

(5) *Eknath Ranoji Falke* v. *Ranoji Bawajji Falke,* (1911) 10 Ind Cas 813 (813): 13 Bom L R. 237: 35 Bom 261.

(6) *Hriday Nath Parai* v. *Akshay Lal,* (1919) 39 Ind Cas 963 (964): 25 Cal L Jour 454.

Note 12.

(1) *Ghazanfar Husain* v. *Ram Ratan Lal,* (1913) 20 Ind Cas 17 (18) Oudh; *Satyabhamabhai* v. *Ganesh,* (1905) 29 Bom 13 (18): 6 Bom L R 533; *Saiyed Ashfaq Husain* v. *Saiyed Bunyad Husain,* 1923 Oudh 252 (253): 77 Ind Cas 874; *Debendra Chandra Ghose* v. *Chaudhuri Bandhu Sahu,* 1921 Jour 13 (2): 2 Pat L Tim 591: 61 Ind Cas 831; *Rajrikh Pandey* v. *Sham Shanker Dubey,* 1930 Pat 410 (411): 12 Pat L Tim 543 [It would not be right to allow withdrawal of suit in Letters Patent Appeal]; see also *Ram Kumar Banikya* v. *Safiuniasa Bibi,* (1921) 63 Ind Cas 169 (171) (Cal) [Withdrawal of suit in Second Appeal by plaintiff-Appellant—Depends upon the question if concurrent decree of two Courts has to be set aside]; *V K Kunju Kombi Achan* v. *Ammu,* 1932 Mad 31 (32): 61 Mad L Jour 549: 135 Ind Cas 8: 34 Mad L W 548 [Application for withdrawal of appeal by karnavan of a Malabar Tarwad—Petition by anandravans to be impleaded—Karnavan's acts not in the interest of the Tarwad—Substitution ordered and appeal proceeded with .. ..].

prejudiced the rights of the other defendants, *viz.*, the ryots and that the proper course was to hear the appeal on the merits.[1]

14. Withdrawal of application for execution.—The provisions of O. 23 do not apply to execution proceedings (*see* R. 4, *infra*). But a party setting the Court in motion has the right to withdraw the proceedings from the Court. Hence, a decree-holder may withdraw his application for execution and if the Court persists in selling the judgment-debtor's property after such withdrawal it acts without jurisdiction.[1] But the procedure as to the Court allowing withdrawal with permission to sue afresh does not apply to execution proceedings.[2] Conversely, the withdrawal of an application for execution does not require the sanction of the Court to enable fresh proceedings to be taken.[3] *See also* Note 6, *ante*.

15. Withdrawal of application for entering up satisfaction of decree.—Where a decree-holder applies to enter up satisfaction of a decree but afterwards wants to withdraw his application, it has been held that the Court should not allow him to do so, but should inquire into the matter under O. 21, R. 2. Allowing a withdrawal of the application without any such inquiry would amount to a refusal to exercise jurisdiction under O. 21, R. 2 such as would justify interference by the High Court in revision.[1]

16. Withdrawal of application for withdrawal of suit.—A plaintiff applying to withdraw his suit unconditionally has a *locus penitentiae* until his petition has been acted upon by the Court, and he can withdraw his petition at any time before an order is made as prayed for in the petition.[1]

17. Withdrawal of suit on behalf of minor.—Court should be very jealous of the interests of minors, and should not allow a suit instituted on behalf of a minor to be withdrawn without being satisfied that it is for the minor's benefit. Where the next friend of a minor fraudulently withdraws a suit on behalf of a minor, the latter can sue again in respect of the same subject-matter.[1]

It has been held by the High Court of Madras that the Court should not allow the unconditional withdrawal of a suit on behalf of a minor, by the minor's next friend without liberty being reserved to bring a fresh suit.[2] According to the High Court of Calcutta the withdrawal of a suit

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Note 13.

(1) *Dharma Raja* v. *Pitha Raju*, 1924 Mad 79 (79, 80): 46 Mad 811: 45 Mad L Jour 212: 18 Mad L W 243: 1923 Mad W N 677: 74 Ind Cas 4.

Note 14.

(1) *Ram Prasad Rai* v. *Mahesh Kant*, 1922 Pat 525 (526): 1 Pat 232: 3 Pat L Jour 115: 65 Ind Cas 122.

(2) *Mata Palat* v. *Beni Madho*, (1914) 22 Ind Cas 961 (962): 12 All L J 235: 36 All 172.

(3) *Tara Chand* v. *Kashi Nath*, (1886) 10 Bom 62 (65). See also *Ashraf Begum* v. *Md Safdar Ali Khan*, 1891 All W N 154 (155).

Note 15.

(1) *Soma Pattar* v. *Ranganami*, (1919) 51 Ind Cas 411 (412): 35 Mad L Jour 252.

Note 16.

(1) *Lakshmana Pillai* v. *Appalvar Alwar*, 1923 Mad 246 (247): 44 Mad L Jour 77: 31 Mad L Jour 151: 71 Ind Cas 288: 17 Mad L W 632; *Muthusami* v. *Kalimuthu Pillai*, (1912) 15 Ind Cas 852 (853): 1912 Mad W N 997 [Per Sadasiva Iyer, J. Plaintiff cannot withdraw application except on very good grounds]; *Rajkumari Debi* v. *Nritya Kalidebi*, (1910) 7 Ind Cas 892 (893): 12 Cal L Jour 434; *Rambhuroo Lall* v. *Gopee Beebee*, (1874) 6 N W P H C 66. But see contra *Rajah Shumsher* v. *Mirza Mahomed Ali*, (1867) 2 Agra 158.

Note 17.

(1) *Rajada* v. *Ghulla*, (1918) 47 Ind Cas 308 (310): 164 Pun W R 1918: 59 Pun Re 1919; *Eshan Chundra Safoor* v. *Nundamoni Dassee*, (1884) 10 Cal 357 (367) [Fraudulent withdrawal]; *Ram Sarup* v. *Shah Lutafat Hossein*, (1902) 29 Cal 735 (737) [Guardian grossly negligent of minor's interests—Minor can have suit reopened on review through another next friend].

(2) *Doraiswami Pillai* v. *Thangasami Pillai*, (1904) 27 Mad 377 (380): 14 Mad L Jour 159.

O. 23, R. 1. Notes 17—22.

by the next friend of a minor has the same effect as the withdrawal by a person of full age.[3]

18. Withdrawal of suit by pauper plaintiff.—The withdrawal of a suit by a pauper plaintiff amounts to failure in the suit within the meaning of O. 33, R. 11, and the plaintiff must pay the Court-fees under that rule.[1]

19. Withdrawal of suit by some of several plaintiffs.—Where there are several plaintiffs in a suit the suit cannot be withdrawn without the consent of *all* the plaintiffs.[1] But one of several co-plaintiffs or co-appellants may withdraw *from* the suit or appeal so far as his own interest is concerned.[2]

The withdrawal of unnecessary plaintiffs *from* a suit does not cause the dismissal of the suit.[3]

20. Withdrawal of suit by vakil.—The authority to compromise an appeal, conferred on a vakil by a *vakalatnama,* does not authorise him to withdraw the appeal unconditionally.[1] But a vakalatnama which authorises him to choose arbitrators, prefer objections to the award, file solenamah, and do all necessary acts in connection with the suit will include also an authority to withdraw a suit under this rule.[2]

21. "As against all or any of the defendants."—Where there are several defendants to a suit, the plaintiff may withdraw his suit as against *some* of the defendants alone,[1] and if it is so withdrawn without the liberty of suing again being reserved, a subsequent suit against them will be barred.[2] But where the names of some of the defendants are *struck off*, the suit is not *withdrawn* as against them and a subsequent suit against them is not barred.[3]

22. Effect of permission.—The granting of the permission to withdraw with liberty to bring a fresh suit removes the bar of *res judicata* which

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(3) *Eshan Chundra* v. *Nundamoni*, (1884) 10 Cal 357 (364, 365).

Note 18.

(1) *The Secretary of State for India in Council* v. *Narayan Bal Krishna Kulkarni*, (1905) 29 Bom 102 (104, 105): 6 Bom L R 1122; *Secretary of State* v. *Bhagirathi*, (1907) 31 Bom 10 (15): 8 Bom L R 689.

Note 19.

(1) *Mt Sursati Bibi* v. *Bharat Rai*, (1920) 55 Ind Cas 926 (927) All; *Jogendra Narayan* v. *Mahomed Ismail*, 1925 Cal 637 (640): 52 Cal 139: 86 Ind Cas 1035; *Kali Charan Rai* v. *Sheikh Sakhawat Chaukidar*, (1919) 52 Ind Cas 183 (184): 1 U P L R (B R) 14; *Mussammat Ram Dei* v. *Mussammat Bahu Rani*, 1922 Pat 489 (490, 491): 1 Pat 228; *Jaggu* v. *Musst Nanni Jan*, (1887) Pun Re No 93; *Upputuri Punnayya* v. *Lingayya*, 1928 Mad 496 (496): 107 Ind Cas 431 [Two plaintiffs—One of them, a minor represented by the other as guardian—Suit cannot be withdrawn]; *Udey Ram* v. *Mauda*, 1885 All W N 189 (190) [Pre-emption suit by several plaintiffs —One of them withdrawing—Rights of others not affected]. See also *Sant Ram* v. *Hira Nand*, 1930 Lah 719 (721): 125 Ind Cas 894 [Quære—Whether O 23, R 3, sub-S (4), Civil Procedure Code is controlled by any rules of Hindu Law]. But see *Mohamaya* v. *Durga Charan*, (1882) 9 Cal L R 332 (333).

(2) *Nilappagouda* v. *Basangouda*, 1927 Bom 244 (244): 101 Ind Cas 348: 29 Bom L R 299; *Gopala* v. *Hira Singh*, 1908 Pun W R 119.

(3) *Phago* v. *Dharam Raji*, (1921) 60 Ind Cas 592 (592) U P: 2 U P L R (B R) 105.

Note 20.

(1) *Ramaswami Pillai* v. *Badra Nayakar*, (1920) 55 Ind Cas 267 (268): 38 Mad L Jour 322: 11 Mad L W 225: 27 Mad L Tim 99.

(2) *Kailash Chandra Kar* v. *Haradhan Chatterjee*, (1912) 14 Ind Cas 190 (190): 16 Cal W N 932.

Note 21.

(1) *Indoor Subbarami Reddi* v. *Sundararaja Iyengar*, (1915) 31 Ind Cas 312 (314): 18 Mad L Tim 460: 1915 Mad W N 1021. See also *Tilakdhari* v. *Ram Prasad*, (1921) 62 Ind Cas 25 (27) Pat [Some defendants exonerated—Claim for mesne profits—No joint decree but liability of each to be fixed in the decree].

(2) *Biram Devi Ammal* v. *Shamsuddin*, (1910) 8 Ind Cas 860 (860): (1911) 1 Mad W N 33: 9 Mad L Tim 160: 21 Mad L Jour 404.

(3) *Manindra Chandra* v. *Balaram Das*, (1910) 5 Ind Cas 725 (726): 11 Cal L Jour 161; *Nathabhai Tricamlal* v. *Ranchodlal Ramji*, (1915) 27 Ind Cas 165 (165): 39 Bom 52: 16 Bom L R 696.

would otherwise apply if a fresh suit on the same cause of action is brought.[1] It places the plaintiff in the same position as he would have been in, had he brought no suit at all.[2] But the granting of the permission to withdraw a suit with liberty does not imply the recognition of the maintainability of the second suit.[3] Thus, where a suit instituted with the leave of the Court under Cl. 12 of the Letters Patent is withdrawn with liberty to bring a fresh suit, and an application is again made under Cl. 12 of the Letters Patent for leave to institute the fresh suit, there is nothing to prevent the Court from dealing with the application and granting or refusing leave as it deems proper.[4]

O. 23, R. 1, Notes 22—25.

23. Withdrawal from suit pending arbitration.—After a reference to arbitration has been made by order of Court under Sch. 2 of the Code the Court has no jurisdiction, whether before or after the award has been passed, to allow the suit to be withdrawn with liberty to bring a fresh suit.[1] And this is so even though, the reference is invalid, and the award consequently void.[2] But where the reference to arbitration is private and out of Court and an application is made to the Court under Sch. 2, para. 20 of the Code, to file the award, the applicant may be allowed to withdraw the application.[3]

24. Withdrawing from suit after suit has abated against some of the defendants.—Where a suit abates as against a particular defendant by reason of his legal representatives not having been brought on the record within the period of limitation and the plaintiff thereupon withdraws his suit with permission to bring a fresh suit, the fresh suit can only be brought against defendants who were *actually* on the record at the time of the permission and not against the legal representatives of the deceased defendant.[1]

25. Formal defect.—The expression "*formal* defects" connotes defects of various kinds not *affecting the merits* of the case.[1] A defect which

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Note 22.

(1) *Venkata* v. *Ranga*, (1887) 10 Mad 160 (164); *Kunhan* v. *Sankara*, (1894) 14 Mad 78 (80); *Fateh Singh* v. *Jagannath Bakhsh Singh*, 1925 P C 55 (58): 48 Mad L Jour 64: 52 Ind App 100: 6 L R P C 50: 12 Oudh L J 117: 2 Oudh W N 25: 47 All 158: 27 Oudh Cas 334: 27 Bom L R 725: 29 Cal W N 749: 23 All L J 739: 22 Mad L W 58: 94 Ind Cas 280 P C; *Perumal* v. *Pichan*, (1910) 8 Ind Cas 268 (269): 21 Mad L Jour 574: 1910 Mad W N 791: 9 Mad L Tim 275 [Withdrawal of a suit with the leave of the Court does not bar a fresh suit merely because some of the defendants do not consent]; *Mamola* v. *Kedarnath*, (1914) 22 Ind Cas 918 (919) Oudh [Defendant cannot plead *res judicata* in the subsequent suit]; *Natha Singa* v. *Ishar Singh*, (1914) 23 Ind Cas 458 (460): 163 Pun L R 1914: 99 Pun W R 1914 [Joint suit withdrawn with liberty to bring new suit—Separate suit by several plaintiffs not barred], *Kallu* v. *Hukma*, 1872 Pun Re No 24; *Abdul Rahman* v. *Lal Behari*, 1885 All W N 151 (151): 7 All 649; *Ram Lochan Singh* v. *Jatadhari Singh* (1917) 40 Ind Cas 853 (854) Pat [Withdrawal of suit in Appeal].

(2) *Parbhu Dayal* v. *Mandan Singh*, (1911) 12 Ind Cas 323 (324) Oudh. See also *Beharam Choudhuri* v. *Purna Chandra Chatterji*, 1925 Cal 845 (851): 41 Cal L Jour 456: 29 Cal W N 755: 88 Ind Cas 637: 52 Cal 804 F B.

(3) *Muthiah Chetty* v. *Palaniappa Chetty*, 1922 Mad 447 (450): 45 Mad 90: 15 Mad L W 190: 70 Ind Cas 432: 41 Mad L Jour 594: 1921 Mad W N 764.

(4) *Sabhapathi* v. *Lakshmu*, (1901) 24 Mad 293 (295).

Note 23.

(1) *Shroambar* v. *Deodat*, (1887) 9 All 168 (172): 1887 All W N 13; *Kalian Singh* v. *Lakhraj*, (1884) 6 All 211 (213): 1884 All W N 28; *Abdul Karim* v. *Muhammad Husain*, (1916) 32 Ind Cas 347 (347): 2 Oudh L J 497; *Debi Churan Manna* v. *Bijra Prasad Jana*, (1903) 7 Cal W N 186 (187, 188).

(2) *T S Subba Rao* v. *Appadurai Aiyar*, 1925 Mad 621 (624): 48 Mad L Jour 142: 21 Mad L W 428: 1925 Mad W N 97: 86 Ind Cas 839 [As award was absolutely void, the second suit was not incompetent]. See *Nagamma* v. *Lakshminarasu*, 1928 Mad 1085 (1086, 1087): 112 Ind Cas 312 [Award much wider than submission—Court refusing to pass decree on award—Permission to withdraw suit and sue again cannot be granted].

(3) *Gauri Shankar* v. *Maida Koer*, (1904) 31 Cal 516 (518).

Note 24.

(1) *Gade Seshamma* v. *Bulusu Venkatasurya narayana*, (1914) 22 Ind Cas 260 (261): 38 Mad 643: 14 Mad L Tim 485: 1914 Mad W N 61.

Note 25.

(1) *K B A K A Sahib & Co* v. *K M Adamsa*, 1924 Rang 249 (253): 2 Rang 66: 81 Ind Cas 465.

O. 23, R. 1, Note 25.

goes to the *root* of the plaintiff's claim is not a formal defect.[2] The "formal defect" need not necessarily be in the pleadings.[3]

The rule requires that the *Court* must be satisfied that the suit must fail by reason of some formal defect. Hence, mere objections by the defendant are not enough.[4]

The following are some examples of "formal defects" within the rule:—

(1) Omission to obtain the permission of the Insolvency Court for filing the suit.[5]

(2) Misjoinder of parties or causes of action.[6]

(3) Erroneous valuation of the subject-matter of the suit.[7]

(4) The institution of a suit in a Court which has no jurisdiction to entertain a suit is a formal defect or at least one analogous to a formal defect so as to come within sub-R. 2 (*b*). But in such a case the Court can only *return the plaint* for presentation to the proper Court under O. 7, R. 10, and cannot act under this rule.[8]

The following are instances of defects which are not formal within this rule.

(1) Where the suit is barred by limitation.[9]

(2) Non-joinder of parties. The defect in this case could be remedied by the addition of the necessary parties.[10]

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(2) *Venkataramayya* v. *B Veeraswami*, 1925 Mad 617 (618): 21 Mad L W 282: 88 Ind Cas 665. See also *Goganma* v. *Bhanumurthy*, 1927 Mad W N 851 (851, 852).

(3) *Syed Sadeq Reza* v. *Nawab Asaf Kader*, 1931 Cal 268 (269): 34 Cal W N 578: 127 Ind Cas 549.

(4) *Rajendra Puri* v. *Beni Madho*, 1925 Oudh 140 (141): 11 Oudh L J 351: 79 Ind Cas 1031: 1 Oudh W N 383; *Abdul Sobhon Khan* v. *Samasuddin Ahmed*, 1931 Cal 336 (336): 35 Cal W N 112: 131 Ind Cas 863 [Court should apply its mind to the question]; *Gopal Chandra* v. *Benode Behari*, (1921) 64 Ind Cas 82 (82) Cal [Plaintiff's allegation of misjoinder of parties and causes of action—Found against—Leave not to be granted]; *Kiranmoyi* v. *Ramanath*, (1921) 64 Ind Cas 556 (558) Cal [Vague and mere allegation "Formal defect" without specifying the same—Not sufficient]; *Rani Harshamukhi Dassi* v. *Sarat Chandra Ata*, (1928) 32 Cal W N 1244: 1928 Notes 84 (*c*): 117 Ind Cas 864; [Formal defect—Not referred to by lower Court—Withdrawal bad]; *Mahendra Ram* v. *Singi Lal*, (1918) 48 Ind Cas 197 (198): 3 Pat L Jour 651. But see *Bisheshar* v. *Brijraj*, (1918) 44 Ind Cas 406 (407): 3 Pat L Jour 630: 4 Pat L W 233 [Where the defendant himself alleges a 'formal defect,' the Court has jurisdiction to pass any order it pleases under this rule]; *K E A K A Sahib & Co* v. *K M Adamsa*, 1924 Rang 249 (255): 2 Rang 66: 81 Ind Cas 465 [Court need not inquire whether suit must necessarily fail by reason of the formal defect—Reasonable apprehension of such failure is enough—In most cases, plaintiff's assertion of existence of such defects would be enough].

(5) *Rowe & Co* v. *Tan Thean Taik*, 1925 Rang 105 (107): 2 Rang 648: 84 Ind Cas 909.

(6) *Afzal Shah* v. *G Lachmi Narain*, (1917) 42 Ind Cas 856 (858): 40 All 7: 15 All L J 809; *Watson* v. *Collector of Rajshahye*, (1869) 12 Suth W R P C 48: 13 Moo Ind App 160 (170): 8 Beng L R P C 48: 2 Suth P C J 269: 2 Sar P C J 500 P C; *Ganeshi Lal* v. *Khairati Singh*, (1894) 16 All 279 (288): 1894 All W N 82.

(7) *Watson* v. *Collector of Rajshahye*, (1869) 13 Moo Ind App 160 (170): 8 Beng L R P C 48 (49): 12 Suth W R P C 48: 2 Suth 269: 2 Sar 500 P C; *Hussaini Khanam* v. *Ali Husain Khan*, (1907) 29 All 471 (476): 4 All L J 375: 1907 All W N 133.

(8) *Kannuswami* v. *Jagathambal*, (1918) 46 Ind Cas 265 (268): 41 Mad 701: 1918 Mad W N 497: 24 Mad L Tim 46: 8 Mad L W 145: 35 Mad L Jour 27.

(9) *Ladhomal Purtomal Firm* v. *Secretary of State for India*, (1919) 51 Ind Cas 570 (572): 13 Sind L R 1. See also *Valliammal* v. *Raja Shanmugam Pillai*, (1910) 6 Ind Cas 285 (285): 21 Mad L Jour 466: 7 Mad L Tim 223 [*Obiter*].

(10) *Veera Reddy* v. *Akka Reddy*, (1915) 28 Ind Cas 487 (487) Mad.

(3) Omission to include all the causes of action which the plaintiff has against the defendant.[11] O. 23, R. 1, Notes 25—26.

(4) Where a suit for a declaration of a public right of pathway is instituted without taking steps under S. 91 or O. 1, R. 8 or proving special damage.[12]

26. "Other sufficient grounds."—Courts in India have no general power of allowing a suit to be withdrawn with the liberty of suing again, apart from the provisions of the present rule[1-a] and the Court before granting leave under this rule must satisfy itself that the conditions therein specified exist.[1-b] In *Watson* v. *Collector of Rajshaye*[1] their Lordships of the Privy Council observed as follows:—

"There is a proceeding in those Courts called a non-suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of *form*, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them."

This passage from the judgment of their Lordships of the Privy Council conclusively shows that the failure of the plaintiff to prove his case is no ground for allowing him to withdraw his suit with the liberty of suing again for the same subject-matter.[2] The object of the rule is not to enable

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(11) *Manbhari* v. *Sumer Chand*, (1914) 25 Ind Cas 175 (176): 12 All L J 441; *Parduman Chand* v. *Ganga Ram*, (1922) 66 Ind Cas 285 (286) Lah [Suit for interest due on mortgage —Bar of subsequent claim for principal no ground —Grant of leave prejudicial to defendant].

(12) *Nishi Kanta Sarkar* v. *Umar Lal Sarkar*, 1925 Cal 711 (713): 41 Cal L Jour 186: 86 Ind Cas 1029.

Note 26.

(1-a) *Raj Kumar* v. *Ram Khelawan*, 1922 Pat 11 (46): 1922 Pat H C C 17: 64 Ind Cas 347: 3 Pat L Tim 80: 1 Pat 90; *Ramchandra* v. *Hachania Faker*, (1916) 35 Ind Cas 843 (844) Cal; *Khajamiyan Rawther* v. *Appavu Pillai*, 1926 Mad 126 (129): 1925 Mad W N 493: 90 Ind Cas 612; *Rajendra Nath Chakravarti* v. *Baikanta Nath Pramanick*, (1916) 34 Ind Cas 934 (935) Cal; *Rama Singh* v. *Janak Singh*, (1920) 56 Ind Cas 697 (698): 1 Pat L Tim 300: 1920 Pat H C C 232: 2 U P L R (Pat) 121 and 222; *Lachi Rai* v. *Raghubir Dube*, (1918) 43 Ind Cas 455 (456): 2 Pat L Jour 682. See also *Y Lakshminarasimham* v. *D Lakshmipathi*, 1931 Mad 830 (831): 1931 Mad W N 1008: 135 Ind Cas 718 [Except under express provisions, no power to give leave to sue afresh for a relief not granted].

(1-b) *Beshasher Das* v. *Abdul Jalil*, (1910) 5 Ind Cas 556 (557) All; *Pundalik* v. *Chandraban*, (1918) 43 Ind Cas 346 (347) Nag; *Nathuni Ram* v. *Sheo Koer*, (1918) 46 Ind Cas 179 (180): 3 Pat L Jour 460: 5 Pat L W 104: 1918 Pat H C C 220. See also *Jogamma* v. *Bhanumurthy*, 1927 Mad W N 851 (851, 852).

(1) (1869) 13 Moo Ind App 160 (170): 3 Beng L R P C 18: 12 Suth W R P C 43: 2 Suth 269: 2 Sar 500.

(2) *Ramji* v. *Anjani Prasad*, 1929 Nag 72 (73): 115 Ind Cas 172 [Claim based on particular pro-note—After evidence plaintiff finding it to be based on other note—He cannot be allowed to withdraw]; *Zahur-un-nissa* v. *Khudayar Khan*, (1881) 3 All 528 (529): 1881 All W N 18; *Charles, J Wiers* v. *The Central Railway Co*, 1914 P C 219 (252) [Damages claimed in plaint—Inability to prove same—Party not to be given liberty to bring fresh action]; *Satindra Mohan Tagore* v. *Bama Sundari Devi*, 1926 Cal 432 (432): 88 Ind Cas 512; *Nishi Kanta Sarkar* v. *Umar Lal Sarkar*, 1925 Cal 711 (712): 41 Cal L Jour 186: 86 Ind Cas 1029; *Moti Lal Dutt* v. *Kali Das Battacharji*, 1931 Cal 107 (108): 34 Cal W N 912: 130 Ind Cas 142; *Mt Rangabai* v. *Madhorao*, 1925 Nag 101 (102): 81 Ind Cas 276; *Ramji* v. *Anjaniprasad*, 1929 Nag 72 (73): 115 Ind Cas 172; *Venkata Ramayya* v. *Bandi Veeraswami*, 1925 Mad 617 (618): 21 Mad L W 282: 88 Ind Cas 565; *Jogamma* v. *Bhanumurthy*, 1927 Mad W N 851 (851, 852) [Practically plaintiff's side closed —Failure to substantiate relationship as reversioner—Pedigree not given—Not formal defect—No

O. 23, R. 1, Note 26.

a plaintiff after he has failed to conduct his suit with proper care and diligence, and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous bad conduct of the case so as to prejudice the opposite party.[3] The defect in the suit must be one not affecting the merits of the case, but having the effect of shutting out a fair trial on the merits and arising out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*.[4] The defect must not be due to the plaintiff's own fault[5] nor one curable by amendment of the pleadings.[6] Further, after a judgment has been passed in the suit, the Court has no jurisdiction to allow the suit to be withdrawn with permission to the plaintiff to bring a fresh suit on the same cause of action.[7]

It has also been held in a series of cases that the expression "other sufficient ground" should be construed *ejusdem generis* with "formal defect" in C. (*a*) of the Sub-R.[8], although the opinion has also been expressed

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withdrawal]; *Jagannath Sahu* v. *Sheo Gobind Prasad*, 1926 Pat 128 (128): 90 Ind Cas 217; *Mt Ejaz Rasul Khan* v. *Mubarak Hussain*, 1925 Oudh 291 (293): 27 Oudh Cas 231: 11 Oudh L J 613: 79 Ind Cas 1033: 1 Oudh W N 388 [Non-inclusion of prayer for possession in suit for possession—Suit cannot be allowed to be withdrawn with liberty to sue afresh]; *Ambika Charan Chakravarthy* v. *Sarat Chandra Basu*, (1918) 45 Ind Cas 913 (914) Cal [Failure to prove case—No ground to allow withdrawal with leave for fresh suit on alternative case]; *Padma* v. *Girish Chandra*, (1919) 45 Ind Cas 241 (242): 46 Cal 168: 27 Cal L Jour 392; *Gulab Dei* v. *Patan Din*, (1915) 30 Ind Cas 351 (351): 2 Oudh L J 461 [Pedigree relied upon by plaintiff found to be wrong—No sufficient ground for allowing withdrawal]; *Kharda Co, Ltd* v. *Durga Charan Chandra*, (1910) 5 Ind Cas 187 (188): 11 Cal L Jour 45; *Manbhari* v. *Sumerchand*, (1914) 25 Ind Cas 175 (176): 12 All L J 441; *Bhikaji Raghunath* v. *Anant Laxman*, 1929 Bom 320 (320): 31 Bom L R 613: 119 Ind Cas 773; *Daula* v. *Dwarka Pal*, 1925 Oudh 61 (62): 78 Ind Cas 121; *Khub Chand* v. *Ajodhya Prasad*, (1913) 21 Ind Cas 76 (76): 11 All L J 733; *Chinta Rangayya* v. *Chinta Butchamma*, (1917) 41 Ind Cas 281: 6 Mad L W 1: 1917 Mad W N 719; *Watson* v. *The Collector of Rajshahye*, (1869) 3 Beng L R P C 48: 13 Moo Ind App 160: 12 Suth W R P C 43 (44): 2 Suth 269: 2 Sar 500; *Muddun* v. *Israil Ali Chowdhry*, (1874) 21 Suth W R 291 (291); *Mabulla Sardar* v. *Hemangini Debi*, (1919) 6 Ind Cas 629 (631): 11 Cal L Jour 512; *Hridaya Nath* v. *Akshay Lal*, (1917) 39 Ind Cas 963 (964): 25 Cal L Jour 454; *Mahabir Prasad* v. *Mahomed Ali Khan*, 1927 All 704 (705): 103 Ind Cas 229: 25 All L J 870 [Failure to prove particular document not "sufficient ground"]; *Ishar Das* v. *Lal Singh*, 1925 Lah 497 (498): 7 Lah L Jour 290: 26 Pun L R 319: 90 Ind Cas 632; *Bhikaji* v. *Anant*, 1929 Bom 320 (320): 31 Bom L R 613: 119 Ind Cas 773; *Tikai Chobay* v. *Sheo Dayal Ramji Das*, 1928 Oudh 482 (484, 485): 3 Luck 403: 5 Oudh W N 61: 107 Ind Cas 887; *Uchant Ahir* v. *Basawan Ahir*, 1921 Pat 42 (42): 6 Pat L Jour 112: 2 Pat L Tim 634: 61 Ind Cas 639 [Inability to produce some important evidence not sufficient ground]; *Musammat Sukhdai* v. *Bhagwan Pershad*, (1913) 20 Ind Cas 542 (548) Oudh; *Bai Kishibai* v. *Shidappa Anapa Pujari*, (1913) 21 Ind Cas 28 (24): 15 Bom L R 823: 37 Bom 682; *Benode Behari Pati* v. *Choudhuri & Co*, (1919) 50 Ind Cas 453 (454) Cal; *Kali Prasanna Sil* v. *Panchanan Nandi*, (1916) 33 Ind Cas 670 (672): 23 Cal L Jour 489: 20 Cal W N 1000: 44 Cal 367.

(3) *Singhai Rajjilal* v. *Kanhai*, 1922 Nag 84 (85): 18 Nag L R 30: 61 Ind Cas 584; *Hiralal Mitra* v. *Udaychandra Dey*, (1912) 14 Ind Cas 33 (34): 16 Cal L Jour 103: 16 Cal W N 1027; *Nathuni Ram* v. *Mt Sheo Koer*, (1918) 46 Ind Cas 179 (180): 5 Pat L W 104: 1918 Pat H C C 220: 3 Pat L Jour 460.

(4) *Doma* v. *Daya Ram*, (1918) 48 Ind Cas 1005 (1006) Nag.

(5) *Motilal Dutt* v. *Kali Das*, 1931 Cal 107 (108): 34 Cal W N 912: 130 Ind Cas 142.

(6) *Rameswar Bhaksh Singh* v. *Rasul Beg*, (1918) 45 Ind Cas 603 (604): 21 Oudh Cas 66; *Jogamma* v. *Bhanumurthy*, 1927 Mad W N 851 (851, 852).

(7) *Abdul Sobhan Khan* v. *Samasudden Ahmed*, 1931 Cal 336 (336): 35 Cal W N 112: 131 Ind Cas 363; *Ram Saran Mandal* v. *Radha Raman Mandal*, 1929 Cal 88 (89): 55 Cal 1067: 118 Ind Cas 847; *Eknath Ranoji* v. *Ranoji Bawaji*, (1911) 10 Ind Cas 813 (813): 13 Bom L R 237: 35 Bom 261; *Raja Sheoraj Nundun Singh* v. *Rajcoomar Baboo Deo Nundun*, (1875) 24 Suth W R 23 (23); *Anund Mohan Paul* v. *Ram Kishen Paul*, (1865) 2 Suth W R 297 (299).

(8) *Punjushet* v. *Motiram*, 1926 Bom 315 (316): 50 Bom 192: 28 Bom L R 440: 94 Ind Cas 777; *Palikanji Chettiar* v. *Krishna Aiyar*, 1926 Mad 863 (864): 23 Mad L W 525: 94 Ind Cas 983; *Udoy Chand* v. *Molla Syed Reasat Hossain*, 1922 Cal 58 (59): 70 Ind Cas 484; *Burathagunta Pentadee* v. *Rajamma*, (1910) 8 Ind Cas 868 (869): (1911) 1 Mad W N 105: 9 Mad L Tim 204; *Ishar Das* v. *Lal Singh*, 1925 Lah 497 (498): 7 Lah L Jour 290: 26 Pun L R 319: 90 Ind Cas 632; *Nagamma* v. *Lakshmi Narasu*, 1928 Mad 1085 (1086): 112 Ind Cas 312; *Naimatulla* v. *Abdul Razack*, 1925 Mad 1268 (1269): 22 Mad L W 535: 91 Ind Cas 292; *Venkataramayya* v. *Bandi Veeraswami*, 1925 Mad 617 (618): 21 Mad L W 282: 88 Ind Cas 665; *Buta Singh* v. *Hardit Singh*, 1930 Lah 175 (176): 124 Ind Cas 686; *Jagmohan Singh* v. *Ram Khilawan*, 1929 All 683 (685): 1929 All L J 961: 119 Ind Cas 859; *Tikai Chobay* v. *Sheo Dayal*, 1928 Oudh 482 (484): 3 Luck 403: 5 Oudh W N 61: 107 Ind Cas 887; *Jagannath Sahu* v. *Sheogobind Prasad*, 1926 Pat 128 (128): 90 Ind Cas 217; *Mt Ejaz Rasul Khan* v. *Mubarak Husain*, 1925 Oudh 291 (293): 27 Oudh Cas 231: 11 Oudh L J 613: 79 Ind Cas 1033: 1 Oudh W N 388; *Munna Lal* v. *Ohhabil Das*, (1918) 46 Ind Cas 181 (182): 117 Pun W R 1918; *Hriday*

that the expression should be given a wider meaning.[9]

O. 23, R. 1, Note 26.

The following have been held to be "sufficient grounds" for allowing the plaintiff to withdraw his suit with liberty to sue a fresh:

(1) The omission to file a power-of-attorney.[10]

(2) Evidence being not available, for no fault of the plaintiff's.[11]

(3) The suit being premature and the cause of action accruing pending the suit.[12]

(4) Where the plaintiff has failed to put, in evidence, an important document essential to the success of his case. In this respect there is a distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract the defendant's evidence and a case where a plaintiff merely wishes to give formal proof of a document.[13]

(5) Where two suits are brought and both are sought to be withdrawn to be consolidated into one and there is an apprehension that the second of the two suits would be barred under O. 2, R. 2.[14]

(6) Where the plaintiff had been misled by the absence of a specific denial in the written statement.[15]

(7) Where a material document has been rejected as not properly stamped.[16]

(8) Where the plaintiff finds that the defendant is absent and that even if a decree is passed it cannot be executed.[17]

(9) For other instances *see* the undernoted cases.[18]

Nath v. *Akshaylal*, (1917) 39 Ind Cas 963 (964): 25 Cal L Jour 454; *Kali Prasanna* v. *Punchanan*, (1917): 33 Ind Cas 670 (672): 44 Cal 867: 23 Cal L Jour 489: 20 Cal W N 1000; *Jagathambal* v. *Kannusami Pillai*, (1918) 43 Ind Cas 985 (986): 7 Mad L W 131: 1918 Mad W N 106; *Mahendra Ram* v. *Singi Lal*, (1918) 48 Ind Cas 197 (198): 3 Pat L Jour 651; *Uday Chand* v. *Molla Syed Reasat Hossain*, 1922 Cal 58 (59): 70 Ind Cas 484; *Mabulla Sardar* v. *Hemangini Debi*, (1910) 6 Ind Cas 629 (630): 11 Cal L Jour 512; *Buratha Gunta Pentadee* v. *Thurlapatti Rajamma*, (1910) 8 Ind Cas 868 (869): (1911) 1 Mad W N 105: 9 Mad L Tim 204; *Sitaram* v. *Mt Chhotkai*, (1909) 3 Ind Cas 61 (63): 5 Nag L R 88; *Alya Gounden* v. *Gopanna Mauradiyar*, (1915) 26 Ind Cas 57 (58): 1 Mad L W 726: 16 Mad L Tim 253: 27 Mad L Jour 480: 1914 Mad W N 832.

(9) *Syed Sadeq Reza* v. *Nawab Asaf*, 1931 Cal 268 (269): 34 Cal W N 578: 127 Ind Cas 549; *Kannusami Pillai* v. *Jagathambal*, (1918) 46 Ind Cas 265 (266, 268): 35 Mad L Jour 27: 1918 Mad W N 497: 24 Mad L Tim 46: 8 Mad L W 145: 41 Mad 701 [Per Sadasivier, J].

(10) *Pancham Lal* v. *Muhammad Yaqub Khan*, 1926 All 294 (294, 295): 24 All L J 313: 92 Ind Cas 558.

(11) *Syed Sadeq Reza* v. *Nawab Asaf Kader*, 1931 Cal 268 (269): 34 Cal W N 578: 127 Ind Cas 549. See also *Poresh Narain* v. *Suruf Soonduree*, (1871) 16 Suth W R 100 (100).

(12) *Rangappa Naidu* v. *Basana Simon*, 1926 Mad 594 (595): 94 Ind Cas 639: 23 Mad L W 367.

(13) *Chandrika Lal* v. *Sami Nath*, 1929 All 133 (134): 50 All 835: 26 All L J 774: 115 Ind Cas 124.

(14) *K E A K A Sahib & Co* v. *K M Adamsa*, 1924 Rang 249 (255): 2 Rang 66: 81 Ind Cas 465; *Yakoob Ali Khan* v. *Rura Mal*, 1875 Pun Re No 65 [Objection to a suit on the ground of O 2, R 2 is a good ground].

(15) *Satyes Chandra Sarkar* v. *Monmohini Dasi*, (1914) 25 Ind Cas 567 (570): 19 Cal L Jour 518 [Plaintiff was allowed to abandon portion of claim with liberty to sue afresh].

(16) *Watson* v. *Collector*, (1869) 13 Moo Ind App 160 (170): 12 Suth W R P C 43: 3 Beng L R P C 48: 2 Suth 269: 2 Sar 500 P C.

(17) *H H Syed Ali* v. *A Adib*, (1891) 15 Bom 160 (164) [But see 1892-96 U B R p 261—Court should not ask the plaintiff to withdraw his suit if he does not know the address of the defendant].

(18) *Maung Po Tha* v. *D'Attaides*, (1910) 8 Ind Cas 962 (962): 5 L B R 191: 3 Bur L T 123 [Promissory note invalid—Withdrawal with li-

O. 23, R. 1, Notes 26—27.

In the following cases it has been held that there are no sufficient grounds for allowing the plaintiff to withdraw his suit with liberty:—

(1) Where the parties are ready for trial, and a withdrawal will prejudice the defendant.[19]

(2) Where the plaintiffs are not ready to go on with the case.[20]

(3) Where notices on the heirs of a deceased defendant could not be served.[21]

(4) Where owing to the mistake of the writer who drew up the plaint, some important items were left out.[22]

(5) Where the plaintiff deliberately and grossly undervalues his suit and pays insufficient Court fee.[23]

(6) For other instances *see* the undermentioned cases.[24]

27. May grant permission.—The Court can pass an order under the rule *suo motu*. An application by the plaintiff is not necessary.[1] Although the rule does not specifically mention anything about notice, still "it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard". Hence, if the Court allows a plaintiff to withdraw his suit with the liberty of bringing a fresh suit on the same cause of action, without giving notice to the defendant, the High Court will interfere in revision.[2] The permission under the rule extends only to *one* suit. A plaintiff was allowed

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berty of suing for money lent allowable]; *Khatoon Koonwar* v. *Hurdoot Narain*, (1873) 20 Suth W R 163 (163) [Where plaintiff had a good claim for contribution and the best evidence to determine the proportion payable by the various defendants had not been given]; *Juggurnath Deb* v. *Mohebullah*, (1872) 17 Suth W R 164 (165) [Plaint containing prayer for separate possession instead of for joint possession]; *Chidambara Mudali* v. *Kozhandevelu Mudali*, (1912) 17 Ind Cas 395 (396): 1912 Mad W N 1003 [All facts set out with no clear conception of the exact nature of right]; *Krishnan Somayajipad* v. *Vatavatte Raman Nair*, 1929 Mad 36 (37): 114 Ind Cas 557 [Plaintiff urging new point of law at late stage—Case raising questions of great importance affecting the rights of a large body of persons]; *Indu Bhusan Sarkar* v. *Jatu Mallik*, 1921 Cal 611 (612): 35 Cal L Jour 161: 62 Ind Cas 699 [Claim for enhancement of rent on the ground of excess area under S 52 Bengal Tenancy Act—Case sought to be proved on the basis of contract—Case not framed as on contract —Withdrawal allowed].

(19) *Venkataramayya* v. *Bandi Veeraswami*, 1925 Mad 617 (618): 21 Mad L W 282: 88 Ind Cas 665; *Singhai Rajilal* v. *Kanhai*, 1922 Nag 84 (85): 18 Nag L R 30: 61 Ind Cas 584; *Umrao Singh* v. *Umrao Singh*, (1918) 47 Ind Cas 905 (906): 16 All L J 584; *Mahipat Shamla* v. *Nathu Vithoba*, (1909) 4 Ind Cas 252 (253): 33 Bom 722: 11 Bom L R 1109.

(20) *Subedar Naimathulla Khan* v. *Abdul Razack*, 1925 Mad 1268 (1269): 22 Mad L W 535: 91 Ind Cas 292.

(21) *Lakshmibai Jagannath Joshi* v. *Yeshwant Vithal Bagkar*, 1922 Bom 449 (449): 47 Bom 92: 24 Bom L R 909: 75 Ind Cas 283.

(22) *Shanu Sheikh* v. *Dhani Sarkar*, (1917) 41 Ind Cas 934 (935) Cal.

(23) *Jagathambal* v. *Kannuswami Pillai*, (1918) 43 Ind Cas 985 (986): 7 Mad L W 181: 1918 Mad W N 106; *Kannuswami* v. *Jagathambal*, (1918) 46 Ind Cas 265 (268, 269): 41 Mad 701 1918 Mad W N 497: 24 Mad L Tim 46: 8 Mad L W 145: 35 Mad L Jour 27.

(24) *Mohammad Asghar Ali* v. *Mt Maiyan*, (1902) 5 Oudh Cas 367 (368) [Suit as filed not maintainable]; *Pundalik* v. *Chandrabhan*, (1918) 43 Ind Cas 846 (847) Nag [Plaintiff who has misunderstood his case is not entitled to the indulgence]; *Aghore Nath Shah* v. *Natabar Bairagi*, (1917) 41 Ind Cas 406 (407) Cal [Reliefs not properly asked for]; *Bulaqi Das* v. *Jugal Kishore*, 1925 Oudh 718 (718): 87 Ind Cas 1055 [Amendment of plaint at late stage refused as necessitating new trial—Withdrawal with liberty also not allowed]; *Prabhaker* v. *Khander Rao*, (1908) 10 Bom L R 625 (627) [Alteration in substantive law pending suit—Withdrawal so as to get benefit of not allowable].

Note 27.

(1) *Zakiuldin* v. *Ohunnilal*, 1927 Nag 302 (303): 10 Nag L R 142: 103 Ind Cas 290.

(2) *Rajendra Lal Sur* v. *Atal Bihari Sur*, (1917) 39 Ind Cas 969 (970): 25 Cal L Jour 456: 44 Cal 454; *Chaganlal* v. *Dhania*, 1930 Nag 151 (151, 152): 123 Ind Cas 897: 13 Nag L J 93; *Misser Debee Pershad* v. *Buldeo*, (1873) 5 N W P H C 116; *Kalian Singh* v. *Lakraj Singh*, (1884) 6 All 211 (213): 1884 All W N 28: *Lalta Prasad* v. *Mt Ohutki*, (1898) 1 Oudh Cas 97 (99) [Order of withdrawal without notice though erroneous, cannot be questioned in second suit].

to withdraw his suit with permission to bring a fresh suit, on condition of his paying defendant's costs. He filed the second suit without paying the costs, but paid it afterwards. The second suit was dismissed on the ground of the plaintiff's failure to comply with the condition as to costs. Thereupon the plaintiff tried to bring a third suit. *Held*, that he was not entitled to do so.[3] O. 23, R. 1, Notes 27—28.

28. Form of permission.—The permission to file a fresh suit need not be express but may be implied from the circumstances under which the order was passed.[1] Where the Court does not wish to grant the application for permission, it can dismiss the application and direct the plaintiff to proceed with the suit and if he fails to do so, it can dismiss the suit for default of prosecution.[2] But the Court cannot refuse the liberty to file a fresh suit and *at the same time* dismiss the suit.[3] Nor can it merely allow the suit to be withdrawn but refuse the permission to bring a fresh suit.[4] Similarly, an order on such an application granting permission to sue in respect of a portion of the claim only is bad.[5] Directing a new plaint to be filed is also not a legal order to be passed on application under R. 1, sub-R. (2).[6] Similarly an order substituting the plaintiff's assignee on the record and permitting him to withdraw the suit with liberty to bring a fresh suit is not valid.[7] The dismissal of a suit in the form "in which it is brought" does not amount to a permission to sue again.[8]

An application for withdrawal of a suit under R. 1 is a petition chargeable with Court-fee under the Court Fees Act.[9]

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(3) *Ambubai Hanmantrao* v. *Shankarsa Nagosa*, 1925 Bom 272 (272): 27 Bom L R 243: 87 Ind Cas 807.

Note 28.

(1) *Savitri* v. *Madhao Rao*, 1924 Nag 285 (286): 78 Ind Cas 772; *Khudi Rai* v. *Lalo Rai*, 1926 Pat 259 (260): 5 Pat 23: 93 Ind Cas 1001: 7 Pat L Tim 495; *Bhopal Singh* v. *Avadh Behari*, 1927 Oudh 360 (360): 103 Ind Cas 510; *Mg Ko Lay* v. *Maung Nyo*, 1927 Rang 237 (238): 6 Bur L Jour 85: 104 Ind Cas 370; *Kedlangoti Narayana* v. *Nagappa*, (1918) 44 Ind Cas 889 (890): 34 Mad L Jour 515 F B; *Dwalia Koshti* v. *Dinoo Koshti*, (1896) 9 C P L R 3 (4). But see contra *Jita Singh* v. *Hari Singh*, (1917) 37 Ind Cas 128 (129): 97 Pun Re 1916; *Banwari Lal* v. *Kishen Devi*, (1920) 67 Ind Cas 1002 (1005): 2 Lah L Jour 242 [Application for probate withdrawn and suit filed].

(2) See *Hossaini Bibi* v. *Peri Khanum*, (1868) 1 Beng L R O C 45.

(3) *Gosto Behary Gorai* v. *Harihara Ram Mondal*, 1926 Jour 111 (4): 95 Ind Cas 199; *Harnand Mier* v. *Dina Singh*, (1888) 8 All W N 132 (132); *Dodraj* v. *Gayan Prakash*, 1931 All L J 966: 1931 Notes 5 (b): 135 Ind Cas 160.

(4) *Nathji* v. *Languria*, 1925 All 272 (272): 6 L R A (Civ) 62: 85 Ind Cas 548; *Kamini Kumar Roy* v. *Rajendra*, 1926 Cal 233 (233): 42 Cal L Jour 219: 90 Ind Cas 432; *Jotirmoy Goswami* v. *Guru Gobinda Goswami*, 1928 Cal 273 (273): 107 Ind Cas 469; *Shamanandan* v. *Mulchandram*, 1921 Pat 360 (360): 1921 Pat H C C 208: 1 Pat L Tim 292: 56 Ind Cas 286; *Bhagwat Pershad* v. *Lachmi Pershad*, (1911) 10 Ind Cas 346 (346) Cal; *Sura Dhani Debya* v. *Chandra Nath Pramanick*, (1917) 37 Ind Cas 131 (131): 20 Cal W N 1011; *Mahant Behari* v. *Parsotamdas*, (1908) 32 Bom 345 (347): 10 Bom L R 293; *Subhan* v. *Latchmi*, (1909) 3 Ind Cas 206 (206): 6 Mad L Tim 191; *Suggi Lal* v. *Mohammad Wali*, (1920) 56 Ind Cas 756 (757): 1 Pat L Tim 299; *Shamanandan Prasad* v. *Mulchand*, (1920) 56 Ind Cas 286 (286): 1 Pat L Tim 292: 1921 Pat H C C 208: 1921 Pat 360; *Nagpal* v. *Chintaman*, (1882) 2 All W N 69; *Marudachela Nadar* v. *Chinna Muthu Nadar*, 1932 Mad 155 (155): 1931 Mad W N 1148: 136 Ind Cas 316 [Application indivisible].

(5) *Honappagowda* v. *Damangowda*, (1903) 5 Bom L R 223 (224).

(6) *Ledgard* v. *Bull*, (1887) 9 All 191 (200): 13 Ind App 134 P C.

(7) *Judooputtee Chatterjee* v. *Chunder Kant*, (1868) 9 Suth W R 309 (311).

(8) *Kudrat* v. *Dinu*, (1887) 9 All 155 (157): 1887 All W N 5; *Ganesh* v. *Kalka*, (1883) 5 All 595 (596): 1883 All W N 140; *Muhammad Salim* v. *Nabian Bibi*, (1886) 8 All 282 (290): 1886 All W N 119.

(9) *Reference under Stamp Act*, (1884) 8 Mad 15 (17).

O. 23, R. 1, Notes 29—31.

29. Dismissal of suit with liberty to bring a fresh suit.—A Court cannot *dismiss* a suit with liberty to the plaintiff to bring a fresh suit on the same cause of action.[1] *See* Note 28, *ante*.

30. Liberty to withdraw two suits in order to bring a consolidated suit.—Where a plaintiff files two suits and then prays for permission to withdraw both the suits with leave to bring a fresh suit in respect of the subject-matter of both the suits so as to obviate any danger of the claim comprised in the second suit being barred by O. 2, R. 2, the application may be granted although in fact, O. 2, R. 2 may not be applicable to the case.[1] *See also* Note 26, *ante*.

31. "On such terms as it thinks fit."—A defendant should ordinarily be granted his costs where the plaintiff is granted permission to withdraw the suit with the liberty to bring a fresh suit.[1] Where the payment of costs is made a condition of withdrawal with liberty, the order should limit the time for such payment and should further direct that on default of such payment the suit should stand dismissed with costs.[2] Where such direction has not been given, and the plaintiff fails to pay the costs within the time fixed, there is a conflict of opinion as to whether the second suit is barred. According to the High Courts of Calcutta,[3] Lahore[4] and Patna,[5] the second suit is not barred, whether a date has been fixed for the payment or not or whether or not such payment has been made a condition precedent to the institution of a fresh suit. These decisions proceed on the view that until the costs are paid the original suit itself cannot be deemed to have been withdrawn but must be

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Note 29.

(1) *Fateh Singh* v. *Jagannath*, 1925 P C 55 (58): 48 Mad L Jour 64: 52 Ind App 100: 6 L R P C 50: 12 Oudh L J 117: 2 Oudh W N 25: 47 All 158: 27 Oudh Cas 334: 27 Bom L R 725: 29 Cal W N 749: 23 All L J 739: 22 Mad L W 58: 91 Ind Cas 280; *Watson* v. *Collector of Rajshaye*, (1869) 13 Moo Ind App 160 (170): 3 Beng L R P C 48: 12 Suth W R P C 43: 2 Suth 269: 2 Sar P C 500; *Hiralal* v. *Udoy*, (1912) 14 Ind Cas 33 (33): 16 Cal L Jour 103: 16 Cal W N 1027; *Banwari* v. *Muhammad*, (1887) 9 All 690 (697): 1887 All W N 254: 12 Ind Jur 192; *Sukh Lal* v. *Bhikhi*, (1889) 11 All 187 (189): 1889 All W N 13; *Fateh Singh* v. *Jagannath Bakhsh Singh*, 1923 Oudh 242 (245): 10 Oudh L J 182: 74 Ind Cas 549; *Doucett* v. *Wise*, (1864) 1 Suth W R 322 (322).

Note 30.

(1) *K E A M A Sahib & Co* v. *K M Adamsa*, 1924 Rang 249 (255): 2 Rang 66: 81 Ind Cas 465. See *Lakshmanan Chetty* v. *Muthaya Chetty*, (1921) 62 Ind Cas 888 (889): 40 Mad L Jour 126: 29 Mad L Tim 126 [Permission to consolidate withdrawn suit with a pending suit—Consolidation alone to be made—Fresh suit barred].

Note 31.

(1) *Khimchand* v. *Sobhagchand*, 1923 Bom 206 (207): 25 Bom L R 242: 72 Ind Cas 324: 47 Bom 559. See also *Doucett* v. *Wise*, (1864) 1 Suth W R 322 (322); *Somasundaram Pillai* v. *Muthumanicka Nadar*, (1932) 139 Ind Cas 167 (169) Mad. See also *Bhajan Lal* v. *Keder Nath*, 1926 All 733 (733): 48 All 696: 96 Ind Cas 754 [Contested suit—Defendant ready—Full costs to be allowed].

(2) *Kuldip Singh* v. *Kuldip Choudhuri*, (1918) 44 Ind Cas 79 (80): 3 Pat L Jour 63: 4 Pat L W 134; *Rachpal Singh* v. *Sheoratan Singh*, 1929 All 692 (695): 118 Ind Cas 584; *Sadhu Charan Tewari* v. *Baikuntha Nath*, (1914) 23 Ind Cas 210 (211): 19 Cal L Jour 529.

(3) *Sadhu Charan Tewari* v. *Baikunta Nath Madak*, (1914) 23 Ind Cas 210 (211): 19 Cal L Jour 529; *Gopi Lal* v. *Naggu Lal*, (1911) 10 Ind Cas 6 (6): 14 Cal L Jour 105: 15 Cal W N 998 [Notwithstanding provision that otherwise suit should stand dismissed]; *Abdul Aziz* v. *Ebrahim Molla*, (1904) 31 Cal 965 (968); *Chitto* v. *Kire*, 2 Hyde 212; *Sajjad Hussain* v. *Ram Lal*, (1912) 15 Ind Cas 159 (160) Cal [Suit must be taken to be instituted on the day the costs were paid]. But see *Harinath* v. *Syed Hassain*, (1905) 2 Cal L Jour 480 (484): 10 Cal W N 8 [Order was that the suit should *stand dismissed on* default]. Also *Subalchandra* v. *Mosarafali*, (1917) 38 Ind Cas 476 (477) Cal [Order should be strictly complied with]. See however *Deb Kumar Roy Chowdhury* v. *Deb Nath Barna Bipra*, (1921) 64 Ind Cas 788 (789) Cal [Second suit not barred unless payment of costs is made condition precedent].

(4) *Nazir Hussain* v. *Nathu*, 1927 Lah 159 (160): 99 Ind Cas 420.

(5) *Qazi Mohammad* v. *Lachuman Singh*, 1926 Pat 409 (410): 5 Pat 806: 7 Pat L Tim 491: 96 Ind Cas 942; *Dindayal* v. *Indrasan Rai*, 1926 Pat 472 (473): 95 Ind Cas 875; *Kuldip Singh* v. *Kuldip Choudhuri*, (1918) 44 Ind Cas 79 (80): 3 Pat L Jour 63: 4 Pat L W 134 [It is sufficient if the costs are paid before the suit comes on for trial]. But see *Hukum Mahto* v. *Sant Saho*, 1925 Pat 308 (310): 78 Ind Cas 19.

taken to be pending till such costs are paid, that inasmuch, therefore, as the second suit must be taken to have been filed at the time when the first suit was pending it should be stayed under S. 10 of the Code, and that, when the costs were actually paid the first suit will be deemed to be withdrawn on the date of such payment and the second suit can be proceeded with. The Judicial Commissioner's Court of Nagpur has held that where a suit is allowed to be withdrawn with liberty on payment of costs before the institution of the fresh suit, the failure to pay such costs is only an irregularity which does not entail *ipso facto* a dismissal of the suit, and that, if the costs were paid before the hearing, the irregularity is cured.[5-a] The Calcutta view as to the original suit being pending till the costs are paid was not accepted by this Court. According to the High Courts of Allahabad,[6] Bombay[7] and Madras[8] the costs must, where the time for payment is *specified,* be paid before the specified date, or, where no time is specified, before the *institution of the suit;* otherwise, the second suit will be barred. According to this view, the permission means a permission *to bring a fresh suit* and not a permission to *withdraw* from the first suit, and that the first suit does not continue pending till the costs are paid, but is withdrawn immediately *on the order for withdrawal.* O. 23, R. 1, Notes 31—32.

Where it is impossible for the plaintiff to pay the costs within the time fixed, it has, however, been held that the Court could extend the time for such payment.[9]

Where a plaintiff suing for redemption is allowed to withdraw his suit with liberty to sue again within two years from the date of the withdrawal but sues after the expiry of the two years, his suit is not barred, provided it is within limitation. It is not open to the Court in which the first suit is instituted to curtail the period of limitation which the law allows to the plaintiff within which to bring his second suit for redemption.[10]

32. Fresh suit must be between the same parties.—The bar under this rule applies only if the second suit is between the *same parties* as the first suit.[1] Thus where the second suit is against a different defendant it is not barred under this rule.[2] Similarly, the withdrawal without the leave of the Court of a suit by a Hindu reversioner, challenging an improper aliena-

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(5-a) *Narsingh* v. *Nathuji,* 1929 Nag 135 (136): 118 Ind Cas 54: 25 Nag L R 171.

(6) *Rachhpal Singh* v. *Sheo Ratan Singh,* 1929 All 692 (695): 118 Ind Cas 584.

(7) *Shidramappa Mulappa* v. *Mallappa Ramachandrappa,* 1931 Bom 257 (258, 259): 33 Bom L R 278: 55 Bom 206: 133 Ind Cas 256.

(8) *Gollapudi Seshayya* v. *Nadendla Subbayya,* 1924 Mad 877 (878, 879): 47 Mad L Jour 646: 20 Mad L W 642: 85 Mad L Tim 62: 1924 Mad W N 887: 82 Ind Cas 499; *Fischer* v. *Nagappa Mudaly,* (1910) 6 Ind Cas 288 (288): 7 Mad L Tim 226: 33 Mad 258. But see *Dasarathy Naidu* v. *Palala Kumaramull,* (1918) 45 Ind Cas 969 (971): 7 Mad L W 557: 1918 Mad W N 427: 24 Mad L Tim 311.

(9) *Peria Muthirian* v. *Karappanna Muthirian,* (1908) 29 Mad 370 (371); *Qazi Mohammad* v. *Lutchuman Singh,* 1926 Pat 409 (411): 5 Pat 306: 7 Pat L Tim 491: 96 Ind Cas 942; *Sajjad Hossain* v. *Ramlal Shahu,* (1912) 15 Ind Cas 159 (160) Cal.

(10) *Ramchandra* v. *Hunmanta,* (1920) 58 Ind Cas 45 (46): 22 Bom L R 939: 44 Bom 989.

Note 32.

(1) *Rangacharya* v. *Raman Acharya,* 1928 All 689 (694, 695) [Suits by Shebaits representing idol—The idol need not be represented by the same Shebait]; *Shib Nath Singh* v. *Tin Kauri,* (1917) 39 Ind Cas 276 (277): 1 Pat L W 741: 1917 Pat H C C 141 [Bar not applicable to stranger]; *Basangouda* v. *Rudrappa,* 1927 Bom 87 (88): 28 Bom L R 1507: 99 Ind Cas 814 [Same person claiming but in a different capacity —Bar does not apply].

(2) *Mukhoda* v. *Ram Churn,* (1882) 8 Cal 871 (874).

O. 23, R. 1, Notes 32—33.

tion by a Hindu widow, is no bar to another suit by another presumptive reversioner for the same purpose as the reversioners do not claim through each other.[3]

33. **Same subject-matter.**—Sub-R. (3) provides that where a plaintiff withdraws his suit without the permission of the Court under sub-R. (2), he shall be debarred from bringing a fresh suit in respect of the same subject-matter. The term "subject-matter" means the plaintiff's *cause of action* for his suit[1] and a suit on a different cause of action is therefore not barred under this rule[2] even though the suit may relate to the *same property*.[3] Conversely, a suit based on the same cause of action as the first one is barred.[4]

Illustrations.

(1) A suit for *declaration of title* to a war bond is a bar to a suit for the *recovery of the bond*.[5]

(2) A suit for recovery of plots *A* and *B* and which is withdrawn with reference to plot *B* will bar a second suit for recovery of plot *B* as the cause of action with reference to both the plots is the same.[6]

(3) A suit for the ejectment of the defendant as a *trespasser* will not bar a second suit for the ejectment of the same defendant as a *tenant*, after notice to quit.[7]

(4) A suit claiming *ownership* of land is no bar to the institution of a suit claiming an *easement* over the same land.[8]

(5) Where, during the lifetime of a Hindu widow, a reversioner sues for a declaration that an alienation made by the widow is not binding on him and he then withdraws the suit without the permission of the Court to sue again, a subsequent suit by him after the widow's death, for *possession* of the property is *not* barred.[9]

(6) Where a suit is withdrawn in view of a compromise between the parties, a subsequent suit to enforce the terms of the compromise is not barred.[10]

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(3) *Aiya Ramalinga Mudali* v. *Arumuga Mudali*, (1917) 42 Ind Cas 512 (512): 33 Mad L Jour 471.

Note 33.

(1) *Shedi Ram* v. *Amin Chand*, 1930 Lah 937 (939): 12 Lah L Jour 208: 130 Ind Cas 513; *Rakhmabai* v. *Mahadeo*, (1918) 48 Ind Cas 752 (752): 20 Bom L R 35: 42 Bom 155; *Kuppusami Iyer* v. *Venkataramier*, (1905) 15 Mad L Jour 462 (465, 466) F B; *B Chenchuram Naidu* v. *Muhamed Baharuddin Sahib*, (1932) 139 Ind Cas 475 (476); *Karam Singh* v. *Sardar Singh*, (1931) 134 Ind Cas 482 (483, 484): 1932 Lah 138 (139, 140) [Suit under S 77 of Registration Act before refusal by Registrar—Withdrawal without permission—Subsequent suit after such refusal—Not barred].

(2) *Pandillapalli Surja Reddi* v. *Yeddula Subba Reddi*, (1916) 35 Ind Cas 185 (190): 31 Mad L Jour 48: 20 Mad L Tim 62: (1916) 2 Mad W N 1: 4 Mad L W 1: 39 Mad 987 [Overruling 21 Mad 35 (39)]; *Somasundara Avalappa Naicker* v. *Murugappa Chettiyar*, (1913) 18 Ind Cas 49 (55): 1913 Mad W N 86: 12 Mad L Tim 571: 23 Mad L Jour 658: 36 Mad 325; *Narayanaswamy Udayan* v. *Mannar*, 1929 Mad 798 (800, 801): 30 Mad L W 562.

(3) *Pultoo Khan* v. *Ahmad Zaman Khan*, 1924 Oudh 180 (181): 74 Ind Cas 56; *Gopal Chandra Bennerjee* v. *Purna Chunder Bennerjee*, (1900) 4 Cal W N 110 (115); *Kamini Kant Roy* v. *Ram Nath Chuckerbutty*, (1894) 21 Cal 265 (268).

(4) *Karam Chand* v. *Umer Dutt Hans Raj*, 1930 Lah 755 (756): 31 Pun L R 383: 129 Ind Cas 753.

(5) *Maung Mu* v. *Maung Kaw Gyi*, 1924 Rang 127 (131): 1 Rang 618: 77 Ind Cas 893.

(6) *Abdul Andovel* v. *Dhanajoy*, (1917) 40 Ind Cas 408 (411): 29 Cal L Jour 11.

(7) *Rakhmabhai Piraji Sapkal* v. *Mahadeo Narayan Bundre*, (1918) 43 Ind Cas 752 (752, 753): 20 Bom L R 35: 42 Bom 155; *Abdulla* v. *Akhil Chandra*, (1921) 59 Ind Cas 84 (85) Cal; *B Chenchuram Naidu* v. *Muhamed Baharuddin Sahib*, (1932) 139 Ind Cas 475 (476).

(8) *Chedami* v. *Shibcharan*, (1906) 2 All L J 59 (61): 1905 All W N 18.

(9) *P Singareddi* v. *Y Subba Reddi*, (1916) 35 Ind Cas 185 (190): 31 Mad L Jour 48: 20 Mad L Tim 62: (1916) 2 Mad W N 1: 4 Mad L W 1: 39 Mad 987 F B; *Jangi Singh* v. *Durga Singh*, (1906) 9 Oudh Cas 164 (166). But see *Machana Vajhala* v. *Gorugantulu*, (1910) 8 Ind Cas 1066 (1067): 1910 Mad W N 782: 9 Mad L Tim 468; *Sennava Reddiar* v. *Venkatachala Reddiar*, (1915) 28 Ind Cas 91 (92): 2 Mad L W 177.

(10) *Ghulam Ali Shah* v. *Shahabal Shah*, 1905 Pun Re No 8: 87 Pun L R 1905: 13 Pun W R 1905; *Rajah Shumsher Bahadur* v. *Mirza Mohomed Ali Beg*, (1867) 2 Agra 158; *Gulab Singh* v. *Cheda Singh*, (1868) 3 Agra 185.

(7) On the attachment of a house in execution of a decree, the plaintiff sued to establish her title. Meanwhile the executing Court refused to confirm the sale. Thereupon the plaintiff withdrew her suit. But the sale was afterwards confirmed in appeal. *Held*, that a fresh suit by the plaintiff was not barred as there was a fresh cause of action.[11] O. 23, R.1, Notes 33—35.

(8) The withdrawal of a suit for *possession* is no bar to the institution of a suit for *rent*.[12]

(9) The withdrawal of a suit for partition is no bar to a fresh suit for partition by the same plaintiff and of the same property, as the cause of action for a suit for partition is a *recurring* one.[13]

For other instances, *see* the undermentioned cases.[14]

34. Additional relief in fresh suit.—The withdrawal of a suit *without* the permission of the Court to institute a fresh suit operates as a dismissal thereof. Hence O. 2, R. 2 will be a bar to the institution of any suit in respect of any portion of the claim which the plaintiff may have omitted in the previous suit in such a case.[1] But where the withdrawal is with the Court's permission to bring a fresh suit, O. 2, R. 2 is no bar to the inclusion in the second suit of any portion of the plaintiff's claim or of any relief which the plaintiff might have but did not include in his first suit.[2] When a suit is withdrawn with permission to bring a fresh suit on the same cause of action, it is not necessary to allege in the subsequent suit the same title as in the first.[3]

35. Effect of withdrawal without permission.—The effect of the withdrawal of a suit without the Court's permission to bring a fresh suit is to debar the plaintiff from filing such a suit.[1] Thus, where a plaintiff unconditionally withdraws his suit in view of the matter in dispute being referred to arbitration, he cannot subsequently sue again in respect of such matter

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(11) *Mir Nasir Husain* v. *Musst Fakir Jehan Begam*, 1881 Pun Re No 119.

(12) *Ram Kishore Mundle* v. *Moorad Mundali*, 1864 Suth W R Act X, 67.

(13) *Krishnaswami Naidu* v. *Perumal*, 1925 Mad Mad 112 (114): 20 Mad L W 540: 1924 Mad W N 742: 83 Ind Cas 84; *Radha Lal* v. *Mulchand*, 1924 All 905 (906): 46 All 820: 22 All L J 749: 5 L R A (Civ) 541: 80 Ind Cas 933.

(14) *Kumar Bose* v. *Sushisabalu Bose*, 1926 Cal 178 (178): 85 Ind Cas 547 [Redemption suit—Claim for mesne profits withdrawn—Suit for mesne profits from payment under decree to delivery of possession is not barred]; *Kalipada Basu* v. *Font Glester*, 1927 Cal 365 (371): 31 Cal W N 348: 100 Ind Cas 866 [Different portion (of same plot) from that involved in prior suit—Subsequent suit not barred]; *Mt Gopharan* v. *Kallu*, (1915) 29 Ind Cas 24 (24) (U P B R); *Mussammat Kumari* v. *Adit Misir*, 1926 All 34 (34): 89 Ind Cas 379 [Right to sue for ejectment under the Agra Tenancy Act is a recurring one from year to year]; *Bhullan* v. *Dasarath Pandey*, 1929 All 67 (67, 68): 113 Ind Cas 748 [Withdrawal of suit to eject year to year tenant is no bar to suit for ejectment with effect from a subsequent year]; *Aswini Kumar Alch* v. *Saroda Charan Basu*, (1917) 37 Ind Cas 253 (255): 24 Cal L Jour 79 [Withdrawal of suit for declaration that defendant's name was wrongly entered as owner of certain share is no bar to suit for declaration of title and recovery of possession].

Note 34.

(1) *Harinath Dass* v. *Syed Hossainali*, (1905) 2 Cal L Jour 480 (484): 10 Cal W N 8.

(2) *Ghulam Muhammad* v. *Nur Khan*, (1917) 41 Ind Cas 897 (900); *Bula* v. *Bishen Das*, (1911) 9 Ind Cas 950 (956, 957): 37 Pun L R 1911: 176 Pun W R 1911; *Ma Po* v. *A Bux*, 1925 Rang 118 (119): 3 Bur L Jour 189: 84 Ind Cas 483; *Ilahi Baksh* v. *Imam Baksh*, (1876) 1 All 324 (325): 1 Ind Jur 561; *Behari Lal* v. *Baran Mal*, (1895) 17 All 53 (55): 1894 All W N 201; *Mulchand* v. *Bhikari*, (1885) 7 All 624 (626): 1885 All W N 129; *Venkata Chetti* v. *Ranga Nayak*, (1887) 10 Mad 160 (164).

(3) *The London, Bombay and Mediterranian Bank* v. *Burjorji Sorabji*, (1885) 9 Bom 346 (352).

Note 35.

(1) *Niaz Ahmad* v. *Abdul Hamid*, (1908) 30 All 279 (282): 5 All L J 278: 1903 All W N 131; *Danesh Molla* v. *Dhananjoy Biswas*, (1917) 40 Ind Cas 408 (411): 29 Cal L Jour 11 [Though plaintiff may falsely allege a different cause of action]; *Ram Prasad* v. *Dunger Singh*, (1907) 4 All L J 201 (203-204): 1907 All W N 91; *Kanahi Ram* v. *Rao Baldeo Singh*, (1919) 53 Ind Cas 478 (479): 136 Pun Re No 1919; *Paykat Manakkal* v. *Theyyankaran*, (1916) 32 Ind Cas 624 (626): (1916) 1 Mad W N 171; *Aswini Kumar* v. *Saroda Charan*, (1917) 37 Ind Cas 253 (255): 24 Cal L Jour 79; *Devchand* v. *Pirbhu Lal*, 1927 All 628 (629): 102 Ind Cas 870; *Aboo Taleh*

O. 23, R. 1, Notes 35—36.

although the arbitration may have become infructuous.[1-a] The fact that the plaintiff states at the time of withdrawal that he reserves to himself the liberty of bringing a fresh suit does not remove the bar under the rule.[2] Even the *defendant's consent* to the withdrawal of the suit at the time of such withdrawal would not remove the bar under the rule.[3] But an illegal order for withdrawal without liberty being reserved to the plaintiff to bring a fresh suit, does not bar a fresh suit.[4] Similarly where the second suit has been *already filed* at the time of the withdrawal of the first suit, the withdrawal does not bar the trial of the second suit.[5] The rule merely bars a remedy but does not extinguish the right.[6]

Where the suit property is partly within the Court's jurisdiction and partly without, the withdrawal of the suit with reference to the former portion is no bar to the continuance of the suit with reference to the latter.[7]

36. Erroneous order granting permission.—An order for withdrawal of a suit with liberty to institute a fresh suit, contrary to the provisions of this rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void, and a fresh suit instituted upon leave so granted is not incompetent. Further the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw his first suit had *properly made such order*.[1] The following cases[2] in which a contrary view was held are not good law. But where there are a number of plaintiffs and the Court allows *some* of them alone to withdraw the suit without the consent of the others, the

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v. *Abdul Nubee*, (1873) 20 Suth W R 415 (415); *Rangacharya* v. *G R Raman Acharya*, 1928 All 689 (692) [Rule as to bar of suit is mandatory].

(1-a) *Jadunandan* v. *Sheo Balak*, (1915) 28 Ind Cas 601 (602): 13 All L J 847. But see contra *Ma Ko* v. *Maung Po Tun*, (1897-1901) U B R Vol II, 284; *Ma Kyaw* v. *Ma Thwe*, (1897-1901) 2 U B R 286. See also *Ameer Begum* v. *Noor Begum*, 1866 Agra F B 1 [Suit withdrawn as compromised—Compromise not acted upon—If former position is restorable, then original cause of action revives—Otherwise not].

(2) *U E Maung* v. *P A R P Chettiar Firm*, 1928 Rang 273 (274): 6 Rang 494.

(3) *Jadu Nandan* v. *Sheo Balak*, (1915) 28 Ind Cas 601 (602): 13 All L J 847; *Gopal Chandra Banerjee* v. *Purna Chundra Banerjee*, (1900) 4 Cal W N 110 (112) [*Juggobundo Chatterjee* v. *Watson & Co*, 1865 Bourke's Rep Part 7, page 162, doubted].

(4) *Hoshdar Ali* v. *Hassan Ali*, 1888 Pun Re No 147.

(5) *Mangi Lal* v. *Radha Mohan*, 1930 Lah 599 (600): 129 Ind Cas 215; *Rudrappa* v. *Mariappa*, 1926 Mad 490 (491): 92 Ind Cas 385; *Ram Lal* v. *Upendra Dutt*, 1928 Lah 710 (712): 110 Ind Cas 818.

(6) *Solai Ammal* v. *Jogi Chetty*, (1920) 56 Ind Cas 675 (676): 10 Mad L W 637: 27 Mad L Tim 53.

(7) *Khatija* v. *Ismail*, (1889) 12 Mad 380 (386).

Note 36.

(1) *Samadd Sheikh* v. *Fulbash Bewa*, 1928 Cal 269 (269): 65 Ind Cas 704; *Hriday Nath Roy* v. *Ram Chandra Barna Sarma*, 1921 Cal 34 (36): 48 Cal 138: 24 Cal W N 723: 58 Ind Cas 806; *Chajju* v. *Khyali Ram*, (1912) 14 Ind Cas 175 (175): 9 All L J 378; *Thularam Row* v. *Gopala Iyer*, (1917) 40 Ind Cas 611 (613): 1917 Mad W N 284: 21 Mad L Tim 229: 32 Mad L Jour 484; *Mona Bibee* v. *Oomed Ali*, (1871) 16 Suth W R 276 (276); *Omesh Chunder* v. *Thakoor Das*, (1875) 23 Suth W R 345 (346); *Raj Kumar* v. *Ram Khelawan*, 1922 Pat 44 (46): 1922 Pat H C C 17: 64 Ind Cas 337: 3 Pat L Tim 80: 1 Pat 90 F B; *Rajib Sarkhel* v. *Rajah Nilmonee Singh Deo*, (1873) 20 Suth W R 440 (440). See *Purseotam Gir* v. *Narbada Gir*, (1899) 21 All 505 (514): 26 Ind Cas 175: 3 Cal W N 517: 7 Sar 538: 1 Bom L R 700. Cf. *Zahur-un-nissa* v. *Khuda Yar Khan*, (1881) 3 All 528 (529): 1881 All W N 18 [Plea as to order allowing withdrawal being bad cannot be raised for first time at the hearing of second appeal in the subsequent suit]. See also *Abdul Rahman* v. *Lal Behari*, 1885 All W N 151 (151); *Lakshmanan Chetty* v. *Muthaya Chetty*, (1921) 62 Ind Cas 833 (839): 40 Mad L Jour 126: 29 Mad L Tim 189; *Banwari Lal* v. *Kishen Devi*, (1920) 67 Ind Cas 1002 (1005): 2 Lah L Jour 242 [Application for probate and subsequent suit].

(2) *Satyabadi* v. *Bediadhar Pandu*, (1918) 46 Ind Cas 392 (394): 3 Pat L Jour 404; *Rama Singh* v. *Janak Singh*, (1920) 56 Ind Cas 697 (698, 699): 1 Pat L Tim 300: 1920 Pat H C C 232: 2 U P L R (Pat) 121 and 222; *Kali Prasanna Sil* v. *Panchanan Nandi*, (1916) 33 Ind Cas 670 (672): 23 Cal L Jour 489: 20 Cal W N 1000: 44 Cal 867 [Overruled by 58 Ind Cas 806 (F B)].

Court acts without jurisdiction and there should be deemed to be no withdrawal at all within O. 23, R. 1.[8] O. 23, R.1, Notes 36—39.

37. Effect of reversal of order granting permission.—Where after a fresh suit is filed, the order permitting the withdrawal of the previous suit with leave to institute a fresh suit is reversed by the High Court in revision, the proper procedure is to declare the fresh suit null and void and to direct the lower Court to go on with the first suit from the stage at which the order set aside was passed.[1]

38. Power of Court of Small Causes to allow withdrawal.—A Presidency Small Cause Court which, after dismissing a suit has granted a new trial, is seized of the case, not as a Court of revision but as an *original* Court and can allow the suit to be withdrawn under this rule.[1] But where a decree has been passed in favour of the plaintiff contingent on the opinion of the High Court on a certain question which is referred to it and the High Court decides against the plaintiff, the suit cannot be permitted to be withdrawn with liberty to sue again. The Small Cause Court must pronounce judgment in favour of the defendant.[2]

39. Appeal.—No appeal lies from an order allowing withdrawal of a suit with liberty to bring a fresh suit. Such an order is neither a decree nor an appealable order under S. 104 or O. 43, R. 1.[1] Nor does an appeal lie from an order as to costs under this rule.[2] Where the Court refuses to permit a suit to be withdrawn with liberty to sue again, its order, is not one affecting the decision of the case within the meaning of S. 105 and is therefore not open to attack in the appeal from the decree in the suit.[3] But where a Court while dismissing a suit reserves a right to institute a fresh suit, an appeal lies from the former part of the decree because the appeal in such a case is not from an "order" but from a decree.[4] So also, where the trial Court allows a suit to be withdrawn and, on the defendant appealing, the lower appellate Court sets aside the order and dismisses the plaintiff's

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(8) *Mt Ram Dei* v. *Mt Bahu Rani*, 1922 Pat 489 (491): 1 Pat 228.

Note 37.

(1) *Nathuni Ram* v. *Sheo Koer*, (1918) 46 Ind Cas 179 (181): 5 Pat L W 104: 1918 Pat H C C 220: 3 Pat L Jour 460.

Note 38.

(1) *Judu Mani* v. *Ram Kumar*, (1902) 29 Cal 239 (241); *Ram Chander Sastry* v. *Papu Aiyan*, (1866-67) 3 Mad H C R 27 (28) [*Can* but *not bound* to allow withdrawal].

(2) *A Yule* v. *Mahomed Hossain*, (1896) 24 Cal 129 (132, 133).

Note 39.

(1) *Kalian Singh* v. *Lekhraj*, (1884) 6 All 211 (213): 1884 All W N 28; *Sant Singh* v. *H W M Ives*, (1911) 11 Ind Cas 830 (831): 150 Pun W R 1911: 248 Pun L R 1911; *Mithai* v. *Hasan Ali*, 1930 All 863 (864): 128 Ind Cas 827; *Bishunath* v. *Ram Prasad*, 1926 Oudh 185 (185): 88 Ind Cas 1029; *Sant Ram* v. *Mt Sahib Kuer*, 1922 Lah 267 (268): 65 Ind Cas 719; *Zahuri* v. *Dina Nath*, 1893 All W N 204 (204); *Kulandai Pandichi* v. *Indram Ramaswami*, 1928 Mad 416 (418): 27 Mad W N 286: 108 Ind Cas 589: 51 Mad 664: 55 Mad L Jour 815; *Sita Ram Das* v. *Mahendra Pratab Singh*, (1919) 51 Ind Cas 69 (70) Oudh; *Pindi Dayal* v. *Kishun Kunwar*, (1919) 51 Ind Cas 766 (767): 57 Pun L R 1919; *Jagdesh* v. *Tulshi*, (1894) 16 All 19 (21): 13 All W N 189; *Genda Mal* v. *Pirbhu Lal*, (1895) 17 All 97 (99): 1895 All W N 17; *Saya Mal* v. *Laik Singh*, (1896) All W N 21 (21); *Dick* v. *Dick*, (1893) 15 All 169 (170): 1893 All W N 78; *Jogodindro Nath* v. *Sarut Sundari*, (1891) 18 Cal 322 (323); *Abdul Hossein* v. *Kasi Sahu*, (1900) 27 Cal 362 (363): 4 Cal W N 41; *Ram Kanye* v. *Haru Chunder*, (1872) 17 Suth W R 229 (229, 230). But see *Jenga Ram* v. *Data Ram*, (1886) 8 All 82 (84): 1886 All W N 6; *Satyabama Bai* v. *Ganesh Balakrishna*, (1904) 29 Bom 13 (18): 6 Bom L R 533 [First Court dismissing suit. Lower Appellate Court setting aside decree and allowing withdrawal with permission—Second appeal lies].

(2) *Yeshwant* v. *Gangadar*, 1927 Nag 399 (400): 105 Ind Cas 733; *Rama Kissoor* v. *Sir Rangacharlu*, (1898) 21 Mad 421 (422): 8 Mad L Jour 74.

(3) *Nishi Kanta* v. *Umar Lal*, 1925 Cal 711 (713): 41 Cal L Jour 186: 86 Ind Cas 1029.

(4) *Bharat Singh* v. *Jawali*, (1917) 37 Ind Cas 940 (941) All.

O. 23, R.1, Notes 39—41.

suit, the order of the lower appellate Court amounts to a decree and is appealable to the High Court.[5]

40. Letters Patent Appeal.—An order of a single Judge of a High Court refusing to set aside in revision an order of the lower Court allowing a plaintiff to withdraw his suit with the liberty of bringing a fresh suit is a "judgment" within the meaning of Cl. 15 of the Letters Patent and hence, is appealable.[1] So also, an order of a single Judge of a High Court allowing the withdrawal of a suit with leave to sue afresh is a judgment and is appealable as such.[2]

41. Revision.—An order allowing a withdrawal of a suit with liberty to sue afresh is a decision of a case within the meaning of S. 115,[1] and is therefore open to revision if it is made on grounds not covered by O. 23, R. 1.[2] Similarly, if the lower Court has not exercised a judicial discretion or has not applied its mind at all to the question, in ordering a suit to be withdrawn with liberty, the High Court can interfere in revision on the ground that the lower Court's order is vitiated by material irregularity in the exercise of its jurisdiction.[3] For this purpose, it has been held that if the lower Court orders a suit to be withdrawn with leave to sue afresh, *without giving any reasons*, it acts with material irregularity and its order is liable to be set aside in revision.[4] But where the lower Court has exercised a judicial discretion and allowed a suit to be withdrawn and the

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(5) *Abdul Hussain* v. *Kasi Sahu*, (1900) 27 Cal 362 (363): 4 Cal W N 41.

Note 40.

(1) *Rama Aiyar* v. *Venkatachella*, (1907) 30 Mad 311 (312): 2 Mad L Tim 84: 17 Mad L Jour 123.

(2) *Narandas* v. *Shantilal*, 1921 Bom 267 (268): 45 Bom 877: 58 Ind Cas 1004: 22 Bom L R 1012.

Note 41.

(1) *Udoy Chand* v. *Molla Syed*, 1922 Cal 58 (59): 70 Ind Cas 484. But see contra *Bansi Singh* v. *Kishunlal*, (1915) 26 Ind Cas 203 (204): 41 Cal 632; *Luchi Rai* v. *Raghubir Dube*, (1918) 43 Ind Cas 455 (456): 2 Pat L Jour 682 [Question left open].

(2) *Mt Rabbul Affin* v. *Babu Raza*, 1925 Oudh 596 (597): 85 Ind Cas 824: 1 Oudh W N 861; *Tirupati* v. *Muthu*, (1888) 11 Mad 322 (323); *Dick* v. *Dick*, (1893) 15 All 169 (170): 1893 All W N 78; *Kalian Singh* v. *Lekhraj*, (1884) 6 All 211 (213): 1884 All W N 28; *Udoy Chand* v. *Molla Syyed*, 1922 Cal 58 (59): 70 Ind Cas 484; *Bisheshwar* v. *Brijraj*, (1918) 44 Ind Cas 406 (407): 4 Pat L W 233: 3 Pat L Jour 630; *Luchi Rai* v. *Raghubir Dube*, (1918) 43 Ind Cas 455 (456): 2 Pat L Jour 682; *Rangaya* v. *Butchamma*, (1917) 41 Ind Cas 281 (281): 6 Mad L W 1: 1917 Mad W N 719; *Munna Lal* v. *Chabildas*, (1918) 46 Ind Cas 181 (182): 117 Pun W R 1918; *Kharda Co, Ltd* v. *Durga Charan Chandra*, (1910) 5 Ind Cas 187 (189): 11 Cal L Jour 45; *Aiya* v. *Gopanna*, (1914) 26 Ind Cas 57 (58): 1 Mad L W 726: 16 Mad L Tim 253: 27 Mad L Jour 480; *Hriday Nath* v. *Akshay Lal*, (1917) 39 Ind Cas 963 (964): 25 Cal L Jour 454; *Upendra Chandra* v. *Grish Chandra*, (1916) 32 Ind Cas 402 (402) Cal; *Ramchandra Das* v. *Hachuniya Fakir*, (1916) 35 Ind Cas 843 (844) Cal; *Hiralal* v. *Uday*, (1912) 14 Ind Cas 33 (34): 16 Cal L Jour 103: 16 Cal W N 1027; *Uchant* v. *Basawan*, 1921 Pat 42 (43): 6 Pat L Jour 112: 2 Pat L Tim 634: 61 Ind Cas 639; *Mt Rabbul* v. *Babu Raza*, 1925 Oudh 596 (597): 85 Ind Cas 324: 1 Oudh W N 861; *Ghulam Rasul* v. *Mt Ramzan Bibi*, 1923 Lah 97 (98): 68 Ind Cas 758; *Ishar Das* v. *Lal Singh*, 1925 Lah 497 (498): 7 Lah L Jour 290: 26 Pun L R 319: 90 Ind Cas 682; *Pancham Lal* v. *Muh Yaqub Khan*, 1926 All 294 (295): 24 All L J 313: 92 Ind Cas 558; *Buta Singh* v. *Hardit Singh*, 1930 Lah 175 (176): 124 Ind Cas 686; *Daula* v. *Dwarka Pal*, 1925 Oudh 61 (62): 78 Ind Cas 121; *Subasini Devi* v. *Ashutosh Lahiri*, 1924 Cal 751 (752): 39 Cal L Jour 371: 84 Ind Cas 372; *Shanu Sheikh* v. *Dhani Sarkar*, (1917) 41 Ind Cas 934 (935) Cal; *Bai Kashi Bai* v. *Shidappa Anappa Pujari*, (1918) 21 Ind Cas 23 (24): 15 Bom L R 823: 37 Bom 682; *Mahomed Ejaz Rasul Khan* v. *Mubarak Husain*, 1925 Oudh 291 (292): 27 Oudh Cas 231: 11 Oudh L J 613: 79 Ind Cas 1033: 1 Oudh W N 388.

(3) *Ram Krishna* v. *Ram Kirpa*, (1912) 14 Ind Cas 97 (98): 9 All L J 358; *Zardozi Union* v. *Basher Khan*, 1925 Oudh 107 (108): 80 Ind Cas 556; *Rajendra Puri* v. *Beni Madho*, 1925 Oudh 140 (141): 11 Oudh L Jour 351: 79 Ind Cas 1031: 1 Oudh W N 363; *Abdul Sobhan Khan* v. *Samasuddin Ahmed*, 1931 Cal 336 (336): 35 Cal W N 112: 131 Ind Cas 863; *Mathura Prasad* v. *Kodari*, 1926 Jour 133 (3): 95 Ind Cas 556; *Ram Badan* v. *Sankatha Misra*, 1926 Jour 157 (2): 92 Ind Cas 1030; *Rammat Ullah* v. *Dharam Singh*, 1922 All 185 (185): 20 All L J 90: 64 Ind Cas 948; *Ganga Prasad* v. *Mt Kishni*, 1925 All 466 (466): 47 All 319: 6 L R A (Civ) 155: 87 Ind Cas 175; *Bansidhar* v. *Mt Bitola*, 1931 All 19 (19, 20): 132 Ind Cas 36; *Mahabir Prasad* v. *Mohammad Ali*, 1927 All 704 (705): 103 Ind Cas 229: 25 All L J 870 [Discretion exercised without material—Revision lies].

(4) *Tirupati* v. *Muthu*, (1888) 11 Mad 322 (323); *Bansidhar* v. *Mt Bitola*, 1931 All 19 (19): 132 Ind Cas 36; *Rammat Ullah* v. *Dharam*

reasons assigned by it are within the scope of the rule, the High Court will not interfere with its discretion merely because the High Court itself might have taken a different view of the matter.[5] An order for withdrawal made *ex parte*[6] or made without any enquiry as to the circumstances justifying such withdrawal[7] is liable to be set set aside in revision. An order refusing permission to withdraw a suit with liberty to bring another suit is *interlocutory* in nature and is not open to revision.[8] **O. 23, R.1, Note 41.**

As to powers of a special Judge appointed under S. 54 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), *see* the undermentioned case.[9]

See also S. 115 for a general discussion of the powers of the High Court in revision and Note 25 above.

R. 2. [S. 374.] In any fresh suit instituted on permission granted under the last preceding *rule*, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been *instituted*. **O. 23, R.2.**

Limitation law not affected by first suit.

[1877—S. 374; 1859—S. 97.]

Singh, 1922 All 185 (185): 20 All L Jour 90: 64 Ind Cas 948; *Abdul Sobhan Khan* v. *Samasuddin*, 1931 Cal 336 (336): 35 Cal W N 112: 131 Ind Cas 863; *Pundalik* v. *Chandrabhan*, (1918) 43 Ind Cas 846 (847) Nag; *Harshamukhi Dassi* v. *Sarat Chandra Ata*, (1929) 117 Ind Cas 864: 1928 Notes 84 (c): 32 Cal W N 1244; *Luchi Rai* v. *Raghubir Dube* (1918) 43 Ind Cas 455 (456): 2 Pat L Jour 682; *Veera Reddy* v. *Akka Reddy*, (1915) 28 Ind Cas 487 (487) Mad; *Rajendra Nath* v. *Baikunth Nath*, (1916) 34 Ind Cas 934 (935) Cal; *Radha Rawan* v. *Tula Ram*, (1912) 17 Ind Cas 647 (648): 10 All L J 393; *Jagmohan Singh* v. *Ram Kilawan*, 1929 All 683 (684): 1929 All L J 961: 119 Ind Cas 859; *Motilal Dutt* v. *Kali Dass*, 1931 Cal 107 (108): 34 Cal W N 912: 130 Ind Cas 142; *Gopal Chandra* v. *Renode Behary*, (1921) 64 Ind Cas 82 (82) Cal [Plaintiff's allegation of misjoinder—Found against—No other reasons]; *Kiranmoyi* v. *Ramanath*, (1921) 61 Ind Cas 556 (558) Cal [Mere and vague allegation of 'formal defect'—Not specific—No other reasons]; *Subasini Devi* v. *Ashutosh*, 1924 Cal 751 (752): 39 Cal L Jour 371: 84 Ind Cas 372; *Baijnath Pande* v. *Babban Pande*, 1927 All 522: 103 Ind Cas 232: 25 All L J 484: 49 All 459; *Kamta Singh* v. *Bhagwan Dass*, 1928 All 98 (98): 25 All L J 943: 106 Ind Cas 431: 50 All 199. See *Luchi* v. *Raghubir*, (1918) 43 Ind Cas 455 (456): 2 Pat L Jour 682 [Judge of Court of Small Causes cannot allow withdrawal without assigning reasons]. See *Bansidhar* v. *Mt Bitola*, 1931 All 19 (19): 132 Ind Cas 36 [Order of Lower Court should be in such terms as to make it possible for the High Court to be satisfied that there was *prima facie*, at any rate, proper ground for the Court's order]. But see *Jadu Mani* v. *Ram Kumar*, (1902) 29 Cal 239 (241) [Order not containing ground specified in S 373. It does not follow that Court was not satisfied as to the existence of such ground].

(5) *Jhunku Lal* v. *Bisheshar Das*, (1918) 46 Ind Cas 71 (72): 16 All L J 495: 40 All 612; *Lachman Dube* v. *Basanthi Bibi*, (1903) All W N 12 (12); *Basudeb Narayan Singh* v. *Kadambini Dasi*, (1917) 40 Ind Cas 77 (77) Cal; *Jagadamba Prasad* v. *Hori Lal*, (1930) 125 Ind Cas 580: 1930 Notes 7 (f): 1930 All L J 1209; *Ratan Lal* v. *Mohammad Hamidullah Khan*, 1921 All 65 (66): 19 All L J 47: 60 Ind Cas 899; *Nannhu* v. *Roshen Singh*, 1924 All 121 (122): 74 Ind Cas 112; *Nanhey Lal* v. *Jagannath Prasad*, (1920) 58 Ind Cas 134 (134); *Kamta Prasad* v. *Ram Ratna*, 1926 All 548 (548): 24 All L J 721: 96 Ind Cas 480; *Hasan Ali* v. *Lachman Prasad*, 1927 All 750 (750): 25 All L J 838: 103 Ind Cas 372. See *Shankar Lal* v. *Mahtab Dei*, (1912) 14 Ind Cas 414: 9 All L J 207 [Where the order was held to be not open to objection as it promoted the ends of justice]. See *Ganpat Rao* v. *Anand Rao*, (1910) 32 All 148 (151): 12 Bom L R 267: 14 Cal W N 410: 7 All L J 165: 7 Mad L Tim 53: 11 Cal L Jour 281: 5 Ind Cas 689: 20 Mad L Jour 164 [The P C refused to interfere with the exercise of decision by the High Court]; *Ishar Das* v. *Aya Ram*, 1932 Lah 360 (361): 136 Ind Cas 1: 33 Pun L R 275: 13 Lah 537; *Municipal Committee, Gujerat* v. *Allah Dad*, (1932) 137 Ind Cas 804 (804) Lah.

(6) *Rajendra* v. *Atal*, (1917) 39 Ind Cas 969 970): 25 Cal L Jour 455: 44 Cal 454.

(7) *Nathuni Ram* v. *Mussammat Sheo Coer*, (1918) 46 Ind Cas 179 (180): 5 Pat L W 104: 1918 Pat H C C 220: 3 Pat L Jour 460; *Mahenara Ram* v. *Singi Lal*, (1918) 48 Ind Cas 197 (198): 3 Pat L Jour 651.

(8) *Got Mal* v. *M R Ramchand & Co*, 1930 Lah 589 (1): 31 Pun L R 456: 122 Ind Cas 105.

(9) *Muktaji Bhagaji* v. *Manaji*, (1888) 12 Bom 684 (685) [Such Judge cannot, in exercise of his revisional powers allow a plaintiff to withdraw suit with liberty to sue again].

O. 23, R. 2. Note 1.

Synopsis.

1. Limitation.

Applicability to execution proceedings. See Rule 4 below.

Suit filed with leave under Cl. 12 of Charter. See Note 1, F.-N. (4).

1. Limitation.—Under the present rule, a plaintiff withdrawing a suit under O. 23, R. 1 with liberty to sue again and instituting a fresh suit is not entitled to deduct from the period of limitation applicable to his second suit the time taken up by the withdrawn suit.[1] Section 14 of the Limitation Act does not apply where a suit is *withdrawn* by a plaintiff.[2] The rule provides that the law of limitation shall apply in the *same manner* as if the prior suit had not been brought. Hence a plaintiff is not deprived of the benefit of S. 31 of the Limitation Act merely because he has withdrawn a prior suit relating to the same subject-matter under O. 23, R. 1.[3] This rule applies only to a suit withdrawn under R. 1 but that rule also does not apply except to cases *properly pending* in a Court in which the leave is granted. Therefore, where a Court has *no jurisdiction* to try the suit, its order granting leave to withdraw a suit with the liberty does not fall within R. 1. Hence this rule does not apply to such a case and S. 14 of the Limitation Act is applicable.[4]

Further the present rule applies only where a period is fixed by the *law of limitation.* Hence, where a plaintiff who is required by the order of a Revenue Court to institute a suit within three months, does so within the three months but withdraws the suit with liberty to sue again, his subsequent suit brought on the basis of such liberty is not barred though it may be instituted after the expiry of three months from the Revenue Court's order.[5]

O. 23, R. 3.

R. **3.** [S. 375.] *Where it is proved to the satisfaction of the Court*[6] *that* a suit *has been* adjusted[7] wholly or in part by any lawful agreement or compromise,[8] or *where* the defendant *satisfies* the plaintiff[16] in respect *of* the whole or any part of the *subject*-matter of the suit, *the Court shall order* such agreement, compromise or satisfaction to

Compromise of suit.

Order 23, Rule 2—Note 1.

(1) *Upendra Nath Nag* v. *Surya Kanta Roy Chowdhury,* (1913) 20 Ind Cas 205 (206) Cal; *Krishnaji Lakshman* v. *Vithal Ravji Range,* (1888) 12 Bom 625 (633); *O M Madarsang* v. *Ishwargar Budhagar,* (1892) 16 Bom 243 (248).

(2) *Rahim Ali* v. *Yehia Khan,* 1928 All 402 (403): 9 L R A (Rev) 178: 114 Ind Cas 910; *Varajlal Bhaishankar* v. *Someshwar,* (1905) 29 Bom 219 (225): 7 Bom L R 90; *Arunachalam* v. *Lakshmana,* (1915) 31 Ind Cas 234 (236): 39 Mad 986: 2 Mad L W 1002: 29 Mad L Jour 569: 18 Mad L Tim 385: 1915 Mad W N 850.

(3) *Chhajju* v. *Khyali Ram,* (1912) 14 Ind Cas 175 (176): 9 All L J 878.

(4) *Ramdeo* v. *Ganesh Narain,* (1908) 35 Cal 924 (928): 12 Cal W N 921 [Suit filed with leave of Registrar under Clause 12 of the Charter—Leave bad—Withdrawal of suit—*Ultra vires*]. See also *Narasimma* v. *Muttayan,* (1890) 13 Mad 451 (453) [Suits by some of obligees in one Court and others in another—One suit dismissed—Another withdrawn with permission to file fresh suit—Time saved by S 14, Limitation Act].

(5) *Shaik Mahomed* v. *Quadir Bakhsh,* (1914) 25 Ind Cas 188 (190): 12 All L J 989. See *Darbari Singh* v. *Ram Murut Singh,* 1927 All 98 (99): 98 Ind Cas 516 [The subsequent suit is a *continuation* of the prior suit].

be recorded,[17] and shall pass a decree in accordance therewith so far as it relates to the suit.[18] O. 23, R. 3, Note 1.

[1877—S. 375; 1859—S. 98. *See* S. 96 (3) and O. 20.]

Local Amendment.

RANGOON.—

To Rule 3, of O. 23, the following proviso shall be added:—
"Provided that before recording and passing a decree in accordance with an agreement, compromise or satisfaction in a suit instituted under the provisions of S. 92, Civil Procedure Code, the Court shall direct notice returnable within a reasonable time to be given to the Government Advocate, Burma, or the officer with whose consent the suit was instituted, or the agreement, compromise or satisfaction proposed to be recorded. The Government Advocate or such officer as aforesaid may thereupon appear before the Court and be heard in the matter of such agreement, compromise or satisfaction."

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Applicability to Revenue Courts.
4. Applicability to mortgage suits.
5. Applicability to divorce suits.
6. "Where it is proved to the satisfaction of the Court."
7. "Has been adjusted."
8. "By any lawful agreement or compromise."
9. Submission to award, if a valid adjustment.
10. Agreement to take oath.
11. Compromise of probate proceedings.
12. Compromise of suit under Dekkhan Agriculturists' Relief Act.
13. Compromise pending arbitration.
14. Compromise of guardianship proceedings.
15. Pre-decree agreements in bar of execution.
16. "Where the defendant satisfies the plaintiff."
17. "Shall order such agreement, compromise or satisfaction to be recorded."
18. "Shall pass a decree in accordance therewith so far as it relates to the suit."
19. Where compromise includes matters not relating to the suit.
20. Parties to the compromise.
21. Compromise by minor's guardian.
22. Compromise by Hindu widow.
23. Compromise by pleader.
24. Effect of consent decree and admissibility in evidence.
25. Registration, if necessary.
26. Stamp.
27. Execution of consent decree.
28. Mode and effect of setting aside compromise decrees.
29. Compromise of appeal.
30. Compromise of execution-proceedings.
31. Appeal.
32. Revision.
33. Construction of compromise-decrees.

Compromise not binding on non-parties thereto. See Note 20, Pts. (6) to (8).
Compromise to party's disadvantage not invalid. See Note 8, Pts. (14) to (16).
Jurisdiction of Court under the rule. See Note 18, Pts. (14) to (18).
Partial award not invalid. See Note 9, F.-N. (5).
Procedure in case of denial of compromise. See Notes 2 and 6.
Procedure under this rule not formal. See Note 17, Pt. (1).

1. Legislative changes.—

1. The words 'where it is proved to the satisfaction of the Court that' are new. *See* Notes 2 and 6 below.

2. The words 'the Court shall *order* such agreement, compromise or satisfaction to be recorded' have been substituted for the words "such agreement, com-

O. 23, R. 3, Notes 1—4.

promise or satisfaction shall be recorded". This makes it clear that in every case of compromise decree, there should be an *order* recording the compromise from which an appeal is provided by O. 43, R. 1 (*m*).

3. The words at the end of S. 375 'such decree shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction' have been omitted and a new sub-Section has been added to S. 96, providing that no appeal lies from a consent decree.

2. **Scope of the rule.**—After the institution of a suit it may be adjusted by the parties either *wholly* or *in part* by any lawful agreement or compromise. The defendant may also *satisfy* the plaintiff in respect of the *whole* or *any part* of the subject-matter of the suit. In such cases, on the application of the parties the Court *shall order* such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith *so far as it relates to the suit.* Where the agreement or compromise relates to matters *entirely extraneous* to the suit, no decree can be passed in terms of such agreement or compromise under this rule.

The Court must *be satisfied* that there has been a lawful agreement or compromise: and when one of the parties disputes the legality of the compromise or agreement, the Court should investigate the matter, and, if it finds that there has been a lawful compromise, should pass a decree in terms thereof so far as such compromise relates to the suit.

The word "compromise" is more comprehensive than the word "agreement". It means an adjustment of claims in dispute by mutual concessions, and also a mutual promise of two or more parties at difference, to refer the ending of their controversy to arbitrators.[1]

3. **Applicability to Revenue Courts.**—The rule applies to revenue as well as civil proceedings.[1] It does not however apply to proceedings for the appointment of common manager under S. 93 of the Bengal Tenancy Act.[2] Nor does it apply to a rent suit under that Act, though a compromise in such suits can be recorded by the Court under S. 147-A of that Act which is identical in terms with this rule.[3] The rule does not, likewise, apply to proceedings under some other Special Acts.[4]

4. **Applicability to mortgage suits.**—The rule applies also to suits on mortgages, so that it is open to the Courts to decree such suits on terms settled between the parties, instead of in the form directed by O. 34, R. 4.[1] Similarly, the proceedings for a final decree after the preliminary decree

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Order 23, Rule 3—Note 2.

(1) *See* Wharton's Law Lexicon, 13th Ed, p. 198; *Chanbasappa* v. *Baslingayya*, 1927 Bom 565 (567, 578): 29 Bom L R 1254: 105 Ind Cas 516: 51 Bom 908; *Basaoo* v. *Jagannath*, 1931 Oudh 127 (129): 8 Oudh W N 71: 131 Ind Cas 448.

Note 3.

(1) *Sankar Singh* v. *Kalka Baksh Singh*, (1917) 39 Ind Cas 545 (549): 21 Oudh Cas 346.

(2) *Kali* v. *Parbati*, (1906) 4 Cal L Jour 564 (565).

(3) *Ram Padarath Singh* v. *Sohrai Koeri*, (1919) 52 Ind Cas 20 (21, 22): 4 Pat L Jour 667: 1920 Pat H C C 114: 2 U P L R (Pat) 66.

(4) See S 196 of the Orissa Tenancy Act (II of 1913) and S 199 of the Madras Estates Land Act (I of 1908).

Note 4.

(1) *Mt Arunbati Kumari* v. *Ramniranjan Marwari*, 1921 Pat 320 (320): 2 Pat L Tim 38: 58 Ind Cas 299.

has been passed, are proceedings in *suit* and can be compromised.[2] But a mere agreement to *extend the time* given by the preliminary decree for the payment of the mortgage money does not amount to an adjustment of the suit.[3] This rule cannot be extended by analogy to proceedings under S. 83 of the Transfer of Property Act.[4] O. 23, R. 3, Notes 4—6.

5. Applicability to divorce suits.—Where a decree *nisi* has been passed in a suit for dissolution of marriage it is competent to the Court, where the parties consent, not to make the decree absolute.[1]

6. "Where it is proved to the satisfaction of the Court."—These words are new. Under the old Code there was a conflict of decisions as to whether where a compromise was alleged by one party and denied by the other, or where one of the parties to the compromise was not willing to abide by the compromise, the Court had the power to record the compromise and pass a decree thereon. On the one hand it was held by the High Courts of Madras,[1] Calcutta[2] and Bombay,[3] the Chief Court of Punjab[4] and the Judicial Commissioners' Courts of Nagpur[5] and Oudh[6] that the Court had the power to enquire into the matter, to record it if proved, and to pass a decree thereon; on the other hand, it was held by the High Court of Allahabad that under S. 375, the Court could record a compromise and pass a decree thereon only when *at the time of moving the Court* the parties were agreed as to the compromise and the decree to be passed on it.[7] The present rule makes it clear that the Legislature has adopted the former view, *viz.*, that the Court has jurisdiction in the case of a dispute between the parties as to the compromise, to enquire into, and decide, whether there has been a lawful compromise in terms of which the suit should be decreed.[8] As to whether and

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(2) *Dharam Singh* v. *Ganesh Ram*, (1918) 43 Ind Cas 399 (400) Nag; *Chellaram Khialdas* v. *Kimatram*, (1919) 52 Ind Cas 899 (900): 13 Sind L R 135; *Tirloki Nath* v. *Sadhu Ram*, 1927 Oudh 275 (276): 102 Ind Cas 428; *Jogendra Prasad* v. *Gauri Shankar*, (1917) 40 Ind Cas 138 (138): 2 Pat L Jour 533: 2 Pat L W 66 [Payment *out of Court* after preliminary decree is adjustment under this rule]. But see *Durga Devi* v. *Nand Lal*, 1932 Lah 231 (232): 33 Pun L R 138: 136 Ind Cas 732 [Such payment is not an adjustment under this Rule].

(3) *Ahmed Rahman* v. *A L A R Chettiar Firm*, 1928 Rang 194 (195): 6 Rang 285: 110 Ind Cas 873.

(4) *Tatayya* v. *Pichayya*, (1890) 13 Mad 316 (318).

Note 5

(1) *Culley* v. *Culley*, (1888) 10 All 559 (562, 568): 1888 All W N 249.

Note 6.

(1) *Appasami Nayakan* v. *Varadachari*, (1896) 19 Mad 419 (422); *Sridharan Somayajipad* v. *Puramathan Somayajipad*, (1900) 23 Mad 101 (105, 106): 9 Mad L Jour 350; *Appasami* v. *Manickam*, (1886) 9 Mad 103 (106, 107); *Karuppan* v. *Ramasami*, (1885) 8 Mad 482 (483).

(2) *Brojodurlabh* v. *Ramanath Ghose*, (1897) 24 Cal 908 (915): 1 Cal W N 597 [Overruling 11 Cal 250 (257)].

(3) *Samibai* v. *Premji*, (1896) 20 Bom 304 (308); *The Gokuldas Bulabdas Manufacturing Co, Ltd* v. *James Scott*, (1892) 16 Bom 202 (208, 209); *Ruttonsey Lalji* v. *Pooribai*, (1883) 7 Bom 304 (308).

(4) *Harkha* v. *Kirkpatrick*, 1896 Pun Re No 8; *Hamid-ullah* v. *Hayat Khan*, 1888 Pun Re No 182.

(5) *Bhiwa Teli* v. *Raghu Pandoo & Ramjee*, (1899) 12 C P L R 56 (58).

(6) *Balkaran Singh* v. *Indrapal Singh*, (1899) 2 Oudh Cas 67 (72); *Musammat Lachmin* v. *Parkhotam Singh*, (1902) 5 Oudh Cas 49 (58).

(7) *Bandhu* v. *Shah Muhammad*, (1892) 14 All 350 (352): 1892 All W N 40.

(8) *Sital Prasad* v. *Lal Bahadar*, (1915) 31 Ind Cas 902 (903): 38 All 75: 13 All L J 1122; *Harakhbai* v. *Jamnabai*, (1912) 19 Ind Cas 786 (787): 15 Bom L R 340; *Anadi Krishna Dutta* v. *Priya Shankar Majumdar*, (1916) 36 Ind Cas 375 (377): 21 Cal W N 366; *Gajendra Chandra Burma* v. *Bindubashini*, (1909) 4 Ind Cas 5 (6): 13 Cal W N 1023: 6 Mad L Tim 93; *Khurshed Ali* v. *Wazirunnia*, (1910) 6 Ind Cas 857 (859): 7 All L J 778; *Narayan Singh* v. *Lal Singh*, (1912) 15 Ind Cas 478 (479): 63 Pun L R 1912: 142 Pun W R 1912; *Kelu* v. *Meenakshi*, (1913) 21 Ind Cas 639 (640): 25 Mad L Jour 586: 14 Mad L Tim 574; *Saiyid Mehdi Ali Khan* v. *Chaudhri Ghanshiam Singh*, 1927 P C 204 (205): 29 Bom L R 1376: 4 Oudh W N 837: 104 Ind Cas 375: 39 Mad L Tim 300: 32 Cal W N 93: 46 Cal L Jour 209: 53 Mad L Jour 345 P C; *Jnanendra Nath Dutt* v. *Nasea Dasi*, 1924 Cal 991 (992): 39 Cal L Jour 526: 88 Ind Cas 948; *Raghbir*

O. 23, R. 3, Notes 6—7.

when *appeal* lies from a decree passed under such circumstances, *see* Note 15 to S. 96, *ante*.

It is open to the Court to decide the matter by taking evidence in the usual way or upon affidavits.[9] The agreement compromising the suit may be written or oral,[10] and may be proved by oral[11] or documentary, evidence. The compromise need not be presented by the parties themselves.[12] A compromise otherwise unobjectionable is not vitiated by the want of signature of a party.[13] A compromise disallowed by the Court cannot be again set up in execution of the decree in the suit.[14]

7. "**Has been adjusted.**"—In order that the rule may apply, there must be a *completed agreement* between the parties[1] and the agreement *must amount to an adjustment*, in whole or in part, of the suit.[2] The following cases will show when a suit can be said to be adjusted and when not:—

(1) Where a case is adjourned on the ground that the parties contemplated compromising the matter out of Court, there is no adjustment of the suit within this rule.[3]

(2) Where parties agree that the suit should be disposed of in one way if a certain simple fact was found to exist and in another way if it was found not to exist, it has been held by the High Court of Calcutta that it amounts to an adjustment of the suit.[4] The High Court of Allahabad has taken a contrary

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Singh v. *Chanan Singh*, 1923 Lah 204 (205): 69 Ind Cas 395; *Joint Hindu Family of Sadhu Ram* v. *Botha Ram*, 1930 Lah 293 (294): 11 Lah L Jour 446; *Ramjas Marwari* v. *Baruni Mahton*, 1929 Pat 102 (102): 116 Ind Cas 524.

(9) *Ruttonsey Lalji* v. *Pooribai*, (1883) 7 Bom 304 (309); *Musammat Lachmin* v. *Parkhotam*, (1902) 5 Oudh Cas 49 (53); *Balkaran Singh* v. *Indrapal Singh*, (1899) 2 Oudh Cas 67 (72); *Samibai* v. *Premji*, (1896) 20 Bom 304 (308).

(10) *Gajendra Chandra Burma* v. *Bindubasini*, (1909) 4 Ind Cas 5 (6): 13 Cal W N 1023: 6 Mad L Tim 93; *Bi Ya* v. *On Gaing*, (1905-1906) 8 L B R 243 (243).

(11) *Sambandha Mudaliar* v. *Chinnaswami Sah*, (1915) 29 Ind Cas 860 (861) Mad.

(12) *Hari Chand* v. *Magbi Mal*, (1917) 40 Ind Cas 675 (676): 78 Pun Re 1917: 112 Pun L R 1917: 95 Pun W R 1917.

(13) *Amir* v. *Faqira*, (1914) 25 Ind Cas 874 (875): 242 Pun L R 1914: 139 Pun W R 1914.

(14) *Jhundoo* v. *Himmut*, (1871) 8 N W P 81.

Note 7.

(1) *Muhammad Abdul Ghani* v. *Balmokund Sukul*, (1917) 37 Ind Cas 421 (422) Pat [Parties making mutual concessions with a view to terminate the litigation—Agreement]; *Geti Ara Begam* v. *Jagan Nath*, (1911) 9 Ind Cas 426 (427) Oudh [Mere offer of certain terms by plaintiff which are rejected by defendant not enough]; *Kamalambal* v. *Dorasami Chettiar*, (1920) 56 Ind Cas 26 (32): 11 Mad L W 179 [Mere agreement to draw up a formal document does not prevent the terms settled being a binding agreement unless it is also agreed that till the formal document is perfected, there should be no agreement]; *Taru Bala Dasi* v. *Surendra Nath Mitra*, 1925 Cal 866 (870): 41 Cal L Jour 213: 88 Ind Cas 869: 29 Cal W N 597 [If the terms of an agreement are intelligible, and the agreement is binding between the parties, it cannot be avoided by one of the parties on the ground, that he does not understand whether a particular matter is included in those terms or not]; *Md Shah* v. *Ghulam Mustafa*, 1930 Sind 217 (218): 123 Ind Cas 693 [Inchoate agreement—Evidence of completion is necessary—Agreement is ineffective without it]; *Jagapat Singh* v. *Puran Chand*, 1924 P C 200 (201): 47 Mad L Jour 136: 5 L R P C 145: 26 Bom L R 772: 35 Mad L Tim 136: 1924 Mad W N 646: 20 Mad L W 571: 83 Ind Cas 380 P C [Parties not *ad idem*—No agreement of compromise].

(2) *Ismal Md* v. *Daudbhai*, (1900) 2 Bom L R 118 (119) [Agreement that should plaintiff succeed in his suit with regard to certain land, he should purchase the land from the defendant for a certain price, does not amount to an adjustment of the suit]; *Mahomed Shah* v. *Ghulam Mustafa Shah*, 1930 Sind 217 (217): 123 Ind Cas 693 [Rule applies to adjustment of whole or part of suit]; *Shahdeo Shukul* v. *Jageshar Prasad Shukul*, 1923 Pat 293 (294) [Partial adjustment—Suit must proceed in usual way in respect of portion not compromised].

(3) *Haridas Modak* v. *Ram Das Modak*, 1931 Cal 205 (206): 34 Cal W N 1068: 131 Ind Cas 257; *Venkatarayudu* v. *Venkata Kumara Mahipati Surya Rao*, 1929 Mad 416 (417): 120 Ind Cas 742.

(4) *Khobhari Sah* v. *Jhaman Sah*, (1916) 34 Ind Cas 220 (221): 28 Cal L Jour 462.

view.[4-a]

O. 23, R. 3, Note 7.

(3) An agreement between the parties to a suit to abide by the final decision which may be made in another proceeding amounts to an adjustment when that decision is actually passed.[5]

(4) (*a*) An agreement *between the parties* that a dispute is to be settled in one way or the other in accordance with the statement of a third person is an adjustment.[6]

(*b*) But an agreement between the parties to *refer their disputes* to a third party's decision and abide by his terms is not an adjustment, till the terms are stated and *accepted*.[7]

(*c*) When a dispute is referred by the parties to a third party's decision there is a *locus penitentiae* to withdraw from such agreement till the third party functions.[8]

(5) A compromise which either party has the option of repudiating afterwards is not an adjustment of the suit.[9]

(6) An agreement to abide by the decision of the Court whether right or wrong amounts to a compromise within this rule.[10]

(7) An agreement for making the decision of Court depend on contingencies *beyond* the control of parties is not an adjustment[11] while, it will be an adjustment if the contingency is within the power of the parties themselves.[12]

(4-a) *Muhammad* v. *Cheda Lal*, (1892) 14 All 141 (144): 1892 All W N 8 [Agreement to make disposal of suit depends upon a certain fact being found upon a certain document or not—Agreement is not "adjustment" as it leaves something to be done by the Court].

(5) *V Sreenivasachariar* v. *Kumara Thathachariar*, (1919) 51 Ind Cas 540 (541): 8 Mad L W 470: 24 Mad L Tim 356: 1918 Mad W N 746 [Distinguishing 15 Ind Cas 378 (379) on ground that terms of agreement in that case were not clear].

(6) *Himachal Singh* v. *Jatwar Singh*, 1924 All 570 (570): 5 L R A Civ 439: 80 Ind Cas 16: 46 All 710; *Baadeo Singh* v. *Ram Raj Singh*, 1932 All 166 (167, 168): 1932 All L J 71: 137 Ind Cas 263; *Chet Ram* v. *Bhup Singh*, 1927 Lah 99 (100): 98 Ind Cas 864.

(7) *Tumman Singh* v. *Sheodarshan Singh*, 1930 All 162 (163): 1930 All L J 397: 122 Ind Cas 186: 52 All 235; *Raj Nath Prasad* v. *Narain Prasad*, 1927 All 614 (615): 102 Ind Cas 608: 25 All L J 787; *Seumal* v. *Pursomal*, (1913) 19 Ind Cas 450 (450): 6 Sind L R 166; *Mohomed Umar* v. *Seth Chiman Singh*, (1914) 25 Ind Cas 935 (936): 8 Sind L R 91.

(8) *Tumman Singh* v. *Sheo Darshan Singh*, 1930 All 162 (163): 1930 All L J 397: 122 Ind Cas 186: 52 All 235; *Bishambhar* v. *Radha Kishunji*, 1931 All 557 (559): 1931 All L J 393: 133 Ind Cas 29: 53 All 673

(9) *Ram Lal* v. *Gopi*, (1914) 25 Ind Cas 710 (711): 24 Pun Re 1914: 58 Pun W R 1914: 196 Pun L R 1914.

(10) *Sita Ram* v. *Peare*, 1925 All 558 (558): 23 All L J 525: 88 Ind Cas 611: L R 6 All 503; *Shahzadi Begam* v. *Muhammad Ibrahim*, 1921 All 310 (310): 43 All 266: 19 All L J 14: 59 Ind Cas 787; *Basir Ahmed* v. *Sadiq Ali*, 1929 Oudh 451 (452): 6 Oudh W N 771: 120 Ind Cas 826; *Madan Mohan Gargh* v. *Munna Lal*, 1928 All 497 (498): 26 All L J 804 [Judge deviating from ordinary procedure on the strength of agreement between parties and deciding on question of fact—Findings of fact are binding on the parties].

(11) *Mt Maqboolan* v. *Habib Ullah*, 1927 Oudh 222 (223): 1 Luck Cas 19: 102 Ind Cas 470; *Gouri Shankar* v. *Bansi Dube*, 1924 Oudh 367 (368): 27 Oudh Cas 157: 11 Oudh L J 306: 78 Ind Cas 540: 1 Oudh W N 44; *Dwarka Nath* v. *Atul Chandra*, 1928 Cal 108 (110): 46 Cal L Jour 353: 106 Ind Cas 509 [Parties agreeing to withdraw their respective pleas on certain contingency—Contingency not occurring—There is no compromise within O. 23, R. 3].

(12) *Ramaswamy Kavundan* v. *Trisa Maistry*, (1905) 17 Mad L Jour 37 (38) [Agreement that suit should be dismissed if within a given time the plaintiff failed to convey the suit lands to the defendant].

O. 23, R.3, Notes 7—8.

(8) The abandonment of an issue does not amount to a compromise.[13]

(9) It has been held by the Allahabad High Court that any agreement that the suit should be decreed if a certain witness eats food served by the plaintiff is binding on the parties and if the witness eats the food the suit should be decreed as per the agreement.[14] In the above case it was held that the present rule did not apply to it. In an earlier case of the same High Court it was held that such an agreement concluded the matter only with reference to one of the issues in the case, *viz.*, that of legitimacy and that the other issues should be tried on the merits.[15] According to the Oudh Judicial Commissioner's Court such an agreement does not constitute an adjustment within this rule but the agreement and its performance would be evidence on the issue of legitimacy.[16]

8. **"By any lawful agreement or compromise."**—The rule restricts the power of the Court to record agreements, or compromises to such agreements, as are *lawful* and the Court is therefore bound to enquire into the question whether the compromise it is asked to record is a lawful one or not.[1] If a *part* of the compromise is unlawful and it can be separated from the rest, the Court can record that portion of the compromise which is lawful.[2]

The expression "lawful" refers to the *legality* of the terms of the agreement and not to its *binding character*. Therefore, an agreement or compromise may be lawful within this rule although it may not be *binding* on one of the parties on the ground of its having been brought about by coercion, undue influence or fraud.[3]

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(13) *Venkata Narasimha Naidu* v. *Bhashyakarlu Naidu*, (1899) 22 Mad 538 (546): *Pancham* v. *Ansar Hussain*, 1926 P C 85 (88): 53 Ind App 187: 24 All L J 736: 1926 Mad W N 520: 48 All 457: 24 Mad L W 241: 31 Cal W N 824: 99 Ind Cas 650 P C [Cause of action once abandoned cannot be availed of].

(14) *Ram Sundar* v. *Jai Karan Singh*, 1925 All 271 (272): 23 All L J 251: 6 L R All (Civ) 270: 87 Ind Cas 174: 47 All 456.

(15) *Bhawani Prasad Misir* v. *Ram Sunder*, 1924 All 911 (912): 22 All L J 801: 5 L R A Civ 268: 79 Ind Cas 853.

(16) *Gauri Shankar* v. *Bakst Dube*, 1924 Oudh 367 (368): 27 Oudh Cas 157: 11 Oudh L J 306: 78 Ind Cas 540: 1 Oudh W N 44.

Note 8.

(1) *Sheikh Jamu* v. *Muhammad Ibrahim*, 1926 Nag 194 (195): 90 Ind Cas 378; *Umeshananda Dut Jha* v. *Mohendra Prosad Jah*, (1911) 11 Ind Cas 280 (284): 14 Cal L Jour 337; *Malchand* v. *Osman Ali*, 1924 Cal 159 (159): 38 Cal L Jour 272: 80 Ind Cas 307; *Kumara Venkata Perumal* v. *Thatha Ramaswami Chetti*, (1911) 9 Ind Cas 875 (880): 35 Mad 75: (1911) 1 Mad W N 290: 21 Mad L Jour 709: 9 Mad L Tim 487; *Seth Hukum Chand* v. *Rajah Ran Bahadur Singh*, (1919) 53 Ind Cas 833 (842): 4 Pat L Jour 580: 1919 Pat H C C 305; *Golap Khan* v. *Bhola Nath Marik*, (1910) 7 Ind Cas 481 (488): 12 Cal L Jour 545; *Kisandas* v. *Nama*, (1910) 8 Ind Cas 651 (652): 35 Bom 190: 12 Bom L R 1024.

(2) *Khurshad Ali* v. *Vazirunnissa*, (1910) 6 Ind Cas 857 (859): 7 All L J 778; *Baiju Lal Marwari* v. *Narayan Hemram*, 1928 Pat 495 (496): 109 Ind Cas 261. See also *Prasanna Leb* v. *Darpa Narayan*, (1918) 44 Ind Cas 145 (146) Cal [Separate petitions by both parties to a suit for a decree—Held, not a compromise under this rule].

(3) *Qadri Jahan Begam* v. *Fazal Ahmad*, 1928 All 494 (496): 26 All L J 691: 50 All 748: 110 Ind Cas 578; *Laraiti* v. *Shiam Sunder*, 1932 All 478 (479): 1932 All L J 509 [The fact that the compromise infringes rights of third party will not make it unlawful]; *Musst Lalairi* v. *Hussain Shah*, 1892 Pun Re No 114; *Sundarambal* v. *Yogavanagurukkal*, (1914) 23 Ind Cas 72 (80): 38 Mad 850: 26 Mad L Jour 815: 1 Mad L W 276: 1914 Mad W N 286; *Budhu Mal* v. *Mussammat Rup Kour*, 1890 Pun Re No 81; *Dwarkadhish Prasad Singh* v. *Keshb Prasad Singh*, 1925 All 266 (267): 6 L R All 20: 85 Ind Cas 557. But see *Nand Lal* v. *Ram Sarup*, 1927 Lah 546 (549): 103 Ind Cas 80 [In the peculiar circumstances of the case it was held that the compromise which had been brought about by undue influence was unlawful and could not be recorded].

The following have been held to be agreements which are *unlawful* within the meaning of this rule:— O. 23, R. 3, Note 8.

(1) Agreements *prohibited* by law such as an agreement to transfer a property which is inalienable in law.[4]

(2) Agreements which are *opposed to public policy*, such as an agreement for the alienation of a religious office,[5] or an agreement relating to a public trust which is detrimental to its interests,[6] or an agreement which amounts to a breach of trust.[7]

(3) Agreements which involve injury to a third party.[8]

(4) According to the High Courts of Allahabad[9] and Madras[10] an agreement amounting to the transfer of a *spes successionis* which is prohibited by S. 6 of the Transfer of Property Act, is not lawful. According to the High Court of Calcutta an agreement between expectants to divide a particular property in a certain way on the happening of a particular contingency is lawful.[11] Where certain reversioners executed a sale-deed of a *spes successionis* before the death of the limited owner but entered into a compromise as to it *after the limited owner's*

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(4) *Ramachandra Suru* v. *Akela Venkatalakshmi Narayana*, (1919) 50 Ind Cas 577 (579): 37 Mad L Jour 65: 1919 Mad W N 332 [Mortgage invalid under S. 4 of Madras Impartible Estates Act]; *Tikaram* v. *Tejram*, (1920) 54 Ind Cas 274 (275) Nag [Compromise involving sale of *Thekadari* interest, the transfer of which is prohibited by law]; *Sakli* v. *Ram Kishen Das*, (1920) 55 Ind Cas 504 (506): 2 U P L R (Pat) 31 [Compromise amounting to a clear violation of statutory rules is not "lawful"]; *Sarbesh* v. *Hari Dayal*, (1910) 5 Ind Cas 236 (238): 14 Cal W N 451: 11 Cal L Jour 346 [Compromise in excess of powers conferred by S 90 of Probate and Administration Act is unlawful].

(5) *Sundarambal* v. *Yogavanagurukkal*, (1914) 23 Ind Cas 72 (80): 38 Mad 850: 26 Mad L Jour 315: 1 Mad L W 276: 1914 Mad W N 286; *Lakshmanaswamy Naidu* v. *Rangamma*, (1903) 26 Mad 31 (33).

(6) *Narayanaswami Mudali* v. *President of the Board of Commissioners for the Hindu Religious Endowments, Madras*, 1930 Mad 629 (630): 58 Mad L Jour 410: 1930 Mad W N 243: 31 Mad L W 442: 124 Ind Cas 602: 53 Mad 398; *Venkatachalam* v. *Ramanathan*, 1922 Mad 429 (432): 15 Mad L W 111: 31 Mad L Tim 52: 70 Ind Cas 410: 1921 Mad W N 423 [Compromise relating to public trust is not necessarily unlawful. But Court must scrutinise compromise to see if it is not detrimental to trust]; *Arunachallam* v. *Velappa*, (1915) 28 Ind Cas 337 (341): 28 Mad L Jour 410: 18 Mad L Tim 135 [Compromise by *Mataadhipathi* under influence of indirect motive, *viz.*, to avoid appearing in Court as a witness is breach of duty and not lawful]; *Anandlal* v. *Jagannath Das*, (1928) 106 Ind Cas 645: 1928 Notes 39 (a): 9 Pat L Tim 214 [Agreement by mahant to transfer *mutt* property for no necessary purpose is unlawful]; *Gyananunda Asram* v. *Kristo Chandra Mukherji*, (1901) 8 Cal W N 404 (406) [Decree for removal of mahant—Appeal pending—Parties compromising suit not lawful]. See *Hossein Ali* v. *Bhagwandas*, (1907) 34 Cal 249 (255, 256): 11 Cal W N 261: 6 Cal L Jour 442 [Compromise by Shebait for benefit of endowment is valid and binding]. See also *Abdul Karim* v. *Abdus Sohan*, (1915) 26 Ind Cas 360 (361, 362): 18 Cal W N 1264 [Suit relating to public trust under S 92, C P C cannot be compromised]. But see *Pambayam Chetty* v. *Kandaswami Aiyar*, (1921) 60 Ind Cas 22 (23): 12 Mad L W 562 [*Bona fide* compromise by trustee of public trust is lawful—It is not for Court to enquire whether it is in fact beneficial to trust or not].

(7) *Shankaralinga Nadan* v. *Rajeswara Dorai*, (1908) 31 Mad 236 (250): 12 Cal W N 946: 4 Mad L Tim 101: 8 Cal L Jour 230: 10 Bom L R 781: 18 Mad L Jour 387: 35 Ind App 176 P C [Compromise by trustee allowing certain castes to worship in a temple, against the settled custom].

(8) *Hukum Chand* v. *Raja Ran Bahadur Singh*, (1919) 53 Ind Cas 833 (842): 4 Pat L Jour 580: 1919 Pat H C C 305; *Asan Pandey* v. *Rajmon Misser*, (1919) 52 Ind Cas 105 (108) Pat; *Ajoy Kumari Debi* v. *Manindra Nath*, (1905) 82 Cal 561 (566) [Compromise between the plaintiffs and the executors in administration suit ignoring the rights of the other defendants]; *Ashfaq Hussain* v. *Bunyad Hussain*, 1923 Oudh 252 (253, 254): 77 Ind Cas 874 [Compromise in fraud on some of the parties]; *Malchand* v. *Osman*, 1924 Cal 159 (160): 38 Cal L Jour 272: 80 Ind Cas 307 [*A* suing *B* the mortgagor and *C* the puisne mortgagee—*A* and *B* compromising whereby *A* agrees to pay *B* more than what was due].

(9) *Munshi Fayzul Rahaman* v. *Mahammad Usman*, (1909) 2 Ind Cas 865 (873) All.

(10) *Ramasami Naik* v. *Ramaswami Chetti*, (1907) 30 Mad 255 (263): 2 Mad L Tim 167: 17 Mad L Jour 201.

(11) *Ram Nirunjan* v. *Prayag*, (1882) 8 Cal 138 (145): 10 Cal L Rep 66.

O. 23, R. 3, Notes 8—9.

death it was held by the Chief Court of Oudh that the compromise was not unlawful.[12]

A compromise containing an agreement for the withdrawal of a prosecution for a *compoundable offence*,[13] or for allowing a relief which is barred by limitation,[14] is not unlawful. Nor is a compromise unlawful merely because the parties do not get the shares to which they would be legally entitled[15] or because it contains a penal provision.[16]

9. Submission to award, if a valid adjustment.—Under the old Code it was held that where the parties to a pending suit referred the matter to arbitration the award could be filed as an adjustment under this rule.[1] The present Code, however, contains a new section namely S. 89 which provides as follows:—

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by *any other law* for the time being in force *all* references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder *shall be governed by the provisions contained in the second schedule.*"

The question has arisen whether, in view of this section a submission to arbitration by parties without the intervention of the Court and the award passed by the arbitrators on such submission can be filed as an adjustment by way of compromise under this rule. On this question there is a conflict of opinion. According to the High Courts of Calcutta[2] and Lahore[3] the words "any *other* law in force" cannot include the *provisions of the Code itself*, and, therefore, cannot include the provisions of O. 23, R. 3, that, therefore, such a matter in view of S. 89 must be governed only by the provisions of the Second Schedule, and that the submission and the award cannot be filed as an adjustment under this rule. On the other hand, the High Courts of Allahabad,[4] Madras,[5] Patna[5-a] and Rangoon,[6] the Chief Court of Oudh[7]

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(12) *Durga Prasad* v. *Narain*, 1929 Oudh 63 (64): 5 Oudh W N 1081: 4 Luck 181: 115 Ind Cas 294.

(13) *Nihal Singh* v. *Ashtabakar*, 1930 Lah 860 (861): 31 Pun L R 225: 127 Ind Cas 705. But see *Ganga Prasad* v. *Hanuman*, 1883 All W N 145 (145) [Compromising with the object of escaping from criminal prosecution held to be unlawful].

(14) *Nathu Ram* v. *Kalian Das*, (1904) 26 All 522 (525): 1 All L J 217; *Chandoo* v. *Murli Dhar*, 1926 Oudh 311 (313): 13 Oudh L J 138: 92 Ind Cas 732 [Compromise preventing consideration of legal bar to claim is not unlawful].

(15) *Sashibala Dasi* v. *Kamikshanath Dutt*, (1920) 55 Ind Cas 716 (717) Cal.

(16) *Kishen Prasad* v. *Kunj Behari Lal*, 1926 All 278 (280): 24 All L J 210: 91 Ind Cas 790.

Note 9.

(1) *Ghellabhai* v. *Nandubhai*, (1897) 21 Bom 335 (341); *Samibai* v. *Premji*, (1896) 20 Bom 304 (308); *Lakshmana Chetty* v. *Chinnathambi Chetty*, (1901) 24 Mad 326 (330); *Pragdas* v. *Girdhardas*, (1902) 26 Bom 76 (78, 80, 81): 3 Bom L R 431.

(2) *Amarchand* v. *Banwari Lall*, 1922 Cal 404 (406): 49 Cal 608: 69 Ind Cas 808; *Dekari Tea & Co, Ltd* v. *I G S Navigation & Co, Ltd*, 1921 Cal 238 (239): 25 Cal W N 127: 61 Ind Cas 919; *Guimonidasi* v. *Tarini Charan Porel*, 1927 Cal 887 (888): 104 Ind Cas 860: 47 Cal L Jour 59. But see *Sashibala Dasi* v. *Kamikshanath Dutt*, (1920) 55 Ind Cas 716 (717) Cal.

(3) *Hari Pershad* v. *Soogni Devi*, 1921 Lah 232 (233): 3 Lah L Jour 162: 67 Ind Cas 123; *Nihal Singh* v. *Ashtabakar*, 1930 Lah 860 (861): 31 Pun L R 225: 127 Ind Cas 705 [But otherwise if consented to by parties]. See also *Gurdevi* v. *Gujar Mal*, 1931 Lah 594 (595): 131 Ind Cas 126.

(4) *Gajendra Singh* v. *Durga Kumari*, 1925 All 503 (506, 509): 23 All L J 561: 88 Ind Cas 768: 47 All 637.

(5) *Subbaraju* v. *Venkataramaraju*, 1928 Mad 1025 (1028): 28 Mad L W 321: 55 Mad L Jour 429: 51 Mad 800: 113 Ind Cas 632; *Chintalapalli Chinna Dorayya* v. *Chintalapalli Venkanna*, 1925 Mad 50 (51): 76 Ind Cas 502; *Nune Ayyannamma* v. *Ramaswami*, 1927 Mad 1126 (1127): 53 Mad L Jour 444: 39 Mad L Tim 593: 26 Mad L W 281: 104 Ind Cas 674; *Alagu Pillai* v. *Veluchami*, 1923 Mad 576 (576): 45 Mad L Jour 76: 32 Mad L Tim 369: 18 Mad L W 26: 1923 Mad W N 331: 1923 Mad W N 509: 74 Ind Cas 609 [Partial award not invalid]; *Nanjappa* v. *Nanja Rao*, (1912) 16 Ind Cas 478 (481): 23 Mad L Jour 290: 12 Mad L Tim 183: 1912 Mad

and the Judicial Commissioners' Courts of Nagpur[8] and Sind[9] are of the opinion that the words "any other law in force" include the provisions of O. 23, R. 3 and that therefore such submission and award can be filed as an adjustment by way of a compromise within the meaning of this rule. The High Court of Bombay has reached the same conclusion but on a somewhat different reasoning. According to it the words "any other law in force" mean only any other law of *arbitration* for the time being in force, such as S. 152 of the Companies Act or Ss. 43 to 45 of the Dekkhan Agriculturists' Relief Act or of the Co-operative Societies Act or the general Law of Contracts whereby parties may agree to refer their disputes to arbitration, and that it does not include O. 23, R. 3. It is however of opinion that the words in S. 89 of the Code "shall be governed by the provisions of the Second Schedule" are totally inapt to convey a *prohibition* and that they mean no more than that in those arbitrations which are dealt with by Second Schedule the procedure of that Schedule shall be followed: Where, therefore, a submission and award are not covered by the provisions of the Second Schedule as where the reference is made in a *pending suit* without the intervention of the Court, S. 89 has no application at all and the award can therefore be recognised as an adjustment of the suit by way of compromise under this rule.[10] In a recent case of the Bombay High Court,[11] Rangnekar, J., sitting as a single Judge, was inclined to agree with the Calcutta view. The observations were, however, *obiter*. Where both the parties *accept* the award of the arbitrators, the award becomes a compromise and can be recorded under this rule.[12]

O. 23, R. 3, Note 9.

The Court acting under O. 23, R. 3 (in cases where it has been held that an award can be pleaded in a compromise), can enquire into any alleged misconduct of the arbitrator.[13] Further, if a party does not raise any

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W N 1091. See *Chinna Venkataswami* v. *Venkataswami*, (1919) 51 Ind Cas 827 (828, 829): 42 Mad 625: 36 Mad L Jour 291: 1919 Mad W N 221: 25 Mad L Tim 397 [Decree obtained upon an award on a reference to presiding Judge and another individual must be regarded as consent decree].

(5-a) *Ramadhar* v. *Subedar*, 1932 Pat 205 (205): 11 Pat 237: 138 Ind Cas 82: 13 Pat L Tim 434.

(6) *Laljee Serang* v. *Chander Bhan*, 1931 Rang 58 (60): 131 Ind Cas 57: 9 Rang 39; *K M T T Shanmugam Chetty* v. *C T A Annamalai Chetty*, (1912) 15 Ind Cas 959 (960): 6 L B R 55: 5 Bur L Tim 125 [A decision of the Chief Court of Lower Burma].

(7) *Basaoo* v. *Jagannath*, 1931 Oudh 127 (131): 8 Oudh W N 71: 131 Ind Cas 443; *Hakim Fazal Ahmed* v. *Enayat Ahmed*, 1922 Oudh 189 (190): 9 Oudh L J 219: 68 Ind Cas 209: 25 Oudh Cas 213.

(8) *Narain Das Bhagwandas & Co* v. *Kalyanji Mawaji & Co*, 1928 Nag 173 (174): 24 Nag L R 55: 107 Ind Cas 525; *Namdarkhan* v. *Nanhoo*, 1926 Nag 405 (406): 9 Nag L J 97: 95 Ind Cas 89; *Ghunari Kurmi* v. *Purshottam*, (1919) 49 Ind Cas 746 (746) Nag; *Govindram* v. *Mt Deokabai*, 1931 Nag 66 (66): 18 Nag L J 237: 130 Ind Cas 156. But see *Puphi Bai* v. *Ansuya Bai*, (1918) 46 Ind Cas 902 (904) Nag.

(9) *Seumal Nihalchand* v. *Pursomal*, (1913) 19 Ind Cas 450 (450): 6 Sind L R 166; *Sidik Mahomed Shah* v. *Nihalchand*, 1929 Sind 107 (109): 116 Ind Cas 102: 23 Sind L R 349 [*Obiter*]; *Firm of Bolmal Chellaram* v. *Firm of Jhamandas Kisharam*, 1925 Sind 266 (268): 18 Sind L R 111: 88 Ind Cas 61; *Haji Umar* v. *Shivaldas*, 1921 Sind 65 (67): 16 Sind L R 174: 81 Ind Cas 653.

(10) *Chanbasappa* v. *Baslingayya*, 1927 Bom 565 (574, 577): 29 Bom L R 1254: 105 Ind Cas 516: 51 Bom 908 F B [Overruling by necessary implication 37 Ind Cas 140 (141)]; *Manilal Motilal* v. *Firm Gokal Das*, 1921 Bom 310 (314): 45 Bom 245: 59 Ind Cas 53: 22 Bom L R 1048; *Raoji* v. *Kalanji*, 1930 Bom 431 (435): 32 Bom L R 389: 126 Ind Cas 305: 54 Bom 698; *Harakhbai* v. *Jamnabai*, (1913) 19 Ind Cas 786 (787): 37 Bom 639: 15 Bom L R 340.

(11) *Dinkarrai Lakshmiprasad* v. *Yeshvantrai*, 1930 Bom 98 (105): 31 Bom L R 1403: 124 Ind Cas 119: 54 Bom 197.

(12) *Nihal Singh* v. *Ashtabakar*, 1930 Lah 860 (861): 31 Pun L R 225: 127 Ind Cas 705; *Virabhadra Goud* v. *Kalyani Gangamma*, 1926 Mad 1211 (1211, 1212): 97 Ind Cas 465; *Shanmugam Chetty* v. *Annamalai Chetty*, (1912) 15 Ind Cas 959 (960): 6 L B R 55: 5 Bur L Tim 125.

(13) *Thakoredas* v. *Lallubhai*, 1923 Bom 401 (401): 25 Bom L R 452: 75 Ind Cas 102.

O. 23, R. 3, Notes 9—11.

objection to the recording of a submission and award as a compromise under this rule he is estopped from questioning the Court's power to do so.[14] But a *mere agreement* to refer to arbitration has been held not to be a compromise within this rule.[15] Nor can an award under an invalid reference be accepted as a compromise or adjustment under this rule.[16]

10. Agreement to take oath.—The Oaths Act does not provide for the *adjustment* of a suit in an arbitrary way by the oath of a party: Hence, an agreement to be bound by the oath of the opposite party does not amount to an adjustment of the suit but the oath amounts only to a *conclusive proof*, as against the party agreeing to be bound, of the matter stated.[1] Similarly, if a party has agreed that if he fails to take a certain oath the suit should be decreed or dismissed, his failure to take the oath does not justify the disposal of the suit under the present rule. Under S. 12 of the Oaths Act the Court can only record the failure to take the oath and the reasons given for such failure and proceed with the suit.[2]

11. Compromise of probate proceedings.—A compromise between an applicant for probate of a will and a caveator which aims at *excluding proof of the genuineness of the will* is opposed to public policy which requires that the question of the genuineness of a will should be decided only by the Court. Hence, such a compromise is *unlawful* and probate cannot be granted merely on the basis of such a compromise and without proof of the will in some form or other.[1] It is open to a caveator who has entered into such a compromise to resile from it and to require due proof of the will.[2] In the same way an executor who withdraws his application for probate in pursuance of a compromise is not debarred from filing another application for probate.[3]

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(14) *Kondi Ravji* v. *Chunilal Rupchand*, 1929 Bom 1 (6): 30 Bom L R 1539: 113 Ind Cas 229: 53 Bom 75.

(15) *Tincowry* v. *Fakir Chand*, (1903) 30 Cal 218 (228, 229): 7 Cal W N 180; *Budha* v. *Haku*, 1882 Pun Re No 130; *Khimchand Narotamdas* v. *Bhogilal Hirachand*, 1922 Bom 436 (437): 24 Bom L R 861: 67 Ind Cas 913: 46 Bom 854; *Karimunnessa Khatun* v. *Mahomed Fazlul Karim*, 1925 P C 70 (73): 88 Ind Cas 149 P C; *Venkatachalam* v. *Rangiah*, (1911) 12 Ind Cas 372 (375): 36 Mad 353: 10 Mad L Tim 248: (1911) 2 Mad W N 249: 21 Mad L Jour 990; *Nanjappa* v. *Nanja Rao*, (1912) 16 Ind Cas 478 (482): 23 Mad L Jour 290: 12 Mad L Tim 133: 1912 Mad W N 1091; *Ghulam Dastaghir Khan* v. *Ghulam Hussain Khan*, (1915) 27 Ind Cas 369 (370): 8 Sind L R 187; *Vankatesh Mahadev* v. *Ramachandra Krishna*, (1915) 27 Ind Cas 46 (48): 38 Bom 687: 16 Bom L R 653; *Khobhari Sah* v. *Jhaman Sah*, (1916) 34 Ind Cas 220 (221): 23 Cal L Jour 482.

(16) *Rukhanbai* v. *Adamji*, (1908) 33 Bom 69 (76): 10 Bom L R 366: 1 Ind Cas 622. Compare *Narayana Aiyangar* v. *Thippayya*, 1926 Mad 366 (366): 23 Mad L W 382: 1926 Mad W N 1: 92 Ind Cas 847; *Bodachari* v. *Muniyachari*, 1921 Mad 709 (709): 14 Mad L W 666: 1921 Mad W N 756: 65 Ind Cas 92; *Babubhai* v. *Madhaoji*, 1931 Bom 343 (346): 33 Bom L R 759: 55 Bom 503: 134 Ind Cas 705.

Note 10.

(1) *Thoyi Ammal* v. *Subbaroya*, (1899) 22 Mad 234 (237); *Vasudeva* v. *Naraina*, (1879) 2 Mad 356 (360); *Prabhu Dayal* v. *Jamil Ahmad*, 1922 All 160 (161): 64 Ind Cas 646: 44 All 117: 19 All L J 911; *Muhammad* v. *Oheda*, (1892) 14 All 141 (145): 1892 All W N 8; *Talawand* v. *Fateh Din*, (1918) 45 Ind Cas 230 (231): 50 Pun W R 1918: 83 Pun Re 1918: 115 Pun L R 1918.

(2) *Bawa Suchet Singh* v. *Ratna*, 1888 Pun Re No 31; *Moyan* v. *Pathu Kutti*, (1908) 31 Mad 1 (3): 17 Mad L Jour 545: 3 Mad L Tim 98; *Uthatchadayan* v. *Perott Meloden Ramen*, (1868) 4 Mad H C R 422 (424). See *Umayammai* v. *Muthiah*, (1907) 17 Mad L Jour 99 (100).

Note 11.

(1) *Janak Bati Thakurain* v. *Gajanand Thakur*, (1917) 37 Ind Cas 12 (13): 20 Cal W N 986: 1 Pat L Jour 377: 1 Pat L W 41; *Ghellabhai* v. *Nandubai*, (1897) 21 Bom 335 (344); *Monmohini* v. *Banga Chandra*, (1904) 31 Cal 357 (362, 363): 8 Cal W N 197; *Sarada Kanta Das* v. *Gobinda Mohan Das*, (1910) 6 Ind Cas 912 (915): 12 Cal L Jour 91; *Jugeshwar Nath* v. *Jagatdhari*, (1918) 40 Ind Cas 345 (346): 1917 P H C C 192: 2 Pat L Jour 535: 5 Pat L W 280.

(2) *Janak Bati Thakurain* v. *Gajanand Thakur*, (1917) 37 Ind Cas 12 (14): 20 Cal W N 986: 1 Pat L Jour 377: 1 Pat L W 41.

(3) *Jugeshwar* v. *Jagatdhari*, (1917) 2 Pat L Jour 535.

O. 23, R. 3, Notes 12—15.

12. Compromise of suit under Dekkhan Agriculturists' Relief Act.— Parties to a suit under the Dekkhan Agriculturists' Relief Act can enter into a compromise under this rule.[1] A compromise decree in such a suit is not unlawful merely because it is not in accordance with S. 15-B of the Act.[2] But even where a defendant admits the whole of the plaintiff's claim, this rule does not oust the jurisdiction of the Court under S. 12 of the Dekkhan Agriculturists' Relief Act to go behind the transaction and examine whether the admission is true and made by the debtor with a full knowledge of his legal rights against the creditor.[3]

13. Compromise pending arbitration.—A compromise entered into pending arbitration proceedings without the intervention of the Court is valid.[1] Proceedings under Sch. II, para. 17[2] or under para. 20[3] can be validly compromised. But where an arbitration is held on an order of reference by the Court, then, unless the arbitration is superseded, the parties cannot validly enter into any compromise.[4] The mere fact that the time fixed for making the award has expired does not amount to supersession of the arbitration.[5] But it has been held by the Lahore High Court that even after a reference to arbitration through the Court, the parties can validly compromise the disputes under the present rule.[6] In a Madras case, where the Court recorded a compromise under the present rule after the expiry of the time fixed for the making of the award by the arbitrator, it was held that the Court should be deemed to have superseded the arbitration.[7] An agreement not to dispute an award may be said to be a lawful adjustment of the suit within O. 23, R. 3.[8]

14. Compromise of guardianship proceedings.—A guardian appointed by the Court cannot be removed by a compromise as it would have the effect of withdrawing from the jurisdiction of the Court the question of the welfare of the minor and would defeat the provisions of Ss. 40 and 42 of the Guardians and Wards Act.[1]

15. Pre-decree agreements in bar of execution.—An agreement between the parties to a suit entered into before the decree is passed to treat

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Note 12

(1) *Piraji* v. *Ganapati*, (1910) 6 Ind Cas 527 (528): 12 Bom L R 378: 34 Bom 502; *Gotu Ram* v. *Barku Dhodu*, 1922 Bom 331 (333): 46 Bom 560: 24 Bom L R 88: 67 Ind Cas 253.

(2) *Madhav Balakrishna* v. *Appaji Venkatesh*, 1921 Bom 398 (399): 45 Bom 1123: 23 Bom L R 503: 62 Ind Cas 631; *Shivanagappa* v. *Govindappa*, (1913) 20 Ind Cas 969 (971): 15 Bom L R 768: 37 Bom 614 F B [Impliedly overruling 8 Ind Cas 651].

(3) *Gotu Ram* v. *Barku Dhodu*, 1922 Bom 331 (333, 334): 46 Bom 560: 24 Bom L R 88: 67 Ind Cas 253.

Note 13.

(1) *Biharilal* v. *Dholan*, (1910) 5 Ind Cas 994 (995): 38 Pun W R 1910.

(2) *Sohanari Bai* v. *Chatta Ram*, (1914) 23 Ind Cas 591 (592): 27 Pun W R 1914: 69 Pun L R 1914.

(3) *Hakim Fazal Ahmad* v. *Enayat Ahmad*, 1922 Oudh 189 (190, 191, 196): 9 Oudh L J 219: 68 Ind Cas 299: 25 Oudh Cas 213; *Dwarka Das* v. *Krishan Kishore*, 1921 Lah 34 (38): 2 Lah 114: 3 Lah L Jour 349: 73 Pun L R 1921: 61 Ind Cas 628; *Behari Lal* v. *Dholan Das*, (1910) 5 Ind Cas 994 (995): 38 Pun W R 1910.

(4) *Dooly Chand* v. *Mohan Lal*, 1924 Cal 722 (724): 51 Cal 432: 83 Ind Cas 606; *Niaz Ahmad* v. *Abdul Hamid*, (1904) 1 All L J 29 (32): 1901 All W N 49.

(5) *Dooly Chand* v. *Mohan Lal*, 1924 Cal 722 (724): 51 Cal 432: 83 Ind Cas 606.

(6) *Mt Aishan* v. *Abdulla*, 1927 Lah 156 (157): 99 Ind Cas 1002.

(7) *Alagu* v. *Veluswami*, 1923 Mad 576 (577): 45 Mad L Jour 76: 18 Mad L W 26: 32 Mad L Tim 369: 1923 Mad W N 331: 1923 Mad W N 509: 74 Ind Cas 609.

(8) *Sri Lal* v. *Arjun Das*, (1915) 27 Ind Cas 233 (235): 18 Cal W N 1325.

Note 14.

(1) *Sheik Mahomed* v. *Mussammat Radhibai*, (1918) 47 Ind Cas 817 (818): 12 Sind L R 14.

O. 23, R.3, Notes 15—17.

the decree as not executable wholly or partly cannot be given effect to by the executing Court.[1] But an agreement not to execute the decree in whole or in part, entered into after the decree is passed is valid and binding.[2]

16. "Where the defendant satisfies the plaintiff."—In an old case of the Punjab Chief Court it was held that a Court cannot dispose of a suit according to a compromise if the plaintiff professes himself merely satisfied *aliunde* and that the defendant must have satisfied the plaintiff.[1] It is submitted that this view will hold good even now but that the "defendant" includes his agents also.

17. "Shall order such agreement, compromise or satisfaction to be recorded".—The provision requiring the Court to order that the compromise be recorded is not a mere matter of form but is one of *substance* as the aggrieved person has right of appeal against such an order under O. 43, R. 1 (*m*) of the Code.[1] In the absence of an *order directing the compromise to be recorded* there can be no valid executable decree[2] as the rule makes it obligatory on the Court to record a compromise duly entered into by the parties to a suit.[3] The Court cannot refuse to record the compromise merely because the Court considers it too favourable to one side[4] or that the working of it would give trouble.[5]

It has been held by the Madras High Court[6] and the Chief Court of Punjab[7] that till judgment is delivered in open Court, the Court has jurisdiction to record a compromise. In a Calcutta case[8] where an appeal had

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Note 15.

(1) *Arumugam* v. *Krishnaswami*, (1920) 56 Ind Cas 976 (977): 12 Mad L W 41: 39 Mad L Jour 222: 43 Mad 725; *Azizur Rahman* v. *Aliraja*, 1928 Cal 527 (530): 32 Cal W N 434: 113 Ind Cas 9 [Remedy of aggrieved party is by suit].

(2) *Hukam Chand* v. *Radha Kisan*, (1915) 29 Ind Cas 838 (840): 11 Nag L R 110.

Note 16.

(1) *Jervis* v. *Mansfield*, 1867 Pun Re No 12.

Note 17.

(1) *Sabitri* v. *Savi*, 1927 Pat 354 (360): 6 Pat 108: 105 Ind Cas 271; *Muhammad Rashid* v. *Rahmutullah*, (1914) 24 Ind Cas 630 (631): 212 Pun L R 1914: 134 Pun W R 1914: 96 Pun Re 1914; *Paban Sardar* v. *Bhupendra Nath*, (1916) 33 Ind Cas 769 (769): 43 Cal 85; *Mt Ummarkulsum* v. *Ghulam Rasul Khan*, 1929 Sind 32 (36): 114 Ind Cas 101; *Govindasami* v. *Alagiriswami*, (1906) 29 Mad 104 (105) [Compromise petition not accepted—Court cannot subsequently pass a decree on the same compromise]; *Seth Kevaldas* v. *Sankar Lal Bulakhidas*, 1923 P C 178 (183): 45 Mad L Jour 763: 33 Mad L Tim 424: 28 Cal W N 930: 79 Ind Cas 542, P C [Failure to record satisfaction makes adjustment not in accordance with the rule]; *Renuka* v. *Onkar*, (1916) 46 Ind Cas 775 (777) Nag [Compromise not recorded is no compromise under rule]; *Ramratan* v. *Subban*, (1914) 24 Ind Cas 93 (94): 12 All L J 672 [The mere fact of an *oral* compromise having been come to cannot supersede the mortgage unless the Court accepts it and passes a decree in accordance with it]. But see *Hassomal* v. *Sahibo*, 1929 Sind 12 (12): 111 Ind Cas 619 [Omission to record is not fatal to validity of decree —Defect is curable under S 99].

(2) *Sreemati Sabitri Thakurain* v. *F A Savi*, 1927 Pat 354 (360): 6 Pat 108: 105 Ind Cas 271.

(3) *Sourindra Nath* v. *Heramba Nath*, 1923 P C 98 (101): 1923 Mad W N 734: 33 Mad L Tim 294: 4 L R All (P C) 138: 84 Ind Cas 721: 45 Mad L Jour 453 P C; *Sourendra Nath Mitra* v. *Tarabula Dasi*, 1930 P C 158 (162): 57 Ind App 133: 34 Cal W N 453: 1930 All L J 489: 32 Bom L R 645: 51 Cal L Jour 809: 123 Ind Cas 545: 11 Pat L Tim 461: 31 Mad L W 803: 58 Mad L Jour 551 P C; *Firm Ram Lal Bihari* v. *Sundar Lal*, 1928 Oudh 48 (48): 4 Oudh W N 1119: 110 Ind Cas 140; *Vishnu* v. *Ramchandra*, 1932 Bom 466 (467): 34 Bom L R 849.

(4) *Motiram* v. *Yesu*, (1898) 22 Bom 238 (240); *Narayanaswamy* v. *Board of Religious Endowments*, 1930 Mad 629 (630): 58 Mad L Jour 410: 1930 Mad W N 243: 31 Mad L W 442: 124 Ind Cas 602: 53 Mad 898.

(5) *Kurshed Ali* v. *Wazir-un-nissa*, (1910) 6 Ind Cas 857 (858): 7 All L J 778. But see *Sourendra Nath* v. *Tarubala Dasi*, 1930 P C 158 (162): 34 Cal W N 453: 1930 All L J 489: 58 Mad L Jour 551: 32 Bom L R 645: 51 Cal L Jour 809: 123 Ind Cas 545: 11 Pat L Tim 461: 31 Mad L W 803: 57 Ind App 133: 57 Cal 1311: 31 Pun L R 884 P C [*Quaere*:—Whether notwithstanding the words of O 23, R 3 Courts retain an inherent power not to allow proceedings to be used to work a substantial injustice]; *Vishnu* v. *Ramchandra*, 1932 Bom 466 (467): 34 Bom L R 849, (Do.).

(6) *T Nagiah* v. *K Seshamma*, 1921 Mad 690 (691): 41 Mad L Jour 385: 14 Mad L W 514: 1921 Mad W N 866: 65 Ind Cas 82 [Though result of suit announced on notice board].

(7) *Gurandita Mal* v. *Radha Kishan*, 1908 Pun W R 67 [Though judgment already *written*].

(8) *Aswini Kumar* v. *Sukhoda Sundari*, 1923 Cal 819 (819): 68 Ind Cas 448.

O. 23, R.3, Notes 17--18.

been dismissed for default, both parties being absent and they then presented a petition asking that the case should be decreed in terms thereof, it was held that the Court ought to restore the case giving effect to the petition of compromise. Where an *ex parte* decree is set aside, by suit on the ground of fraud, the original suit is restored as on the date of the *ex parte* decree and any compromise entered into before the decree should be recorded.[9] But there can be no consent decree unless the case has come on the cause list of the Court.[10]

Where, a plaintiff, in pursuance of a compromise merely asks for a withdrawal of suit the Court is not bound to record the compromise.[11] Where the parties enter into a compromise outside Court, but a compromise decree is not duly passed under this rule, and a decree is passed in the usual way, the terms of the agreement between the parties cannot be enforced.[12] If the Court's order does not embody the whole compromise but embodies only a portion of it, the compromise is not enforceable.[13] But the rule does not require that the order should set out the compromise *verbatim*. It is enough if the terms of the compromise are indicated with sufficient clearness.[14] An order of adjournment incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment is not a record of the compromise.[15] Where the claim is beyond the jurisdiction of the Court it cannot pass a compromise decree. It can only return the plaint under O. 7, R. 10.[16]

18. "Shall pass a decree in accordance therewith so far as it relates to the suit".—A decree on a compromise under this rule can be passed only so far *as it relates to the suit*.[1a] The question whether particular term of a petition of compromise relates to the suit must be decided from the frame of the suit, the relief claimed and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down and each case must be governed by its own facts.[1] Where the suit is merely for the

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(9) *Nistarini Dasi* v. *Mohendra Nath*, (1918) 47 Ind Cas 535 (536): 28 Cal L Jour 158.

(10) *Pell* v. *Valetta*, (1879) 5 Cal L Rep 464 (464).

(11) *Brojendra Kumar Das* v. *Gobinda Mohan Das*, (1916) 34 Ind Cas 186 (187): 20 Cal W N 752; *Mahomed Ali Khan* v. *Shujat Ali Khan*, (1918) 46 Ind Cas 913 (916) Nag [Dismissal at party's request amounts to withdrawal of suit without leave to sue afresh].

(12) *Hem Raj* v. *Dost Muhammad*, 1921 Lah 248 (249): 3 Lah L Jour 10: 1 Lah 445: 57 Ind Cas 153; *Mt Mulia* v. *Partab*, 1924 Nag 325 (327): 78 Ind Cas 72. But see *T Venkatachalaswami Chettiar* v. *Krishnaswamy Iyer*, (1874-75) 8 Mad H C R 1 (5) [Suit lies on the *agreement* against the party violating its terms].

(13) *Attar Chand Kapur and Sons* v. *Chandu Lal*, 1929 Lah 291 (292): 11 Lah L Jour 50: 30 Pun L R 112: 117 Ind Cas 240: 10 Lah 685.

(14) *Surjubai* v. *Moropant*, 1928 Nag 51 (51): 23 Nag L R 124: 104 Ind Cas 810; *Mahbub* v. *Munshi*, 1932 Lah 24 (24, 25): 135 Ind Cas 203: 32 Pun L R 761 [A reference to the agreement in the order held sufficient record of its terms].

(15) *Sambanda Mudaliar* v. *Chinnasawmi Sah*, (1915) 29 Ind Cas 860 (861) Mad.

(16) *Govindasami Kadavakar* v. *Kaliaperumal*, 1921 Mad 696 (699): 16 Mad L W 155: 1922 Mad W N 83: 66 Ind Cas 837.

Note 18.

(1a) *Venkatappa Nayanim* v. *Thimma Nayanim*, (1895) 18 Mad 410; *Fajalch Ali* v. *Kamaruddin*, (1886) 13 Cal 170 (171); *Mussammat Sakli* v. *Ram Kishan*, (1920) 55 Ind Cas 504 (505) Pat; *Ram Ratan* v. *Gokal Sah*, (1899) 2 Oudh Cas 330 (334); *Bharat Ramanuja* v. *Sarat Kamini Dasi*, 1922 Cal 358 (362): 25 Cal W N 806: 34 Cal L Jour 96: 49 Cal 220: 66 Ind Cas 273.

(1) *Gobind Chandra Pal* v. *Dwarkanath Pal*, (1903) 35 Cal 837 (841): 7 Cal L Jour 492: 12 Cal W N 849; *Sabapathy Pillay* v. *Venmahalinga Pillai*, (1914) 23 Ind Cas 581 (585): 38 Mad

O. 23, R. 3, Note 18.

recovery of specific properties the compromise must relate to such properties only. But where the suit is not merely for the recovery of the property, but to establish particular rights, the facts have to be looked at as a whole to decide whether matters that do not relate to the suit have been introduced. In such cases, all terms which *form the consideration for the adjustment* of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit, and can be embodied in the decree.[2]

The following are instances in which the compromise was held to "relate to the suit" within the meaning of this rule:—

(1) The compromise of a suit for a money decree may provide for a charge being created on the defendant's immoveable property for the payment of the amount agreed on.[3]

(2) The compromise of a suit for a declaration may include a term for the payment of a sum of money by one of the parties to the others.[4]

(3) The parties to a claim suit under O. 21, R. 63 may compromise it by agreeing that the defendant (decree-holder) should relinquish his right to the property and the plaintiff (claimant of the attached property) should execute in his favour a mortgage for the decree amount.[5]

(4) Where one co-tenant who has paid the entire rent of the land sues the other co-tenant for contribution, the suit may be

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959: 15 Mad L Tim 206: 26 Mad L Jour 331: 1914 Mad W N 256; *Shambhusing* v. *Manilal*, 1932 Bom 47 (48-51): 33 Bom L R 1457: 135 Ind Cas 479.

(2) *Shashi Bhusan* v. *Hari Narain*, 1921 Cal 202 (207): 48 Cal 1059: 25 Cal W N 990: 66 Ind Cas 705; *Charu* v. *Sambhu*, (1918) 46 Ind Cas 358 (365): 3 Pat L Jour 255: 4 Pat L W 393: 1918 Pat H C C 193 F B; *Vishnu* v. *Ramchandra*, 1932 Bom 466 (467): 34 Bom L R 849; *Sabapathy* v. *Venmahalinga*, (1914) 23 Ind Cas 581 (585): 15 Mad L Tim 203: 26 Mad L Jour 331: 1914 Mad W N 256: 38 Mad 959; *Ayyagiri* v. *Koovur Basivireddi*, (1914) 25 Ind Cas 56 (57): 27 Mad L Jour 173: 1 Mad L W 541: 16 Mad L Tim 125; *Ratnaswami* v. *Ratnamal*, (1914) 24 Ind Cas 135 (136): 1 Mad L W 446: 15 Mad L Tim 415: 27 Mad L Jour 388; *Karumian* v. *Tejo Mian*, (1918) 43 Ind Cas 282 (285): 3 Pat L W 141: 3 Pat L Jour 43; *Shambhusing* v. *Manilal*, 1932 Bom 47 (51): 33 Bom L R 1457: 135 Ind Cas 479; *Bajirao* v. *Sakharam*, 1931 Bom 295 (296): 33 Bom L R 463: 132 Ind Cas 434; *Ramaswami Naidu* v. *Subbaraya Thevar*, 1925 Mad 1101 (1104): 49 Mad L Jour 490: 1925 Mad W N 525: 88 Ind Cas 648; *Rampadarath Sing* v. *Sohari Koeri*, (1919) 52 Ind Cas 20 (22): 1920 Pat H C C 114: 2 U P L R (Pat) 66: 4 Pat L Jour 667; *Natesan Chetty* v. *Vengu Nachiar*, (1909) 33 Mad 102 (105): 6 Mad L Tim 313: 20 Mad L Jour 20: 3 Ind Cas 701 (702) [Relief granted under O 23, R 3 (S 375) can extend to what is not prayed for, in the plaint]; *Ana Pakiri Sha* v. *Somasundaram*, 1922 L B 22 (24): 64 Ind Cas 391: 10 L B R 349: 13 Bur L Tim 170 [The words "so far as it relates to the suit" mean "so far as it relates to the adjustment or settlement of the matters litigated in the suit," and there is nothing to prevent that settlement taking any form which is lawful and fair and which satisfies the parties]. But see *Lakshmikanthayamma* v. *Raja of Kalahasti*, (1895) 5 Mad L Jour 145 (147) [The compromise should be confined to the relief that could be given in the same suit if decided in the regular course].

(3) *Bapuji* v. *Tansa*, 1930 Nag 17 (18): 120 Ind Cas 218; *Ramakrishna* v. *Lakshminarayan*, 1929 Nag 164 (167, 168): 116 Ind Cas 651: 25 Nag L R 110; *Ramaswamy Nayudu* v. *Subbaraya Thevar*, 1925 Mad 1101 (1103, 1104): 49 Mad L Jour 490: 1925 Mad W N 525: 88 Ind Cas 648; *Kandulu Peda Linga Reddi* v. *Kakumanu Hanumayya*, (1917) 37 Ind Cas 764 (766); *Joti* v. *Izari*, (1907) 30 Mad 478 (480, 481): 16 Mad L Jour 354; *Gobinda Chandra* v. *Dwarka Nath*, (1908) 35 Cal 837 (843): 7 Cal L Jour 492: 12 Cal W N 849; *Subbarayadu* v. *Venkataratnam*, (1907) 17 Mad L Jour 200 (201) [Suit on mortgage bond and for accounts compromised —Mortgage decree for whole amount including the sum not forming part of the mortgage amount may be passed]. See *Vishnu Moreshwar* v. *Sadasiv Shivram*, 1925 Bom 509 (510): 27 Bom L R 943: 89 Ind Cas 889 [Mortgage suit—Compromise decree making the decretal amount charge on certain properties *in addition* to the mortgaged property legal].

(4) *Naraindas Bhagwandas & Co* v. *Kalyanji Mawaji & Co*, 1928 Nag 173 (174, 175): 24 Nag L R 55: 107 Ind Cas 525.

(5) *Barat Ramanuj* v. *Sarat Kamini Dasi*, 1922 Cal 358 (360): 49 Cal 220: 66 Ind Cas 273: 34 Cal L Jour 96: 25 Cal W N 806.

compromised by providing that the defendant should give up his share of the land in favour of the plaintiff.[6] O. 23, R.3, Note 18.

(5) Where a suit is for the recovery of certain property, a compromise providing that the defendant should redeem a certain house under mortgage and deliver it to the plaintiff is one relating to the suit.[7]

(6) *A* and *B*, a lessee from *A*, sued *C* asserting *A's* title to certain land. The suit was compromised by providing that *C*, the defendant, should recognise the lease granted by *A* to *B* and that, in consideration for this, was to be entitled to a half share of the rent paid by *B*. *Held*, that the compromise was one relating to the suit.[8]

(7) *See also* the undernoted case.[9]

The following are instances in which the compromise was held *not* to "relate to the suit":—

(1) A consent decree in a partition suit between brothers cannot deal with the rights in the mother's share after her death.[10]

(2) Plaintiff claimed a certain sum with interest at 9½ per cent. per annum. The suit was compromised by the defendant agreeing that he would pay a smaller sum within a fixed time and that on default he would pay the amount with interest at a very much higher rate. *Held*, that the stipulation as to the higher rate of interest did not relate to the suit.[11]

(3) A suit for damages for crops misappropriated was compromised by the amount of damages being settled and also by a provision being made that the defendant should hold the land under the plaintiff at a certain rent. *Held*, that the agreement as to tenancy was outside the scope of the suit.[12]

(4) Plaintiff sued to restrain the defendant from building a house in such a way as to interfere with the plaintiff's enjoyment of light and air. The suit was compromised by providing that the defendant should not build his house higher than it originally was and also that the defendant should not let water into the passage between the houses. *Held*, that the agreement as to the passage was beyond the scope of the suit.[13]

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(6) *Jachin* v. *Chennineesa*, (1919) 54 Ind Cas 538 (540): 24 Cal W N 328.

(7) *Murugappa Asari* v. *Amritammal*, (1909) 2 Ind Cas 480 (480) Mad.

(8) *Natesan Chetti* v. *Vengu Nachiar*, (1909) 33 Mad 102 (105, 106): 6 Mad L Tim 313: 20 Mad L Jour 60: 3 Ind Cas 701.

(9) *Ramdhari* v. *Ram Kanta*, (1909) 1 Ind Cas 572 (572): 9 Cal L Jour 16: 5 Mad L Tim 274 and 359: 13 Cal W N 217 [Suit by *A* against his landlord for possession of leased land—*B* impleaded as party—Real contest being between *B* and landlord—Compromise of suit—*A* abandoning suit and *B* agreeing to pay rent to landlord—Compromise was one relating to suit].

(10) *Sashi Bhusan* v. *Hari Narayan*, 1921 Cal 202 (207): 48 Cal 1059: 25 Cal W N 990: 66 Ind Cas 705.

(11) *Gauri Dutt* v. *Dohan*, (1917) 43 Ind Cas 459 (459): 2 Pat L Jour 673: 4 Pat L W 209.

(12) *Purna Chandra Burman* v. *Panchkari Ghose*, (1907) 5 Cal L Jour 15 (17).

(13) *Ruttonsey* v. *Pooribai*, (1883) 7 Bom 304 (309).

O. 23, R. 3, Notes 18—19.

Although it is obligatory upon a Court, under this rule, to pass a decree in terms of a compromise, after it has been recorded, it is not necessary that the decree should be passed *simultaneously* with the order recording the compromise. There is nothing to prevent the Court from postponing the passing of a decree in a proper case.[14] Also, the Court is not bound to pass a decree in the exact form which the parties propose.[15] Further, the decree is not vitiated merely because it does not recite *verbatim* the compromise.[16] A Court acting under this rule cannot make a *declaratory* decree inasmuch as not having heard the case on the merits, the Court is not in a position to form its own opinion as to the merits of the case.[17] As the decree should be in accordance with the compromise, where the latter does not provide for a personal remedy, the decree also cannot grant it.[18] If a suit has been compromised by the original parties thereto, a third party cannot be allowed to intervene and oppose the passing of a decree on the compromise.[19]

19. Where compromise includes matters not relating to the suit.—We have seen that a decree can be passed under this rule only so far as the compromise relates to the suit. But a compromise which includes matters extraneous to the suit is not unlawful[1] and cannot be rejected in its entirety by the Court.[2] Where a compromise comprises matters unconnected with the suit, the proper course for the Court is to recite the compromise as a whole in its decree or in the form of a schedule to the decree for purposes of reference but to restrict the operative part of the decree to those terms of the compromise which relate to the suit. In such a case the decree would be executable only in respect of the matters that relate to the suit.[3] The remaining terms of the compromise, *i.e.*, those which are not incorporated in the operative part of the decree may be enforced by means of a separate suit.[4]

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(14) *Abhayanand Singh* v. *Rameshwar Singh Bahadur*, 1930 Pat 395 (400): 9 Pat 314: 125 Ind Cas 521.

(15) *Chandulal* v. *Nagindas*, 1929 Bom 350 (352): 31 Bom L R 621: 119 Ind Cas 663. See also *Munshi Ram* v. *Dera Mul*, (1897-1901) U B R 256 [Court to ascertain terms of compromise and decree accordingly].

(16) *Malik Chand* v. *Jiwan Mal*, 1929 Lah 527 (528): 11 Lah L Jour 127: 118 Ind Cas 395.

(17) *Chandu Lal* v. *Nagindas*, 1929 Bom 350 (352): 31 Bom L R 621: 119 Ind Cas 663.

(18) *Mira Moti Ju Deo* v. *Musammat Janki*, 1926 Nag 20 (21): 89 Ind Cas 926.

(19) *Raja Rajeswara Muthuramalinga Sethupathi Avl* v. *Secretary of State for India*, 1926 Mad 341 (341, 342): 50 Mad L Jour 59: 92 Ind Cas 311; *Laraiti* v. *Oh Shiam Sunder*, 1932 All 478 (479, 480): 1932 All L J 509.

Note 19.

(1) *Hari Chand* v. *Maghi Mal*, (1917) 40 Ind Cas 675 (677): 95 Pun W R 1917: 78 Pun Re 1917: 112 Pun L R 1917.

(2) *Hari Chand* v. *Maghi Mal*, (1917) 40 Ind Cas 675 (677): 95 Pun W R 1917: 78 Pun Re 1917: 112 Pun L R 1917.

(3) *Hemanta Kumari* v. *Midnapur Zamindari Co*, (1919) 53 Ind Cas 534 (539): 1919 P C 79: 37 Mad L Jour 525: 17 All L J 1117: 24 Cal W N 177: 1920 Mad W N 66: 27 Mad L Tim 42: 11 Mad L W 301: 46 Ind App 240: 31 Cal L Jour 298: 22 Bom L R 488: 47 Cal 485 P C; *Purna Chandra Sarkar* v. *Nil Madhub Nandi*, (1901) 5 Cal W N 485 (487); *Charu Chandra Mitra* v. *Sambhu Nath Pandey*, (1918) 46 Ind Cas 358 (364): 3 Pat L Jour 255: 4 Pat L W 393: 1918 Pat H C C 193 F B; *Vishnu* v. *Ramchandra*, 1932 Bom 466 (467): 139 Ind Cas 830: 34 Bom L R 849; *Bai Monghibai* v. *Bai Rambhalaxmi*, (1921) 59 Ind Cas 344 (345): 22 Bom L R 1286; *Jivan Krishan* v. *Rames Chandra*, 1921 Cal 500 (500): 38 Cal L Jour 72: 65 Ind Cas 47; *U Po Nyun* v. *Ma Pan Me*, 1928 Rang 43 (44): 5 Rang 662: 107 Ind Cas 163.

(4) *Rajagopalan* v. *T S Subrama Iyer*, (1919) 53 Ind Cas 354 (359): 1919 Mad W N 356; *Gupta Narain Das* v. *Bijai Sundari Debya*, (1898) 2 Cal W N 663 (664); *Murugappa* v. *Amrithammal*, (1909) 2 Ind Cas 430 (430) Mad; *Parasanni* v. *Naraini*, (1905) 2 All L J 680 (681): 1905 All W N 128; *Vishnu* v. *Ramchandra*, 1932 Bom 466 (467): 34 Bom L R 849: 139 Ind Cas 830.

Where a compromise which includes matters extraneous to the suit has been entered into on condition that it should be given effect to as a whole, the Court should not dismiss the suit,[5] but can permit the parties to suitably enlarge the scope of the suit by means of amendment of pleadings, so as to enable the compromise to be passed into a decree.[6] O. 23, R. 3, Notes 19—20.

As to whether where a decree erroneously includes in the operative part of it, terms extraneous to the suit, the executing Court can refuse to execute the decree with respect to those terms and whether a separate suit lies in respect of them, *see* Note 27 below.

20. Parties to the compromise.—A compromise to which some of the parties to a suit alone are parties is not necessarily invalid[1] though on good cause being shown by any of the other parties, the Court has a discretion to reject such a compromise.[2] Thus where a partial compromise would be prejudicial to the interests of the parties not joining it, it cannot be recognised.[3] Similarly where the interests of the several parties to a suit are *inseparable,* it is not open to some of them alone to compromise the matter.[4] Thus a suit for partition cannot be compromised by some of the parties to it alone.[5]

A compromise between some parties alone cannot affect the position of the other parties to the suit. They are neither bound by it nor entitled to enforce it.[6] Nor is a party bound by the unauthorised compromise entered into by his agent.[7] But a person who is suing or is being sued in a representative capacity can enter into a *bona fide* compromise and thereby bind the persons represented.[8]

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(5) *Muthu Vijaya Raghunatha Udayana Tevar* v. *Tandavaroya Thambiran,* (1898) 8 Mad L Jour 301 (302): *Muthu Vijaya Ragunatha Udayana Tevar* v. *Thandavaraya Thambiran,* (1899) 22 Mad 214 (216): *Bhag Singh* v. *Nazir,* 1908 Pun Re No 77: 140 Pun W R 1908.

(6) *Mohibullah* v. *Imami,* (1887) 9 All 229 (230): 1887 All W N 19.

Note 20.

(1) *Shankar Bharati* v. *Narasimha Bharati,* 1927 P C 57 (59): 52 Mad L Jour 466: 25 Mad L W 791: 1927 Mad W N 347: 4 Oudh W N 428: 101 Ind Cas 20: 29 Bong L R 839: 45 Cal L Jour 420: 31 Cal W N 649: 51 Bom 442: 54 Ind App 111 P C; *Achama Naidu* v. *Krishnaswamy Naidu,* (1916) 34 Ind Cas 518 (519, 520) Mad; *Shib Ram* v. *Abdul Ghani,* 1928 Lah 792 (794): 112 Ind Cas 695.

(2) *Gopika Raman* v. *Atul Singh,* 1926 Cal 193 (198): 85 Ind Cas 678.

(3) *Ashfuq Hussain* v. *Bunyad Hussain,* 1923 Oudh 252 (253, 254): 77 Ind Cas 874: *Ajay Kumar Debi* v. *Manindra Nath Chatterji,* (1905) 32 Cal 561 (566).

(4) *Brojeshwar* v. *Syama Charan,* (1919) 50 Ind Cas 363 (364) Cal: *Vir Singh* v. *Kharak Singh,* 1925 Lah 280 (280): 6 Lah L Jour 604: 86 Ind Cas 361: *Mt Maqboolan* v. *Habib Ullah,* 1927 Oudh 222 (223): 1 Luck Cas 19: 102 Ind Cas 470.

(5) *Thiruvengada* v. *Thangavelu,* 1928 Mad 594 (596): 108 Ind Cas 221: *Gobind Chandra Sardar* v. *Bhagbat Sardar,* (1915) 27 Ind Cas 242 (243) Cal. See also *Chellaram* v. *Seth Kimatram,* (1921) 61 Ind Cas 118 (122, 123, 124): 14 Sind L R 245 [Some only of the partners in a partnership suit].

(6) *Mussammat Bhagwati Kuar* v. *Jagdam Saha,* 1921 Pat 260 (262): 6 Pat L Jour 604: 2 Pat L Tim 471: 62 Ind Cas 933; *Ala Bakhsh Khan* v. *Kasim Ali Khan,* 1895 Pun Re No 48; *Abdul Karim* v. *Meherunnessa,* (1918) 45 Ind Cas 33 (33) Cal; *Gobind Chandra Sardar* v. *Bhagbat Sardar,* (1915) 27 Ind Cas 242 (243) Cal [Consent decree not binding on some defendants—Suit to declare this *not necessary*]; *Durlav Mandal* v. *Hem Chandra,* 1926 Cal 188 (188): 89 Ind Cas 177. But see *Protap Narain Mukerjee* v. *Sarat Kumari Debi,* (1901) 5 Cal W N 386 (390): *Debendra Narain Sinha* v. *Narendra Narain Sinha,* (1913) 19 Ind Cas 915 (916) Cal [Person beneficially entitled may sue to enforce compromise though not party]. See also *Kailaschandra* v. *Hriday Chandra,* 1924 Cal 814 (815): 39 Cal L Jour 367: 83 Ind Cas 958 [Points arising out of the new state due to the compromise between the other parties may be raised].

(7) *Monmohini* v. *Benga Chandra Das,* (1904) 31 Cal 357 (362): 8 Cal W N 197: *Muhammad Rashid* v. *Rahmatullah,* (1914) 24 Ind Cas 630 (631): 212 Pun L R 1914: 134 Pun W R 1914: 96 Pun Re 1914; *Andi Krishna Dutta* v. *Priya Sankar Majumdar,* (1916) 36 Ind Cas 375 (378): 21 Cal W N 366 [Though agent entrusted with the general conduct of the litigation].

(8) *Krishnamachariar* v. *Chinnammal,* (1913) 18 Ind Cas 369 (371, 372): 24 Mad L Jour 192: 13 Mad L Tim 151: 1913 Mad W N 194 [Person suing under O 1, R 8]: *Padmanabha Chettiar* v. *Williams and others,* (1900) 23 Mad

O. 23, R.3, Notes 20—24.

Where a compromise includes, as parties thereto, some persons who are not parties to the suit and the terms affecting the parties to the suit are not separable from those affecting the non-parties, the Court cannot pass a decree under O. 23, R. 3.[9] Where a consent decree between some of the parties alone is sought to be enforced in execution against the other parties to the suit who, however, are not parties to the compromise and such persons object to the execution of the decree against them on the ground that the consent decree is not binding on them, the dispute falls within S. 47 of the Code.[10]

A purchaser *pendente lite* is bound by a compromise decree.[11]

21. Compromise by minor's guardian.—*See* O. 32, R. 7 and the notes thereunder.

22. Compromise by Hindu widow.—A *bona fide* compromise by a Hindu widow as representing her husband's estate binds the reversioners.[1]

23. Compromise by pleader.—*See* Note 7 to O. 3, R. 4, *ante*.

24. Effect of consent decree and admissibility in evidence.—As has been seen in Note 114 to S. 11 a compromise decree does not operate as *res judicata* though it will create an estoppel between the parties, and is as much binding upon them as a decree *in invitum*.[1] Hence, a compromise decree is

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239 (249, 250): 10 Mad L Jour 10 [Trustee can compromise on behalf of the beneficiary]; *Devi Dial* v. *Utam Devi*, 1907 Pun Re No 37: 120 Pun L R 1907: 156 Pun W R 1907 [Compromise by reversioner binding on successor in title]; *Satyendra Nath* v. *Nilkantha*, (1894) 21 Cal 383 (386) [Auction-purchaser bound by compromise entered into by judgment-debtor]; *Digambar* v. *Nishibala*, (1910) 8 Ind Cas 91 (95): 15 Cal L Jour 655 [Compromise by purchaser with regard to title to property binds vendor]; *Subrahmanyan* v. *Raja Rajeswar*, 1915 P C 33 (35): 33 Mad 115: 14 All L J 153: 18 Bom L R 360: 23 Cal L Jour 337: 20 Cal W N 201: 29 Mad L Jour 856: 19 Mad L Tim 150: 3 Mad L W 149: (1916) 1 Mad W N 100: 32 Ind Cas 258 P C [Trustee compromising—Act not reasonable and proper in the circumstances—Act not binding]; *Khetra Moni Dasi* v. *Amodini Dasi*, (1912) 16 Ind Cas 611 (612) Cal [Compromise by pardanashin lady—Court should satisfy itself that terms were understood by her and that she acted on independent advice].

(9) *Doolychand Srimali* v. *Mohan Lal Srimali*, 1924 Cal 722 (723, 724): 51 Cal 432: 83 Ind Cas 606.

(10) *Sankaravadivammal* v. *Kumarasamya*, (1885) 8 Mad 473 (475).

(11) *Raghubar* v. *Ghasite*, (1910) 6 Ind Cas 750 (751): 13 Oudh Cas 98; *Junna* v. *Tarachand*, (1910) 6 Ind Cas 168 (169) All. But see *Kishory Mohun* v. *Mahommed Muzafar*, (1891) 18 Cal 188 (195, 196) [Affirmed by P C in 22 Cal 909 (920)].

Note 22.

(1) *Sankar Nath* v. *Bejoy Gopal*, (1909) 4 Ind Cas 513 (516-517): 13 Cal W N 201: 8 Cal L Jour 458; *Shyam Lal* v. *Rameswar Basu*, (1916) 33 Ind Cas 273 (277): 23 Cal L Jour 82; *P Rajagopalan* v. *V Ramamurthy*, 1924 Mad 301 (304): 18 Mad L W 491: 73 Ind Cas 284. But see the following cases:—*Sheo Narain* v. *Bishen Prasad*, (1882) 10 Cal L Rep 337 (344); *Imrit Kunwar* v. *Roop Narain*, (1880) 6 Cal L Rep 76 (81); *Gobind Krishna Narain* v. *Khunni*, (1907) 29 All 487 (494): 4 All L J 365: 1907 All W N 151; *Mahadei* v. *Baldeo*, (1908) 30 All 75 (78): 1906 All W N 16: 5 All L J 43; *Ashram Sadhani* v. *Chandi Churn Mukerjee*, (1909) 2 Ind Cas 549 (550): 13 Cal W N 147.

Note 24.

(1) *Sivadas Dutta* v. *Birendra Krishna Dutta*, 1926 Cal 672 (675): 43 Cal L Jour 116: 94 Ind Cas 844; *Pulliah Chetty* v. *Varadarajulu*, (1908) 31 Mad 474 (477): 18 Mad L Jour 409; *Vilakandhen* v. *Padmanabha*, (1895) 18 Mad 1: 21 Ind App 128 (130-131): 4 Mad L Jour 233: 6 Sar 478 P C; *Ameer Begum* v. *Noor Begum*, (1866) 1 Agra F B 1; *Nicholas* v. *Asphar*, (1897) 24 Cal 216 (237); *Lakshmishankar* v. *Vishnuram*, (1900) 24 Bom 77 (85): 1 Bom L R 534; *Mahadeo Bakhsh* v. *Suraj Bakhsh*, 1924 Oudh 34 (38): 10 Oudh L J 252: 80 Ind Cas 447; *Kuar Nageshar Sahai* v. *Kuar Mata Prasad*, 1922 Oudh 236 (248): 9 Oudh L J 235: 25 Oudh Cas 189: 69 Ind Cas 730 [Not rendered invalid because it proceeds on a wrong legal ground]; *Madan Lal* v. *Gajendrapal Singh*, 1929 All 248 (249): 1929 All L J 344: 116 Ind Cas 436: 51 All 575; *Tukaram Mahadu Tandel* v. *Ramachendra Mahadu Tandel*, 1925 Bom 425 (427): 27 Bom L R 921: 49 Bom 672: 89 Ind Cas 984; *Sitaram* v. *Petia*, (1918) 43 Ind Cas 962 (964): 14 Nag L R 35 [Whatever is necessarily involved in the decree pronounced cannot be re-opened by either party]; *Jamnabai* v. *Fazalbhoy Heptoola*, 1923 P C 184 (185): 18 Mad L W 437: 26 Bom L R 189: 46 Mad L Jour 160: 33 Mad L Tim 376: 5 L R P C 30: 77 Ind Cas 355; *Ram Nirunjan Singh* v. *Prayag Singh*, (1882) 8 Cal 138 (141): 10 Cal L Rep 66; *Raoji Narainji* v. *Ratansi Kanji*, 1930 Bom 431 (436): 32 Bom L R 389: 126 Ind Cas 305: 54 Bom 696; *Venkatagiri Nayanivaru* v. *Subbarayalu Nanayani*, (1914) 24 Ind Cas 491 (499) Mad; *Keshab Panda* v. *Bhobani Panda*, (1913) 21 Ind Cas 538 (539): 18 Cal L Jour 187; *Kumaravenkata Perumal* v. *Thatha Ramaswami Chetty*, (1911) 9 Ind Cas 875 (881): (1911) 1 Mad W N 290: 9 Mad L Tim 487: 21 Mad L Jour 709: 35 Mad 75 [Consent decree operates as a waiver of prior errors of procedure not going to root of Court's jurisdiction]; *Rajagopalan* v. *T S Subramania Iyer*, (1919) 53 Ind Cas 354 (359):

admissible in evidence in a later suit between the same parties, for the same purposes for which an ordinary decree would be admissible under the provisions of the Evidence Act.[2] Where a suit is terminated by a compromise decree, a breach of its terms does not restore the parties to the rights which they had prior to the decree.[3] But a compromise decree is a creature of the *agreement* on which it is based and is subject to *all the incidents of such agreement.*[4] A compromise decree is but a contract with the command of a Judge superadded to it.[5] Hence such a decree is of no greater validity than the contract on which it is based.[6] It can therefore be set aside on any of the grounds, such as fraud, mistake, misrepresentation, etc., on which a contract may be set aside (*see* Note 28, *infra*). For the same reason, where a compromise decree contains any term which is in the nature of a penalty under the Contract Act, S. 74 or of a forfeiture it is open to the Court to grant relief against the forfeiture incurred under such penal clause.[7] As a minor's contract is void, so a decree on a compromise with a minor is a nullity.[8] *See also* the undermentioned cases.[9] O. 23, R. 3, Notes 24—25.

25. Registration if necessary.—Under S. 17 (2) (*vi*) of the Registration Act before the amendment thereof by Act XXI of 1929, a decree or order of a Court was exempt from registration, even though it may otherwise come within the scope of sub-S. 1 of S. 17 which made the registration of certain types of documents obligatory. Hence, a compromise decree was

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1919 Mad W N 356; *Rampat* v. *Mt Durga Bharthi*, (1921) 60 Ind Cas 440 (448): 23 Oudh Cas 303; *Kaliana Rama Aiyar* v. *Sivarama Chettiyar*, (1919) 51 Ind Cas 439 (441) Mad; *Kumara Venkata Perumal* v. *Thatha Ramaswamy Chetty*, (1911) 9 Ind Cas 875 (880): 35 Mad 75: (1911) 1 Mad W N 290: 9 Mad L Tim 487: 21 Mad L Jour 709 [Decree binding though wrongly passed]; *Aryaputhura Gounden* v. *Ettia Gounden*, (1917) 42 Ind Cas 223: 1917 Mad W N 751: 6 Mad L W 635: 33 Mad L Jour 615; *Thiruvambala Desikar* v. *Chinna Pandaram*, (1916) 34 Ind Cas 57 (60, 68): 30 Mad L Jour 274: (1916) 2 Mad W N 43: 4 Mad L W 306: 40 Mad 177; *Amrita Sundari* v. *Shera Juddin Ahmed*, (1915) 29 Ind Cas 156 (159, 160): 19 Cal W N 565; *Helan Dasi* v. *Durga Das*, (1906) 4 Cal L Jour 323 (327) [Compromise will not be set aside on the ground that it gave to one party more than he would have got if he had obtained judgment]; *Yadorao* v. *Mirabai*, 1924 Nag 180 (183): 76 Ind Cas 368 [Terms attacked as contrary to Hindu Law—Compromise still binding on consenting party]; *Kishan Singh* v. *Ganesha*, (1899) 2 Oudh Cas 112 (115); *Latafat Hussain* v. *Badshah Husain*, (1905) 8 Oudh Cas 143 (141) P C.

(2) *Ramdhari Koer* v. *Ramakanta*, (1909) 13 Cal W N 217: 5 Mad L Tim 274 and 359: 9 Cal L Jour 16: 1 Ind Cas 572 (573); *Lala Shib Lal* v. *Lala Gouri Prasad*, (1898) 2 Cal W N 171 (175).

(3) *Bishun Coomar* v. *Joy Hurish Chunder*, (1865) 2 Suth W R 209 (210); *Sadik Hussain* v. *Kaniz Zohra Begum*, (1911) 12 Ind Cas 15 (17): 33 All 743: 38 Ind App 161: 15 Cal W N 1005: (1911) 2 Mad W N 152: 10 Mad L Tim 173: 13 Bom L R 829: 11 Cal L Jour 313: 8 All L J 1104: 11 Oudh Cas 289: 21 Mad L Jour 1151 P C; *Pem Nahar* v. *Bhawani Dharee*, (1861) 1 Suth W R 265 (266); *Ameer Begum* v. *Noor Begum*, (1866) Agra 1 F B. But see *Thakur Das* v. *Jaswant Rai*, 1904 Pun Re No 1: 41 Pun L R 1904 [Where a second suit for the same claim was held not barred].

(4) *Shadi Ram* v. *Amin Chand*, 1930 Lah 937 (941): 12 Lah L Jour 203: 130 Ind Cas 513; *Amrita Sundari* v. *Sherajaddin Ahmed*, (1915) 29 Ind Cas 156 (159, 160): 19 Cal W N 565; *Nayappa* v. *Venkat Rao*, (1901) 24 Mad 265 (270).

(5) *C J Smith* v. *A Kenny*, 1924 Pat 231 (232): 2 Pat 749: 81 Ind Cas 298.

(6) *Thiruvambala Desikar* v. *Chinna Pandaram*, (1916) 34 Ind Cas 57 (68): 40 Mad 177: 30 Mad L Jour 274: (1916) 2 Mad W N 43: 4 Mad L W 306.

(7) *Krishna Bai* v. *Hari*, (1907) 31 Bom 15 (22): 3 Bom L R 813: 1 Mad L Tim 370 [Over-ruling 10 Bom 435 (437)]. See also *Baldishen Das* v. *Run Bahadur Singh*, (1884) 10 Cal 305 (314): 10 Ind App 162: 13 Cal L Rep 492: 7 Ind Jur 554: 4 Sar 465 P C; *Ram Gopal Mookerjee* v. *Masseyk and Kenny*, (1860) 8 Moo Ind App 239 (261): 2 Suth W R 43: 1 Suth 409: 1 Sar 760.

(8) *Ganganand* v. *Rameshwar*, 1927 Pat 271 (279, 280): 6 Pat 388: 103 Ind Cas 449: 8 Pat L Tim 730.

(9) *Beharee Lall* v. *Mewa Koonwar*, (1868) 3 Agra 82 [Compromise between members of family for settlement of their disputes—Effect—New rights are not created—Only previously asserted rights are recognised]; *Mewa Kuwar* v. *Hulas Kuwar*, (1870-71) 1 Ind App 157 (166): 13 Bom L R 412: 3 Sar 811 [Compromise based on the assumption that there was an antecedent title of some kind in the parties—Suit on compromise did not rest on contract only but also on title].

O. 23, R. 3, Note 25.

held exempt from registration,[1] even in cases where the compromise which it embodied affected matters extraneous to the suit.[2] Under the section as amended, a compromise decree comprising properties *extraneous* to the suit is not exempted from registration under S. 17, sub-S. 2. A compromise in so far as it is not incorporated in a decree, is not exempt from registration if it is otherwise compulsorily registrable.[3]

A petition to the Court, which merely recites the compromise arrived at between the parties and prays for an order recording the compromise does not come within the provisions of the Registration Act regarding compulsory registration of documents[4] even though the compromise may include terms affecting matters extraneous to the suit.[5] Where the compromise does not transfer or declare any rights in immoveable property but merely provides for the temporary management of the property, registration is not necessary.[6] Even where a compromise is compulsorily registrable the doctrine of part-performance applies to such a compromise and where it has been acted upon, parties cannot resile from it.[7] (*See* S. 53-A of the Transfer of Property Act as amended in 1930.)

Note 25. Ind Cas 377 (379) Cal.

(1) *Prannal Anne* v. *Lakshiannee,* (1899) 3 Cal W N 485 (490): 22 Mad 508: 26 Ind App 101: 1 Bom L R 394: 9 Mad L Jour 147: 7 Sar 516 P C; *Gupta Narain* v. *Bijoya Sundari,* (1898) 2 Cal W N 663 (664); *Bindesri Naick* v. *Ganga Saram Sahu,* (1898) 20 All 171 (180): 25 Ind App 9: 2 Cal W N 129: 7 Sar 273 P C; *Upendra Nath* v. *Bindeshri,* (1916) 32 Ind Cas 468 (475): 22 Cal L Jour 452: 20 Cal W N 210; *Poorvanayi* v. *Kundron,* (1920) 58 Ind Cas 554 (557): 1920 Mad W N 431: 12 Mad L W 35: 39 Mad L Jour 77: 28 Mad L Tim 90: 43 Mad 688 F B; *Kalyanaramaiyer* v. *Sivarama Chettiar,* (1919) 51 Ind Cas 439 (440) Mad; *Protap Chandra Pal* v. *Nityananda Nag,* (1920) 57 Ind Cas 751 (753) Cal; *Ambicacharan Sher Kaibarta* v. *Srinath Dutta,* (1913) 19 Ind Cas 551 (552) Cal; *Jagadish Chandra* v. *Rasik Mandal,* 1926 Cal 666 (667): 30 Cal W N 307: 96 Ind Cas 753; *Mt Aishan* v. *Abdulla,* 1927 Lah 156 (157): 99 Ind Cas 1002 [Compromise embodied in decree of revenue Court—Registration not necessary]; *Shadi Ram* v. *Amin Chand,* 1930 Lah 937 (940): 12 Lah L Jour 203: 130 Ind Cas 513; *Mahbub* v. *Munshi,* 1932 Lah 24 (24): 135 Ind Cas 203: 32 Pun L R 761; *Gobinda Chandra Pal* v. *Dwarkanath,* (1908) 35 Cal 837 (840): 7 Cal L Jour 492: 12 Cal W N 849; *Biraj Mohinee* v. *Kedar Nath,* (1908) 35 Cal 1010 (1012): 8 Cal L Jour 90: 12 Cal W N 854.

(2) *Jasimuddin Biswas* v. *Bhuban Jelani,* (1907) 34 Cal 456 (462, 468); *Raghubans* v. *Mahibir,* (1906) 28 All 78 (81): 1905 All W N 195: 2 All L J 564; *Mt Arunbati Kumari* v. *Ramniranjan Marwari,* 1921 Pat 320 (321): 58 Ind Cas 299: 2 Pat L Tim 38; *Hemanta Kumari* v. *Midnapore Zemindari Co,* (1919) 53 Ind Cas 534 (540): 1919 P C 79: 47 Cal 485: 46 Ind App 240: 17 All L J 1117: 22 Bom L R 488: 31 Cal L Jour 298: 24 Cal W N 177: 37 Mad L Jour 525: 27 Mad L Tim 42: 11 Mad L W 301: 1920 Mad W N 66 P C; *Arunbati Kumari* v. *Ram Niranjan,* (1920) 58 Ind Cas 299 (300): 1921 Pat 320: 2 Pat L Tim 38; *Karu Mian* v. *Tejo Mian,* (1918) 43 Ind Cas 282 (285): 3 Pat L Jour 43: 3 Pat L W 141: 1919 Pat H C C 373. But see *Kartar Singh* v. *Indar Singh,* (1919) 51 Ind Cas 273 (275): 31 Pun Re 1919; *Shaikh Rafic* v. *Bhagaban Chandradhar,* (1914) 25

(3) *Har Sarup* v. *Tohfa Singh,* 1928 All 534 (536): 111 Ind Cas 156; *Kashi* v. *Sumar,* (1910) 5 Ind Cas 234 (235): 32 All 206: 7 All L J 206; *Sadaruddin* v. *Chajju,* (1909) 1 Ind Cas 558 (559): 31 All 13: 1908 All W N 264: 5 All L J 717; *Chelamanna* v. *Rama Rao,* (1911) 12 Ind Cas 317 (320): 10 Mad L Tim 232: 21 Mad L Jour 870: (1911) 2 Mad W N 265: 36 Mad 46; *Ghulam Mustafa* v. *Ghulam Nabi,* 1923 Lah 581 (582): 4 Lah 263: 75 Ind Cas 461; *Patha Muthammal* v. *Esup Rawther,* (1906) 29 Mad 365 (366); *Pranal Anni* v. *Lachumi Anni,* (1899) 22 Mad 508 (514): 26 Ind App 101: 1 Bom L R 394: 3 Cal W N 485: 9 Mad L Jour 147: 7 Sar 516.

(4) *Birbhadra* v. *Kalpataru,* (1905) 1 Cal L Jour 388 (406); *Sital Prasad* v. *Lal Bahadur,* (1915) 31 Ind Cas 902 (904): 38 All 75: 13 All L J 1122; *Mussammat Jeo* v. *Jaimal Singh,* (1915) 29 Ind Cas 311 (312): 90 Pun W R 1915: 1 Pun L R 1916; *Hari Chand* v. *Maghi Mal,* (1917) 40 Ind Cas 675 (677): 95 Pun W R 1917: 78 Pun Re 1917: 112 Pun L R 1917; *Shankar Singh* v. *Kalka Baksh Singh,* (1917) 39 Ind Cas 545 (550): 21 Oudh Cas 346; *Mohammed Ali Khan* v. *Shujat Ali Khan,* (1918) 46 Ind Cas 913 (916) Nag; *Pitambar Gain* v. *Uddhab Mondal,* (1908) 12 Cal W N 59 (60); *Chellaram* v. *Kimatram,* (1921) 61 Ind Cas 118 (119, 120): 14 S L R 245.

(5) *Charu Chandra Mitra* v. *Sambhu Nath Pandey,* (1918) 46 Ind Cas 358 (370): 3 Pat L Jour 255: 4 Pat L W 393: 1918 Pat H C C 193; *Biseswar* v. *Mahadeo,* (1916) 36 Ind Cas 290 (292): 1 Pat L Jour 208: 1917 Pat 161. But see *Kali Charan* v. *Ramchandra,* (1903) 30 Cal 783 (787); *Muthayya* v. *Venkataratnam,* (1902) 25 Mad 553 (555).

(6) *Rupchand* v. *Jankibai,* 1926 Bom 24 (25): 27 Bom L R 1441: 91 Ind Cas 817.

(7) *Muhammad Musa* v. *Aghore Kumar,* 1914 P C 27 (29): 42 Cal 801: 42 Ind App 1: 17 Bom L R 420: 21 Cal L Jour 281: 28 Mad L Jour 548: 19 Cal W N 250: 13 All L J 229: 17 Mad L Tim 143: 2 Mad L W 258: 28 Ind Cas 930: 1915 Mad W N 621 P C.

O. 23, R. 3, Notes 26—27.

26. Stamp.—A *solenamah* on stamped paper is not necessary for a compromise decree to be passed under O. 23, R. 3.[1]

See the undermentioned cases.[2]

27. Execution of consent decree.—A consent decree is executable in the same manner as an ordinary decree.[1] Thus, a consent decree providing for the execution of a document by one of the parties may be enforced under O. 21, R. 34.[2] But, where the decree is *incapable of execution*, as for instance, where it merely creates a charge on property and does not confer the power of sale, a separate suit is necessary to enforce the right created by the decree.[3] Similarly, a decree can be executed only in respect of the terms included in the *operative part* thereof. Hence, where certain terms of compromise are not included in the operative part of a decree as being concerned with matters extraneous to the suit, such terms cannot be enforced in execution.[4]

With regard to the power of an executing Court to go behind a consent decree the question has arisen with reference to three matters as noted below:—

(1) *Where the decree gives effect to an unlawful compromise.*—In such a case, the executing Court is entitled and bound to refuse to execute the decree.[5]

(2) *Where the operative part of the decree gives effect to terms of a compromise which do not relate to the suit.*—On this question there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras[6] and Allahabad[7] and by the Chief Court of Oudh[8] that the executing Court cannot refuse to execute the decree in such a case. The reason,

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Note 26.

(1) *Mahadeo Prasad* v. *Baadeo Tewari*, (1915) 29 Ind Cas 511 (512) U P B R; *Pitambar Gain* v. *Uddhab Mondal*, (1908) 12 Cal W N 59 (60).

(2) *Durga Churn Sett* v. *Shamanund Gossain*, (1869) 12 Suth W R 376 (376); *Barrow* v. *Hugh Thever Pollick*, 1 Hyde 149: 1 Ind Jur O S 57; *Bristoo Chander Roy Chowdhry* v. *Parabutty Debea*, 2 Hay 213: Marsh 274.

Note 27.

(1) *Bishesher* v. *Mehomed Yasin*, 1922 Oudh 150 (152): 25 Oudh Cas 53: 9 Oudh L J 276: 68 Ind Cas 232; *Soudamini* v. *Behary Lal*, 1921 Cal 227 (229): 25 Cal W N 68: 61 Ind Cas 535; *Ram Mohun* v. *Lakhi Narayan*, (1870) 4 Beng L R A C 207: 13 Suth W R 151 (154); *Nikka Mal* v. *Marwar Bank, Ltd*, (1919) 52 Ind Cas 188: 151 Pun Re 1919.

(2) *Soudamini Dassi* v. *Behari Lal* 1921 Cal 227 (228, 229): 25 Cal W N 68: 61 Ind Cas 535; *Ashwini Coomar* v. *Ram Gopal*, 1926 Cal 975 (976): 95 Ind Cas 179.

(3) *Chandra Nath* v. *Burroda Shoodury*, (1895) 22 Cal 813 (816); *Dubhoyeswry* v. *Gouri Sankar*, (1895) 22 Cal 859 (863, 864).

(4) *Ariyaputhra Goundan* v. *Ittiya Gounden*, (1917) 42 Ind Cas 223 (224, 225): 1917 Mad W N 751: 6 Mad L W 635: 33 Mad L Jour 615; *Subbanarayana Aiyar* v. *Maya Thevan*, (1915) 30 Ind Cas 263: 2 Mad L W 608; *Satis Kanta Roy* v. *Jyoti Rupa Devi*, 1924 Cal 49 (51): 81 Ind Cas 459.

(5) *Sarbesh* v. *Hari Dayal*, (1910) 6 Ind Cas 236 (239): 14 Cal W N 451: 11 Cal L Jour 346; *Parashram* v. *Sita Ram*, 1924 Nag 84 (85): 20 Nag L R 1: 78 Ind Cas 357; *Ambu Nair* v. *Kelu Nair*, 1930 Mad 303 (314): 31 Mad L W 44: 123 Ind Cas 584: 53 Mad 805; *Lakshmanasicand* v. *Rangamma*, (1903) 26 Mad 81 (93).

(6) *Ratnasami* v. *Rathnammal*, (1914) 21 Ind Cas 135 (136): 1 Mad L W 446: 15 Mad L Tim 415: 27 Mad L Jour 388; *Manager of Sri Meenakshi Devasthanam* v. *Abdul Kasim*, (1907) 30 Mad 421 (423): 2 Mad L Tim 349: 17 Mad L Jour 255; *Govinda Nattar* v. *Murugesa Mudaliar*, 1932 Mad 557 (558): 1932 Mad W N 628: 36 Mad L W 476.

(7) *Mohibullah* v. *Imami*, (1887) 9 All 229 (231): 1887 All W N 19.

(8) *Shankar Baksh* v. *Mussammat Tajudei*, 1927 Oudh 33 (33): 29 Oudh Cas 276: 92 Ind Cas 722: 3 Oudh W N 375: 13 Oudh L J 320; *Yasin Ali Khan* v. *Ali Bahadur*, 1924 Oudh 230 (231): 10 Oudh L J 443: 79 Ind Cas 685 [A decision of the Judicial Commissioner's Court of Oudh].

O. 23, R.3, Note 27.

according to the Madras High Court being that an objection to the decree cannot be allowed to be raised in the executing Court but must be taken by way of appeal.[9] The High Court of Calcutta[10] and the Chief Court of the Punjab[11] on the other hand have held that a decree is inoperative and invalid and cannot be executed in so far as it gives effect to the terms of a compromise not relating to the suit. The High Court of Bombay seems to take the latter view.[11-a]

(3) *Where the decree contains any provision in the nature of a penalty.*—A compromise decree being of no greater validity than the contract on which it is based, an executing Court can in the exercise of its equitable jurisdiction, relieve against any forfeiture incurred under any penal clause in a consent decree.[12]

It follows from the differences in views noted above that in respect of the terms of a consent decree which do not relate to the suit a separate suit according to the Calcutta High Court can be brought on the *contract,*[13] while according to the Allahabad High Court the question in such a case is one relating to execution and hence a fresh suit is barred under S. 47 of the Code.[14] Where, however, any terms of a compromise *are not embodied* in the operative part of a decree the bar of S. 47 cannot apply to a suit to enforce such terms and such a suit will therefore lie.[15]

Where a consent decree orders the sale of any property, it can be executed and the property can be sold without the formality of an attachment.[16] Similarly, a consent decree in a mortgage suit can be executed

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(9) *Sabapathy Pillay* v. *Venmahalinga Pillai,* (1914) 23 Ind Cas 581 (586): 38 Mad 959: 15 Mad L Tim 206: 26 Mad L Jour 331: 1914 Mad W N 256; *Manager of Sri Meenakshi Devastanam* v. *Abdul Kasim,* (1907) 30 Mad 421 (423): 2 Mad L Tim 349: 17 Mad L Jour 255.

(10) *Gurdas Singh* v. *Chandrika Singh,* (1909) 1 Ind Cas 913: 36 Cal 193 (223): 5 Cal L Jour 611; *Sarat Chandra* v. *Shyam Chand,* (1912) 14 Ind Cas 701 (701): 16 Cal L Jour 71: 39 Cal 663; *Birbhadra* v. *Kalpataru,* (1905) 1 Cal L Jour 388 (899); *Jasimuddin* v. *Bhuban,* (1907) 34 Cal 456 (463); *Arjun Kapali* v. *Asvini Kumar Kapali,* 1925 Cal 286 (288): 78 Ind Cas 317; *Jagabhandu Saha* v. *Hari Mohan Roy,* (1921) 62 Ind Cas 653 (654, 655) Cal.

(11) *Kartar Singh* v. *Indar Singji,* (1919) 51 Ind Cas 273 (273): 31 Pun Re 1919.

(11-a) *Vishnu Sitaram* v. *Ramchandra,* 1932 Bom 466 (467): 34 Bom L R 849 [Compromise including extraneous matters—Executable only as to subject-matter of suit—Extraneous matters to be enforced by separate suit].

(12) *Thayyammalachi* v. *Rajali,* (1911) 12 Ind Cas 334 (335): 10 Mad L Tim 326: (1911) 2 Mad W N 327; *Narayan Bapuji* v. *Rajimal Motiram,* 1926 Bom 81 (81): 27 Bom L R 1453: 91 Ind Cas 990; *Kandarpa* v. *Banwari,* 1921 Cal 356 (359): 32 Cal L Jour 244: 60 Ind Cas 864; *Gopal Krishna Nath* v. *Hari Nath,* 1921 Cal 565 (566): 34 Cal L Jour 157: 66 Ind Cas 766; *Nagappa* v. *Venkata Rao,* (1901) 24 Mad 265 (270); *Surendra Nath Banerjee* v. *The Secretary of State for India in Council,* (1920) 57 Ind Cas 643 (645): 24 Cal W N 545; *Harendra Lal* v. *Maharani Dasi,* (1900) 28 Cal 557 (567): 28 Ind App 89: 5 Cal W N 586: 11 Mad L Jour 171: 8 Sar 48 P C [Compromise decree in a mortgage suit and enforcement of its terms]; *Bheama Venkataramana* v. *Bommini Gurappa,* (1915) 28 Ind Cas 970 (971): 28 Mad L Jour 488: 2 Mad L W 587; *Jogamma* v. *Ramalaksmi,* (1915) 30 Ind Cas 248 (249): 2 Mad L W 685. But see *Raghunandan Prasad* v. *Gulam Alauddin Beg,* 1924 All 689 (689, 690): 46 All 571: 22 All L J 464: 4 L R All Civ 356: 79 Ind Cas 916.

(13) *Jasimuddin Biswas* v. *Bhuban Jelani,* (1907) 34 Cal 456 (463); *Arjun Kapali* v. *Aswini Kumar,* 1925 Cal 286 (288): 78 Ind Cas 317.

(14) *Mohibullah* v. *Imami,* (1887) 9 All 229 (231): 1887 All W N 19.

(15) *Rajagopalan* v. *Subramania Iyer,* (1919) 53 Ind Cas 354 (359): 1919 Mad W N 856; *Shib Lal* v. *Collector of Bareilly,* (1894) 16 All 428 (436): 1894 All W N 161 [Suit for specific performance lies]; *Narain Dass* v. *Baba Bishan Das,* 1880 Pun Re No 95. But see *Pati Ram Patel* v. *Moti Ram Patel,* (1897) 10 C P L R 56 (57).

(16) *Mussammat Arunbati* v. *Ramniranjan Marwari,* 1921 Pat 320 (321): 2 Pat L Tim 38: 58 Ind Cas 299.

without any final decree being passed (unlike the case of an ordinary preliminary decree on the mortgage).[17]

See also the undermentioned cases.[18]

28. Mode and effect of setting aside compromise decrees.—No appeal lies from a consent decree [*see* S. 96 (3) and Note 31 below]. But an appeal lies from an order recording a compromise [O. 43, R. 1 (*m*)] and when such an order is set aside, the decree based on it also falls to the ground (*see* Note 31, *infra*). Apart from this, the two usual methods of setting aside a consent decree are (*a*) by suit or (*b*) by review.[1] These two remedies are cumulative and not alternative: so that failure in an application for review is no bar to a suit to set aside the decree.[2]

A consent decree being only the contract between the parties with a command of a judge superadded to it, a suit lies to set aside the consent decree on any of the grounds on which the contract can be set aside, such as fraud, mistake, etc.[3] In appropriate cases, a compromise decree may be set aside by means of an application under O. 9, R. 13. Thus, when such a decree is attacked on the ground that the compromise was not actually entered into by the defendants, that they were not duly served and that they were not present or represented at the trial an application under O. 9, R. 13 is a proper remedy to set aside the compromise decree.[4]

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(17) *Ahmed Mirza* v. *Allahabad Bank, Ltd.* 1926 Oudh 385 (386): 29 Oudh Cas 26: 94 Ind Cas 317; *Vishnu Moreshwar* v. *Sadashiv Shivram*, 1925 Bom 509 (510): 27 Bom L R 943: 89 Ind Cas 889; *Arumbati Kumari* v. *Ram Niranjan*, (1920) 58 Ind Cas 299 (300): 2 Pat L Tim 38. But see *Rameshar* v. *Sukkaran*, (1911) 10 Ind Cas 481 (485, 486): 8 All L J 418.

(18) *Bi Ya* v. *Ou Gaina and Ma Shwe Thit*, (1905-1906) 3 L B R 243 (243) [Suit under S 9 of the Specific Relief Act compromised—Suit by the parties, to establish their title not barred]: *Ganesh Bakhsh* v. *Harihar Baksh*, (1904) 26 All 299 (309): 31 Ind App 116: 8 Cal W N 521: 11 Mad L Jour 190: 6 Bom L R 505 P C [Suit based on compromise decree is not a suit for breach of contract]: *Basangouda* v. *Rudrappa*, 1927 Bom 87 (88): 28 Bom L R 1507: 99 Ind Cas 814 [Earlier suit brought in a different right is as if it was brought by a different person].

Note 28.

(1) *Ala Baksh Khan* v. *Kadim Ali Khan*, 1895 Pun Re No 48: *Mussamat Lalaiti* v. *Hussain Shah*, 1892 Pun Re No 114: *Pudhumal* v. *Mussammat Rup Kour*, 1890 Pun Re No 81: *Ashootosh* v. *Taraprasanna*, (1884) 10 Cal 612 (614): *Miroli Rahimbhoy* v. *Rehmoobhoy Habibhoy*, (1891) 15 Bom 594 (598): *Virupakshappa* v. *Shidappa*, (1899) 23 Bom 620 (623): 1 Bom L R 82: *Rirai Mohat* v. *Chinta Moni*, (1901) 5 Cal W N 877 (878): *Lalji Sahu* v. *Collector of Tirhoot*, (1871) 6 Beng L R 648: 15 W R 23 P C [Review application lies]. But see *Purmessuree Narain* v. *Rajeezuddeen*, (1866) 5 Suth W R 226 (226) [Review of consent decree not legal]. See also *Barhamdeo* v. *Bauresi*, (1916) 3 Cal L Jour 119 (128-129) [Remedy of minor seeking to set aside compromise decree on the ground of fraud is by suit and not by review].

(2) *Gulab Koer* v. *Badshah Bahadur*, (1909) 2 Ind Cas 129 (143): 13 Cal W N 1197: 10 Cal L Jour 420. Contra *Ram Gopal* v. *Prosanna Kumar*, (1905) 2 Cal L Jour 508 (510): 10 Cal W N 529.

(3) *Bibee Soloman* v. *Abdul Azeez*, (1881) 6 Cal 687 (704): 8 Cal L Rep 169 [Consent decree can be set aside on the ground of mistake of material facts]: *Sadho Saran Rai* v. *Anant Rai*, 1932 Pat 483 (486): 1923 Pat H C C 197: 2 Pat 731: 77 Ind Cas 14: *Dwarkadish Prasad* v. *Keshava Prasad*, 1925 All 266 (267): 6 L R All Civ 26: 85 Ind Cas 557 [Consent decree can be set aside on the ground of undue influence or coercion]: *Surendranath* v. *Hemangini*, (1907) 34 Cal 83 (89): *Bhaguti* v. *Chandan*, (1909) 3 Ind Cas 4 (5) All: *Sarbesh* v. *Hari Dayal*, (1910) 5 Ind Cas 236 (238): 14 Cal W N 451: 11 Cal L Jour 346: *Biku Halwai* v. *Mohesh Halwai*, (1908) 8 Cal L Jour 266 (271): *Reily* v. *Raj Kumari*, 1922 Cal 493 (497): 36 Cal L Jour 245: 74 Ind Cas 770: *Jamshedji* v. *Sarabji*, 1921 Bom 414 (415): 25 Bom L R 1137: 85 Ind Cas 504: *Ram Lagan* v. *Ram Birich*, (1919) 50 Ind Cas 497 (497): 4 Pat L Jour 205: *Kshetra Moni Dasi* v. *Amodini Dasi*, (1912) 16 Ind Cas 611 (612) Cal. But see *Kumara Venkata Perumal* v. *Thatha Ramaswami Chetty*, (1911) 9 Ind Cas 875 (880): 35 Mad 75: (1911) 1 Mad W N 290: 9 Mad L Tim 487: 21 Mad L Jour 709 [Consent decree cannot be set aside on some of the grounds on which a contract can be set aside, such as absence of consideration, mistake etc].

(4) *Bhalai* v. *Alach*, (1906) 3 Cal L Jour 158 (159): *Jhanda Singh* v. *Lachmi*, (1920) 56 Ind Cas 878 (879): 22 Pun W R 1920: 68 Pun L R 1920: 1 Lah 344: 2 Lah L Jour 623: *Panna Lal* v. *Balwant*, 1925 Lah 431 (432): 7 Lah L Jour 207: 87 Ind Cas 250: 26 Pun L R 196: *Dasi Chand* v. *Mota Singh*, 1927 Lah 602 (604): 103 Ind Cas 759: *Asaban* v. *Ananda*, (1909) 3 Ind Cas 116 (117): 14 Cal W N 823: *Basiruddin* v. *Sadhu*, (1918) 45 Ind Cas 690 (691): 22 Cal W N 571: *Koruna Moyee* v. *Nubo Kishore*, (1866) 6 Suth W R Mis 36 (37).

O. 23, R. 3, Notes 28—32.

But a consent decree cannot be set aside by rule on motion,[5] or by an application under S. 151.[6]

An interlocutory consent order can be set aside by application in same suit.[7]

Parties cannot rescind a consent decree as an ordinary contract by mutual agreement.[8]

When a compromise decree is set aside, both the parties are restored to their original rights in the former suit when the compromise was effected and the suit can be proceeded with from that point.[9]

Ignorance of real facts, when it was within the party's power to know them,[10] or a mistake or an ignorance of law is[11] no ground for setting aside a compromise decree. *See also* the undermentioned case.[12]

29. **Compromise of appeal.**—The present rule applies also to appeals and an appellate Court can pass a compromise decree if the appeal is compromised.[1]

30. **Compromise of execution proceedings.**—*See* R. 4, *infra*.

31. **Appeal.**—*See* Note 15 to S. 96, *ante* for a full discussion.

An order recording or refusing to record a compromise is appealable under O. 43, R. 1 (*m*).[1] It has been held by the High Court of Lahore that that rule applies only where a compromise was actually made but the Court for some reason has refused to record it, and not where it has been found that there has been no *compromise at all*.[2]

32. **Revision.**—Although under this rule a Court has power only to record a "lawful" compromise, yet, where it requires evidence to be given

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(5) *Fatmabai* v. *Sonbai*, (1911) 11 Ind Cas 568 (568): 13 Bom L R 573: 36 Bom 77; *A G* v. *Fardoonji Ardeshir*, (1911) 11 Ind Cas 356 (357): 13 Bom L R 332; *Foolcoomary* v. *Woodoy Chunder*, (1898) 25 Cal 649 (652) [Charges of fraud cannot properly be tried on affidavits].

(6) *Alamelu Ammal* v. *Rama Iyer*, 1922 Mad 446 (446): 16 Mad L W 440: 43 Mad L Jour 290: 1922 Mad W N 495: 31 Mad L Tim 132: 70 Ind Cas 425. Contra *Devendra Nath* v. *Ram Rachpal*, 1926 Oudh 315 (315): 3 Oudh W N 277: 93 Ind Cas 302: 13 Oudh L J 482 [May be set aside under the inherent powers of the Court if in excess of authority].

(7) *Yusuf* v. *Abdullabhoy*, 1930 Bom 362 (364): 32 Bom L R 667: 125 Ind Cas 697.

(8) *Kumara Venkata Perumal* v. *Thatha Ramaswami Chetty*, (1911) 9 Ind Cas 875 (879): 35 Mad 75: (1911) 1 Mad W N 290: 9 Mad L Tim 487: 21 Mad L Jour 709.

(9) *Bibee Soloman* v. *Abdool Azeez*, (1881) 6 Cal 687 (704): 8 Cal L Rep 169; *Khajooroonnissa* v. *Rowshan Jehan*, (1876-77) 2 Cal 184 (196): 3 Ind App 291: 3 Sar 629: 26 Suth W R 36: 3 Suth 287 P C; *Ashrafilal Mahta* v. *Surajmaya Mishrain*, 1924 Pat 758 (758): 1924 Pat H C C 253: 6 Pat L Tim 150: 82 Ind Cas 181. But compare *Bhimaji* v. *Rakmabai*, (1885) 10 Bom 338 (340).

(10) *Rajunder Narain Rae* v. *Bijai Gobind Singh*, (1837-41) 2 Moo Ind App 181 (247): 1 Moo P C 117: 1 Sar 175 P C.

(11) *Ram Nirunjun* v. *Prayag Singh*, (1882) 8 Cal 138 (141): 10 Cal L Rep 66.

(12) *Shanmuga Mudaliar* v. *Kaveri Ammal*, 1928 Mad 708 (710): 109 Ind Cas 539.

Note 29.

(1) *Mussammat Lachmin* v. *Parkhotam Singh*, (1902) 5 Oudh Cas 49 (58); *Uttam Singh* v. *Munshi*, 1925 Lah 145 (146): 6 Lah L Jour 261: 80 Ind Cas 527.

Note 31.

(1) *Ramdutt Kishan Dayal* v. *Mt Basanti Bai*, 1929 Nag 275 (276): 12 Nag L J 124: 119 Ind Cas 673; *Kishore Chand* v. *Hans Raj*, 1928 Lah 39 (40): 28 Pun L R 580: 104 Ind Cas 561; *Nand Lall* v. *Ram Sarup*, 1927 Lah 546 (548): 103 Ind Cas 80; *Md Idris* v. *Md Esahak*, (1917) 42 Ind Cas 192 (192) Cal; *Haridas Sadhu Khan* v. *Sri Sri Iswar Ratneswar*, (1932) 36 Cal W N 1013 (1014) [Even though no appeal be filed against the decree]; *Satyanarayana* v. *Butchayya*, 1925 Mad 606 (607): 48 Mad L Jour 249: 87 Ind Cas 124.

(2) *Shanti Sarup* v. *Jahanger Mal Bansi Mal*, 1924 Lah 248 (249): 73 Ind Cas 177.

of an illegal compromise, its order is not open to revision as such order is not likely to cause irreparable injury.[1] O. 23, R. 3, Notes 32—33.

33. Construction of compromise decrees.—*See* the undermentioned cases.[2]

Proceedings in **execution of decrees not affected.**

R. **4.** [S. 375-A.] Nothing in this *Order* shall apply to any proceedings *in execution of a* decree *or order.* O. 23, R. 4, Notes. 1—2.

Synopsis.

1. History of rule. 2. Effect of the section.

Adjustment of decrees. See Note 2, Pt. (5). Mesne profits—Compromise as to. See Note 2, Pt. (6).

O. 21, R. 90—Proceedings under. See Note 2, Pts. (8) and (9).

1. History of rule.—There was no provision in the old Code corresponding to the present rule. Hence, there was a conflict of decisions as to whether, by virtue of S. 647 (now S. 141) the provisions relating to this order could be applied to proceedings in execution, some cases holding that they could be so applied[1] and others holding that they could not.[2] This conflict was set at rest by Act VI of 1892 which introduced S. 375-A, into the Code, by which the provisions of the chapter were declared inapplicable to proceedings after the passing of the decree. In 1894, the Privy Council in I. L. R. 17 All. 106[3] decided that irrespective of the changes made by Act VI of 1892, S. 647 (now S. 141) had not the effect of making the provisions of the Code relating to withdrawal and adjustment of suits, applicable to execution proceedings. The present rule states in explicit terms that O. 23 does not apply to execution proceedings.[4] (For fuller information *see* notes under S. 141, *supra.*)

2. Effect of the section.—O. 23, R. 1 relating to withdrawal and abandonment of a suit does not apply to execution proceedings. But a decree-holder may apply to have his application for execution dismissed.[1]

Note 32.

(1) *Ahmed Hussain* v. *Abdul Karim,* (1912) 16 Ind Cas 8 (4) Cal.

(1895) 19 Bom 546 (549); *Muhammad Sulaiman* v. *Jhukki Lal,* (1888) 11 All 228 (232): 1889 All W N 53.

(2) *Eshan Chunder* v. *Pranath,* (1875) 22 Suth W R 512: 14 Beng L R 143 (F B); *Tarachand Megraj* v. *Kashinath Trimbak,* (1886) 10 Bom 62 (64); *Banku Behari Gangopadhya* v. *Ail Madhub Chuttopadhya,* (1891) 18 Cal 635 (639).

(3) *Thakur Prasad* v. *Fakirullah,* (1895) 17 All 106 (111): 22 Ind App 44: 5 Mad L Jour 3: 6 Sar 526 P C.

(4) *Benarsi Das* v. *Ramzan,* 1924 Lah 342 (343): 72 Ind Cas 477.

Note 33.

(1) *Chowdhary Chintaman* v. *Nowlukho,* (1874) 2 Ind App 263: 1 Cal 153: 24 Suth W R 225: 3 Sar P C J 537: 3 Suth P C J 201; *Lakshmi Devi Garu* v. *Surya Narayana,* (1897) 20 Mad 256 (268): 24 Ind App 218: 7 Sar 185 P C; *Ramlal* v. *Datu,* (1920) 55 Ind Cas 418 (419, 420): 16 Nag L R 212; *Gajadhar Prasad Sahu* v. *Mahadeo Prashad Sahu,* 1926 P C 110 (111): 24 Mad L W 139: 1926 Mad W N 611: 96 Ind Cas 936; *Partha Singh* v. *Mohammad Khan,* 1926 Oudh 427 (427): 13 Oudh L J 126: 94 Ind Cas 188; *Sambasiva Iyer* v. *Viswam Iyer,* (1907) 30 Mad 356 (360): 17 Mad L Jour 243: 2 Mad L Tim 316.

Order 23, Rule 4—Note 1.

(1) *Kifayat Ali* v. *Ram Singh,* (1885) 7 All 359 (362): 1885 All W N 51; *Pirjade* v. *Pirjade,* (1881-82) 6 Bom 681 (682); *Rada Charan* v. *Man Singh,* (1890) 12 All 392 (395): 1890 All W N 110; *Hari Raghunath* v. *Krishnaji,*

(2) *Chowdhury* v. *Mahesh,* 1922 Pat 525 (526): 1 Pat 232: 3 Pat L Tim 445: 65 Ind Cas 122; *Kenaram* v. *Kailash Chandra,* (1913) 19 Ind Cas 904 (905): 18 Cal L Jour 53 [A decree-holder has no absolute right to discontinue execution proceedings at any stage at his option].

O. 23, R. 4, Note 2

The Court has no power to allow an application for execution to be withdrawn with the liberty of bringing a fresh application.[2] Similarly, the withdrawal of an application for execution without the Court's permission to bring a fresh application is no bar to a fresh application for execution.[3] O. 23, R. 3 does not apply to execution proceedings and the Court has no power to pass a consent order in such proceedings.[4] O. 21, R. 2 and S. 47 provide a complete procedure for the adjustment of decrees out of Court.[5] Where a decree leaves the amount of mesne profits to be ascertained in further proceedings, the suit being undisposed of, the parties can enter into a compromise pending the proceedings for the ascertainment of mesne profits.[6] But it has been held by the Rangoon High Court that an agreement between a mortgagor and mortgagee after preliminary decree for sale and before the final decree for sale whereby the mortgagor is to be given an extension of time for the payment of decretal amount falls within O. 21, R. 2 and not under this rule.[7] The High Courts of Patna[8] and Lahore[9] hold that an application to set aside an execution sale, under O. 21, R. 90 is not a proceeding in execution and hence, O. 23, R. 3 applies to such application. According to the Bombay High Court, where a preliminary decree is passed in a suit for partnership accounts and an enquiry is pending before the Commissioner for taking the accounts, the parties can enter into a compromise, as the proceedings before the Commissioner are not proceedings in execution.[10]

Whatever its other effects may be, R. 4 does not in any way affect the rule of estoppel.[11] Thus, where an application for execution is allowed to be dismissed on the basis of a compromise which provides for a fresh application if the compromise was not carried out and where the compromise is broken, the defendant is estopped from contending that as O. 23, R. 3 does not apply to applications for execution, the decree-holder cannot file a fresh application for execution as on the basis of the compromise.[12]

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(2) *Mata* v. *Beni*, (1914) 22 Ind Cas 961 (962): 12 All L J 235: 36 All 172.

(3) *Palaniandie* v. *Papathi*, (1914) 22 Ind Cas 76 (77): 15 Mad L Tim 100: 1914 Mad W N 159.

(4) *Sakharam* v. *Bhivrabai*, (1918) 44 Ind Cas 164 (165) Nag; *Banarsi Das* v. *Ramzan*, 1924 Lah 342 (343): 72 Ind Cas 477: *Lodd Govind Doss* v. *Ramdoss Vishnudoss*, (1912) 17 Ind Cas 752 (752): 1912 Mad W N 1245: 24 Mad L Jour 88; *Lodd Govindoss Krishna Doss* v. *Ramdoss Vishnadoss*, (1915) 28 Ind Cas 876 (877): 17 Mad L Tim 222: 1915 Mad W N 225; *Rasan Chettiar* v. *Rangaya Chettiar*, 1930 Mad 105 (108): 30 Mad L W 551: 1929 Mad W N 867: 120 Ind Cas 72; *Haider Morza* v. *Kailash Narain Dar*, 1925 Oudh 136 (137): 80 Ind Cas 454; *Suradhani* v. *Sitto*, 1922 Cal 311 (313): 27 Cal W N 280: 71 Ind Cas 378: 38 Cal L Jour 17. Contra *Ram Prasad* v. *Haridas*, 1927 Nag 31 (32): 97 Ind Cas 768 [This decision, it is submitted, is not correct].

(5) *Choudhury* v. *Choudhury*, 1921 Pat 107 (108): 6 Pat L Jour 253: 2 Pat L Tim 273: 62 Ind Cas 608. See also *Sitala Das* v. *Bhut Nath*, (1921) 62 Ind Cas 688 (689) Cal [Assumed].

(6) *Vythinada* v. *Vythinada*, (1909) 4 Ind Cas 1040 (1041): 6 Mad L Tim 187: 33 Mad 78 (79).

(7) *Ahmed* v. *A L A R Chettiar Firm*, 1928 Rang 194 (195): 6 Rang 285: 110 Ind Cas 873.

(8) *Chaudhury Jagadish Missir* v. *Chaudhury Sureswar Missir*, 1921 Pat 107 (108): 6 Pat L Jour 253: 2 Pat L Tim 273: 62 Ind Cas 608.

(9) *Gobind Sahai* v. *Narsingh Das*, 1929 Lah 886 (887): 118 Ind Cas 908.

(10) *Pragdas* v. *Girdhardas*, (1902) 26 Bom 76 (82): 3 Bom L R 431.

(11) *Sriranga Bunala Balai Rao* v. *Rajah Damara Kumara Thimma Nayanim Bahadur*, (1912) 13 Ind Cas 81 (82) Mad; *Ganga Bishun Marwari* v. *Raghunath Prasad*, 1930 Pat 615 (617): 128 Ind Cas 786: 11 Pat L Tim 609: *Sheo Golam* v. *Beni Prosad*, (1880) 5 Cal 27 (30, 31): 4 Cal L Rep 29: 2 Shome L R 182: 4 Ind Jur 409.

(12) *Shri Ranga Bhupala Balai Rao Garu* v. *Nayanim Bahadur Varu*, (1912) 13 Ind Cas 81 (82) Mad.

A pre-decree arrangement concerning the execution of the decree cannot be set up in bar of execution in the executing Court. But it can be enforced by means of a separate suit.[13] O. 23, R. 4, Note 2.

ORDER XXIV.

PAYMENT INTO COURT.

O. 24, R. 1, Notes 1—2.

Deposit by defendant of amount in satisfaction of claim.

R. 1. [S. 376.] The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

[1877—S. 376, R. S. C., O. 22, R. 1.]

Synopsis.

1. Scope of the rule.
2. Payment into Court.
3. Suit to recover debt or damages.
4. Suit for injunction.
5. Suits for accounts.
6. "At any stage of the suit."
7. Insolvency of defendant after payment into Court.

Expression of willingness to pay. See Note 2, Pt. (1).

May deposit in Court. See Note 1, Pt. (4) and Note 2, Pt. (1).

1. Scope of the rule.—This rule deals with payments into Court in satisfaction of a claim *after* the institution of a suit and *before decree.*[1] Payments made after decree are dealt with by O. 21, R. 1. This rule does not apply to payments made into Court under S. 83 of the Transfer of Property Act, *before the institution* of the suit,[2] nor to payments made in pursuance of the order of the Court under the provisions of O. 9, R. 13 setting aside an *ex parte* decree.[3]

The rule contemplates an unconditional deposit of a sum of money in Court by the defendant.[4] This is contrary to the corresponding English rules (O. 22 Rr. 1 and 6), whereunder, a deposit may be made coupled with a denial of liability.

2. Payment into Court.—A mere expression of willingness to pay made in a written statement, is not equivalent to a payment into Court[1] nor is a payment into a post office by a money order, a valid payment under this rule unless and until it reaches the Court's hands.[2] But a payment into Govern-

(13) *Azizur Rahman Choudhury* v. *Alraja Choudhury*, 1928 Cal 527 (530): 32 Cal W N 434: 113 Ind Cas 9.

Order 24, Rule 1—Note 1.

(1) *See* Note 6 below.

(2) *Rayya Sao* v. *Narsinga*, (1911) 10 Ind Cas 393 (397): 10 Mad L Tim 37: (1911) 2 Mad W N 126: 35 Mad 209 [After the institution of the suit, payment into Court is regulated by this rule]; *Rajendra Kishore Singh* v. *Saheb Pershad Sen* (1878) 2 Cal L Rep 183 (184); *Chunder Canimookerjee* v. *Judoonath Khan*, (1877-78) 3 Cal 468 (472): 1 Cal L Rep 470; *Prannath Roy Chowdhry* v. *Ram Rutton Roy*, (1857-59) 7 Moo Ind App 323 (358): 4 Suth W R P C 37: 1 Suth P C J 367: 1 Sar P C J 692; *Kora Nayar* v. *Ramappa*, (1894) 17 Mad 267 (268): *Nanu* v. *Manchu*, (1891) 14 Mad 49 (50): *Makhan Kuar* v. *Jasoda Kuar*, (1884) 6 All 399 (402): 1884 All W N 138: *Madhavi Amma* v. *Kunhi Pathumma*, (1900) 23 Mad 510 (512).

(3) *Rama Goundan* v. *Velappa Goundan*, 1926 Mad 1069 (1070, 1071): 24 Mad L W 520: 1926 Mad W N 662: 97 Ind Cas 989.

(4) *K M Bose & Co* v. *Allen Bros*, 1927 Cal 72 (73): 97 Ind Cas 479.

Note 2.

(1) *Haice Abdul Rahman* v. *Haji Noor Muhamed*, (1892) 16 Bom 141 (150).

(2) *Ramchandra Krishnappa* v. *Belya*, (1898) 22 Bom 415 (416).

O. 24, R.1, Notes 2—7.

ment Treasury under rules, framed by the High Court is a payment into Court.[3] Where moneys in the hands of the defendant were sought to be attached before judgment, and the defendant deposited the same into Court and the attachment was subsequently found not to have been validly made, the money deposited was construed to be a payment under this rule.[4] *See also* the undermentioned case.[5]

3. **Suit to recover debt or damages.**—The rule applies to all suits to recover a debt or damages, though there may be other reliefs claimed in the suit.[1] It does not apply to a suit for a *return of goods* taken or their value.[2]

4. **Suit for injunction.**—A suit for injunction for obstruction to light and air, is not a suit to recover a debt or damages within the meaning of this rule even though the Court may in a proper case, award damages in lieu of injunction. According to the practice of the High Court of Bombay, however, where a defendant deposits money into a Court in a suit for injunction in satisfaction of the plaintiff's claim and the Court allows damages in lieu of injunction to the extent of the amount deposited, the Court should apply the provisions of Rule 4 in directing the payment of costs.[1]

5. **Suits for accounts.**—The rule does not apply to suits for accounts.[1] But the Court has, in such suits, the power to direct the payment into Court of admitted sums in the possession of parties liable to account, or of persons in a fiduciary capacity; such a power is not, in any way, controlled by this rule.[2]

6. **"At any stage of the suit."**—These words show that the payment must be made before decree.[1] Note also the words "in full of the *claim*".

7. **Insolvency of defendant after payment into Court.**—According to English law where the defendant pays money into Court admitting liability to the plaintiff, and then becomes a bankrupt, the plaintiff is, in respect of such money, a secured creditor in respect of such amount. When the liability is denied, he is a secured creditor to the extent to which the claim is admitted or proved.[1]

O. 24, R.2. Notice of deposit.

R. 2. [S. 377.] Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless

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(3) *Srinivasa* v. *Malayachan*, (1884) 7 Mad 211 (212).

(4) *Maganlal Parbhuram* v. *Aziz Hajee Karim*, 1927 Rang 278 (278): 5 Rang 753: 106 Ind Cas 77.

(5) *Gujadhur Pauree* v. *Naick Pauree*, (1882) 8 Cal 528 (529).

Note 3.

(1) *Moon* v. *Dickinson*, (1890) 63 L T 371: 38 W R 278; *Coote* v. *Ford*, (1899) 2 Ch 93 (103 & 105): 68 L J Ch 508: 80 L T 697: 47 W R 548: 15 T L R 378.

(2) *Allan* v. *Dunn*, (1857) 1 H & N 572: 26 L J Ex 185.

Note 4.

(1) *Luxumon* v. *Moroba*, (1897) 21 Bom 502 (508 & 509).

Note 5.

(1) *Nicholas* v. *Evans*, (1883) 22 C D 611: 52 L J Ch 383: 48 L T 66: 31 W R 412.

(2) *Hollis* v. *Burton*, (1892) 3 Ch 226: 67 L T 146: 40 W R 610; *London Syndicate* v. *Lord*, (1878) 8 C D 84.

Note 6.

(1) *Rama Goundan* v. *Velappa Goundan*, (1926) Mad 1069 (1070): 24 Mad L W 520: 1926 Mad W N 662: 97 Ind Cas 989.

Note 7.

(1) Re *Gordon*, (1897) 2 Q B 516: 66 L J Q B 768: 46 W R 81: 4 Manson 141.

the Court otherwise directs) be paid to the plaintiff on his application. O. 24, R.2, Notes 1—2.

[1877—S. 377, R. S. C., O. 22, R. 4.]

Synopsis.

1. Form of the notice. 2. "Unless the Court otherwise directs."

"Shall be paid to the plaintiff." See Note 2, Pt. (1).

1. Form of the notice.—The words "in writing" which occurred in the old Code have been omitted as unnecessary in view of S. 142 of the present Code under which all notices under the Code should be in writing.

For form of notice, *see* Appendix H, Form No. 3.

2. "Unless the Court otherwise directs."—The Court has a *discretion* under this rule to refuse to allow the plaintiff to withdraw the money deposited in Court, but that discretion must be exercised reasonably. "In a case where the money sued for is due on a promissory note, it would be unreasonable in the absence of special circumstances not to allow the plaintiff to take the money out."[1] But where the amount in deposit is *claimed by different parties*, no party can, without an order of the Court, withdraw the amount.[2] The money deposited to the credit of the plaintiff but not withdrawn by him, should not be treated as the defendant's money and paid over to the person who attaches the same in execution of his decree against the defendant.[3]

It is the practice of the Court to appropriate payment upon a bond first, to the interest due, and then to principal.[4]

R. 3. [S. 378] No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof. O. 24, R.3.

Interest on deposit not allowed to plaintiff after notice.

[1877—S. 378.]

Synopsis.

1. Scope of the rule.
2. Tender without payment.
3. Execution proceedings.

Plaintiff whether entitled to interest after notice of deposit. See Note 1, Pt. (1).
Tender and payment, refusal to accept. Effect. See Note 2, Pts. (5), (6) and (7).

Order 24, Rule 2—Note 2.

(1) *Dwarka Das* v. *Girish Chunder*, (1899) 26 Cal 766 (769).

(2) *Hajee Abdul Rahman* v. *Hajee Noor Muhamed*, (1892) 16 Bom 141 (150).

(3) *Lakshman* v. *Damodar*, (1891) 15 Bom 681 (684).

(4) *Maharajah of Benares* v. *Har Narain*, (1905) 28 All 25 (27): 1905 All W N 167: 2 All L J 585; In the matter of *Florence Emily Brownlow and Lilian Kate Brownlow Trifana*, (1885) 11 Cal 219 (220).

O. 24, R. 3, Notes 1—3.

1. Scope of the rule.—No interest can be claimed by the plaintiff after he receives notice of the payment into Court.[1]

2. Tender without payment.—The general rule is that a creditor is not bound to accept a sum tendered which is less than what is due to him.[1] This rule provides an exception to the general rule in that interest ceases to run on the deposit whether such deposit is in *full* satisfaction of the claim or *falls short* thereof. But the plea of tender before action must in order to stop interest be accompanied by a payment into Court after the suit, otherwise the tender is ineffectual.[2] Where the defendant was restrained by an order of injunction not to pay the amount due by him on a bond to the plaintiff, but the Court ordered him to deposit the amount *in Court* and he did not do so, he was held bound to pay interest from the date of the order.[3] A deposit, in Court, before the due date, of money due upon a bond is not a valid tender of the debt[4] nor is a mere offer to pay the amount.[5] A valid tender, if improperly refused, stops payment of interest.[6]

As to the effect of a tender made to one of two joint promisees, *see* the cases noted below.[7]

3. Execution proceedings.—This order does not apply to proceedings in execution.[1] But the benefit of this rule has been extended by way of analogy to judgment-debtors and as a result, a decree-holder, who might have, but has not, drawn the amount immediately after its deposit will be disallowed interest, even though the amount deposited is not the full amount due under the decree.[2]

O. 24, R. 4.

R. 4. [S. 379.] (1) *Where* the plaintiff accepts such amount as satisfaction in part *only* of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plain-

Procedure where plaintiff accepts deposit as satisfaction in part.

Order 24, Rule 3—Note 1.

(1) *Dwarka Dass* v. *Girish Chunder*, (1899) 26 Cal 766 (768, 769); *Digambara Das* v. *Harendra Narain*, (1910) 5 Ind Cas 165 (170): 11 Cal L Jour 226: 14 Cal W N 617; *Thevaraya* v. *Venkatachala*, (1917) 37 Ind Cas 444 (445, 446 & 447): 31 Mad L Jour 548: (1916) 2 Mad W N 321: 20 Mad L Tim 403: 4 Mad L W 433: 40 Mad 804: *Subramaniya Iyer* v. *Narayanasamy Vandyar*, (1918) 45 Ind Cas 638 (641): 34 Mad L Jour 439: 7 Mad L W 537.

Note 2.

(1) *Watson & Co* v. *Dhonendra Chunder*, (1876) 3 Cal 6 (16): 2 Ind Jur 209; *Rajendra Kishore* v. *Saheb Pershad*, (1877) 2 Cal L Rep 183 (184).

(2) *Hajee Abdul Rahman* v. *Hajee Noor Muhamed*, (1892) 16 Bom 141 (149): *Arunachalla Pillai* v. *Govindasamy Naicker*, (1931) 34 Mad L W 843: 62 Mad L Jour 266: 55 Mad 458: 1931 Mad W N 1226: 1932 Mad 109 (111); *Bolyechand* v. *Moulard*, (1879) 4 Cal 572 (575); *Chunder Caunt Mookerjee* v. *Jodoonath Khan*, (1878) 3 Cal 468 (471): 1 Cal L Rep 470; *Ram Nath* v. *Gopal Chandra*, (1904) 8 Cal W N 153 (155); *Rakhal Chandra* v. *Baikuntha Nath*, 1928 Cal 874 (875): 32 Cal W N 1082; *Chapman* v. *Hicks*, 1 M & Cromp 633; *Dixon* v. *Clark*, 5 C B 365.

(3) *Ram Dass Gossamee* v. *Prosunno Moyee Dossee*, (1871) 16 Suth W R 297 (298).

(4) *Eshauq Molla* v. *Abdul Bari Haldar*, (1903) 31 Cal 183 (185).

(5) *Kamaya* v. *Devapa*, (1898) 22 Bom 440 (446).

(6) *Jagat Tarini* v. *R Nabagopal*, (1907) 34 Cal 305 (323): 5 Cal L Jour 270; *Rajah Ranjit Singh* v. *Bhagbutty Charan*, (1908) 7 Cal W N 720 (723).

(7) *Barber Maran* v. *Ramana Goundan*, (1897) 20 Mad 461 (463, 464): 7 Mad L Jour 269; *Ahinsa Bibi* v. *Abdul Kadar*, (1902) 25 Mad 26 (39).

Note 3.

(1) *K N Bose & Co* v. *Allan Bros*, 1927 Cal 72 (73): 97 Ind Cas 479.

(2) *Amtul Habib* v. *Muhamed Yusuf*, (1918) 43 Ind Cas 520 (520, 521): 16 All L J 15: 40 All 125; *Kali Dass Ghose* v. *Puran Kumaree*, (1871) 16 Suth W R 304 (304); *Bissessur Singh* v. *Nim Chand Bose*, (1869) 12 Suth W R 505; *Poreshnath Mookerjee* v. *Kristo Mohan*, (1869) 3 Beng L R App 105: 12 Suth W R 50; *Kunhya Singh* v. *Tooydun Singh*, (1867) 7 Suth W R 20 (20).

tiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim. O. 24, R. 4, Notes 1—2.

(2) *Where* the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall *pronounce* judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Procedure where he accepts it as satisfaction in full.

[1877—S. 379. *Cf.* R. S. C., O. 22. R. 6.]

Illustrations.

(*a*) *A* owes *B* Rs. 100. *B* sues *A* for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, *A* pays the money into Court. *B* accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(*b*) *B* sues *A* under the circumstances mentioned in illustration (*a*). On the plaint being filed, *A* disputes the claim. Afterwards *A* pays the money into Court. *B* accepts it in full satisfaction of his claim. The Court should also give *B* his costs of suit, *A's* conduct having shown that the litigation was necessary.

(*c*) *A* owes *B* Rs. 100, and is willing to pay him that sum without suit. *B* claims Rs. 150 and sues *A* for that amount. On the plaint being filed *A* pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. *B* accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay *A's* costs.

Synopsis.

1. "May prosecute his suit for the balance."
2. Apportionment of costs.

1. "May prosecute his suit for the balance."—Where the plaintiff accepts the payment only in part satisfaction of his claim, he is entitled under this rule to prosecute the suit for the balance.[1]

2. **Apportionment of costs.**—The Court has a discretion under this rule in awarding costs[1] and, in exercising such discretion, the Court ought to find which of the parties is most to blame for litigation.[2] Where, at the settlement of issues, the defendant paid the amount into Court which plaintiff took out in part satisfaction and raised an issue as to damages and subsequently the plaintiff withdrew the suit accepting the same in full satisfaction of his claim, it was held, that the plaintiff was entitled to his costs up to the settlement of the issues.[3]

Order 24, Rule 4—Note 1.

(1) *Dwaraka Dass* v. *Girish Chunder*, (1899) 26 Cal 766 (768, 769).

Note 2.

(1) *Ramaswamy Reddi* v. *Lakshmiambal*, (1911) 13 Ind Cas 200 (201): (1911) 2 Mad W N 568.

(2) *Jayanti Kistappa* v. *Jayanti Chinnapiya*, (1912) 13 Ind Cas 188 (188): 1912 Mad W N 38; *W Stalkartt* v. *Guru Das Kundu Chowdhry*, (1894) 21 Cal 680 (683) [Defendant not blameable. He is entitled to his costs].

(3) *Ardeshir Limji* v. *Sorabji*, (1862-65) 1 Bom H C R 70.

O. 24, R.4, Note 2. Where the suit is not one "to recover debt or damages" within the meaning of this rule, the Court has full discretion to apportion costs under S. 35 of the Code.[4]

ORDER XXV.

SECURITY FOR COSTS.

O. 25, R.1. R. 1. [Ss. 380, 382.] (1) *Where*, at any stage of a suit, it appears to the Court that a sole *plaintiff*[11] is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India *other than* the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by *it*, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

When security for costs may be required from plaintiff.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of *sub-rule* (1).

Residence out of British India.

(3) On the application of any defendant in a suit for *the payment of* money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

Local Amendments.

ALLAHABAD.—

After the words "property" in suit", *add* "or that the plaintiff is being financed by a person not a party to the suit".

MADRAS.

The following shall be *inserted* as sub-Rule (4):—

"(4) In all cases in which an element of champerty or maintenance is proved, the Court may on the application of the defendant demand security for the estimated amount of the defendant's costs, or such proportion thereof, as from time to time during the progress of the suit, the Court may think just."

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(4) *Luxumon* v. *Moraba*, (1897) 21 Bom 502 (509).

NAGPUR.

O. 25, R. 1.

In Rule 1 (1) *insert* the words "or that any plaintiff is being financed by a person not a party to the suit" between the words "other than the property in suit" and "the Court may".

OUDH.

Add the following as sub-Rules (4) and (5):—

(4) Where the plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person within a time to be fixed by the Court to give security for the payment of all costs likely to be incurred by any defendant. In case of his default, the Court may dismiss, the suit so far as his right to, or interest in, the property in suit is concerned, or may declare that he shall be debarred from claiming any right to, or interest in, the property in suit.

(5) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by the Court, to give security for the payment of all costs likely to be incurred by any other defendant. In case of his default, the Court may declare that he shall be debarred from claiming any right to, or interest in, the property in suit.

RANGOON.

ORDER XXV.

Costs and security for costs in Special Cases.

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may either of its own motion or on the application of any defendant order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

Residence out of British India.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-R. (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

Synopsis.

1. Scope, object and applicability of the rule.
2. Residence outside British India.
3. "British India." See Note 1 to S. 1.
4. Trading corporations.
5. Immoveable property.
6. "The Court may . . . . order."
7. Poverty of plaintiff.
8. Where plaintiff is a minor.
9. Where the plaintiff is a woman—Sub-Rule (3).
10. Where leave has been granted to sue as a pauper.
11. Inherent power to order security for costs.
12. "Suit for the payment of money"—Sub-Rule (3).

O. 25, R. 1, Note 1.

13. Claim and cross claims.
14. Appeal.
15. Revision.
16. Other cases under the Code where security may be required.
17. Liability of a person standing surety.
18. Enforcement of security bonds given under this rule.

Plaintiff. See Note 11, Pt. (2).
Principle on which the Court should act. See Note 6, Pt. (1) and F.-N. (1).
Security in suit by a foreigner. See Note 1, Pt. (5) and Note 2, Pt. (2).
Security in suits by undischarged insolvent. See Note 7, Pt. (6).
Security in suits for administration and partition of property. See Note 1, Pt. (2).
Security in suit to enforce a religious trust. See Note 1, F.-N. (2).
When to apply for security. See Note 6, F.-N. (8).

1. Scope, object and applicability of the Rule.—This rule provides for the taking of security for the *costs of the suit* and O. 41, R. 10 provides for the taking of security for the *costs of the appeal.* Security for costs of the suit may, under this rule, be ordered to be given in the following cases:—

(1) Where the sole plaintiff, or where there are more plaintiffs than one, *all* the plaintiffs reside outside British India and none of them have sufficient immoveable property in British India other than the property in suit;

(2) Where, in a *suit for money,* the plaintiff is a *woman* and she does not possess sufficient immoveable property in British India.

In *Bidhatree Dassee* v. *Mutty Lall Ghose*[1] Mr. Justice Sale observed as follows:—

> "The object of the section clearly is to provide for the protection of defendants in certain cases, where, in the event of success, they may have difficulty in realising their costs. . . . . But there are cases in which the plaintiff in a suit for money (the claim being real and open to no objection) cannot be rendered liable for the defendant's costs of suit. In illustration I may refer to an administration suit by a creditor or legatee where the claim is admitted, or to a suit on a mortgagee or promissory note where there is no defence. "Is it" to be supposed that it was intended that the defendant, in such cases should be in a position to ask as a matter of absolute right that security may be given for costs that he may choose to incur needlessly?"

And he held that no security should be demanded in such cases, even though the plaintiff is a woman having no sufficient immoveable property within British India. *See also* the undermentioned cases.[2]

Order 25, Rule 1—Note 1.

(1) *Prem Chand Moonshee,* In the goods of, (1894) 21 Cal 832 (836) O C.

(2) *Bibi Fatma Sultan* v. *Aga Mahomed,* (1905) 7 Bom L R 495 (496, 497); *Russick Lal* v. *Jaduram,* (1878) 10 Beng L R App 25; *Brojomohun Doss* v. *Hurrolall Dosse,* (1880) 6 Cal L Rep 58 (60): 5 Cal 700 [Representatives of a Hindu testator suing for the performance of religious and charitable trusts created by him and in which they are not personally interested, should, it has been held, give security]; *Muzhur Hussain* v. *Denobundoo,* Bourke 40 (1865) [Do. confirmed in Bourke O C 119].

O. 25, R. 1, Notes 1—4.

The provisions of the rule are wide enough to cover the case of *every* plaintiff, including a *minor* plaintiff[3] and even though the defendant is himself a resident outside British India.[4] In the case of a pauper plaintiff, however, no security should be ordered to be furnished except in exceptional circumstances, inasmuch as it virtually deprives the plaintiff of the benefit of the order made in his favour under O. 33 of the Code.[5] As to when security for costs can be demanded from infants, *see* Note 8 below.

The rule does not apply to a reference under the Revenue Jurisdiction Act as there is no *suit* before the Court.[6] Irrespective of this rule, the High Court may, by S. 26 (3) of the Indian Patents and Designs Act II of 1911 demand security for the costs to be incurred by the opposite party, from the person applying for the revocation of a patent, in proceedings under that Act.[7]

2. **Residence outside British India.**—"Residence" should be residence under such circumstances as will afford reasonable probability that the plaintiff will be forthcoming when the suit is decided."[1-a] A mere temporary residence at the time of the suit is not "residence" within the meaning of this rule.[1] Thus a resident of a Native State temporarily staying in British India for the purpose of legal proceedings for taking his wife back cannot be said to be "residing" in British India.[2] But where a subject of Bhopal, a Native State, was living for four years at Poona and there was nothing to show that he had come to Poona on a mere *temporary* purpose, it cannot be said that he resides outside British India.[3] Where there are several co-plaintiffs *all* of them must reside outside British India; if one of them resides ordinarily within the jurisdiction though a bankrupt, no security will be ordered from any of them.[4] Where a plaintiff *leaves* the country before the case is decided the proper course for the defendant is to apply to the Court to take security for costs before the case is decided.[5] But security will not be ordered on an affidavit that plaintiff is *about to* leave the country.[6]

3. "**British India.**"—*See* Note 1 to S. 1.

4. **Trading corporations.**—Trading corporations comprise—

(*a*) Chartered Companies,

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(3) *Bai Parebai* v. *Devji Meghji*, (1898) 23 Bom 100 (101).

(4) *Koroona Mayee* v. *Ooma Churn*, (1869) 12 Suth W R 465 (465).

(5) *Har Kaur* v. *Chamba*, 1928 Lah 960 (960): 113 Ind Cas 911.

(6) *Shri Jagannath Vasudev* v. *The Maharajah of Kolhapur*, 1921 Bom 463 (463).

(7) See S 26 (3), Indian Patents and Designs Act (II of 1911).

Note 2.

(1-a) *Mahomed Shufft* v. *Laldin Abdulla*, (1878-79) 3 Bom 227 (229). See also *Chain Rai Vellrace* v. *Sunday Times, Ltd*, 1932 Sind 33 (34): 26 Sind L R 21.

(1) *Mahomed Shuffi* v. *Laldin Abdulla*, (1878-79) 3 Bom 227 (229); *Shri Gosvami* v. *Shri Govardhan Lalji*, (1890) 14 Bom 541 (547, 553); *Wilfred* v. *Mary Louisa Coombes*, (1900-02) 1 L B R 222 (224-225).

(2) *Hanif* v. *Kulsum*, 1922 Bom 299 (300): 46 Bom 589: 64 Ind Cas 703: 23 Bom L R 1253.

(3) *Mahomed Habibullah Khan* v. *Almila Automobile Co*, 1930 Bom 220 (221): 32 Bom L R 111: 125 Ind Cas 719.

(4) *Winthorp* v. *Royal Exchange Co*, (1755) 1 Dick 282; *Mc Connell* v. *Johnston*, (1801) 1 East 431; *D'Hormusgee* v. *Gray*, (1882) 10 Q B D 13.

(5) *The Calcutta & S E Ry Co*, In re, (1867) 7 Suth W R 217 (217).

(6) *Adams* v. *Colethurst*, (1795) 2 Anst 552: 1 R R 201 (n).

O. 25, R. 1, Notes 4—7.

(*b*) Companies incorporated by special Acts of Parliament, such as Railway Companies and the like including Joint Stock Companies incorporated under Special Acts, and

(*c*) Companies incorporated under the Companies Act.[1]

A Trading corporation ought to have a place of foundation. It may have more than one residence. But it "dwells" at the place where it carries on its general administration business and not where it carries on even a considerable part of its other businesses.[2] *See* S. 20, Note 3.

5. **Immoveable property.**—*See* Note 4, S. 16, *ante.*

A beneficial interest in a part of the surplus *income* derived from immoveable property cannot be said to be immoveable property.[1] But a lease is a transfer of an interest in immoveable property and a leasehold interest is therefore itself immoveable property within the meaning of this rule.[2]

6. **"The Court may . . . order."**—The Court has a discretion under this rule to require or not, security for costs from the plaintiff.[1] There is no rigid rule for the exercise of such discretion, but the Court will not, ordinarily, make an order for security, unless it is shown that the exercise of power is necessary for the reasonable protection of the interests of the defendant.[2] The order should be in the Judge's own handwriting[3] and should contain reasons for ordering such security.[4] No specific sum need, however, be mentioned in the order, for which security should be granted.[4a] A defendant asking that security may be taken from the plaintiff under this rule should not be guilty of delay in making the application.[5] He should supply full information on all necessary points.[6]

An order for security will not be made before the defence has been filed[7] or after the judgment has been passed.[8]

7. **Poverty of plaintiff.**—The mere poverty or insolvency of the plaintiff is not a sufficient ground for ordering him to give security for costs as a condition precedent to his going on with the suit.[1] "The general rule is" said

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Note 4.

(1) Halsbury: Laws of England, Vol 8, p 304.

(2) Halsbury: Laws of England, Vol 8, p 312, paras 702, 703.

(3) *Fasihuddin* v. *Babu Lal*, 1888 All W N 241 (241).

(4) *Musamat Hafizan* v. *Abdul Karim*, (1908) 7 Cal L Jour 312 (314): 12 Cal W N 163.

Note 5.

(1) *Premchand Moonshee*, In re, (1894) 21 Cal 832 (836).

(2) *Ullman* v. *Justices of Peace for Calcutta*, (1871) 7 Beng L R App 60.

Note 6.

(1) *Degumbari Debi* v. *Aushootosh Banerjee*, (1890) 17 Cal 610 (613); *Shama Sundary* v. *Rash Behari Dhur*, (1899) 3 Cal W N 753 (764); *Farkhandalunnissa* v. *The Collector of Meerut*, 1889 All W N 147 (148) [Discretion must be carefully exercised]; *Motibai* v. *Daruwalla*, (1904) 6 Bom L R 1072 (1072) [The principle on which the Court acts is to see whether, at first sight, the suit appears *bona fide* and whether the defence is such as is likely to succeed].

(2) *Prem Chand*, In the goods of, (1894) 21 Cal 832 (836); *Chandra Kanta Ganguly* v. *Sarojini Debi*, (1916) 32 Ind Cas 786 (787) Cal.

(4-a) *Lekha* v. *Bhauna*, (1896) 18 All 101 (101, 105): 15 All W N 238 F B. See also *Bibi Fatma Sultan* v. *Aga Muhamed Ismail*, (1905) 7 Bom L R 495 (497).

(5) *Dalip Singh* v. *Azim Ali Khan*, 1884 All W N 99 (99); *Bibi Fatma Sultan* v. *Aga Muhamed Ismail*, (1905) 7 Bom L R 495 (496) [About two years' delay].

(6) *Gaura* v. *Jhabbi Lal*, 1886 All W N 64 (64).

(7) *Georgiana Major* v. *Bandmann*, (1913) 18 Ind Cas 217 (218) Cal.

(8) In re *Calcutta and S E Ry Co*, (1867) 8 Suth W R 217 (217) [Defendant must apply before judgment].

Note 7.

(1) *Maneckji Limji* v. *Goolbai*, (1878-79) 3 Bom 241 (241); *Lakshmi Chand* v. *Gulio Bai*,

Bowen, L.J., in *Cowell* v. *Taylor*,[2] "that poverty is no bar to a litigant; that, from time immemorial, has been the rule at Common Law, and also, I believe in equity." There is, however, an exception to this rule introduced for the purpose of preventing abuse, that is, if an insolvent sues as *nominal* plaintiff for the benefit of somebody else, he must give security; in that case the nominal plaintiff is a mere shadow.[3] Thus, where *A*, an undischarged bankrupt, and his daughter *B* sued *C* for damages for breach of promise of marriage and it was contended by *C* that the suit was brought really for the purpose of benefiting *A* out of his daughter's engagement and that the daughter *B* had no property within British India, it was held that an order for security should be made against *A*.[4] But an insolvent plaintiff who is bound to hand over the fruits of his suit to the Official Assignee cannot said to be a nominal plaintiff,[5] especially if the insolvent is also to benefit himself by the result of the suit as, for instance, where the suit is in respect of a sum earned by him subsequent to his adjudication and the amount claimed is in excess of the amount of his debt provable in insolvency.[6]

O. 25, R. 1, Notes 7—9.

8. Where plaintiff is a minor.—As has been said already in Note 1 *ante*, the rule applies to *all* plaintiffs including minors. But, except in exceptional circumstances, neither a minor nor his next friend should be called upon to give security for costs.[1] A suit on behalf of a minor plaintiff should not be stopped merely on the ground that the next friend is unable to give security of costs. The other parties are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for the benefit of the minor or if there is a just cause other than the poverty of the next friend to have him removed.[2]

9. Where the plaintiff is a woman—Sub-rule (3).—It has always been a principle of the law relating to security for costs that persons privileged from legal process can be called upon to give security[1] and this sub-rule has been enacted in view of the provisions of S. 56 of the Code which provides that a woman is exempted from arrest in execution of a decree.[2] The Court

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(1885) 7 All 542 (546): 1885 All W N 127; *Jiwan Ali Beg* v. *Busa Mal*, (1886) 8 All 203 (204): 1886 All W N 310; *Dalip Singh* v. *Asin Ali Khan*, 1884 All W N 99 (99); *Muhammad Hussain* v. *Ahmed Bakhsh*, 1886 All W N 286 (286); *Ajubulnissa* v. *Kasut Hussain*, 1888 A I [illegible] 36 (49); *Khajah* v. *Solomon*, (1887) 14 Cal 533 (535) [Though a portion of the interest in the subject-matter of the suit is parted with for carrying on the litigation]; *Hari Nath* v. *Ram Kumar*, (1913) 20 Ind Cas 703 (704): 18 Cal W N 119: 19 Cal L Jour 59; *Raghunath Singh* v. *Preya Sakhi Debi*, (1915) 28 Ind Cas 598 (599): 19 Cal W N 446; *E D Murray* v. *East Bengal Mahajan Flotilla Co, Ltd*, (1918) 48 Ind Cas 622 (622): 22 Cal W N 1018: 46 Cal 156.

(2) (1885) 31 Ch D 34 (38).

(3) *Cowell* v. *Taylor*, (1885) 31 Ch D 34 (38); *Ram Coomar* v. *Chunder Canto*, (1876-77) 2 Cal 233 (259): 4 Ind App 23: 3 Sar 654 P C; *Khajah Assanulla* v. *Solomon*, (1881) 14 Cal 533 (538); *Rama Sundari* v. *Ram Narayan*, (1872) 8 Beng L R App 65 (67). See also *Jogendro Deb* v. *Funindro Deb*, (1872) 18 Suth W R 102 (108).

(4) *Bomanji* v. *Nusserwanji*, (1902) 27 Bom 100 (103): 5 Bom L R 113.

(5) *Chainrai Valiram* v. *Sunday Times, Ltd*, 1932 Sind 33 (35): 26 Sind L R 21; *Bomanji* v. *Nusserwanjee*, (1903) 5 Bom L R 113 (114): 27 Bom 100.

(6) *E D Murray* v. *East Bengal Mahjan Flotilla Co, Ltd*, (1918) 48 Ind Cas 622 (622, 623): 22 Cal W N 1018: 46 Cal 156.

Note 8.

(1) *Bai Porebai* v. *Devji Meghji*, (1899) 23 Bom 100 (102); *Fellows* v. *Barrett*, (1836) 1 Keen 119; *Mani Bai* v. *Lodd Govind Dass*, (1908) 13 Ind L Jour 155 (156).

(2) *Bhaishankar* v. *Mulji Asharam*, (1911) 11 Ind Cas 551 (552): 13 Bom L R 480: 35 Bom 339.

Note 9.

(1) *Aldborough* v. *Burton*, (1834) 2 My1 & K 401; *Goodwin* v. *Archer*, (1727) 2 P Wms 452: 1 Eq Cas Abr 350 Ref in 23 Bom 100.

(2) *Prem Chund Moonshee*, In the goods of, (1894) 21 Cal 832 (836).

O. 25, R. 1, Notes 9—11.

has, however, a discretion in the matter and the principle to be adopted in the exercise of such discretion has been thus stated by Mr. Justice Davar in *Sonabai* v. *Tribhuvandas*[3]: "I have always been most averse to making orders against a woman for depositing security for the defendant's costs when I find that such an order would embarrass them and hamper them in the conduct of their cases. In the case of poor women, such an order amounts to a denial of justice to them. Unless the suit is on the face of it vexatious, or is one which I feel is filed merely for the harrassment of the defendant, I do not make an order against a woman plaintiff for security for defendant's costs—when she says she is not in a position to give such security and I believe her statement." This principle was approved in a later case[4] by the same High Court though it was recognised that "the discretion given by the rule is one of the most difficult that a Court can be called upon to exercise." In no case will a Court order a female plaintiff to give security unless grounds are shown tending to show that the defence is true.[5]

10. Where leave has been granted to sue as a pauper.—There is a conflict of opinion as to whether security can be ordered against a plaintiff who has been allowed to sue in *forma pauperis*. On one hand it has been held by the High Courts of Calcutta[1] and Bombay[2] that this rule does not apply to such cases and that the Court has no power to order security against a plaintiff suing in *forma pauperis*, the reason being that to do so would be to render the leave granted under O. 33, R. 8, nugatory. The High Court of Bombay has further held that where an order is made against the plaintiff for security for costs and subsequently he is granted leave to sue as a pauper, the order as to security ceases to operate, provided the leave is granted before the time limited for giving security has expired.[3] On the other hand, it has been held by the High Courts of Lahore,[4] Madras[5] and Rangoon[6] that the rule is wide enough to cover the case of a pauper plaintiff also, though, as a rule, very special grounds must be shown for granting an order for security for costs against him.

11. Inherent power to order security for costs.—There is a difference of opinion on the question whether apart from the provisions of this rule, the Court can order security for costs against a plaintiff. It has been held in the undermentioned cases[1] that the Court has such power to act in proper cases, as for example, where the plaintiff suing is not the real plaintiff but a

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(3) (1908) 32 Bom 602 (606): 10 Bom L R 337.

(4) *Namubai* v. *Daji Govind*, (1910) 6 Ind Cas 1055 (1056): 12 Bom L R 1071: 35 Bom 421.

(5) *Georgiana* v. *Bandmann*, (1913) 18 Ind Cas 217 (218) Cal; *Shama Sundary* v. *Rash Behary*, (1899) 3 Cal W N 753 (754).

Note 10.

(1) *Mt Hafizan* v. *Abdul Karim*, (1908) 7 Cal L Jour 312 (313, 314): 12 Cal W N 163; *Nusseroodeen* v. *Ujjul*, (1872) 17 Suth W R 68 (69).

(2) *Ma Gun* v. *Tha Hnin*, (1916) 36 Ind Cas 320 (320): 8 L B R 387: 10 Bur L Tim 105.

(3) *Bai Luxmi* v. *Hari Jiwan*, (1911) 12 Ind Cas 538 (539): 13 Bom L R 955: 36 Bom 415.

(4) *Har Kuar* v. *Chamba*, 1928 Lah 960 (960): 113 Ind Cas 911.

(5) *Seshaiyengar* v. *Jenulavadin*, (1881) 3 Mad 66 (67): 4 Ind Jur 507.

(6) *Ma Saw* v. *Maung Shwe Gon*, 1923 Rang 244 (245): 2 Bur L Jour 78: 75 Ind Cas 309.

Note 11.

(1) *Chainrai* v. *The Sunday Times*, 1932 Sind 33 (35): 26 Sind L R 21: *Hari Nath Sing* v. *Ram Kumar Bagchi*, (1913) 20 Ind Cas 703 (704): 18 Cal W N 119: 19 Cal L Jour 59; *Ram Coomar* v. *Chunder Canto*, (1876) 2 Cal 233 (259): 4 Ind App 23: 3 Sar 654 P C; *Chunder Cant* v.

mere puppet in the hands of others. A contrary view has however been expressed by *Cuming, J.*,[2] to the effect that the Court has no inherent power to order security for costs apart from the provisions of this rule.

12. "Suit for the payment of money"—Sub-rule (3).—A suit which, though not exclusively for money, will result in a decree for money on the relief sought, is a suit for the payment of money within the meaning of this rule.[1] Thus a suit to recover possession of certain ornaments and other moveable properties, or in the alternative to obtain a decree for their value is a "suit for the payment of money."[2] Similarly a suit by an actress for damages for wrongful dismissal[3] or a suit on which a claim is made for a share in a partnership business[4] are "suits for payment of money". But the main claim in the suit must be one for money the other reliefs being only incidental. A suit for dissolution of partnership and accounts and for the recovery of stridhanam property[5] or a suit for the administration of an estate consisting largely of immoveable property and in which it may ultimately be necessary to sell the estate and distribute the proceeds in money[6] is not a "suit for the payment of money" within this rule.

13. Claim and cross-claim.—A defendant cannot as a general rule be ordered to give security for costs[1] inasmuch as he is a person *compelled* to litigate and take proceedings in defence of the claim.[2] But where there is a *claim and a counter-claim* the position is different. The substantial position of the parties will have to be taken into consideration.[3] If the claim and the cross-claim arise out of the *one subject-matter* a defendant setting up a cross-claim will not be ordered to give security.[4] If, however, the cross-claim is in respect of a matter *wholly distinct* from the claim, an order for security may be made.[5] In other words, if the counter-claim is really in the nature of a *cross-action*, a defendant out of jurisdiction will as a rule be required to furnish security for costs[6]; but if cross-claim arising out of the same subject-matter is, in substance, *the defence to the claim*, the Court has a discretion to refuse to order such defendant to give security.[7]

Ram Coomar, (1874) 22 S W R 138 (148): 13 Beng L R 530.

(2) *Bhairabendra Narain Deb* v. *Udai Narain*, 1924 Cal 251 (252, 254 and 256): 79 Ind Cas 298: 50 Cal 853.

Note 12.

(1) *Sonabai* v. *Tribhovandas*, (1908) 32 Bom 602 (609, 611): 10 Bom L R 337.

(2) *Ananda* v. *Gokul*, (1912) 14 Ind Cas 290 290): 16 Cal W N 763; *Bomanji* v. *Nusserwanji*, (1903) 27 Bom 100 (101, 103): 5 Bom L R 113 [Suit for damages and return of presents]; *Degamburi* v. *Aushootosh*, (1890) 17 Cal 610 (613); *Bai Porebai* v. *Devji*, (1899) 23 Bom 100 (100).

(3) *Georgiana Major* v. *M Edward Bandmann* (1913) 18 Ind Cas 217 (218) Cal.

(4) *Ram Singh* v. *Balu Bai*, (1903) 5 Bom L R 661 (662).

(5) *Amulya Sundari Dasya* v. *Syama Sundar-dhe*, 1922 Cal 316 (317): 68 Ind Cas 607

(6) *Amina Bibi* v. *Moideen Kaka*, 1925 Rang 300 (301): 3 Rang 311: 89 Ind Cas 620; *Bibi Fatma* v. *Aga Muhammad*, (1905) 7 Bom L R 495 (496, 497); *Russicklal* v. *Jadubram*, (1873) 10 Beng L R App 25.

Note 13.

(1) *Baxter* v. *Morgan*, (1815) 6 Taunt 379: 2 Marsh 80: 16 R R 628; Re *Percy* v. *Mining Company*, (1876) 2 Ch D 531: 45 L J Ch 526: 24 W R 1057.

(2) *Vincent* v. *Hunter*, (1846) 5 Hare 320; *Wild* v. *Murray*, (1854) 18 Jur 892.

(3) *Accident Corp*, (1911) 2 K B 619 C A.

(4) *Neck* v. *Taylor*, (1893) 1 Q B 560 C A; *Mapleson* v. *Masini*, (1879) 5 Q B D 144.

(5) *Neck* v. *Taylor*, (1893) 1 Q B D 560 C A; *Sykes* v. *Sacerdoti*, (1885) 15 Q B D 423 C A.

(6) *Sykes* v. *Sacerdoti*, (1885) 15 Q B D 423.

(7) *Neck* v. *Taylor*, (1893) 1 Q B 560 C A; *New Fenix Campagnie* v. *General Accident Assurance Corporation*, (1911) 2 K B 619 C A.

O. 25, R. 1, Notes 14—17.

14. Appeal.—No appeal lies under the Code from an order under this rule. It is, however, appealable under Cl. 15 of the Letters Patent as a "Judgment".[1] Where the plaintiff deposits in Court security for costs and ultimately the suit is decreed in his favour, the defendant appealing against the decree, is not entitled to an order for detaining in Court, the money deposited by the plaintiff, pending the appeal.[2]

15. Revision.—A Court will be acting "illegally" in the exercise of its jurisdiction in ordering security for costs in a case to which this rule does not apply, as where it orders security for costs in an administration suit which is not a "suit for the payment of money" within this rule.[1] Similarly it will be acting with "material irregularity" in the exercise of its jurisdiction if it orders security for costs against a plaintiff suing as a pauper, in the absence of exceptional circumstances.[2] In such cases, therefore, a revision will lie against the orders so passed.

16. Other cases under the Code where security may be required.—The following are some of the other provisions of the Code under which security may be required by the Court:—

(1) O. 16, R. 16 (Security from witness, for his attendance).

(2) O. 21, R. 26 (Security from judgment-debtor).

(3) O. 22, R. 8 (Insolvency of plaintiff).

(4) O. 32, R. 6 (Security from next friend or guardian *ad litem* of minor).

(5) O. 37, R. 3 (Summary suits on negotiable instruments).

(6) O. 38, Rr. 1, 2, 5 (Arrest and attachment before judgment).

(7) O. 40, R. 3 (From Receiver).

(8) O. 41, Rr. 5 and 6 (Stay of execution).

(9) O. 41, R. 10 (Security for costs of appeal).

(10) O. 45, Rr. 7 and 10 (In Privy Council appeals).

(11) O. 45, R. 13 (Stay of execution in Privy Council appeals).

17. Liability of a person standing surety.—*A* was surety for costs for *B*, and the surety bond provided that if *B* failed to obey the order of the Court, the property of *A* would be liable, and that if the property proved insufficient, *A* would be personally liable. There was no provision for the principal debtor being proceeded against in the first instance. It was held that a failure to execute the decree against *B* in the first instance, does not amount to a release of the surety's liability.[1]

Note 14.

(1) *Sonabai* v. *Tribhovandas*, (1908) 32 Bom 602 (609, 610): 10 Bom L R 337; *Seshagiri Rao* v. *Askur Jung*, (1903) 26 Mad 502 (503).

(2) *Fleming* v. *Shearman*, (1870) 4 Beng L R O C 92.

Note 15.

(1) *Amine Bibi* v. *K M Moideen*, 1925 Rang 300 (301): 3 Rang 311: 89 Ind Cas 620.

(2) *Har Kuar* v. *Chamba*, 1928 Lah 960 (960): 113 Ind Cas 911.

Note 17.

(1) *Ata Hussain* v. *Mustafa Hussain*, 1926 All 657 (658): 92 Ind Cas 546.

18. Enforcement of security bonds given under this rule.—The proper mode of enforcing a surety bond given under this rule is the one indicated in S. 145 (*c*) of the Code. As to cases under the old Code, *see*.[1] O. 25, R. 1, Note 18.

O. 25, R. 2.

R. **2.** [S. 381.] (1) In the event of such security not being furnished within the time fixed, the Court shall *make an order dismissing* the suit unless the plaintiff or plaintiffs *are* permitted to withdraw therefrom.

Effect of failure to furnish security.

(2) *Where* a suit is dismissed under this *rule*, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of *such* application has *been* served *on* the defendant.

[1877—Ss. 380, 381; 1859—S. 35.]

Local Amendments.

BOMBAY.

The following shall be *added* as sub-Rule (4):—

"(4). The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

NAGPUR.

After Rule 2, *add* the following new Rule 3:—

"3. (1) Where any plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in, the property in suit is concerned or declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(2) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not

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Note 18.

(1) *Poynor Bibi* v. *Nuffoo Khan*, (1880) 5 Cal 437: 5 Cal L Rep 524; *Mingale Antone* v. *Ramachandra Baji*, (1894) 19 Bom 694 (696); *Gopinath Chowdhry* v. *Benode Lal Roy*, (1903) 31 Cal 162 (165); *Krishnan Nayar* v. *Ittinan Nayar*, (1901) 24 Mad 687.

O. 25, R. 2, Note 1.

being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-Rules (2) and (3) of Rule 2 shall apply, *mutatis mutandis*, to such application."

RANGOON.

Substitute for Rule 2:—

Champerty and Maintenance.

2. Where, it is proved to the satisfaction of the Court that the plaintiff is deriving assistance from or is being maintained by a person in consideration of a promise to give to such person a share in the subject-matter or proceeds of the suit, or in consideration of having transferred his interest in the subject-matter of the suit, the Court may, either of its own motion or on the application of any defendant—

(*a*) award costs on a special scale to be decided by the Court, and approximating to the actual costs reasonably incurred by the defendant;

(*b*) at any stage of the suit, order the plaintiff, within a time fixed by it, to give security for the payment of the estimated amount of such costs or such proportion thereof as the Court may think just.

Add the new Rule 3:—

Effect of failure to furnish security.

3. (1) In the event of security demanded under R. 1 or Rule 2 not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff is permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the order of dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The order of dismissal shall not be set aside unless notice of such application has been served on the defendant.

Synopsis.

1. Scope of the rule.
2. Dismissal under this rule, if res judicata.
3. Notice.
4. Limitation.
5. Appeal.

Within the time fixed. See Note 1, Pt. (1).

1. Scope of the rule.—The Court has power to extend the time for furnishing security under S. 148 of the present Code.[1] This rule enables the Court to restore a suit dismissed under this rule.[2]

Order 25, Rule 2—Note 1.

(1) See also *Badri Narain* v. *Sheo Koer*, (1890) 17 Cal 512 (515): 17 Ind App 1: 5 Sar 493 P C [Case of appeal]; *Fazulunnissa* v. *Mulo*, (1884) 6 All 250 (252): 1884 All W N 71; *Soorj Mukhi*, In re, (1877) 2 Cal 272 (273); *Burjore* v. *Bhagana*, (1884) 10 Cal 557 (561): 11 Ind App 7: 4 Sar 498: 8 Ind Jur 216: R & J 76 P C; *In the matter of Lalla Gopeechand*, (1876-77) 2 Cal 128 (129): 1 Ind Jur 374; *Funeendro Deb* v. *Jogendro Deb*, (1874) 23 Suth W R 220 (221).

(2) *Balwant Singh* v. *Daulat Singh*, (1886) 8 All 315 (319): 13 Ind App 57: 4 Sar 707 P C.

2. Dismissal under this rule, if res judicata.—A suit dismissed under this rule for failure to furnish security for costs, cannot be said to have been "heard and finally decided" within the meaning of S. 11 of the Code and cannot operate as *res judicata* in a subsequent suit between the parties.[1] O. 25, R. 2, Notes 2—5.

3. Notice.—The general principle is that no order affecting a party should be made without notice to him.[1]

4. Limitation.—The limitation for an application to set aside a dismissal under this rule is 30 days from the date of the dismissal under Art. 163 of the Limitation Act, 1908.

5. Appeal.—Under the old Code, an order under this rule was held to be a *decree* and appealable as such.[1] Under the present Code, the order is only an *appealable order* (*see* O. 43, R. 1 (*n*)). No appeal will lie, however, from such an order passed in a suit in which the decree itself is not open to appeal. *See* S. 104.

ORDER XXVI.

COMMISSIONS.

Commissions to examine witnesses.

R. **1**. [S. 383.] Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of *any* person resident within the local limits of its jurisdiction who *is* exempted under this code from attending the Court or who *is* from sickness or infirmity unable to attend it. O. 26, R. 1.

Cases in which Court may issue commission to examine witness.

[1877—Ss. 383, 385; 1859—S. 175. *See* S. 75 above.]

Synopsis.

1. Scope of the rule.
1a. Applicability to proceedings under other special or local Acts.
2. May in any suit issue.
3. "Who is exempted under the Code."
4. "Who is, from sickness or infirmity unable to attend."
5. Procedure where evidence is taken on commission.
6. Arbitration.
7. Appeal.
8. Revision.

"Any person." See R. 4, Note 4, Pt. (2).
Commission to examine a particular witness. See R. 8, Note 2, Pt. (6).
Commission—When Court may not issue. See Note 1, Pts. (1) and (2).
Examination, de bene esse. See O. 8, R. 16, Note 2, Pt. (1).
Notice to opposite side whether necessary. See Note 2, Pt. (11).
Pardanishin ladies. See Note 3.
Party applying must procure attendance of Witnesses. See Note 5, Pt. (1).
Right of opposite party to cross-examine. See Note 5, Pts. (3) and (4).

Note 2.

(1) *Hariram* v. *Lalbhai*, (1902) 26 Bom 637 (640): 4 Bom L R 262 [Suit]; *Rangrav Ravji* v. *Sidhi Mahomed*, (1881-82) 6 Bom 482 (486) [Defence].

Note 3.

(1) *Sirajul Haq* v. *Khadim Hussain*, (1883) 5 All 380 (382): 1883 All W N 60; *Timmu* v. *Deva Rai*, (1882) 5 Mad 265 (266).

Note 5.

(1) *Williams* v. *Brown*, (1886) 8 All 108 (111): 1886 All W N 30.

O. 26, R.1, Notes 1—2.

1. **Scope of the Rule.**—The grounds upon which a commission can be issued are specified in this rule and in Rules 4 and 5 below; they ought not to be relaxed or nullified because the witness is a man of rank or is a man of social status[1] and it will be derogatory to him to appear personally in Court.[2]

The Court can issue a commission even after remand.[3] The issue of a commission being a matter of *routine*, the successor of a Judge has power to cancel the issue of a commission made by his predecessor.[4]

1-a. Applicability to proceedings under other special or Local Acts.—Rules 1 to 8 of this Order, dealing with the issue of commission for the examination of witnesses, have been made applicable to enquiries and proceedings under the undermentioned Acts.[1]

2. May in any suit issue.—The general trend of opinion is that the issue of a commission is a matter of *Judicial Discretion*.[1] The High Court of Madras, has, however, held, in the undermentioned cases[1-a] that the word "may" must be read as equivalent to "is given authority to" and that a commission should issue as a *matter of right* unless the application for commission amounts to an abuse of the process of the Court. As a general rule, an application will not be granted unless

(1) The application is made *bona fide*,

(2) The issue in respect of which the evidence is required is one which the Court ought to try,

(3) The witness to be examined would give evidence material to the issue, and

(4) There are some good reasons why the witness cannot be examined in Court.[2]

But the Court has not the absolute discretion or inherent power to issue a commission except when authorised by the provisions of the Code; nor, according to the general trend of opinion, is the Court *bound* to issue a commission simply because all the conditions laid down in the rule exist; where the examination on commission may result in *manifest injustice* to any party, or where it is not calculated to permit of the evidence being *tested fairly*, or

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Order 26, Rule 1—Note 1.

(1) *Panachand* v. *Manoharlal*, (1918) 43 Ind Cas 729 (731, 733, 734): 42 Bom 136: 20 Bom L R 1; *Somasundaram* v. *Manicka*, (1908) 31 Mad 60 (61): 3 Mad L Tim 246.

(2) *Veerabadran Chetty* v. *Nataraja Desikar*, (1905) 28 Mad 28 (35, 36): 14 Mad L Jour 829.

(3) *Labh Singh* v. *Ram Lal*, 1925 Lah 89 (41): 81 Ind Cas 589: 5 Lah 252.

(4) *Chettyar, A K R M M O T* v. *Mg Ba Chit*, 1930 Rang 315 (316): 128 Ind Cas 589.

Note 1-a.

(1) The Punjab Sikh Gurdwaras and Shrines Act (VI of 1922), S 24 (4); The Official Trustees Act (II of 1913), S 20; The Madras Ganjam and Vizagapatam Act (XXIV of 1839), R 16; The Administrator-General's Act (III of 1913), S 46; The Bengal Tenancy Act (VIII of 1885), S 31 (b); The Presidency Towns Insolvency Act (III of 1909), S 37; The Indian Naturalisation Act (VII of 1926), S 11; The Charitable and Religious Trusts Act (XIV of 1920), S 11; The Chota Nagpur Tenancy Act (VI of 1908), S 265 (3).

Note 2.

(1) *Mowji* v. *Nem Chand*, (1899) 23 Bom 626 (629): 1 Bom L R 884; *Burney* v. *Eyre*, (1862-3) 1 Hyde 68; *Gondu* v. *Tu'siram*, 1930 Nag 27 (28): 120 Ind Cas 335 [Has a discretion in issuing commissions for examining experts].

(1-a) *Jagannada* v. *Sarathambal*, 1923 Mad 821 (822); *Sitarama* v. *Subraya*, 21 Mad L Jour 889: 12 Ind Cas 74.

(2) *A E Saleji* v. *Ahmed Musaji Saleji*, (1913) 19 Ind Cas 643 (644) All.

when the application is made to avoid cross-examination before the Court, the Court is not bound to issue a commission.[3] The difference between the examination of a witness on commission and a *viva voce* examination in open Court is so greatly to the disadvantage, almost invariably, of the opposite party that the Court should very jealously inquire, in every case, into the reason for the commission.[4] The question is, whether the Courts can be said to have acted with jurisdiction in taking away from a litigant the right which he undoubtedly has of having the witness brought before the Court in accordance with the normal procedure.[5] Regard must always be had to the possibility of the witness not being a credible witness in which case the opportunity of noting his *demeanour*[6] and of hearing the exact and precise answers given by him would be lost.[7] This is specially so in a case where a party accused of fraud, seeks to examine himself on commission.[8] O. 26, R.1, Notes 2—3.

The fact that the witness sought to be examined is *interested*, or that the case of the party asking for the issue of the commission is improbable[9] or that the Judge thinks that no useful end would be attained by the evidence[10] is however, no ground *per se* for refusing to issue a commission.

As a matter of practice, notice ought to be given to the opposite party before ordering a commission.[11]

3. "**Who is exempted under the Code.**"—Section 132 of the Code recognises the right of *Pardanashin* ladies who according to their custom can claim the privilege of being examined on commission.[1] The fact that an allegation of immorality is made against such a lady[2] or that she had appeared on a former occasion in public[3] or in Court,[4] is no ground for refusing to issue a commission. In the undermentioned cases[5] a commission was issued even though the lady was old and had entirely abandoned the purdah.

But where no custom of not appearing in public is made out,[6] or the custom alleged is of a varying and uncertain character,[7] the Court will not

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(3) *Veerabadran Chetty* v. *Nataraja Desikar*, (1905) 28 Mad 28 (35, 36): 14 Mad L Jour 329.

(4) *Amrithanath* v. *Dhunpat*, (1873) 20 Suth W R 253 (255); *Mohesh Chunder* v. *Manick Lal*, (1899) 26 Cal 650 (652): 3 Cal W N 751.

(5) *Sreenivasa Ayyangar* v. *Ranga Ayyangar*, 1927 Mad 524 (525): 1927 Mad W N 218.

(6) *Mowji* v. *Nemchand*, (1899) 23 Bom 626 (628): 1 Bom L R 384.

(7) *Panchkari Mitra* v. *Panchanan Saha*, 1924 Cal 971 (972, 973): 39 Cal L Jour 598: 84 Ind Cas 9.

(8) *Satish Chandra Chatterjee* v. *Satish Kantha Roy*, 1923 P C 73 (76): 45 Mad L Jour 363: 33 Mad L Tim 325: 28 Cal W N 327: 39 Cal L Jour 165: 73 Ind Cas 891 P C.

(9) *Dwarkadas Javhermal* v. *David Sassoon & Co.*, 1930 Sind 83 (86): 121 Ind Cas 865.

(10) *Huree Dass* v. *Meer Moazzum*, (1871) 15 Suth W R 447 (448): 8 Beng L R App 16; *Vidya Purna* v. *Seethamma*, (1911) 12 Ind Cas 74 (75): 21 Mad L Jour 889.

(11) *Tarucknath* v. *Gource Churn*, (1865) 3 Suth W R 147 (150).

Note 3.

(1) *Rahimannessa Bibi* v. *Sk Halim*, 1928 Cal 814 (815); *Vellai Nachiar* v. *Meiyappa*, 1925 Mad 905 (906): 86 Ind Cas 513 [Plaintiff *gosha* lady applying for commission for examining herself should be granted]. See however *Nusrut Banoo* v. *Md Sayem*, (1872) 18 Suth W R 230 (230) [Where Pardanashin lady can be examined in Court in a *Palki*—Court can refuse].

(2) *Binodini* v. *Kalachand*, (1901) 5 Cal W N 232.

(3) *Mohesh Chunder* v. *Manick Lal*, (1899) 26 Cal 650 (652): 3 Cal W N 751; *Chamatkar* v. *Mohesh Chunder*, (1899) 26 Cal 651 (N): 3 Cal W N 750.

(4) *Sm Provat Kumaree* v. *Opurba Kissen Sett*, (1899) 3 Cal W N 753 (753) [Appearance on a prior occasion in Police Court]; *Balakeshwari* v. *Janananda*, (1917) 41 Ind Cas 610 (611): 45 Cal 697: 26 Cal L Jour 319: 22 Cal W N 197, (Do.).

(5) *Ellias Joseph Solomon* v. *Jyotsna*, (1918) 44 Ind Cas 157 (158): 22 Cal W N 147; *Kistomohun* v. *Adurmoney*, 2 Hyde 88.

(6) *Sreenivasa Ayyangar* v. *Ranga Ayyangar*, 1927 Mad 524 (525): 1927 Mad W N 218.

(7) *Rustomji* v. *Banoobai*, (1890) 14 Bom 584 (587).

O. 26, R. 1, Notes 3—6.

issue a commission. *A Pardanashin* lady is not entitled to decline to be examined on commission at any place other than that of her choice.[8]

A religious preceptor is not entitled to be examined on commission on the ground of his social status.[9]

4. **"Who is from sickness or infirmity unable to attend."**—In the case of persons who, owing to illness, are unable to attend the Court, a commission ought not to be refused.[1] If sickness or infirmity is alleged, the Court will, of course, have to take into account the character and gravity of the sickness and the risk consequent upon the refusal to issue a commission.[2] Infancy, however, is not a ground for the issue of a commission.[3]

5. **Procedure where evidence is taken on commission.**—It is the duty of the party obtaining the commission to take all such steps as are necessary to secure the attendance of the witnesses before the commissioner.[1] The examination is on the same footing as that in Court[2] and the opposite party is entitled to cross-examine the witnesses,[3] though where the cross-examination is unnecessarily prolonged or amounts to an abuse of process, the Court can fix a time limit and order the cross-examination to be finished.[4] But the commissioner has no power to disallow questions and rule points as to admissibility of evidence.[5]

Where the commission is for examining a witness on interrogatories, the party is entitled to a copy of the cross-interrogatories filed by the opposite party.[6]

6. **Arbitration.**—Where a case is referred to arbitration under Schedule II (Section 506 of the old Code), it is competent to the Court to issue a commission under this rule as the suit is, still before the Court.[1] But the Court has no power either under Section 75 or under this rule to issue a commission for examination in the case of *private* arbitration. The consent of parties cannot confer such power nor can the Court issue a commission in such a case under its inherent powers.[2]

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(8) *Khitipati Roy* v. *Dharani Mohan*, 1921 Cal 229 (231): 48 Cal 448: 64 Ind Cas 228.

(9) *Panachand* v. *Manoharlal*, (1918) 43 Ind Cas 729 (731): 20 Bom L R 1: 42 Bom 136.

Note 4.

(1) *Jagannatha* v. *Sarathambal*, 1923 Mad 321 (322): 46 Mad 574: 71 Ind Cas 530: 44 Mad L Jour 202: 17 Mad L W 251: 1923 Mad W N 157.

(2) *Panchkari Mitra* v. *Panchanan Saha*, 1924 Cal 971 (972): 39 Cal L Jour 598: 84 Ind Cas 9.

(3) *Beenodeeny Dossee*, In re, 2 Hyde 152: Cor 78.

Note 5.

(1) *Lekhraj* v. *Palee Ram*, (1870) 2 N W P 210.

(2) *Hoffman* v. *Framji*, Cor 7.

(3) *Gregory* v. *Dooly Chand*, (1870) 14 Suth W R O C 17 (19); *Boisagomoff* v. *Nahapiet Jute Co*, (1901) 5 Cal W N 230; *Prankrishna Chandra* v. *Biswanath Chandra*, (1872) 8 Beng L R App 101 [An attorney cannot, however, cross-examine the witness].

(4) *Sivaj Prosad* v. *Standard Life Insurance Co*, (1903) 30 Cal 625 (627); *Mt Kaniz Zainab* v. *Mobarak Hussain*, 1924 Pat 284 (295): 72 Ind Cas 748 [Commissioner can stop proceedings if cross-examination is abusive].

(5) *Mt Atkia Begam* v. *Md I R Nawab*, 1916 P C 250 (251): 21 Cal W N 345: 6 Mad L W 26: 1917 Mad W N 261: 10 Bur L Tim 79: 36 Ind Cas 20 P C.

(6) *Application by Bibi Saran*, (1917) 39 Ind Cas 944 (944): 10 Sind L R 210.

Note 6.

(1) *Rabiabai* v. *Rahimabai*, (1905) 7 Bom L R 560 (561).

(2) *Mackintosh & Co* v. *S S Navigation Co*, 1922 Bom 444 (446, 448): 24 Bom L R 858: 47 Bom 250: 75 Ind Cas 221.

O. 26, R.1, Notes 7—8.

7. **Appeal.**—An order under this rule is not appealable under Order 43, Rule 1 or Section 104. Nor is an order directing the issue of a commission a "Judgment" within the meaning of Cl. 15 of the Letters Patent.[1] The issue of a commission being a matter of *discretion* neither the High Court nor the Privy Council will interfere in appeal with an order made in the proper exercise of the discretion.[2]

8. **Revision.**—An order made under this rule in the exercise of discretion cannot be interfered with in revision[1] unless there has been a wanton abuse of the process of the Court.[2]

O. 26, R.2, Note 1.

R. **2.** [S. 384.] *An* order *for the issue of a commission for the examination of a witness* may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

Order for commission.

[1877—S. 384; 1859—S. 175.]

Synopsis.

1. "Either of its own motion or on the application."

1. "Either of its own motion or on the application."—Under this rule, a commission may be issued for the examination of a witness either *suo motu* or on the application of a party.[1]

The rule only requires that the application of a party or of a witness is to be supported by affidavit or otherwise; it does not require that the affidavit must be made by *the witness or by the party himself.*[2]

O. 26, R.3.

R. **3.** [S. 385.] A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

Where witness resides within Court's jurisdiction.

[1877—S. 385; 1859—S. 175.]

Synopsis.

1. Scope of the rule.
2. Deputy Collector, if can delegate an officer of his Court to take evidence on commission.

Note 7.

(1) *Miya Mohamed* v. *Zerabi*, (1909) 2 Ind Cas 157 (158): 11 Bom L R 241.

(2) *Akikunnisa Bibi* v. *Ruplal Das*, (1898) 25 Cal 807 (815): 25 Ind App 117: 2 Cal W N 566: 7 Sar 358 P C; *Pramathanatha Chandra Kar* v. *Bhagwandas Jadavlal*, 1932 Cal 236 (238, 239): 35 C L W N 705: 54 Cal L Jour 516: 59 Cal 40: 136 Ind Cas 529 [Application to examine on commission filed after the close of the case].

Note 8.

(1) *Mt Malaubai* v. *Nihal Chand Tikamdas*, 1927 Sind 261 (265): 102 Ind Cas 321; *Phanindra Krishna Dutt* v. *Raja Promatha Nath Malia*, 1928 Cal 421 (423): 32 Cal W N 128: 103 Ind Cas 880: 55 Cal 748; *S R M M Chetty Firm* v. *Narayanan Chetty*, 1921 L B 6 (8): 64 Ind Cas 821: 11 L B R 65.

(2) *Chinna* v. *Sambanda*, (1914) 23 Ind Cas 522 (522): 15 Mad L Tim 839.

Order 26, Rule 2—Note 1.

(1) *Firm of Chotmal* v. *Firm of Lilaram Lakshmichand*, 1926 Sind 34 (35): 90 Ind Cas 64.

(2) *Ram Sewak* v. *Harihar*, 1927 Rang 175 (175): 5 Bur L J 242: 103 Ind Cas 141.

O. 26, R.3, Notes 1—2.

1. Scope of the Rule.—The rule contemplates the issue of a commission to *any person* for examining a witness or a party residing within its local limits.

But the failure to *issue* the commission to the Commissioner will not invalidate the examination actually held by him pursuant to the order of the Court; the omission to actually *issue* the commission is only an irregularity which, if not objected to before the examination commences, will be deemed to have been waived.[1]

2. Deputy Collector, if can delegate an officer of his Court to take evidence on commission.—A Deputy Collector is competent to depute an officer of his Court to examine a witness on commission provided the place where the witness is sought to be examined is within his jurisdiction.[1]

O. 26, R.4. **Persons for whose examination commission may issue.**

R. 4. [S. 386.] (1) Any Court may in any suit issue a commission for the examination of—

(*a*) any person resident beyond the local limits of its jurisdiction;

(*b*) *any* person who *is* about to leave such limits before the date on which *he is* required to be examined in Court; and

(*c*) *any* civil *or* military officer of *the* Government who cannot, in the opinion of the *Court*, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this *rule* shall direct whether the commission shall be returned to itself or to any subordinate Court.

[1877—Ss. 383, 384, 385, 386; 1859—Ss. 175, 176.]

Synopsis.

1. Scope of the rule.
2. "May issue."
3. Plaintiff asking his evidence to be taken on commission.
4. Defendant asking his evidence to be taken on commission.
5. Commission to England to take evidence.
6. Second commission on failure of the first.
7. Appeal.
8. Revision.

Order 26, Rule 3—Note 1.

(1) *Dina Nath Law* v. *Metharam Navalrai & Co.*, 1921 Cal 852 (854): 33 Cal L Jour 577: 64 Ind Cas 785.

Note 2.

(1) *Ram Chand* v. *Kameenee*, (1868) 10 Suth W R 236 (237).

"About to leave such limits." See R. 1, Note 5, Pt. (2), see also O. 18, R. 16, Note 2, Pt. (1).
Commission to examine a witness in Mandalay. See R. 5, Note 1, F.-N. (1).
Discretion of lower Court how far will be interfered with in appeal or revision. See Note 7, Pt. (6); Note 8, Pt. (2).
"Resident beyond the limits of its jurisdiction. See Note 1, Pts. (2) and (3).

1. Scope of the rule.—The power of the Court is not more restricted under this rule than under rule 1.[1] A party is entitled to the issue of a commission if it is clear that the witness is residing outside the jurisdiction of the Court.[2] It is not for the Court, as has already been pointed out in rule, 1, to decide whether the party will be benefited or not, as it is a matter entirely for the party.[3]

Where a commission is issued to a Court it should be addressed *to the Court of first instance* within the limits of whose jurisdiction the witness resides.[4]

2. "May issue."—As has been seen in Note 2 to Rule 1, *ante* the word "May" in this rule as well as in rule 1 has been construed in two decisions of the Madras High Court to mean "is given authority to", and that the issue of a commission is a matter of statutory right.[1] But according to the general trend of opinion, the Court has a discretion to grant or refuse a commission.[2] The discretion must, however, be exercised *judicially*.[3] (*See also* Note under the same heading in Rule 1, *supra*.)

3. Plaintiff asking his evidence to be taken on commission.—The general and accepted rule is that the evidence of a plaintiff in a case ought not to be taken on commission except for very strong reasons.[1] The reason is the plaintiff has had a *choice of the forum*, and having chosen to institute his suit in a particular Court, he cannot ask for his examination elsewhere.[2]

4. Defendant asking his evidence to be taken on commission.—"But the case is entirely different" observed Mr. Justice Chitty in *Ross* v. *Woodford*, (1894) 1 Chancery Division 38. "When it is the defendant's application, and particularly when the defendant is lawfully resident out of its jurisdiction according to the ordinary course of his life and business, and to compel these defendants to come over here at a great expense to attend the trial, or give up their case would be oppressive and unfair, and in

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Order 26, Rule 4—Note 1.

(1) *Ramamma Iyer* v. *Sankaranarayana Aiyar*, 1929 Mad 192 (193): 114 Ind Cas 843.

(2) *Mahalakshmi Ammal* v. *Venkata Naicker*, 1926 Mad 345 (346): 23 Mad L W 210: 93 Ind Cas 446; *Gopal Chunder* v. *Karunadhar*, (1867) 7 Suth W R 349 (352) [Commission issued to a [illegible] Magistrate is not bound to do so].

(3) *Jagannatha Sastri* v. *Saradambal Ammal*, 1923 Mad W N 321 (322): 46 Mad 574: 17 L W 202: 44 Mad L Jour 202: 71 Ind Cas 530: 41 M L T 251: 1923 Mad W N 157; *Vidya Purna Thirthaswami* v. *Sithamma*, (1911) 12 Ind Cas 74 (74): 21 M L Jour 869.

(4) 17 W R H C Rules and Orders 3.

Note 2.

(1) *Jagannatha Sastri* v. *Saradambal*, 1923 Mad 321 (322): 44 Mad L Jour 202: 17 Mad L W 251: 1923 Mad W N 157: 71 Ind Cas 530: 46 Mad 574.

(2) *Burney* v. *Eyre*, (1864) 1 Hyde 68; *Rakhunth Nath* v. *Jai Kishen*, 1929 All 449 (451): 51 All 341: 113 Ind Cas 268; *Rao Sewak Kaeri* v. *Haribar Prasad Singh*, 1927 Rang 175 (175): 103 Ind Cas 141: 5 Bur L Jour 212, *Mauji* v. *Nem Chand*, (1899) 23 Bom 626 (629).

(3) *Cock* v. *Allcock*, (1888) 21 Q B D 178 Ref: 19 Bom 749 (760); *Panchkari Mitra* v. *Panchanan Saha*, 1924 Cal 971 (973): 39 Cal L Jour 508: 81 Ind Cas 9; *Keeley* v. *Yakley*, [illegible] 9 T L R 571 Ref: 57 Ind Cas 955 (956) [In this case the Court refused as the main question was one of damages and the evidence ought to be taken before the jury].

Note 3.

(1) *S A Mudaliar* v. *Abdul Rahman Brothers & Co*, (1920) 57 Ind Cas 955 (956): 13 Bur L Tim 83; *Doucett* v. *Wise*, 1 Ind Jur N S 357.

(2) *Syed Fardduddin Ahmed* v. *Syed Abdul Wahab* 1926 Pat 277 (278): 1926 Pat H C C 108: 5 Pat L Tim 677: 94 Ind Cas 229.

O. 26, R. 4, Notes 4—8.

my opinion it would be wrong to apply to the case of a defendant the principles, that are applicable to the case of a plaintiff asking for a commission to examine himself".[1] Thus where a suit was instituted in Cuttack against a defendant residing at Colombo, a commission was issued for the defendant's examination at Colombo on the ground that it would be obviously unfair to compel him to come to Cuttack or practically give up his defence.[2]

5. **Commission to England to take evidence.**—*See* Rule 5, *infra*.

6. **Second commission on failure of the first.**—If the first commission fails for no fault of the party, a second commission can be issued.[1] (*See also* R. 10, *infra*.)

7. **Appeal.**—A Full Bench of the High Court of Madras[1] over-ruling two earlier decisions[2] has held that an order under this rule directing or refusing to issue a commission is only an *interlocutory order* and not a "judgment" within Cl. (15) of the Letters Patent and is not appealable. The High Courts of Bombay,[3] Calcutta[4] and Rangoon[5] have also taken the same view as that of the Madras Full Bench.

An order under this rule is *not an appealable order*. Nor will the appellate Court interfere with the order in the regular appeal from the decree in the suit, unless the discretion is shown to have been improperly exercised which has prejudiced the party aggrieved.[6]

8. **Revision.**—An order under this rule can be revised when the order is one made *without jurisdiction, e.g.*, in the absence of any of the grounds mentioned in the rule[1] or where the Court has acted with *material irregularity, e.g.*, in refusing to issue a commission to a defendant residing outside its jurisdiction.[2] Where the refusal to issue a commission would

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Note 4.

(1) *Adamji Khadibhai* v. *Iesuf Ahmed*, (1912) 16 Ind Cas 750 (751) Cal; *Kumar Sarat Kumar Ray* v. *Ram Chandra Chatterjee*, 1922 Cal 42 (43): 35 Cal L Jour 78: 68 Ind Cas 9. See also *Visvanatha Chetty* v. *Somasundaram Chetty*, 1924 Mad 541 (541): 1924 Mad W N 191: 34 Mad L Tim 314: 78 Ind Cas 407: 46 Mad L Jour 131 [Plaintiff and defendant both residents of Rangoon —Suit filed in Devakottah—Plaintiff examined himself on commission at Rangoon—Held the defendant ought not to be refused a commission]; *Elvere* v. *American Motor Company*, 1924 Lah 475 (476): 73 Ind Cas 923 [Defendant sole witness residing beyond 200 miles—Applying for a commission —Ought to be issued].

(2) *Adamji Khadi Bai* v. *Iesuf Ahmed Mulla*, (1912) 16 Ind Cas 750 (751) Cal.

Note 6.

(1) *Mullick Ali* v. *Mehar Bano*, (1867) 8 Suth W R 448 (448): *Khan Mohammad Kassin* v. *Bridhi Chand*, (1905) 9 Cal W N 268 (268 n) [Commissioner examined witnesses *ex parte*—Court ordered a fresh commission on deposit of costs].

Note 7.

(1) *Tuljaram* v. *Aagappa*, (1910) 8 Ind Cas 340 (343, 344): 35 Mad 1: 1910 Mad W N 697: 8 Mad L Tim 458: 21 Mad L Jour 1.

(2) *Veerabadram* v. *Nataraja*, (1905) 28 Mad 28 (31): 14 Mad L Jour 829; *Maruthamuthu* v. *Krishnamachariar*, (1907) 30 Mad 143 (144).

(3) *Miya Mahomed* v. *Zorabi*, (1909) 2 Ind Cas 157 (158): 11 Bom L R 241.

(4) *Toremull* v. *Kunj Lall*, (1920) 55 Ind Cas 766 (766): 81 Cal L Jour 162.

(5) *Abdul Gufar* v. *Official Assignee*, 1926 Rang 64 (64): 3 Rang 605: 93 Ind Cas 211: 4 Bur L Jour 254; *Akikunnissa* v. *Rup Lal*, (1898) 25 Cal 807 (816): 25 Ind App 117: 2 Cal W N 566: 7 Sar 858 P C.

(6) *Sarat Kumar Ray* v. *Ram Chandra Chatterjee*, 1922 Cal 42 (44): 35 Cal L Jour 78: 68 Ind Cas 9; *Adamji Khadi Bai* v. *Iesuf Ahmed Mulla*, (1912) 16 Ind Cas 750 (752) Cal.

Note 8.

(1) *Somasundaram* v. *Manikavasaka*, (1908) 31 Mad 60 (61): 3 Mad L Tim 246 [Can interfere under section 15 Charter Act apart from section 622].

(2) *Visvanatha Chetty* v. *Somasundaram Chetty*, 1924 Mad 541 (541): 1924 Mad W N 191: 34 Mad L Tim H C 314: 78 Ind Cas 407: 46 Mad L Jour 131; *Jagannatha* v. *Sarathambal*, 1923 Mad 321 (322): 44 Mad L Jour 202: 17 Mad L W 251: 1923 Mad W N 157: 71 Ind Cas 530: 46 Mad 574 [Witness residing outside jurisdic-

be tantamount to a denial of justice or would result in manifest injury, the High Court can also interfere in revision.[3] O. 26, R.4, Note 8.

O. 26, R.5, Notes 1—4.

R. 5. [S. 387.] *Where* any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that *the* evidence *of such person* is necessary, the Court may issue such commission *or a letter of request.*

Commission or Request to examine witness not within British India.

[1877—S. 387; 1859—Ss. 177, 178.]

Synopsis.

1. Evidence of witnesses not residing within British India.
2. Plaintiff in foreign territory asking for a commission to examine himself.
3. "Letter of request."
4. Revision.

1. Evidence of witnesses not residing within British India.—This rule deals with the issue of a commission for the examination of persons residing outside British India.[1]

Where a commission is issued for taking evidence in England, the Bill of costs with respect to such commission is to be taxed by the taxing Master in India though it is to be taxed on the same principle as would be adopted in England.[2]

2. Plaintiff in foreign territory asking for a commission to examine himself.—As noticed in R. 4, Note 3, the Court will be very reluctant to accede to the request of the plaintiff for the issue of a commission to examine himself abroad except upon very strong grounds. The plaintiff is entitled to choose his own forum and having chosen the forum, he is not entitled to say "I reside outside the jurisdiction. Therefore examine me on commission."[1]

3. "Letter of request."—These words are new. As for the form of letter of request, *see* Appendix H, Form No. 8.

4. Revision.—Interlocutory orders passed in the exercise of discretion under this rule cannot be revised by the High Court.[1] *See also* S. 115, *ante*.

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tion—Refusal to issue commission—Revisable]; *Ramalinga Iyer* v. *Sankaranarayana Aiyar*, 1929 Mad 192 (193): 114 Ind Cas 843; *Sukhdei* v. *Ram Dei*, (1902) 5 Oudh Cas 151 (152) [But the discretion cannot be interfered in revision].

(3) *Ananda Chandra* v. *Suk Chand*, 1925 Cal 1118 (1119): 85 Ind Cas 619.

Order 26, Rule 5—Note 1.

(1) *Kadambini Dassi* v. *Kumudini Dassi*, (1903) 30 Cal 934 (936): 7 Cal W N 806 [Commission issued for examination of a witness in French Territory]; *Aga Mohammad Jafar* v. *Mirza Nazrulah*, (1869) 2 Beng L R A C 73: 10 Suth W R 385 [Commission for the examination of a witness at Mandalay can only issue from the High Court]; *New* v. *Burns*, (1894) 64 L J Q B 104 Ref: 57 Ind Cas 955 (956).

(2) *Goculdas* v. *Scott*, (1891) 15 Bom 209 (211).

Note 2.

(1) *Ross* v. *Woodford*, (1894) 1 Ch 38 (42) Ref: 16 Ind Cas 750 (751); *Md Akbar Ali Khan* v. *Herbert Francis*, 1925 Pat 125 (126): 6 Pat L Tim 520: 3 Pat 863: 84 Ind Cas 993: 1925 P H C C 826; *Nadin* v. *Bassett*, (1883) 25 Ch D 21 referred to in 1925 Pat 125 (126).

Note 4.

(1) *H H The Nizam of Hyderabad*, In re, (1886) 9 Mad 256 (257).

O. 26, R. 6. Court to examine witness pursuant to commission.

R. 6. [S. 388] Every Court receiving a commission for the examination of any person shall examine him *or cause him to be examined* pursuant thereto.

O. 26, R. 7, Notes 1—3. Return of commission with depositions of witnesses.

R. 7. [S. 389.] *Where a* commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court *from* which it *was* issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following *rule*) form part of the record of the suit.

[1877—Ss. 389, 390; 1859—S. 179.]

Synopsis.

1. Return of commission.
2. "Duly executed."
3. Commissioner can note demeanour of witness.
4. "Shall form part of the record."

Evidence recorded by commissioner. When is evidence in suit. See R. 8, Note 2.

1. Return of commission.—The return should show that the evidence was recorded as the law requires it, *viz.*, in the language in ordinary use in the proceedings before the Court and duly read over and signed by the witness.[1]

The time for the execution of the commission may be enlarged on the application of a party.[2]

2. "Duly executed."—If a party to the suit dies before the examination of a witness on commission is completed and the fact of death is brought to the notice of the Commissioner, the proceedings after death are rendered illegal and consequently the commission cannot be said to have been *duly executed*.[1]

3. Commissioner can note demeanour of witness.—A Commissioner is entitled by law to note his observation as to the *demeanour* of the witness examined by him.[1]

Order 26, Rule 7—Note 1.

(1) *Bala Thakoor* v. *Meghburn Singh*, (1870) 14 Suth W R 269 (271).

(2) *Gregory* v. *Dooley Chand*, (1870) 14 Suth W R O C 17 (18).

Note 2.

(1) *Sabitri Thakurain* v. *Suraj Mohan*, 1929 Pat 101 (101): 10 Pat L Tim 51: 115 Ind Cas 240.

Note 3.

(1) *Mariam Bibee* v. *Muhammad Ibrahim*, (1918) 48 Ind Cas 561 (601): 28 Cal L Jour 306.

4. "Shall form part of the record."—Evidence taken on a commission duly executed, subject to R. 8 shall form *part of the record* and a party is entitled to refer to such evidence as a matter of record, though not tendered in evidence.[1] **O. 26, R. 7, Note 4.**

When depositions may be read in evidence.

R. **8.** [S. 390] Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless— **O. 26, R. 8, Notes 1—2.**

(*a*) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, *or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service*, or

(*b*) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (*a*), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

[1877—S. 390; 1859—S. 179.]

Synopsis.

1. Legislative changes.
2. Evidence on commission, when may be read as evidence in the suit.
3. Objection to admissibility of evidence.
4. Admissibility of documents.

"Shall not be read as evidence." See Note 2.

"Unless the Court, in its discretion, dispenses." See Note 2, F.-N. (3).

1. Legislative changes.—

The words "or is a civil or military officer who cannot in the opinion of the Court attend without detriment to the public service" in Cl. (*a*) are new.

2. Evidence on commission—When may be read as evidence in the suit.—The practice on the original side of the High Court of Calcutta is that evidence taken on commission does not become evidence in the suit, until the same has been tendered and read as evidence by the party on whose behalf it was taken,[1] while the practice of the moffussil Courts in Calcutta is that

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Note 4.

(1) *Mangobinda Chowdhuri* v. *Shashindra Chandra Chowdhuri*, (1908) 35 Cal 28 (32): *Chotumal Pulchand* v. *Lilaram Lakshmichand*, 1926 Sind 31 (35): 90 Ind Cas 64: *Dinobundhu* v. *Nistarini*, (1883) 12 Cal L Rep 50 (52): *Dwarkanath Dutt* v. *Gunga Dayi*, (1872) 8 Beng L R App 102; *Nistarini Dassee* v. *Nundo Lall*, (1899) 3 Cal W N ccxxxix: 26 Cal 591.

Order 26, Rule 8—Note 2.

(1) *Kusum* v. *Satya*, (1903) 30 Cal 999 (1003): 7 Cal W N 784; *Gouri Prosad Kundu* v. *Hemanta Kumari*, (1905) 9 Cal W N 794 (795).

O. 26, R.8, Notes 2—4.

such evidence is treated as evidence in the suit, though it is not formally tendered in evidence as it is part of the record.[2]

A party wishing to rely on evidence taken on commission cannot, without the consent of the party against whom he offers it, have it read as evidence in the suit, unless he is able to show that the circumstances mentioned in cl. (*a*) exist at the time the evidence is sought to be read, or unless he is able to persuade the Court to dispense with the proof of such circumstances.[3] Such evidence can be read at the instance of *either* party to the suit and not necessarily by the party who applied for a commission.[4]

The fact that the evidence was taken on commission in the absence of the opposite party is no sufficient ground for refusing to admit it in evidence.[5] But if the commission was issued for examining a particular witness and in spite of objection by the other side *another* witness was also examined, the Court would be justified in ignoring the evidence of such person.[6]

3. Objection to the admissibility in evidence.—Objection to the admissibility of the deposition of witnesses examined in commission should be taken in the trial Court itself.[1]

4. Admissibility of documents.—Where a document is produced before the Commissioner and no objection is taken as to its admissibility, no such objection can be taken after the return of the commission at the time of the trial of the suit.[1] But if the document is objected to before the Commissioner, the party objecting is not precluded from urging other grounds of objection than those taken before the Commissioner at the time of trial.[2]

Commissions for Local investigations.

O. 26, R.9.

R. 9. [S. 392] In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or

Commissions to make local investigations.

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(2) *Dhani Ram Mahata* v. *Murli Lal Mahata*, (1909) 1 Ind Cas 366 (367, 368): 11 Cal L Jour 150: 13 Cal W N 525: 36 Cal 566; *Nistarini Dassi* v. *Nundo Lall*, (1899) 26 Cal 591 (592): 3 Cal W N ccxxxix; *Man Gobinda Chowdhuri* v. *Shashindrachandra Chowdhuri*, (1908) 35 Cal 28 (32) [Pardanishin lady examined on commissions].

(3) *Jetha Devji & Co* v. *Nirmal Singh Mansingh*, 1930 Sind 89 (90): 123 Ind Cas 396; *Mahim Chandra Guha* v. *Naba Chandra Chowdhury*, 1927 Cal 43 (44): 44 Cal L Jour 238: 98 Ind Cas 852 [Court has discretion to dispense in the proof of circumstances mentioned in cl. (a)]; *Rajendra* v. *Ram Narain*, (1869) 3 Beng L R App 3; *Edwards* v. *Muller*, (1870) 5 Beng L R 252; *Satish Chandra* v. *Satish Kanta*, 1923 P C 73 (76): 73 Ind Cas 391: 45 Mad L Jour 363: 28 Cal W N 327: 39 Cal L Jour 165: 33 Mad L Tim 325; *Prittee Bullubh* v. *Haradhun*, (1874) 22 Suth W R 331 (333); *Krista Kishore Bose* v. *Pancha Ram Maity*, 1928 Cal 341 (343): 47 Cal L Jour 467: 111 Ind Cas 430; *Phanindra* v. *Pramatha*, 1928 Cal 421 (423): 32 Cal W N 128: 106 Ind Cas 880: 55 Cal 748; *Aga Mohammad Jafer Tehramee* v. *Mirza Nuzeeroollah Shirazee*, (1868) 10 Suth W R 385: 2 B L R A C 78.

(4) *Firm of Chotumal Bulchand* v. *Firm of Lalaram Lakhmichand*, 1926 Sind 84 (85): 90 Ind Cas 64.

(5) *Rajah Prosonno Narain Deb* v. *Romonee Dossee*, (1868) 10 Suth W R 236 (237).

(6) *Ramchendur Gouri Shanker* v. *Ganpatram Biswanath*, (1921) 59 Ind Cas 539 (541): 47 Cal 583.

Note 3.

(1) *Girie Chandra Kit* v. *Ram Saran Majumdar*, 1929 Cal 591 (592).

Note 4.

(1) *Struther* v. *Wheeler*, (1880) 6 Cal L Rep 109 (112).

(2) *Ralli* v. *Gaukim Swee*, (1883) 9 Cal 939 (941): 8 Ind Jur 140.

annual nett profits, the Court *may issue*[2] a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court: O. 26, R. 9, Notes 1—2.

Provided that, *where* the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

[1877—Ss. 392, 393, 398, 399, 409; 1859—Ss. 180, 306.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Local investigation by the Judge. See O. 18, R. 18, ante.
4. Power of commissioner to take evidence. See R. 10.
5. "Such person as it thinks fit."
6. Admissibility of report of commissioner. See Note 4, R. 10
7. Interference with the report. See R. 10.
8. Form.
9. Appeal from order directing local investigation.
10. Revision.

Application when to be made. See Note 2, Pt. (5).
Commission—When should not issue. See Note 2, F.-N. (3).
Local investigation—Its object and necessity. See Note 2, Pt. (1).
"May issue." See Note 2, Pt. (4).
Selection of commissioner—Discretion of Court. See Note 5, Pt. (1) and F.-N. (1).

1. Legislative changes.—

The words "or proceeding" which occurred in the old section, after the words "in any suit" and the words "and the same cannot be conveniently conducted by the Judge in person" have now been omitted.

2. Scope of the rule.—The object of local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot[1] and to elucidate any point which is left doubtful on the evidence taken before the Court.[2] Cases of boundary disputes and disputes about the identity of lands are instances when a Court may order a local investigation under this rule.[3]

The Court has a *discretion* to order a local investigation or not; it is not bound to order it in all cases.[4] An application under this rule should

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Order 26, Rule 9—Note 2.

(1) *Bhowance Dutt* v. *Beer Singh*, (1870) 2 N W P 196; *Bhuwan Chandra Ghose* v. *George Henderson and Co*, 1929 Cal 774 (774) [Not desirable to order the scene before accident to be re-enacted in the presence of the commissioner].

(2) *Sangili* v. *Mookan*, (1893) 16 Mad 350 (351, 352); 3 Mad L Jour 137; *Hyder Shah* v. *Jafir Shah*, 1868 Pun Re No 11; *Nilkanth Surmah* v. *Sooseela Debia*, (1866) 6 Suth W R 324 (325).

(3) *Po Gyi* v. *Maung Paw*, (1909) 2 Ind Cas 347 (348); 5 L B R 1; *Jhubbo Sahoo* v. *Jussoda*, (1872) 17 Suth W R 230 (232) [Court not justified in ordering local investigation when the issue is whether the parties are man and wife]; *Kales Dass* v. *Khettro Pal*, (1872) 17 Suth W R 472 (474) [Question of possession before date of suit—Local investigation ought not to have been ordered].

(4) *Raj Kishen Mookerjee* v. *Huro Mohun Mookerjee*, (1866) 5 Suth W R 248 (248); *Gour Chunder Roy* v. *Rash Beharee Dutt*, (1868) 1 Beng L R S N 1: 10 Suth W R 43 (44); *Heeralal* v. *Gungadhur Sunnaputty*, (1862) Suth W R 19 (20): Marsh 60: 1 Hay 229: 1 Ind Jur O S 8 F B; *McDonald* v. *Munar Roy*, (1865) Beng L R Sup Vol 358: 3 Suth W R Act X R 153 [Court not bound to order *Suo Motu*]; *Jallinga Valley Tea Company* v. *Chera Tea Company*, (1886) 12 Cal 45 (47), (Do.); *Shurrioollah* v. *Bawl Mundal*, (1864) 1 Suth W R 102 (103) [Successor of a Judge should not interfere with order for local investigation made by his predecessor].

O. 26, R. 9, Notes 2—9.

be made at the hearing of the suit.[5] It cannot be made after the case is closed.[6] The presiding officer or officers in enquiries under the following Acts have been empowered to issue commissions for local investigation in accordance with this rule. *See* the Acts noted below.[7]

3. Local investigation by the Judge.—*See* O. 18, R. 18, *ante*.

By S. 144 of the Oudh Rent Act (XXII of 1886), the Court may, in inquiries under that Act, make a local investigation, instead of issuing a commission under this rule.

4. Power of Commissioner to take evidence.—*See* Note 3, R. 10, *infra*.

5. "Such person as it thinks fit."—Under the Code of 1859, a commission had to be issued, in the first instance, to an officer of the Court and only when there is no such officer, to any other suitable person.[1] There is no such preference under this rule. Under the General Rules of the Allahabad High Court, however, commissions other than commissions for the examination of witnesses or of accounts, should not be issued to persons other than Civil Court *Amins* except when such a course is impracticable and, in every case, a person other than a Civil Court *Amin* is employed, the Court should record its reasons therefor.[2]

The rule does not contemplate the issue of a commission to more than one person. But if more than one is appointed, provision should be made for meeting any difference in opinion that may arise between them.[3]

6. Admissibility of report of Commissioner.—*See* Note 4, R. 10.

7. Interference with the report.—*See* Note 10, R. 10.

8. Form.—For the form of commission for local investigation, *see* Appendix H, Form No. 9.

9. Appeal from order directing local investigation.—An order under this rule is not appealable under O. 43, R. 1. Nor is it a "judgment" within cl. 15 of the Letters Patent.[1] The discretion exercised by the Court under this rule cannot be interfered with in second appeal.[2]

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(5) *Mackinnon, Mackenzie & Co* v. *Bhugram Doss*, Bourke, O C 243.

(6) *Sundar Lal* v. *Sita Ram*, (1919) 51 Ind Cas 399 (399) Oudh; *Roghoonath* v. *Sreejeb Ghosal*, (1866) 6 Suth W R Act X 11 (11).

(7) The Chota Nagpur Tenancy Act (VI of 1908), S 265 (3); The Bengal Tenancy Act (VIII of 1885), S 31 (b) and S 158 (2); The Orissa Tenancy Act (II of 1913), S 86 (b) and S 210.

Note 5.

(1) *Shaikh Bahadoor Ali* v. *Domun Singh*, (1867) 7 Suth W R 27 (28); *Buzl Rohim* v. *Lutafat Hossein*, (1864) Suth W R (Gap) 171 (172); *Ram Doss Koondoo* v. *Nil Kanto Dhur*, (1867) 8 Suth W R 6 (7); *Teluckdharee Roy* v. *Mooraleedhur Roy*, (1870) 13 Suth W R 284 (284); *Rajaram Kalita* v. *Roopa Kagatee Kalita*, (1870) 13 Suth W R 113 (114); *Doorga Doss* v. *Gooroo Churn*, (1866) 6 Suth W R Act X, R 81 (81); *Bysnath Singh* v. *Indurjit Kooer*, (1867) 8 Suth W R 331 (332) [Report by Sheristadar—Ministerial officer]; *Goluck Chunder* v. *Dookhee Ram*, (1869) 12 Suth W R 209 (210) [Report by ministerial officer—Sheristadar]; *Churamun Singh* v. *Anoop*, (1882) 11 Cal L Rep 533 (537) [The District Judge can appoint Munsif to be Commissioner]; *Mahomed Anjob* v. *Gouri Pershad*, (1866) 6 Suth W R 62 (63), (Do.); *Roy Sultan* v. *Mussumat Laloo*, (1872) 17 Suth W R 300 (301) [But a Sub-judge whose judgment is in appeal cannot be ordered to go and inspect]

(2) *Nand Kishore Rai* v. *B Ganesh Prasad Rai*, 1929 All 446 (447): 118 Ind Cas 166.

(3) *Manbodhsay* v. *Mt Bimba*, (1891) 1 C P L R 160 (161).

Note 9.

(1) *Mahommed Hussain* v. *Hussain Hamadanee*, 1925 Rang 290 (291): 4 Bur L Jour 103: 3 Rang 293: 90 Ind Cas 967; *Meer Bahadoor Ali* v. *Bhabo Soondaree Debia Chowdhrain*, (1867) 7 Suth W R 425 (425); *Jeebun Kissun Roy* v. *Dwarkanath Roy*, 1864 Suth W R (Gap) 863 (864); *Haro Mohan Mookerjee* v. *Shoonoyanee Mohunt Thakooraney*, 1862 Marsh 469: 2 Hay 591.

(2) *Ram Dhal Lal* v. *Lakhpat Lal*, 1932 All 270 (271): 135 Ind Cas 243; *Heralall Seal* v. *Gungadhar Sunnaputhy*, (1862) 1 Ind Jour O S 8: Marsh 60: 1 Hay 229; *Graham* v. *Lopez*, (1864) 1 Suth W R 141 (142); *Kristoohunder Goopto* v. *Brojo Mohun Dey Chowdhry*, (1874) 22 Suth W R 183 (184); *Sagore Monee Dossee* v. *Bipro Doss*

10. Revision.—According to the High Court of Patna, where the order directing a local investigation would be a calamitous waste of time and money and would be determining the rights of parties on an improper basis, the High Court would interfere in revision.[1] But the High Court of Madras in the undermentioned case refused to interfere with an order directing a Commissioner to ascertain the mesne profits on the ground that the applicant had a remedy by way of appeal from the final decree.[2] O. 26, R. 9, Note 10.

R. **10.** [S. 393.] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed *by him* to the Court. O. 26, R. 10.

Procedure of Commissioner.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) *shall be evidence in the suit*[3] and *shall form part of the record*[4]; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, *or as to his report*, or as to the manner in which he has made the investigation.

Report and depositions to be evidence in suit.

Commissioner may be examined in person.

(3) *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.*

[1877—Ss. 392, 393, 398, 399; 1859—S. 180.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. Functions and powers of the commissioner.
4. Admissibility of the report of the commissioner.
5. Examination of the commissioner.
6. Objection to commissioner's report.
7. Commissioner's report, how far binding on the Court.
8. Further evidence after commissioner's report.
9. Sub-Rule 3.
10. Interference with the report.

Evidentiary value of the commissioner's report. See Note 4, Pt. (1); Note 3, F.-N. (8); Note 10, F.-N. (1) and R. 9, Note 5, F.-N. (1).

Return of commission whether should be on file before orders are passed. See

Dey, (1864) 1 Suth W R 249 (249); *Bykunt Nath* v. *Pearee Monee*, (1864) 1 Suth W R 195 (196); *Rash Beharee Singh* v. *Saheb Roy*, (1869) 12 Suth W R 76 (76); *Lukhi Narain Jagadeb* v. *Jodu Nath Deo*, (1894) 21 Cal 504 (512, 513): 21 Ind App 39: 6 Sar 408 P C; *Rajendra Narain Saha* v. *Ashutosh Sanyal*, (1912) 18 Ind Cas 194 (197) Cal.

Note 10.

(1) *Ramji Ram* v. *Ramasre Raut*, 1924 Pat 761 (764): 1924 Pat H C C 217: 83 Ind Cas 124.

(2) *Hussain Sahib* v. *Hammad Sahib*, 1923 Mad 13 (43): 16 Mad L W 312: 1922 Mad W N 562: 31 Mad L Tim 180: 74 Ind Cas 812.

O.26, R.10, Notes 1—3.

Note 4, F.-N. (1). "Shall be evidence in the suit." See Note 3, Pt. (5) and Note 4. "Shall form part of the record." See Note 4, Pt. (1).

1. Legislative changes.—

The words "or as to his report" have been added in the concluding part of sub-Rule 2. Sub-Rule 3 is new.

2. Scope of the rule.—Sub-rule 2 is "intended to afford protection to the Commissioner who is a *quasi*-judicial officer and such protection is afforded on grounds of public policy so as to make it impossible for either of the parties to subject the Commissioner to a vexatious examination."[1]

This rule applies to suits under Tenancy Acts.[2]

3. Functions and powers of Commissioner.—The provisions of O. 26 do not amplify S. 75 of the Code and the Court cannot delegate to the Commissioner the trial of any *material issue* which it is itself bound to try.[1] In other words, a Judge cannot depute to the Commissioner functions which he can and should discharge himself.[2] All that the Court can depute a Commissioner to do is to inspect a disputed land, to prepare a map or to obtain information with regard to physical features of the property inspected.[3] It is not the intention of the Legislature to allow witnesses to be examined by the Commissioner in such cases, unless the nature of evidence is such that it ought to be taken only on the spot.[4] Thus the statements regarding a right of way made by village officers to a Commissioner appointed to prepare a map, are not evidence[5] unless the parties agree and accept the same.[6]

Any evidence taken by the Commissioner contrary to instructions cannot be looked into.[7] Thus where a Commissioner who was appointed to ascertain the amount of mesne profits entered into the question of possession of the land, recorded evidence and arrived at a finding, it was held that

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Order 26, Rule 10—Note 2.

(1) *Sitaram* v. *Ram Prosad*, (1914) 22 Ind Cas 858 (860): 19 Cal L Jour 87: 18 Cal W N 697; *Duke of Bucclench* v. *Metropolitan Boards*, 1871 L R 5 H L 418 (433, 462) Ref to in 22 Ind Cas 858 (860).

(2) *Deoki Singh* v. *Scogobind Sahoo*, (1890) 17 Cal 277 (280).

Note 3.

(1) *Sawan Mal* v. *Raunaq Mal*, 1922 Lah 47 (48): 3 Lah 209: 68 Ind Cas 802; *Sangili* v. *Mooken*, (1892) 16 Mad 350 (351): 3 Mad L Jour 137; *Ugira Narain* v. *Haribans Chowdhry*, 1930 Pat 557 (558): 11 Pat L Tim 456: 127 Ind Cas 841; *Raghu Nath* v. *Raj Krishna*, (1868) 1 Beng L R S N 2; *Ram Narain* v. *Odindra Nath*, (1912) 13 Ind Cas 440 (443): 17 Cal W N 369: 15 Cal L Jour 17; *Tulsi Ram* v. *Dina Nath*, 1926 Lah 145 (146): 89 Ind Cas 333; *Ram Dhun* v. *Ram Monee*, (1874) 21 Suth W R 280 (281); *Shibo Soondaree* v. *Ram Chunder*, (1872) 17 Suth W R 469 (470).

(2) *Shustee Ram* v. *Nobo Kant*, (1870) 14 Suth W R 190 (190); *Ishur Chunder Dose* v. *Joogul Kishore Chuckerbutty*, (1892) 17 Suth W R 473 (473) Note; *Buroda Churn* v. *Ajoodhya*, (1875) 23 Suth W R 286 (287); *Shetal Shaikh* v. *Bhills*, (1875) 24 Suth W R 184 (185); *Ali Mahomed* v. *Shamsuddin*, 1928 Bom 145 (147): 30 Bom L R 131: 109 Ind Cas 133 [Question whether one of the parties is personally engaged in agricultural labour cannot be referred]; *Kershaji* v. *Kaikhushru*, 1929 Bom 478 (479): 31 Bom L R 1081: 121 Ind Cas 483 [Cannot enquire as to the heirs and properties of the deceased in an administration suit]; *Brigstock Edulji and Co* v. *Gaguji*, 1930 Sind 221 (222): 125 Ind Cas 831 [Commissioner appointed under the Workmen's Compensation Act (VIII of 1923) cannot issue compensation for examination of witnesses]; *Bejoy Chand Mahatab* v. *Kristo Mohini Dasi*, (1894) 21 Cal 626 (631) [Commissioner has no power to set aside order of Collector passed under S 48 of Bengal Act VI of 1870].

(3) *Iswar Chandra* v. *Jugal Kishor*, (1870) 4 Beng L R App 33: 21 Suth W R 281 (Note); *Bindabun Chunder* v. *Nobin Chunder*, (1872) 17 Suth W R 282 (283).

(4) *Sadhoo* v. *Ramanoograha*, (1868) 9 Suth W R 83 (86); *Bindabhun Chunder* v. *Nobin Chunder*, (1872) 17 Suth W R 282 (283).

(5) *Shitawa* v. *Bhimappa*, (1900) 24 Bom 43 (45): 1 Bom L R 493.

(6) *Shambhu Nath* v. *Satish Chandra*, 1921 Cal 363 (367): 25 Cal W N 369: 66 Ind Cas 49; *Sarat Chandra Roy* v. *The Collector of Chittagong*, (1869) 2 Beng L R App 8.

(7) *Durga Churn Surmah* v. *Neem Chand Surmah*, (1875) 24 Suth W R 208 (209).

the procedure was *ultra vires*.[8] If evidence is taken by him within the scope of his authority such evidence should be reduced into writing. Information given by witnesses and not reduced to writing is not legal evidence.[9] O.26, R.10, Notes 3—5.

A Commissioner is bound to record the state of things as actually existing and not draw upon his own imagination or make surmises.[10]

Notice should be given to the parties of the time when local investigation will be held.[11]

4. Admissibility of the report of the Commissioner.—The report of the Commissioner together with the evidence, if any, recorded by him is legal evidence in the suit.[1] The Court is not justified in refusing to consider the report unless the local investigation is incomplete or inconclusive.[2]

The report however is not *per se* evidence in *any other suit* unless its accuracy is proved in the ordinary way.[3]

5. Examination of the Commissioner.— The parties are entitled to take objection to the report of the Commissioner and substantiate the same by examining the Commissioner or other witnesses.[1] If the report is attacked on grounds which require explanation it is necessary that the Commissioner also should be examined.[2] It is against established practice to find fault with his report behind his back and to reject it *in toto*.[3]

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(8) *Mt Saraswati Bahuria* v. *Suraj Narain Chaudhuri*, 1928 Pat 278 (279): 9 Pat L Tim 258: 109 Ind Cas 641; *Bijoy Govind* v. *Kali Prosonno*, (1871) 16 Suth W R 294 (294); *Pran Nath* v. *Mirnomoyee*, (1862) Suth W R 39 (39) (F B) [The report is of no value regarding past possession].

(9) *Ramakka* v. *Nagesam*, 1925 Mad 145 (147): 47 Mad 800: 48 Mad L Jour 89: 92 Ind Cas 792; *Tweedie* v. *Poorno Chunder*, (1869) 12 Suth W R 138 (139).

(10) *Bala Thakoor* v. *Meghburn Singh*, (1870) 14 Suth W R 269 (271); *Jhubhoo Sahoo* v. *Mussumat Jusoda*, (1872) 17 Suth W R 230 (232).

(11) *Kristo Monee Debia* v. *H Eglinton*, (1869) 12 Suth W R 139 (140).

Note 4.

(1) *Shah Nuthoo* v. *Ghunnessam*, (1867) 8 Suth W R 267 (267); *Sheo Narain Bugget* v. *Boodh Singh*, (1869) 11 Suth W R 423 (424); *Sarat Chandra* v. *Collector of Chittagong*, (1869) 2 Beng L R App 3; *Dole Gobind* v. *Chamoo Singh*, (1868) 10 Suth W R 312 (313); *Seetaram Mookerjee* v. *Ram Narain Mookerji*, (1866) 6 Suth W R 51 (51); *Umbica Churn Dey* v. *Goluck Chunder*, (1868) 9 Suth W R 596 (597); *Jannobee Chowdrain* v. *The Collector of Mymensingh*, (1867) 8 Suth W R 287 (288); *Rajnath* v. *Doorga*, (1869) 12 Suth W R 136 (136); *Chundermonee* v. *Nilambur*, (1867) 7 Suth W R 43 (44); *Khaja Abdul Gunnee* v. *Bhuttoo Shaikh*, (1874) 22 Suth W R 350 (350); *Bhyrub Roy* v. *Nobin Roy*, (1868) 9 Suth W R 601 (601); *Chunder Coomar Dutt* v. *Joy Chunder Dutt Mojoomdar*, (1873) 19 Suth W R 213 (214); *Ram Churn* v. *Surabjit*, (1868) 9 Suth W R 494 (495); *Eshan Chunder* v. *Huree Churn*, (1865) 2 Suth W R 278 (278); *Manbodh Sav* v. *Mt Bimba*, (1888) 1 C P L R 160 (161); *Poreshnauth Mookerjee* v. *Mr Charles Martin*, (1864) 1 Suth W R 93 (93); *Ram Rukha Roy* v. *Gobind Dass*, (1871) 15 Suth W R 291 (292); *Mahomed Anwar* v. *Raj Chunder*, (1872) 17 Suth W R 521 (522); *Madho Singh* v. *Kashi Singh*, (1894) 16 All 342 (343): 1894 All W N 112 [Return should be before the Court, when orders are passed]; *Abdool Ali* v. *Sudderooddeen*, (1870) 14 Suth W R 493 (494) [Report only evidence on the point to which the commission refers]; *Jagat Kishore* v. *Dinanath*, (1890) 17 Cal 281 (284) [Report can't be rejected because Amin's remuneration not paid]; *Bakhtawar Lal* v. *Sheo Prasad*, (1917) 42 Ind Cas 720 (720): 15 All L J 766: 39 All 694 [Report of a commissioner appointed by an Assistant Collector to ascertain collections under S. 164 of the Agra Tenancy Act is admissible in evidence].

(2) *Kalee Dass Mitter* v. *Deb Narain Deb*, (1870) 13 Suth W R 412 (413); *Abdul Hamid Chowdury* v. *Brojendra Kumar Roy*, 1926 Cal 290 (293): 90 Ind Cas 643; *Deb Narain Deb* v. *Kalee Dass Mitter*, (1870) 14 Suth W R 397 (399): 6 Bom L R App 70.

(3) *Denobandhu Ghose* v. *Nistarini Dasi*, (1882) 12 Cal L Rep 50 (52); *Sarat Chandra Rakhit* v. *Sarala Bala Ghosh*, 1928 Cal 63 (64): 105 Ind Cas 61.

Note 5.

(1) *Harcharan Das* v. *Danpat Mal Dewan Chand*, (1917) 42 Ind Cas 221 (222): 164 Pun W R 1917; *Hans Raj* v. *Nathoo Mal*, 1929 Lah 782 (783): 30 Pun L R 501: 119 Ind Cas 490.

(2) *Kamini Kishore Sen* v. *Parbartya Tipperah Raj*, (1921) 60 Ind Cas 434 (436) Cal; *Sheo Dyal* v. *Hodgkinson*, (1875) 24 Suth W R 342 (342); *Sitaram* v. *Ram Prosad Ram*, (1914) 22 Ind Cas 858 (860): 19 Cal L Jour 87: 18 Cal W N 697.

(3) *Ajodhya Prasad Singh* v. *Kamal Narain Singh*, (1917) 38 Ind Cas 491 (492) Pat.

O.26, R.10, Notes 6—9.

6. Objections to Commissioner's report.—The Court must fix a date to enable the parties to file objections, if any, to the report of the Commissioner[1] and is bound to enquire into such objections when filed[2] unless the parties agree to, or accept the report.[3] A party refusing to appear before the Commissioner has, however, been held not entitled to object to the report.[4]

Objections to the report of the Commissioner should be taken in the trial Court and cannot be raised for the first time in appeal[5] although the appellate Court has power to consider whether the report was outside or within the scope of the warrant of commission.[6]

7. Commissioner's report, how far binding on the Court.—A Commissioner's report is only *evidence* in the case. It is in no way *binding* on the Court. The Court has full power to arrive at its own conclusion even at variance with the report.[1] In fact, the report ought not to be made the sole basis and foundation for the judgment in disregard of the other evidence in the case.[2]

8. Further evidence after the Commissioner's report.—The rule does not contemplate the tender of further evidence after the receipt of the report of the Commissioner except the examination of the Commissioner himself. It does not however prohibit further evidence. The point has to be decided in general principles according to the facts and circumstances of each case.[1] It was held that the party cannot at the last moment adduce fresh evidence after going on with the trial of the case without objection and with the knowledge that the investigation was carelessly done.[2]

9. **Sub-Rule** (3).—The Court has a discretion to order a fresh commission or not and is not *bound* to do so in every case where the result of the local investigation is found to be unsatisfactory; it can decide the case on the evidence.[1]

Note 6.

(1) *Ram Narain* v. *Goburdhan Lall*, (1873) 21 Suth W R 2 (3).

(2) *Issur Chunder* v. *Syamkhan*, (1869) 11 Suth W R 95 (95); *Abdool Kareem* v. *Campbell*, (1867) 8 Suth W R 172 (172).

(3) *Wadhumal* v. *Chellomal*, (1913) 19 Ind Cas 870 (871): 6 Sind L R 256; *Bissessur Roy* v. *Kanchun Roy*, (1869) 11 Suth W R 155 (155); *Lalljee Sahoo* v. *Rajendra Pertab*, (1870) 14 Suth W R 418 (418); *Hemmuni Singh* v. *Canty*, (1890) 17 Cal 304 (310): 13 Ind Jur 328: 5 Sar 429.

(4) *Kamini Kishore Sen* v. *Parbatya Tiperah Raj*, (1921) 60 Ind Cas 484 (485) Cal; *Bamun Doss Mookerjee* v. *Brojo Kishore Mitter*, (1866) 6 Suth W R 130 (130).

(5) *Sethegugmull Jethmull* v. *Mt Chahee Kowar*, (1874-75) 2 Ind App 34 (37): 3 Sar 419; *Bhagobutty* v. *Gour Chunder*, (1868) 9 Suth W R 267 (267); *Ganesh Ram* v. *Ranja*, 1882 Pun Re No 161; *Brijonath Chowdhry* v. *Lall Meah*, (1870) 14 Suth W R 391 (392).

(6) *Krishna Reddiar* v. *Ramanuja Reddiar*, 1929 Mad 492 (492): 114 Ind Cas 232.

Note 7.

(1) *Sone Kuar* v. *Baidyanath*, 1926 Pat 462 (463): 96 Ind Cas 827: 7 Pat L Tim 795; *Azim Sarung* v. *Alimoddeen*, (1872) 17 Suth W R 270 (270).

(2) *Bustee Sahoo* v. *Jeo Narain*, (1875) 24 Suth W R 388 (388); *Ameenooddeen Shaha* v. *Asgur Ali*, (1867) 8 Suth W R 464 (464); *Issur Chunder* v. *Jugal Kishore*, (1874) 21 Suth W R 281 (281): 4 Beng L R App 38 [Value of the report depends upon the evidence on which it is founded].

Note 8.

(1) *Grishchunder Lahiri* v. *Shoshi Shikhareswar Roy*, (1900) 27 Cal 951 (966): 27 Ind App 110: 4 Cal W N 631: 10 Mad L Jour 356: 2 Bom L R 709: 7 Sar P C J 687 P C.

(2) *Shiddeswari Dasya* v. *Shashi Bhushan Chaudhury*, (1912) 16 Ind Cas 39 (40) Cal; *Gouree Narain* v. *Madho Soodun*, (1865) 2 Suth W R, Act X, 1 (1) [The party impeaching is to call in evidence].

Note 9.

(1) *Garibullah* v. *Modu*, (1919) 50 Ind Cas 301 (303) Cal; *Tirthabasi* v. *Bepin*, (1916) 34 Ind Cas 80 (81): 23 Cal L Jour 600; *Manindra Chandra* v. *Kumar Sarabindu Ray*, (1918) 45 Ind Cas 408: 27 Cal L Jour 599: 23 Cal W N 593.

Sub-Rule 3 contemplates a *further enquiry* by the Commissioner already appointed and not the issue of a fresh commission covering the same ground.[2] The mere filing of objections to a report is no ground for issuing a fresh commission[3] unless the Court is of opinion on considering the objections that the Commissioner has so misconceived his duties as to render his report valueless.[4] If the Court comes to the later conclusion, then it should wipe out and supersede the first report by a specific order to that effect.[5] O.26, R.10, Notes 9—10.

10. Interference with the report.—The Court ought not to interfere with the result of a long and careful local investigation except upon clearly defined and sufficient grounds.[1] It has been laid down by their Lordships of the Privy Council and followed in a number of decisions of the High Courts in India, that an appellate Court should not interfere with the finding of the trial Court based on a careful local investigation except upon very strong grounds.[2] But disregard of the report of the Commissioner is not such an error or defect "affecting the merits of the case" within the meaning of S. 105 as to justify interference in appeal.[3]

In *Kessowji Issur* v. *G. I. P. Ry. Co.*,[4] [I.L.R. 31 Bom. 381 (392) P. C.] the Privy Council has held that an appellate Court should not as a result of an inspection of the spot of accident, reverse the decisions of the trial Court based on recorded evidence.

Commissions to Examine Accounts.

Commission to examine or adjust accounts.

R. **11.** [S. 394] In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission O.26, R.11.

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(2) *Ambi* v. *Kunhi Kavamma*, 1929 Mad 661 (663): 118 Ind Cas 296; *Nand Kishore Rai* v. *Ganesh Prasad Rai*, 1929 All 446 (447): 118 Ind Cas 166 [The practice of appointing successive commissioners whenever objections are filed to their reports condemned]; *Panangat Blahayil Kurnavan* v. *Achuta Menon*, 1932 Mad 482 (484): 1932 Mad W N 56: 62 Mad L Jour 629: 35 Mad L W 614: 138 Ind Cas 114 [Issue of successive commissions condemned]; *Annapragada Visvanadham* v. *Annapragada Mangamma*, 1930 Mad 236 (238): 120 Ind Cas 737; *Kunhi Kutti Ali* v. *Mohammad Haji*, 1931 Mad 73 (74): 1930 Mad W N 1113: 32 Mad L W 827: 130 Ind Cas 470: 60 Mad L Jour 450: 54 Mad 239.

(3) *Annapragada Visvanadham* v. *Annapragada Mangamma*, 1930 Mad 236 (238): 120 Ind Cas 737.

(4) *Thottamma* v. *Subramaniyan*, 1922 Mad 219 (220): 45 Mad 79: 68 Ind Cas 469: 14 Mad L W 620: 1921 Mad W N 843; *Mohammad Sadiq* v. *Basgit Sah*, 1926 Pat 159 (160): 90 Ind Cas 834; *Sabitri Thakurain* v. *Suraj Mohan Thakur*, 1929 Pat 101 (102): 10 Pat L Tim 51: 115 Ind Cas 240 [Examination by Commissioner wrongly proceeded after the death of a party—Illegal—Fresh commission may be issued].

(5) *Kunhi Kutti Ali* v. *Muhammad Haji*, 1931 Mad 73 (76): 1930 Mad W N 1113: 32 Mad L W 827: 130 Ind Cas 470: 60 Mad L Jour 450: 54 Mad 239; *Annapragada Viswanadham* v. *Annapragada Mangamma*, 1930 Mad 236 (238): 120 Ind Cas 737; *Ambi* v. *Kunhikavamma*, 1929 Mad 661 (663): 118 Ind Cas 296; *Nowab Syed Azim Ali Khan Bahadoor* v. *Surrunulty Debia*, (1875) 23 Suth W R 93 (95).

Note 10.

(1) *Ram Gopal* v. *Gordon Stuart & Co*, (1872) 17 Suth W R 285 (288); *Kamini Kishore* v. *Parbartya*, (1921) 60 Ind Cas 434 (436) Cal; *Rani Amrita Sundari Debi* v. *Munshi Serajuddin Ahmad Chowdhury*, 1924 Cal 620 (622): 28 Cal W N 318: 80 Ind Cas 755; *Bhagwat Sahai* v. *Brijbukhan Prasad Singh*, (1920) 57 Ind Cas 291 (294): 1 Pat L Tim 171; *Porlap Chunder* v. *Surnomoyyee*, (1873) 19 Suth W R 361 (366); *Wise* v. *Ameeronnissa*, (1865) 3 Suth W R 219 (220) [Report by Munsif].

(2) *Rani Surut* v. *Babu Prosanno*, (1867-70) 13 Moo Ind App 607 (617): 6 Beng L R 677: 15 Suth W R 20: 2 Suth 393: 2 Sar 632 P C; *Ram Gopal Roy* v. *Gordon Stuart & Co*, 17 Suth W R (P C) 285; *Nilmadhub* v. *Raj Kishore*, (1913) 21 Ind Cas 413 (414): 18 Cal L Jour 220; *Brindabun* v. *Dhununjoy*, (1872) 18 Suth W R 452 (453); *Govinda Priya* v. *Ratan Dhupi*, (1906) 4 Cal L Jour 37 (39); *Monkee Dumber* v. *Mookee Bullunder Sahee*, (1871) 15 Suth W R 423 (424); *R M S Chetty* v. *Mahomed Essa*, (1901) 5 Cal W N 692 (701); *Jadavendra Nandan* v. *Gajendra Narain Das*, (1918) 47 Ind Cas 650 (651): 28 Cal L Jour 203; *Muffizuddin Bepari* v. *Jalaluddin*, 1928 Cal 748 (748): 110 Ind Cas 448 [The Appellate Court may however issue a fresh commission if the investigation is unsatisfactory].

(3) *Lukhi Narain* v. *Jodu Nath*, (1894) 21 Cal 504 (511): 21 Ind App 39: 6 Sar 408 P C.

(4) (1907) 31 Bom 381 (392): 9 Bom L R 671: 34 Ind App 115: 2 Mad L Tim 435: 11 Cal W N 721: 17 Mad L Jour 347: 6 Cal L Jour 5: 4 All L J 461.

O.26, R.11, Notes 1—3.

to such person as it thinks fit directing him to make such examination or adjustment.

[1877—Ss. 394, 395, 400; 1859—S. 181.]

Synopsis.

1. Commissioner to examine accounts.
2. "Is necessary."
3. Power of commissioner to decide questions of law.
4. Disobedience of order made by commissioner.
5. Non-payment of commissioner's fees.
6. Appeal.
7. Form.

1. Commissioner to examine accounts.—In a suit for accounts the usual and proper procedure is first of all to ascertain whether the defendant is *liable* to account. If the accounts are complicated and require an examination then the Court may appoint a commission under this rule.[1]

The Court may issue a commission even without the consent of parties.[2]

Under S. 265 of the Chota Nagpur Tenancy Act (VI of 1908), the Deputy Commissioner is empowered to issue commissions to examine accounts in any suit, appeal or proceeding pending before him.

2. "Is necessary."—Before an order for the appointment of a Commissioner can be made, the examination or adjustment of accounts must be considered *necessary*.[1]

3. Power of Commissioner to decide questions of law.—The Court cannot delegate its judicial powers to a Commissioner in the matter of taking evidence and determining issues.[1] Thus it is for the Court and not the Commissioner to decide as to the truth or falsity of the account-books[2] or as to whether a certain contract was or was not authorised.[3] In a recent decision of the Privy Council it was held that it is irregular to appoint a Commissioner to give *findings* on mixed questions of law and fact such as, for instance, the nature of a contract.[4] The Commissioner can determine *only the extent*, or the *quantum* and not the *factum* of liability.[5] The function

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Order 26, Rule 11—Note 1.

(1) *Das v. Cachar Native Joint Stock Co.* 1926 Cal 349 (350): 87 Ind Cas 764; *Ebrahim v. Shaban*, (1872-1892) L B R 309: *Degambar Mazumdar v. Kally Nath*, (1881) 7 Cal 654 (657): 9 Cal L Rep 265; *Syad Shah Ali Ahmad v. Bibee Nusibun*, (1875) 24 Suth W R 70 (70); *Thirukumaresan v. Subbaraya*, (1897) 20 Mad 313 (316).

(2) *A Watson v. Aga Mehedee*, (1873-74) 1 Ind App 346 (362): 3 Sar 884 P C.

Note 2.

(1) *Bharat Chandra v. Kiran Chandra*, 1925 Cal 1069 (1072): 52 Cal 766: 90 Ind Cas 944; *Annoda Prasad v. Dwarka Nath*, (1881) 6 Cal 754 (758): 8 Cal L Rep 321 [If taking of accounts by Judge would occasion a waste of public time, Court can issue with necessary instructions]; *Gauri Lal v. Raja Babu*, 1929 Pat 626 (627) [Commission issued for taking accounts from a guardian of property]; *Chand Ram v. Brojo Gobind*, (1873) 19 Suth W R 14 (15) [*Held*, not necessary to issue a commission].

Note 3.

(1) *Tulsi Ram v. Dina Nath*, 1926 Lah 145 (146): 89 Ind Cas 833; *Ramchander v. Gudar Potedar*, 1925 Pat 576 (576): 3 Pat L Rep 136: 89 Ind Cas 343: 7 Pat L Tim 161.

(2) *Assarmal v. Hundomal*, 1925 Sind 265 (265): 91 Ind Cas 766.

(3) *Vishendas Nihal Chand v. Nazar Ali Samji*, 1924 Sind 9 (10): 75 Ind Cas 1014: 17 Sind L R 316; *Abdul Wahab v. Rokia Bibi*, 1924 Mad 406 (408): 73 Ind Cas 903 [Powers and functions of official referee as compared to a commissioner under this rule discussed].

(4) *Ram Krishna v. Ratan Chand*, 1931 P C 136 (140): 1931 All L J 458: 33 Bom L R 988: 53 Cal L Jour 561: 35 Cal W N 841: 132 Ind Cas 613: 58 Ind App 173: 61 Mad L Jour 665: 1931 Mad W N 733: 34 Mad L W 175: 58 All 190.

(5) *Bharat Chandra v. Kiran Chandra*, 1925 Cal 1069 (1072): 52 Cal 766: 90 Ind Cas 944; *Nalini Kumar v. Gangadhar Chowdhry*, 1929 Cal 418 (422): 49 Cal L Jour 245: 120 Ind Cas 100.

of the Commissioner is to place himself as an *assistant* to the Court so as to enable the Court to understand and appreciate the accounts and come to a decision.[6] O.26, R.11, Notes 3—7.

A Commissioner has no power to review as under O. 47, R. 1.[7]

The High Court of Bombay has however held in the undermentioned case[8] that a Commissioner appointed by a Judge on the Original Side of the High Court can decide questions of law arising while accounts are taken.

4. Disobedience of order made by Commissioner.—A Commissioner is an officer of the Court and the Court can issue an attachment to compel a party to obey his order.[1]

5. Non-payment of Commissioner's fees.—The suit should not be dismissed for failure to deposit the Commissioner's fee.[1]

6. Appeal.—An order under this rule is *not a decree* and is not appealable[1] nor is the order one appealable under O. 43, R. 1. The High Court of Calcutta has however held in the undermentioned cases[2] that an order giving directions to the Commissioner amounts to a decree and is appealable. *See* Notes to S. 2, sub-S. (2).

7. Form.—For the form of a commission to examine accounts, *see* Appendix H, Form No. 9.

R. **12.** [S. 395.] (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination. O.26, R.12.

Court to give Commissioner necessary instructions.

(2) The proceedings *and report* (*if any*) of the Commissioner shall be evidence in the suit, *but where* the Court has reason to be dissatisfied with them, *it may* direct such further inquiry as *it shall think fit*.

Proceedings and report to be evidence. Court may direct further enquiry.

[1877—Ss. 394, 395, 400; 1859—S. 181.]

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(6) *Tincowri Debi* v. *Suttya Doyal*, (1907) 6 Cal L Jour 105 (108, 109).

(7) *Fernandez* v. *Rodrigues*, 1924 Bom 231 (232): 47 Bom 593: 25 Bom L R 280: 82 Ind Cas 593.

(8) *Laxmibai* v. *Hussainbhai*, (1916) 36 Ind Cas 618 (620): 18 Bom L R 798: 41 Bom 719.

Note 4.

(1) *Rajendra* v. *Ramnarayan*, (1869) 3 Beng L R App 3; *Dhuramdhar* v. *Bhau Govind*, (1873) 10 Bom H C R O C J 4.

Note 5.

(1) *Ragava* v. *Vedanta*, (1881) 3 Mad 259 (259): 5 Ind Jur 633.

Note 6.

(1) *Narayan Balkrishna* v. *Gopal Jiv Ghadi*, (1914) 23 Ind Cas 889 (890): 16 Bom L R 206: 38 Bom 392; *Kaluram Pirchand* v. *Gangaram Sakharam*, (1914) 23 Ind Cas 605 (606): 16 Bom L R 67: 38 Bom 331. See also *Rustomji Burjorji* v *Kessowji*, (1884) 8 Bom 287 (294).

(2) *Biswanath* v. *Banibanta*, (1896) 23 Cal 406 (409); *Khadem Hussein* v. *Emdad Husain*, (1902) 29 Cal 758 (766, 768): 5 Cal L Jour 617; *Balkishen* v. *Khupnu*, (1904) 31 Cal 722 (724): 8 Cal W N 572 [Stay also can be granted]. But see *Sree Nath* v *Radha Nath*, (1883) 9 Cal 773 (777): 7 Ind Jur 650; *Rahimbhoy* v. *Turner*, (1891) 15 Bom 155 (159): 18 Ind App 6: 5 Sar 639: 15 Ind Jur 35 P C [*Decree* directing defendant to account is appealable].

O.26, R.12, Notes 1—3.

Synopsis.

1. Scope of the rule.
2. "Shall be evidence in the suit."
3. Objections to Commissioner's report.
4. Power and duty of appellate Court.

Accounts ordered to be taken—Appeal. See R. 11, Note 6.

Commissioner's report, application to vary. See Note 3, F.-N. (1).

Evidentiary value of the Commissioner's report. See Note 2, Pt. (2); R. 11, Note 3, Pt. (6), also R. 10, Notes 3, 4, 9 and 10.

Instructions to Commissioner. See Note 1, Pt. (1) and R. 11, Note 2, F.-N. (1).

1. Scope of the rule.—The Court is bound to furnish the Commissioner with the requisite proceedings and issue definite instructions as to what he should do. The Commissioner may, if necessary, apply for enlargement of time fixed for the return.[1]

The rule contemplates the appointment of only *one* Commissioner. But the appointment of more than one is only a mere irregularity.[2]

2. "Shall be evidence in the suit."—The report of the Commissioner together with the evidence, if any, taken by the Commissioner is *evidence* in the suit[1] unless the Court is dissatisfied with and directs a further enquiry. But the report has not the effect of a *decision* in the case.[2]

The Court is not bound to take any other evidence than that furnished by the report, where it sees no reason to doubt its correctness.[3]

3. Objections to the Commissioner's report and to the appointment of a Commissioner.—A party is entitled to file objections to the report of the Commissioner and the Court is bound to give him a reasonable opportunity to produce evidence in support of his objections.[1] But where the reference to a Commissioner has been made by *consent*, the parties are bound by it and cannot go behind the consent so given.[2]

Objections to the report must be taken in the trial Court and cannot be raised for the first time in appeal.[3]

Order 26, Rule 12—Note 1.

(1) *Revachand* v. *Nihalchand*, 1892 Bom P J 318 (318).

(2) *Kishan Shah* v. *Gurmukh*, 1870 Pun Re No 40.

Note 2.

(1) *Rai Nursingh* v. *Rai Narain*, (1871) 3 N W P 217; *Ganesh Ram* v. *Ranja*, 1882 Pun Re No 161; *Rustomji* v. *Kessowji*, (1878-79) 3 Bom 161 (170).

(2) *R M S Chetty* v. *Mohamad Essa*, (1901) 5 Cal W N 692 (707).

(3) *Kishan Shah* v. *Gurumukh*, 1870 Pun Re No 40; *Joti Prasad* v. *Hardwari Mal*, 1932 All 128 (130): 53 All 54: 137 Ind Cas 884 [There is nothing in O 26 to prevent a Court from accepting the report of the Commissioner on a debatable point].

Note 3.

(1) *Hans Raj Walaiti Ram* v. *Nathu Mal*, 1929 Lah 782 (783): 30 Pun L R 501: 119 Ind Cas 490; *Thottamma* v. *Subramanian*, 1922 Mad 219 (220): 45 Mad 79: 68 Ind Cas 469: 14 Mad L W 620: 1921 Mad W N 843; *Firm of Murli Mal Dayal Chand* v. *Lachman*, (1914) 22 Ind Cas 526 (528): 72 Pun L R 1914: 45 Pun W R 1914; *Narrottam* v. *Harichand*, (1889) 13 Bom 868 (869) [Old Code—Motion to vary the report]; *Lutchmee Narain* v. *Byjnath*, (1897) 24 Cal 437 (439): 2 Cal W N 57; *Hormusji* v. *Bomanji*, (1865) 9 Bom 250 (252); *Sumar Ahmad* v. *Ismail Haji*, (1875-77) 1 Bom 158 (161).

(2) *Watson* v. *Aga Mehedee*, (1874) 1 Ind App 346 (362): 3 Sar 884; *The Firm of Murli Mal Dayal Chand* v. *Lachman*, (1914) 22 Ind Cas 526 (527): 72 Pun L R 1914: 45 Pun W R 1914; *Sethe Gugmull* v. *Mst Chahee*, (1874) 2 Ind App 34 (37): 3 Sar 419 P C.

(3) *Ma Dwe* v. *Ma Tin Lun*, (1920) 56 Ind Cas 972 (975): 12 Bur L Tim 228; *Venkata* v. *Venkataramaiya*, (1868) 1 Mad H C R 418 (419); *Kantee Chunder* v. *Gopee Madhub*, (1869) 11 Suth W R 3 (3); *Munshi Ram* v. *Misri*, (1915) 27 Ind Cas 598 (600): 9 Pun W R 1915: 70 Pun L R 1915 [Can't be raised in second appeal].

4. Powers and duties of the appellate Court.—While the Commissioner's report which has been affirmed by the trial Court should have great weight given to it and not be capriciously deviated from, it is not absolutely binding on the appellate Court.[1] The appellate Court is entitled, therefore, whenever necessary, to scrutinise the report and make such further enquiries into the matter as it may deem proper.[2] O.26, R.12, Note 4.

COMMISSIONS TO MAKE PARTITIONS.

O.26, R.13, Notes 1—2.

R. **13**. [S. 396.] *Where a preliminary decree for partition has been passed*, the Court may, *in any case not provided for by section* 54, issue a commission to such person as it thinks fit to make *the* partition *or separation* according *to the* rights *as declared in such decree.*

Commission to make partition of immoveable property.

[1877—S. 396.]

Synopsis.

1. Legislative changes.
2. Scope of the rule.
3. "Such person as it thinks fit."
4. Appeal.

Commission to divide non-revenue paying lands. See R. 14, Note 3.

Limitation. See Note 4, F.-N. (1).

1. Legislative changes.—

The word "person" has been substituted for the word "persons" which occurred in the old section in order to negative the view that had been held under the old Code that the Court could not appoint a *single* commissioner.[1]

2. Scope of the rule.—As has been seen in Note 9 to R. 10 the Court has a discretion in the matter of issuing a commission. It is not, under this rule, bound to appoint a Commissioner in every case.[1]

The essential difference between an arbitrator and a Commissioner appointed under this rule is that the latter merely submits his report for the approval of the Court whereas the former has a final authority to settle all matters of difference between the parties. Further. the former is selected by the parties and therefore his decision cannot be questioned except on the limited grounds specified in Schedule II whereas the latter is selected by the Court and the parties are therefore at liberty to challenge his report.[2]

Note 4.

(1) *Kankatala Chellamaiya* v. *Poleshetti Papaiya*, (1870) 6 Mad H C R 36 (37): [1 Mad H C R 1 and 1 Mad H C R 418 dissented from as being bad law].

(2) *R M S Chetty* v. *Mahomed Essa*, (1901) 5 Cal W N 692 (701, 706, 707); *Shankar Lal Kundan Lal* v. *Firm of Nanhe Mal Kallan Mal*, 1927 Lah 736 (737): 9 Lah L Jour 389: 104 Ind Cas 369 [Report incomplete]; *Ahmed* v. *Khasaji*, (1869) 6 Bom H C R 149. But see *Thiruvenkataswami Mudaliar* v. *Raghavachari*, (1898) 8 Mad L Jour 133 (134) [Proceeds according to R 292 of the Rules of Practice on the Original Side].

Order 26, Rule 13—Note 1.

(1) *Mul Chand* v. *Muhammad Ali Khan*, (1907) 29 All 235 (238): 1907 All W N 32: 2 Mad L Tim 63: 4 All L J 76; *Bhiwaji* v. *Narayan*, (1904) 6 Bom L R 586 (588); *Kanshi Nath* v. *Bulaki*, 1893 Pun Re No 124. But see *Gyanchunder* v. *Durga Churn*, (1881) 7 Cal 318 (320): 8 Cal L Rep 415.

Note 2.

(1) *Krishnamacharlar* v. *Kuppammal*, (1909) 4 Ind Cas 1131 (1132): 5 Mad L Tim 222: 31 Mad 540.

(2) *Abdul Basit* v. *Abdul Salam*, (1914) 25 Ind Cas 227 (228) Oudh; *Bhola Nath Ray* v. *Bata Krishna Ray*, 1927 Pat 135 (137): 1926

O.26, R.13, Notes 2—4.

An application for the appointment of a Commissioner is not governed by any rules of limitation.[3]

By S. 12 of the Bengal Estates Partition Act (V of 1897) a Civil Court passing a decree for an undivided share of an estate governed by this Act may cause the same to be executed as prescribed by this rule.

3. **"Such person as it thinks fit."**—The choice of the Commissioner lies with the Court. But a relation of one of the parties or their pleaders should not be appointed except with the consent of the other party.[1]

4. **Appeal.**—An order issuing a commission under this rule is not appealable under O. 43, R. 1. Nor is the order, one passed in execution within the meaning of S. 47.[1]

O.26, R.14.

R. 14. [S. 396.] (1) The Commissioner shall, *after such inquiry as may be necessary*, divide the property into as many shares as may be directed by the order under which the commission *was* issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

Procedure of Commissioner.

(2) The Commissioner shall then prepare and sign a report or *the Commissioners* (*where the commission was issued to more than one person and* they cannot agree) *shall prepare and sign* separate reports appointing the share of each party and distinguishing each share, (if so directed by the said order) by *metes and bounds*[5]. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall[4], *confirm, vary or set aside*[5], *the same.*

(3) *Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.*

[1877—S. 396 (2 & 3).]

Pat H C C 161: 7 Pat L Tim 739: 95 Ind Cas 321.

(3) *Lachmanan Chetty* v. *Ramanathan Chetty*, (1905) 28 Mad 127 (129): 14 Mad L Jour 436.

Note 3.

(1) *Ghose* v. *Popat Narain*, (1915) 30 Ind Cas 990 (991): 42 Cal 819: 19 Cal W N 609.

Note 4.

(1) *Alur Lakshmi Narasimha Sastrulu* v. *Venkata Narasamma*, (1919) 52 Ind Cas 614 (615) Mad; *Srinivasa Mudali* v. *Ramaswami Mudali*, (1915) 30 Ind Cas 380 (381): 2 Mad L W 693: 18 Mad L Tim 145 [Application for commission is only a step-in-aid in the suit and is not barred by any limitation]: 1915 Mad W N 725; *Mallayya* v. *Subbarayudu*, (1907) 17 Mad L Jour 144 (144); *Shah Mohammad Khan* v. *Hanwant Singh*, (1898) 20 All 311 (314): 1898 All W N 45; *Jogodishury* v. *Kallas Chundra*, (1897) 24 Cal 725 (733, 735, 738): 1 Cal W N 374.

Local Amendment.

O.26 R.14, Note 1—2.

PATNA.

Substitute the following for sub-Rules (2) and (3):—

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by metes and bounds. The commissioner or commissioners shall append to the report or where there is more than one, to each report a schedule showing the plots and areas allotted to each party and also unless otherwise directed by the Court, a map showing in different colours, the plots or portions of plots allotted to each party. In the event of a plot being sub-divided, the area of each sub-plot shall be given in the schedule and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports shall confirm vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up the final decree shall incorporate in the decree the schedule, and the map, if any, mentioned in sub-Rule (2) above, as confirmed or varied by the Court. The whole report or reports of the Commissioner or Commissioners shall not ordinarily be entered in the decree. When the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

Synopsis.

1. Legislative changes.
2. Mode of effecting partition.
3. Partition of non-revenue paying immoveable property.
4. Partition of joint family dwelling-house.
5. Allotment of shares.
6. Objections to Commissioner's report.
7. Resistence to Commissioner.
8. Issue of a new commission.
9. Decree.
10. Final decree to be engrossed on stamp paper.
11. Preliminary decree in a partition suit —Appeal.

Appeal. See Note 9, Pt. (4).

"Confirm, vary or set aside." See Note 4, Pt. (1) and Note 5, Pt. (4).

Metes and bounds. See Note 5, Pt. (1).

Partition Act, IV of 1893. See Note 4, Pt. (2).

1. Legislative changes.—

In sub-Rule (1), the words "after such enquiry as may be necessary" have been substituted for "ascertain and inspect the property and shall".

Sub-Rule (3) is almost new.

In sub-Rule (2), the words "or the Commissioners . . . . shall prepare and sign separate reports" have been newly added and the words "shall confirm, vary or set aside the same" have been substituted for the words "shall either quash the same". The object of the latter amendment was to negative the view taken in *Janki* v. *Gouri*, (1906) I. L. R. 28 All 75 (76) where, it was held that the Court had no power to *vary* the report.

2. Mode of effecting partition.—It is not contemplated by the rule that the Commissioner should propose a number of schemes and ask the

O.26, R.14, Notes 2—4.

Court to choose any one of them;[1] only the shares as ascertained by the decree have to be worked out by him. But the Court may in the case of a joint Hindu family with the consent of all co-parceners order, that any part of the property should remain joint.[2] Where a partition cannot be made without destroying the intrinsic value of the property[3] or where it would be inconvenient to disturb the exclusive possession of one co-sharer[4] the Court may also award a money compensation instead of dividing the properties.

3. **Partition of non-revenue paying immoveable property.**—A partition of Revenue paying land which has the effect of breaking up the joint liability of the sharers for revenue cannot be effected by the civil Court.[1] *See* S. 54 *ante*. Therefore when a *Revenue paying estate* has to be partitioned into several revenue paying estates such partition can be done only by the Collector because the revenue is affected.[2] But where no *allotment of separate revenue* is asked for, the civil Court is competent to allot the shares leaving the *whole estate liable for the whole revenue.*[3] The reason is the jurisdiction of the civil Court is restricted only on questions not affecting the right of the Government to assess and collect in its own way the public revenue.

4. **Partition of joint-family dwelling house.**—In the case of partition of non-revenue paying immoveable property such as a joint-family dwelling house, the Court can actually fix the particular area, rooms or part of the house to be allotted to the respective sharers.[1]

For cases under Partition Act IV of 1893, *see*[2] and for cases regarding valuation of suits *see*.[3]

Order 26, Rule 14—Note 2.

(1) *Bhiwaji* v. *Narayan*, (1904) 6 Bom L R 586 (587).

(2) *Raj Coomaree* v. *Gopal Chunder*, (1877-78) 3 Cal 514 (516).

(3) *Ashanullah* v. *Kali Kinkur*, (1884) 10 Cal 675 (676); *Kallian Banerji* v. *Modhu Sudan Banerji*, (1881) 8 Cal L Rep 259 (260) [A compensation allowed to co-sharer enhancing value of a portion].

(4) *Basanta Kumar* v. *Moti Lal*, (1911) 11 Ind Cas 370 (371): 15 Cal W N 555 (Note): 6 Cal L Jour 8 (Note); *Puddomonee* v. *Dwarka Nath*, (1876) 25 Suth W R 335 (342).

Note 3.

(1) *Badri Lal* v. *Bhagwat Narain*, (1882) 8 Cal 649 (661): 11 Cal L Rep 186: 6 Ind Jur 636; *Damoodar Misser* v. *Senabutty Misrain*, (1882) 8 Cal 537 (545): 10 Cal L Rep 401: 6 Ind Jur 584; *Rutton Monee* v. *Brojo Mohun*, (1874) 22 Suth W R 11 (11); *Rutton Monee* v. *Brojo Mohun*, (1874) 22 Suth W R 333 (333); *Chundernath Nundi* v. *Hur Narain*, (1881) 7 Cal 153 (155): 4 Shome L R 44; *Ali Buksh* v. *Shame Khan*, 1876 Pun Re No 14.

(2) *Debi Singh* v. *Sheo Lal Singh*, (1889) 16 Cal 203 (207): 13 Ind Jur 296.

(3) *Jogodishury* v. *Kallash*, (1897) 24 Cal 725 (734, 735, 745): 1 Cal W N 374; *Ajodhia Lall* v. *Gumani Lall*, (1878) 2 Cal L Rep 184 (186); *Zahrun* v. *Gouri Sunkar*, (1887) 15 Cal 198 (201).

Note 4.

(1) *Janki Prasad* v. *Gauri Sahai*, (1906) 28 All 75 (76): 1905 All W N 188: 2 All L J 709.

(2) *Kadir Bacha Saheb* v. *Abdul Rahiman Sahib*, (1901) 24 Mad 639 (641) [Power to sell under section 2]; *Bai Hira Koer* v. *Trikamdas*, (1908) 32 Bom 103 (105): 10 Bom L R 28: 8 Mad L Tim 141 [Power to sell]; *Hiramoni Dasei* v. *Radha Ohurn Kar*, (1900) 5 Cal W N 128 (130), (Do.); *Hiramoni Dasei* v. *Radha Ohurn Kar*, (1901) 5 Cal W N 128 (130) [Preliminary decree or report of the commissioner no bar to proceeding under section 2]; *Sultan Begam* v. *Debi Prasad*, (1908) 30 All 324 (328): 1908 All W N 126: 5 All L J 352: 4 Mad L Tim 38 F B [Section 4 applies to Muhammadans]; *Balshet* v. *Miran Sahib*, (1899) 23 Bom 77 (79) [Applicability of section 4]; *Abdus Samad Khan* v. *Abdur Razzaq*, (1899) 21 All 409 (411): 1899 All W N 150 [Applicability of section 10].

(3) *Bhagwat* v. *Pashupati*, (1906) 3 Cal L Jour 257 (259): 10 Cal W N 564 [Value of whole property determines jurisdiction]; *Vydinatha* v. *Subramania*, (1885) 8 Mad 235 (236), (Do.); *Hikmat Ali* v. *Waliunnissa*, (1890) 12 All 506 (509): 1890 All W N 128 [Value of share determines jurisdiction]; *Lakshman* v. *Babaji*, (1884) 8 Bom 81 (84), (Do.); *Ramayya* v. *Subbarayudu*, (1890) 13 Mad 25 (27) [Case of co-owners].

5. Allotment of shares.—The duty of the Commissioner is not to give possession but to allot the shares and prepare a report fixing the shares and distinguishing the same by metes and bounds, if so ordered.[1] The Court after considering the rights and objections of the different parties should make the final allotment.[2] A casting of lots for an equitable distribution of shares is not opposed to the rule and can be resorted to by the Courts.[3] O.26, R.14, Notes 5—9.

An order of the Court approving the allotment and division made by a Commissioner has been held to be binding on the parties even though a fresh decree is not passed in accordance with the report.[4]

6. Objections to Commissioner's report.—Objections to the report can be filed within the period fixed by the Court.[1] When they are not so done in the trial Court they cannot be raised for the first time in appeal.[2] But the High Court has power to see whether the Commissioner has exceeded his jurisdiction and acted within the scope of his warrant of commission.[3]

7. Resistance to Commissioner.—As already seen in Note 4, R. 11 Commissioners are officers of the Court and a process of attachment can be issued by the Court to enforce the orders of the Commissioner. But the Court is not justified in *dismissing the suit* when the Commissioner is resisted in executing his warrant of commission.[1]

8. Issue of a new commission.—Ordinarily a second commission ought not to be issued on the mere objection of a party.[1] But where the report is unsatisfactory,[2] or the Commissioner has so misconceived his duties as to render his report useless, a second commission may be issued in which case, however, the old report should be superseded.[3]

9. Decree.—The proceedings contemplated by the rule are proceedings in the suit and not in execution[1] and the Court is bound to pass a

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Note 5.

(1) *Shah Muhammad* v. *Hanwant Singh*, (1898) 20 All 311 (313): 1898 All W N 45; *Sohan Lal* v. *Hardeo Sahai*, (1897) 19 All 194 (195): (1897) 17 All W N 16 [Wall cannot be ordered to be built by Amin to separate shares].

(2) *Narsingh Narain Singh* v. *Harkhu Singh*, (1908) 8 Cal L Jour 521 (523).

(3) *Ananta Ramappa* v. *Subraya*, (1915) 29 Ind Cas 245 (245): 2 Mad L W 430.

(4) *Wadalmanti Shrinivasa* v. *Wadalmanti Venkat Ramaiah*, (1913) 20 Ind Cas 908 (910): 14 Mad L Tim 157: 1914 Mad W N 144. See, however, *Narsingh Narain Singh* v. *Harkhu Singh*, (1908) 8 Cal L Jour 521 (523) *ante* (Semble).

Note 6.

(1) *Sirajuddin* v. *Sharfuddin*, (1919) 50 Ind Cas 152: 17 All L J 498; *Abdul Basit* v. *Abdul Salam*, (1914) 25 Ind Cas 227 (228) Oudh; *Narrotam* v. *Hari Chand*, (1889) 13 Bom 368 (370) [Practice in the original side]; *Sumnun Jha* v. *Bhooput Jha*, (1872) 18 Suth W R 498 (499) [Party objecting is bound to show some better and satisfactory arrangement].

(2) *Ma Dwe* v. *Ma Tin Lun*, (1920) 56 Ind Cas 972 (975): 12 Bur L Tim 228; *Gyan Chunder Sen* v. *Durga Churn Sen*, (1881) 7 Cal 318 (320): 8 Cal L Rep 415.

(3) *Krishna Reddiar* v. *Ramanuja Reddiar*, 1929 Mad 492 (492): 114 Ind Cas 232.

Note 7.

(1) *Masumunnissa* v. *Latifan*, (1910) 5 Ind Cas 872 (873): 7 All L J 196: 32 All 819.

Note 8.

(1) *Thothamma* v. *Subramaniyyan*, 1922 Mad 219 (220): 45 Mad 79: 68 Ind Cas 469: 14 Mad L W 620: 1921 Mad W N 843.

(2) *Mohammad Sadiq* v. *Bagit Sah*, 1926 Pat 159 (160): 90 Ind Cas 834.

(3) *Thothamma* v. *Subramaniyyan*, 1922 Mad 219 (220): 45 Mad 79: 68 Ind Cas 469: 14 Mad L W 620: 1921 Mad W N 843; *Khagendra* v. *Prafulla Kumar*, 1931 Cal 170 (170): 34 Cal W N 909: 130 Ind Cas 840 [Second commissioner can rectify the mistakes of the first].

Note 9.

(1) *Bhoobun Moyi Dabea* v. *Shurut Sundery Dabea*, (1886) 12 Cal 275 (277); *Durga Das* v. *Faqir Chand*, 1906 Pun Re No 47: 86 Pun L R 1907: 94 Pun W R 1906; *Dwaraka Nath Misser* v. *Barinda Nath Misser*, (1895) 22 Cal 425 (432).

O.26. R.14. Notes 9—11.

final decree after perusing the report.[2] The High Court of Madras has held that the Court can pass a final decree *suo motu* without an application by the party, the reason being that the suit must be considered *pending* until a final decree is passed.[3] Though the *final decree* is appealable, no appeal lies against an *order* of the Court confirming or varying the report.[4]

10. Final decree to be engrossed on stamp paper.—A final decree for partition passed in accordance with the report of the Commissioner must be stamped as an instrument of partition within the meaning of S. 2, Cl. (15) of the Indian Stamp Act (II of 1899).[1]

11. Preliminary decree in a partition suit—Appeal.—Under S. 396, Cl. (1) of the old Code corresponding to R. 13 of this order, it was provided that the Court can issue a commission "after ascertaining the several parties interested . . . . and their several rights . . . ." There was a conflict of opinion as to whether such an ascertainment amounted to a decree. It was held by the High Courts of Calcutta[1] and Madras[2] that it did amount to a decree while the chief Court of Punjab[3] held, that it did not. The conflict has now been set at rest by the Legislature by using the words *preliminary decree* in R. 13 to avoid any possible doubt in the matter.

GENERAL PROVISIONS.

O.26, R.15, Note 1.

R. **15**. [S. 397.] Before issuing any commission under this *Order*, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Expenses of Commission to be paid into Court.

[1877—S. 973; 1859—S. 382.]

Synopsis.

1. Expenses of commission.
2. Reduction of Commissioner's Bills when justified.

1. Expenses of commission.—The rule provides that the Court may, if it thinks fit, order the party requiring the commission to deposit the

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(2) *Zubaida Jan* v. *Mohammad Taieb*, 1898 All W N 99 (99); *Wasdeo* v. *Rupchand*, 23 Pun Re 1905: 13 Pun L R 1905: 31 Pun W R 1905 [Decree—Effect—Is in favour of each shareholder].

(3) *Appadu* v. *Venkatarangu Rau*, (1908) 18 Mad L Jour 23 (24): 3 Mad L Tim 328: *Appadu Patnaidu* v. *Togaram Appalaswami Patnaidu*, (1910) 8 Ind Cas 393 (393): 8 Mad L Tim 295: (1911) 1 Mad W N 74.

(4) *Pirthipal* v. *Bhaskor*, 1926 Oudh 195 (196): 91 Ind Cas 817.

Note 10.

(1) *Balaram* v. *Ramakrishna*, (1905) 29 Bom 366 (368): 7 Bom L R 308; *Jothindra Mohun* v. *Bejoy Chand*, (1905) 32 Cal 483 (491).

Note 11.

(1) *Bipin Behari* v. *Lall Mohun*, (1886) 12 Cal 209 (212); *Bhola Nath* v. *Sonamoni*, (1886) 12 Cal 273 (275): 10 Ind Jur 834; *Dulhin Golab Koer* v. *Radha Dulari*, (1892) 19 Cal 463 (467); *Bhoobun Moyi* v. *Sharut Sundary*, (1886) 12 Cal 275 (278) [In this case no declaration as to the rights and hence it was held that no appeal lay].

(2) *Krishnasami* v. *Rajgopala*, (1895) 18 Mad 73 (87): 4 Mad L Jour 212.

(3) *Parma Nand* v. *Rup Chand*, 1896 Pun Re No 37; *Kanshi Nath* v. *Bulaki Das*, 1893 Pun Re 124. See also *Rustom Khan* v. *Latif Khan*, (1902) Pun Re 49: 56 Pun L R 1902.

necessary expenses therefor.[1] The rule is not exhaustive and does not prevent the Court from imposing any terms that it chooses as a condition precedent to the issuing of a commission.[2] Nor does an omission on the part of the Court to require the deposit of the expenses prevent the Commissioner from recovering his remuneration from the party at whose instance he was engaged.[3] O.26, R.15, Notes 1—2.

The object of requiring the expenses to be deposited before hand is, that the Commissioner who is an officer of Court ought not to be driven to a separate suit or execution to get his fees.[4] As to whether an order directing the deposit of fees to the Commissioner is capable of execution, the High Court of Calcutta[5] has held that it can be executed under S. 36 while the High Court of Madras[6] has held that it cannot be so executed. It has been held in the undermentioned cases that the proper course on the failure of the party to deposit the commissioner's fees is to include it in the costs of the suit and enter it in the decree.[7]

But failure to deposit the required fees can afford no ground for rejecting the report[8] or for dismissing the suit.[9]

2. Reduction of Commissioner's Bill when justified.—The reduction or disallowance of a Commissioner's Bill is a matter for the trial Court.[1] The Court will not be justified in re-opening or reducing the fees fixed in the presence of the parties and paid into Court.[2]

Powers of Commissioners.

R. **16.** [S. 399.] Any Commissioner appointed under this *Order* may, unless otherwise directed by the order of appointment,— O.26, R.16.

(*a*) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

Order 26, Rule 15—Note 1.

(1) *Nripendra Bhusan* v. *Raja Pramatha*, 1927 Cal 907 (907): 104 Ind Cas 814; *Jethabhai Versey & Co* v. *Amarchand Madhavji & Co*, 1924 Bom 90 (92): 25 Bom L R 713: 82 Ind Cas 852; *Monindrobhoosun* v. *Shosheebhoosun*, (1880) 5 Cal 866 (867) [In case of Pardanashin lady, Court will not direct payment by her].

(2) *Nripendra Bhusan* v. *Raja Pramatha*, 1927 Cal 907 (907): 104 Ind Cas 814.

(3) *Gopalaratnamayyar* v. *B Narasimma Nayadu*, (1882) 4 Mad 399 (401); *Raj Mokeeny* v. *Muddoosoodun*, (1865) Bourke 24 [But the commissioner has no lien].

(4) *Nanda Lal Sircar* v. *Benode Behari Roy*, (1911) 9 Ind Cas 313 (314): 15 Cal W N 221; *Pramatha Nath* v. *Sheik Abdul Aziz*, 1923 Cal 436 (437, 438): 27 Cal W N 430: 37 Cal L Jour 406: 75 Ind Cas 443 [Commissioner ought not to take a mortgage from the party for his fees].

(5) *Chandra Kumar De* v. *Kusum Kumari*, *Roy*, 1925 Cal 57 (58): 40 Cal L Jour 180: 84 Ind Cas 724: 52 Cal 269. But see *Lalit Mohan Banerjee* v. *Baadeo Narain Singh*, (1913) 21 Ind Cas 191 (191) Cal.

(6) *Venkatanarasimhulu* v. *Narasimhamurti*, (1900) 10 Mad L Jour 241 (242); *Alagappa Chetty* v. *Muthiah Chetty*, (1896) 6 Mad L Jour 124 (125).

(7) *Ram Saran Das* v. *Ram Lal*, 1926 Lah 62 (62): 89 Ind Cas 479 (1). See also *Tadhin Proshad Singh* v. *Sardar Coomar Narayan Singh*, (1906) 10 Cal W N 234 (236).

(8) *Jagat Kishore* v. *Dinanath*, (1890) 17 Cal 281 (284).

(9) *Ragava* v. *Vedanta*, (1881) 3 Mad 259 (260): 5 Ind Jur 633; *Sheik Sahib* v. *Mohammad*, (1890) 13 Mad 510 (511).

Note 2.

(1) *Panchanan Sen* v. *Madhu Sudan Mullik*, (1918) 44 Ind Cas 496 (496): 23 Cal W N 295.

(2) *Bhagavat Sahai* v. *Brij Bhukhan Prasad Singh*, (1926) 57 Ind Cas 291 (294): 1 Pat L Tim 171.

O.26, R.16, Notes 1—2.

(*b*) call for and examine documents and other things relevant to the subject of inquiry;

(*c*) at any reasonable time enter upon or into any land or building mentioned in the order.

Synopsis.

1. Powers of Commissioner. See Note 3 to R. 10, supra. 2 Review. See Note 3 to R. 11, supra.

1. **Powers of Commissioner.**—*See* Note 3, R. 10 *supra.*

2. **Review.**—*See* Note 3, R. 11, *supra.*

O.26, R.17, Notes 1—2.

R. **17**. [S. 399.] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this *Order* whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, *and* for the purposes of this *rule* the Commissioner shall be deemed to be a Civil Court.

Attendance *and* examination of witnesses before Commissioner.

(2) *A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.*

[1877—S. 399.]

Synopsis.

1. Scope of the rule. 2. Sub-Rule (2).

Examination of witnesses before Commissioner. See Note 1, Pt. (1).

1. **Scope of the rule.**—Under this rule the Commissioner is given the powers of Court in regard to the summoning and procuring the attendance of witnesses. The reason is the commissioner is a delegate of the Court acting under its authority.[1]

2. **Sub-Rule (2).**—Sub-R. (2) is new. In the absence of a similar provision under the old Code it was held that if a witness residing outside juris-

Order 26, Rule 17—Note 1.

(1) *Mt Feroza Jan* v. *Mirza Amir Ali*, 1923 Oudh 119 (120): 9 Oudh L J 593: 74 Ind Cas 445.

diction refused to appear before the Commissioner pursuant to his notice, the only course left to the Commissioner was to return the warrant of commission.[1] Such a contingency has now been obviated. O.26, R.17, Note 2.

O.26, R.18, Notes 1—2.

R. **18**. [S. 400.] (1) *Where* a commission is issued under this *Order*, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

Parties to appear before Commissioner.

(2) *Where all or any of* the parties do not so appear, the Commissioner may proceed *in their absence.*

[1877—Ss. 394, 395, 400; 1859—S. 181.]

Local Amendments.

ALLAHABAD.

In clause (1) *after* the words "agents or pleaders" *substitute* a comma for the full stop. and *add* the following words:—

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

OUDH.

In Rule 18, sub-Rule (1), *after* the words "agents or pleaders" *substitute* a comma for the full stop, and *add* the following words:—

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

RANGOON.

The following shall be *substituted* for sub-Rule (1) of Rule 18:—

"(1) When a commission is issued under this Order, the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders, unless otherwise directed by the Court, within fifteen days."

Synopsis.

1. Parties to appear.
2. Form.

1. Parties to appear.—Under this rule it is obligatory on the part of the Court to order the parties to appear before the Commissioner either in person or by their recognised agents or pleaders. Where a party fails to appear in pursuance of the order of Court, the Court can proceed under O. 17, R. 2.[1]

2. Form.—*See* Appendix II; Form No. 7.

Order 26, Rule 18—Note 1.

(1) *M Mahomed Tuque* v. *Judo Nath*, (1871) 16 Suth W R P C 28 (28); *Eshan Chunder* v. *Soorjoo Loll*, (1862) Suth W R S P 1 (2): Marsh 139: 1 Ind Jur O S 3.

Note 2.

(2) *Mahomed* v. *Wazid Ali*, (1896) 23 Cal 404 (405).

O.26, R.19. **The following rules 19 to 22 have been added to this Order by Act X of 1932:—**

"Commissions issued at the instance of foreign tribunals.

R. **19.** [New.] (1) *If a High Court is satisfied—*

(a) *that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,*

(b) *that the proceeding is of a civil nature, and*

(c) *that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of rule* 20, *issue a commission for the examination of such witness.*

(2) *Evidence may be given of the matters specified in clauses* (a), (b) *and* (c) *of sub-rule* (1)—

(a) *by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Governor-General in Council, or*

(b) *by a letter of request issued by the foreign court and transmitted to the High Court through the Governor-General in Council, or*

(c) *by a letter of request issued by the foreign court and produced before the High Court by a party to the proceeding.*

O.26, R.20. R. **20.** [New.] *The High Court may issue a commission under rule* 19—

(a) *upon application by a party to the proceedinj before the foreign court, or*

(b) *upon an application by a law officer of the Local Government acting under instructions from the Local Government.*

O.26, R.21. R. **21.** [New.] *A commission under rule* 19 *may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where the High Court is established under the Indian High Courts Act,* 1861, *or the Government of India Act,* 1915, *and the witness resides within the local limits of its ordinary original civil jurisdiction, to any person whom the Court thinks fit to execute the commission.*

R. **22.** [New.] *The provisions of rules* 6, 15, 16, 17 *and* 18 *of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the Governor-General in Council, along with the letter of request for transmission to the foreign court.*" **O.26, R.22.**

Local Amendments.

RANGOON.

The following shall be added as Rules 19 to 26, respectively. (This is added before the amendments of Rules 19 to 22 by the Indian Legislature in 1932):—

"Fees to commissioners for local investigation, and commissioners of partition, or to take accounts, or for the examination of witnesses.

19. Civil Courts in issuing commissions will be guided by the provisions of Rule 15, and subject to the provisions of Rule 23, will exercise their own judgment in fixing a reasonable sum for the expenses of the commission.

Expenses of commissions.

20. Under Government of India Resolution in the Home Department (Judicial, No. 10-1101, dated 21st July, 1875), Judicial Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces.

Judicial Officers prohibited from accepting fee.

21. It is to be understood that no part of the fee sent for the execution of a commission is to be accepted, either personally or on behalf of Government. The execution of a commission is an official act which judicial officers are bound to perform when called upon and is not work undertaken for a private body.

22. In all cases the unexpended balance, which remains after all charges have been deducted, should be returned to the Court issuing the commission.

Refund of unexpended balance of expenses.

Fees to commissioners of partition or to take accounts or to examine witnesses.

23. The following fees are to be allowed to commissioners of partition or to take accounts, or for the examination of witnesses, namely:—

Commissioner's fees for every effective meeting shall not exceed three gold mohurs for the first two hours, and one gold mohur for each succeeding hour.

Fees to commissioners for administering an oath or solemn affirmation to a declarant of an affidavit.

24. When under the orders of a Court in the Town of Rangoon, or of a District Court, an oath or solemn affirmation is administered to a declarant of an affidavit, at his request elsewhere than at the Court, a fee of Rs. 16 shall be paid by the said declarant:

Provided that—

(*a*) the administration of the oath or of solemn affirmation elsewhere than in Court shall be authorised by the Court by order in writing;

(*b*) if more than one affidavit is taken at the same time and place, the fee shall be Rs. 8 for each affidavit after the first;

O.26, R.22.

(*c*) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs. 80;

(*d*) in pauper suits and appeals, when the affidavit of a pauper is taken, no fee shall be charged.

25. Affidavits taken under Rule 24 shall be taken out of Court hours. The fees shall be retained by the commissioner for administering the oath or solemn affirmation.

No fee for administration of oath under the order of a Court.

26. No fee shall be charged for the administration of an oath under the order of any Court other than those specified in Rule 24.''

MADRAS.

Read the following Order as 26-A (new):—

ORDER XXVI-A.

''1. The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court.

2. The report of the commissioner shall be evidence in the suit and shall form part of the record.

3. Before issuing any commission under this order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.''

ORDER XXVII.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

O. 27, R. 1. Notes 1—2.

R. 1. [New.] *In any suit by or against the Secretary of State for India in Council, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.*

Suits by or against Government.

[*See* Sections 79 and 80.]

Synopsis.

1. Suits by or against Government. State or public officer. See S. 80.
2. Notice in suits against Secretary of

1. Suits by or against Government.—Suits by or against the Government must be instituted by or against the Secretary of State for India in Council, *vide* S. 79.

2. Notice in suits against Secretary of State or public officer.—*See* S. 80.

R. **2.** [S. 417.] Persons being *ex-officio* or otherwise authorized to act for *the* Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of *the* Government.

Persons authorized to act for Government.

O. 27, R. 2. Notes 1—2.

[1877—S. 417; 1859—S. 17, cl. (3). *See* O. 3, R. 2.]

Synopsis.

1. Scope of the rule.
2. Collector, if can sue without power of attorney from Financial Commissioner.

1. Scope of the rule.—As to recognised agents generally *see* O. 3, R. 2. Collectors and Personal Assistants to Collectors have been authorised to act for the Government in judicial proceedings. But a Personal Assistant is not agent of the *Collector*. It is not permissible for the Personal Assistant to sign a vakalat which purports to be executed by the Collector.[1]

2. Collector, if can sue without power of attorney from Financial Commissioner.—In Punjab a Collector is competent to institute a suit on behalf of the Secretary of State for India in Council without obtaining a power of attorney from the Financial Commissioner.[1] All Government Pleaders in the Punjab are also authorised to act for Government as their recognised agents.[2]

R. **3.** [S. 418.] In suits by *or against* the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of *residence* of the plaintiff *or defendant*, it shall be sufficient to insert the words "The Secretary of State for India in Council."

Plaints in suits by or against Government.

O. 27, R. 3.

[1877—S. 418; 1859—S. 36.]

R. **4.** [S. 419.] The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State *for India* in Council *issued by* such Court.

Agent for Government to receive process.

O. 27, R. 4.

[1877—S. 419; 1859—Ss. 52, 67.]

Order 27, Rule 2—Note 1.

(1) *Lakshmi Narayana* v. *Secretary of State*, 1928 Mad 96 (96): 89 Mad L Tim 112: 105 Ind Cas 84.

Note 2.

(1) *Secretary of State* v. *Mehr Bakhsh*, (1905) Pun Re No 84: 160 Pun L R 1905: 116 Pun W R 1905.

(2) *E I Ry Co, Calcutta* v. *Firm Piyare Lal Sohan Lal*, 1928 Lah 774 (775): 112 Ind Cas 736: 10 Lah 860.

O. 27, R. 5. R. **5.** [S. 420.] The Court, in fixing the day for the Secretary of State *for India* in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State *for India* in Council or the Government, and may extend the time at its discretion.

Fixing of day for **appearance** *on behalf of Government.*

[1877—S. 420; 1859—S. 67. *See* O. 5, R. 6.]

Local Amendment.

MADRAS.

(1) *Substitute* the following *for* Rule 5 of Order 27, Schedule I:—

"5. The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion."

O. 27, R. 6. R. **6.** [S. 421.] The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State *for India* in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

Attendance of person able to answer questions relating to suit against Government.

[1877—S. 421; 1859—S. 67. *See* O. 10, R. 4.]

O. 27, R. 7. R. **7.** [S. 423.] (1) *Where the defendant is* a public officer *and*, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

Extension of time to enable *public* officer to make reference to Government.

(2) Upon such application the Court *shall* extend the time for so long as appears *to it* to be *necessary*.

[1877—S. 423; 1859—S. 69. *See* S. 2, sub-Section 17.]

Synopsis.

1. **Suit against public officer.**

1. Suit against public officer.—A suit against a public officer should be brought in his personal and not in his official name.[1] **O. 27, R. 7, Note 1.**

O. 27, R. 8.

R. **8.** [Ss. 426, 427.] (1) *Where* the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register *of civil suits.*

Procedure in suits against public officer.

(2) *Where no* application *under sub-rule* (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties:

Provided that the defendant shall not be liable to arrest nor his property to attachment, otherwise than in execution of a decree.

[1877—S. 427; 1859—S. 71.]

Local Amendment.

ALLAHABAD.—

Add the following to O. 27, as Rule 9:—

9. In every case in which the Government pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of Rule 8 (1), the defence of a suit against an officer of the Government, he shall, in lieu of a *vakalatnama*, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the following form:—Title of the suit, etc., I, *A. B.*, Government Pleader, appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be) Respondent (or etc.), in the suit:—or, on behalf of the Government [which, under Order 27, Rule 8 (1) of Act V of 1908 has undertaken the defence of the suit], respondent (or etc.), in the suit.

Synopsis.

1. Scope of the rule.

1. **Scope of the rule.**—As to the maintainability of suits against public officers, *see* S. 9, Note 58.

Order 27, Rule 7—Note 1.

(1) *The Sheriff of Bombay* v. *Hakmaji Motaji & Co*, 1927 Bom 521 (523, 525): 29 Bom L R 1071: 51 Bom 749: 104 Ind Cas 685.

O. 28, R. 1, Note 1.

ORDER XXVIII.

SUITS BY OR AGAINST MILITARY MEN [OR AIRMEN.]

R. 1. [S. 465.] (1) *Where* any officer, [soldier or Airman] actually serving the Government in a military (or air force) capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

(2) The authority shall be in writing and shall be signed by the officer, [soldier or airman] in the presence of (*a*) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (*b*) where the officer, [soldier or airman] is serving in military [or air force] staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer [soldier or airman] by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this *Order* the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer [soldier or Airman] belongs.

[1877—S. 465; 1859—S. 19.]

Synopsis.

1. Amendments after 1908.

1. Amendments after 1908.—The following amendments have been introduced by the Repealing and Amendment Act X of 1927:—

(1) The words "Or airmen" have been added after the words "Military men" in the heading.

(2) In R. 1 the words "Soldier or airman" have been substituted for the words "or soldier" wherever they occur and the words "or airforce" have been inserted after the word "military".

(3) In Rr. 2 and 3 the words "soldier or airman" have been substituted for the words "or a soldier" and "or soldier" wherever they occur.

O. 28, R. 2, Note 1.

R. **2.** [S. 466.] Any person authorized by an officer [soldier or Airman] to prosecute or defend a suit in his stead may prosecute or defend it *in person* in the same manner as the officer soldier or airman could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer [soldier or airman.]

Person so authorized may act personally or appoint pleader.

[1877—S. 466; 1859—S. 20.]

Synopsis.

1. Amendment after 1908.

1. **Amendment after 1908.**—*See* Note 1 to R. 1.

O. 28, R. 3, Note 1.

R. **3.** [S. 467.] Processes served upon any person authorized by an officer a [soldier or airman] *under rule* 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

Service on person so authorized. or on his pleader, to be good service.

[1877—S. 467; 1859—S. 20. *See* O. 3, R. 5.]

Synopsis.

1. Service on soldiers.

1. **Service on soldiers.**—*Vide* Notes under O. 5, Rr. 28 and 29.

For changes in the rule *vide* Note 1 to R. 1.

ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS.

O. 29, R. 1.

R. **1.** [S. 435.] In suits by *or against* a corporation, *any pleading* may be *signed* and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Subscription and verification of *plea*.

[1877—S.435; 1859—S.26. *See* O. 6, R. 14.]

Local Amendment.

MADRAS.

Insert the following as Rule 1-A of Order 29, Sch. I:—

"**1-A.** In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

Synopsis.

O. 29, R. 1, Notes 1—2.

1. Legislative changes.
2. Suits by or against corporations.
3. Suit by or against unregistered company.
4. Companies authorised to sue and be sued in the name of an officer or trustee.
5. Foreign corporation.
6. "Other principal officer of the corporation."
7. "Who is able to depose to the facts of the case."
8. Subscription and verification of pleadings.

"Companies authorised to sue and be sued in the names of an officer or trustee."

See Note 1.

Suit should be dismissed. See Note 3, Pt. (3).

1. Legislative changes.—

The words "or by a company authorised to sue or be sued in the name of an officer or of a trustee" which occurred in the old section after the word "corporation" have now been omitted. The reason for the omission is that most companies now-a-days are registered, and companies which are *unregistered* but which are authorised by law to sue must be very few, if any indeed exist, and no special treatment is necessary in respect of these.[1]

2. Suits by or against corporations.—This order deals with the subscription and verification of pleadings in suits by or against corporations; it says nothing about the manner in which the suit itself is to be framed.[1]

A "corporation" is a fictitious or imaginary person invested by the law with the attribute of perpetuity.[2] For the purposes of this order it may be stated to be a body authorised by Law to act as one individual and constituted either by prescription, by the Letters Patent, or by an act of the Legislature.[3] A corporation by prescription is one which has existed as a corporation "from a time whereof the memory of man runneth not to the contrary, and therefore, is looked upon in law to be well created". In other words it is a corporation of such antiquity that the consent of the sovereign may be presumed.[3-a] A *registered* company under the Companies Act is a corporation,[4] but not an unregistered one, unless it is authorised by Law to act as an individual. Unregistered companies so authorised are, as has been seen in Note 1, now practically non-existent.

A corporation must sue or be sued, not *in the names* of its agents or servants but in its *own corporate name*,[5] and, in the case of registered com-

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Order 29, Rule 1—Note 1.

(1) See Notes on clauses.

Note 2.

(1) *Sinchi Ram Bihari Lall* v. *The Agent, East India Ry Co*, 1921 Pat 485 (485): 2 Pat L Tim 679: 64 Ind Cas 125.

(2) *Goodeves Law of Real Property*, 5th Edition, p 39; *Digby's Law of Real Property*, 5th Edition, p 218 Foot Note 1.

(3) *Ma Gyi* v. *Pat Lon*, (1917) 38 Ind Cas 572 (573): 9 Bur L Tim 247. See also *The Cantonment Committee, Poona* v. *Brojoraj Bamanji*, (1890) 14 Bom 286 (269).

(3-a) *Panchaiti Akhara* v. *Gauri Kuar*, (1898) 20 All 167 (169): 1898 All W N 7.

(4) *S Campbell* v. *Jackson*, (1886) 12 Cal 41 (44): *Ghulam Muhammad* v. *The Himalaya Bank*, (1895) 17 All 292 (293): 1895 All W N 81: *Northern India Trades Association* v. *Lawrie*, 1885 Pun Re No 43.

(5) *Ram Das* v. *Stephenson*, (1868) 10 Suth W R 366 (367): 2 Beng L R S N 6: *Nubeen Chander* v. *Stephenson*, (1871) 15 Suth W R 534 (535): *India General S N & R Co* v. *Lal Mohan Saha*, (1915) 43 Cal 441 (445): 31 Ind Cas 35: 22 Cal L Jour 241: *M Abdul Haq* v. *Das Mal*, (1913) 19 Ind Cas 595 (596): 190 Pun L R 1913: 43 Pun W R 1913 [Amendment not allowed as the error was persisted in even after objection]. See also *Chattrapat Pratab* v. *Lees*, 1923 Pat 558 (560): 1 Pat L R 322: 4 Pat L Tim 487: 72 Ind Cas 648.

panies, in the form given in Appendix A, First Schedule, Form No. 2[6] and described as "the A. B. Company, Limited having its registered office at" or as "A. B. a public officer of the C. D. Company."[7] A description given as "A. B. agent of C. D. Company" is not in conformity with the rule.[8] Where in a suit against two companies, the description given was "the Indian General S. N. R. Co., Ltd. and the Rivers S. N. Co., Ltd. by their joint agent A. B. Rogers" it was held that the suit was substantially against A. B. Rogers and not against the companies referred to.[9] Where, however, relief is really sought against the company, and the error is *merely one of misdescription*, a suit, though nominally against the agent may be treated as in substance one against the company.[10] Similarly where in a suit by a Municipal Body, the plaintiff was described as "*A.B.*, Chairman of the Municipal Board of . . " but the intention was clear that it was the *Municipal Board* that was suing, it was held that the defect is merely one of form and cannot be a ground in appeal for the reversal of the decree.[11]

O. 29, R. 1, Notes 2—3.

3. **Suit by or against unregistered company.**—A suit by or against an unregistered company or unincorporated body of persons must be brought in the names of, or against, *all* the members of the company or body.[1] Thus an unregistered club or society cannot sue in the name of its secretary.[2] A suit brought in the names of some only of the members of such a society will be dismissed.[3] It was observed by the High Court of Calcutta in the under-mentioned cases[4] that where it appeared that the plaintiff did not know of what persons the company in question was composed, he might sue the company in the name under which it was carrying on the business, provided he has stated in the plaint that he was unable to give a better description of the defendant. This view has, however, not been followed, but has, on the other hand been expressly dissented from by the Allahabad High Court.[5]

Where the company consists of numerous persons the suit may under the provisions of O. 1, R. 8, be instituted by one or more of such persons on behalf of all with the permission of the Court.

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(6) *Sinehi Ram* v. *Agent, E I Ry. Co.* 1921 Pat 485 (485): 2 Pat L Tim 679: 64 Ind Cas 125 [Amendment disallowed and suit dismissed].

(7) *Saraspur Manufacturing Co* v. *B B & C I Ry.* 1923 Bom 452 (453): 47 Bom 785: 73 Ind Cas 1027: 25 Bom L R 513 [Amendment allowed as one of misdescription].

(8) *Agent, Bengal Nagpur Ry* v. *Behari Lal Dutt*, 1925 Cal 716 (718): 29 Cal W N 614: 52 Cal 783: 90 Ind Cas 426.

(9) *India General S N & R Co. Ltd* v. *Lal Mohan*, (1916) 31 Ind Cas 85 (36): 43 Cal 441: 22 Cal L Jour 241.

(10) *Radhe Lal* v. *East India Railway*, 1926 Pat 40 (42): 5 Pat 128: 7 Pat L Tim 57: 90 Ind Cas 680.

(11) *Shamsuddin Khan* v. *A S Patch Shah*, 1924 Oudh 309 (310): 75 Ind Cas 936: 84 Ind Cas 582.

Note 3.

(1) *Ram Sarup* v. *Arya Samaj Dhampur*, 1925 All 337 (338): 47 All 342: 23 All L Jour 37: 86 Ind Cas 255: 6 L R All 101; *Bhagwandge Singh* v. *Pinjra Pole Pashu Anathalaya*, 1927 All 789 (789): 103 Ind Cas 45.

(2) *N W P Club* v. *Saddullah*, (1898) 20 All 497 (498): 1898 All W N 138 (Club); *Panchaiti Akhara* v. *Gauri Kuar*, (1898) 20 All 167 (170): 1898 All W N 7; *Yusuf Beg* v. *Board of Foreign Missions*, (1894) 16 All 420 (422): 1894 All W N 154 [Board of Foreign Missions of the Presbyterian Church of New York]; *Mahomedan Association* v. *Bakshi Ram*, (1884) 6 All 284 (285): 1884 All W N 76: 8 Ind Jur 586 [Majlis Islamia]. See also *Kanwar Ranzor Singh* v. *F B Hebbert*, 1891 Pun Re No 15; *Michael* v. *Briggs*, (1891) 14 Mad 362 (362, 363); *Moti* v. *Sayad Ahmed Shah*, (1896) Pun Re No 29; *Campbell* v. *Jackson*, (1886) 12 Cal 41 (44); *Ma Gyi* v. *Pant Lon*, (1917) 38 Ind Cas 572 (573): 9 Bur L Tim 247; *Haridas* v. *Akhil Chandra*, 1929 Cal 445 (446, 447): 49 Cal L Jour 357 ["Brahma Samaj"].

(3) *Panchaiti* v. *Gauri Kuar*, (1898) 20 All 167 (170): 1898 All W N 7; *Yusuf Beg* v. *The Board of Foreign Missions of the Presbyterian Church*, (1894) 16 All 420 (422): 1894 All W N 154.

(4) *Koylash Chunder Roy* v. *Mr Edwardellis*, (1867) 8 Suth W R 45 (46).

(5) *Ganesha Singh* v. *Mundi Forest Co*, (1899) 21 All 349 (347): 1899 All W N 123.

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Srinagar.

O. 29, R. 1, Notes 4—6.

4. Companies authorised to sue and be sued in the name of an officer or secretary.—As has been seen in Note 2 *ante*, the authority of a company or a body of persons to sue or be sued in the name of an officer or trustee thereof can only be created by prescription or by Letters Patent or by an Act of the Legislature. The Indian Companies Act is one of such Acts of the Legislature.[1] *See also* Act VII of 1890 under which a company such as the *Comptoir National Decompte de Paris* may be sued in the name of its Chief Manager.[2]

Where a gift was made to the members of an unincorporated society by a deed and the society was subsequently registered, the registered society can enforce the gift without a formal deed of transfer from the unincorporated society.[3]

5. Foreign corporations.—It is an established rule of Private International Law, that a corporation duly created according to the Law of one State, may sue or be sued in its corporate name, in the Courts of other States[1] and it is not necessary that it should be registered under the Indian Companies Act before it can claim the benefit of this rule in India.[2] Thus a plaint filed in the Delhi Court on behalf of the Singer Manufacturing Company which is incorporated in the United States of America, may be verified by an agent holding a general power-of-attorney from the company as a "Principal Officer" of the company within the meaning of this rule.[3] The fact that the agent also acts for another is not material.[4]

6. "Other principal officer of the corporation."—The official liquidator of a registered company in liquidation is competent to sue on behalf of the company.[1] Where a branch bank was carried on by a manager holding a power-of-attorney under the seal of the company, and such a manager had in his absence delegated, in pursuance of such power, all his authority to an accountant, but such substituted power omitted words giving power to sue, it was held by the Privy Council that such substitute was a "Principal Officer of the corporation" and could sign and verify a plaint by the company.[2] The signing of the plaint by the "principal officer of the corporation" is not invalid merely because he happens to be an *am-mukhtear* of the corporation.[3]

Where the plaint is signed and verified by an officer other than those specified in the rule, the Court may in its discretion allow the plaint to be amended by filing a properly signed and verified copy of the plaint.[4]

Note 4.

(1) *Campbell* v. *Jackson*, (1885) 12 Cal 41 (44).

(2) *Hope Mills, Ltd* v. *Vithal Das*, (1910) 7 Ind Cas 982 (985): 12 Bom L R 730.

(3) *Rai Gagar Mal* v. *Bawa Kasur Singh*, (1897) Pun Re No 41.

Note 5.

(1) *Singer Manufacturing Co* v. *Baijnath*, (1903) 30 Cal 103 (105).

(2) *Singer Manufacturing Co* v. *Baijnath*, (1903) 30 Cal 103 (106).

(3) *Singer Manufacturing Co* v. *Yar Muhammad*, (1911) 10 Ind Cas 141 (142): 8 Pun Re 1912: 150 Pun L R 1911: 251 Pun W R 1911.

(4) *Saccharin Corporation, Ltd* v. *Chemische Fabrik Von Heyden Aktiengesellschaft*, (1911) 2 K B 516: 80 L J K B 1117: 104 L T 886.

Note 6.

(1) *Muhammad Yusuf* v. *Himalaya Bank*, (1896) 18 All 198 (201, 202, 203): 1896 All W N 28 F B; *Perumal Koundan* v. *Venkataswamy Nayadu*, (1918) 45 Ind Cas 164 (166): 34 Mad L Jour 421: 41 Mad 624.

(2) *Delhi and London Bank* v. *Oldham*, (1894) 21 Cal 60 (65): 20 Ind App 189: 6 Sar 381: 17 Ind Jur 482: R & J 130. See also *Allen Brothers* v. *Aruri Mal*, 1925 Lah 338 (339): 7 Lah L Jour 66: 88 Ind Cas 546: 26 Pun L R 441.

(3) *Chandra Sekhar* v. *Ram Coomar*, (1914) 22 Ind Cas 674 (675): 20 Cal L Jour 89.

(4) *Osborne Garrett & Co* v. *Raisi Jothaboy*, 1927 Sind 263 (268): 100 Ind Cas 460 [Reversed on another point by 1931 Sind 178].

O. 29, R. 1, Notes 7—8.

7. **"Who is able to depose to the facts of the case."**—It is not necessary that the principal officer of the corporation should verify the plaint from actual *personal* knowledge; he may verify upon his information and belief.[1] According to the Rules of the Calcutta High Court, it is necessary that the fitness of the person verifying the pleading on behalf of the corporation should be proved by an affidavit at the time of presenting the pleading.[2] An insufficiency of verification is not a ground, in appeal, for dismissing the proceedings had in the first Court, in the absence of any prejudice caused to any person by such defect.[3]

8. **Subscription and verification of pleadings.**—A plaint, on behalf of the corporation, may, under this rule, be signed and verified either

(*a*) by the Secretary, or

(*b*) by a director of the corporation, or

(*c*) by other principal officer of the corporation.[1]

A Registrar of a Joint Stock Company is not a proper person to represent the company, he being not one of the persons specified.[2] There is a conflict of opinion as to whether the provisions contained in O. 6, R. 14 applies to cases within this rule, so as to enable a plaint by a corporation to be signed and verified by a person duly authorised by it, where, by reason of absence or other good cause it could not be signed by the persons specified in this rule. In *Delhi and London Bank, Ltd.* v. *Oldham*[3] their Lordships of the Privy Council observed as follows:—

"Their Lordships are of opinion that S. 51 of the Code (now O. 6, R. 14), which regulates proceedings taken by or on behalf of *ordinary* plaintiffs, does not apply to such a case as the present, but that this case must be decided with reference only to S. 435, which expressly applies to corporations." The High Court of Bombay has held that the said decision of the Privy Council must be taken to apply to the particular facts of that case and that it is not an authority for the proposition that O. 6, R. 14 does not apply to cases governed by this rule; and they have consequently held that a power-of-attorney agent is entitled to sign and verify the plaint on behalf of a corporation under the provisions of O. 6, R. 14.[4] The High Court of Lahore[5] and the Court of the Judicial Commissioner of Sind[6] are also of the same opinion.

Note 7.

(1) *The Port Canning and Land Improvement Co, Ltd* v. *Dharanidhar Sardar*, (1905) 9 Cal W N 608 (609, 610).

(2) *International Continental Caoutchoue Compagnie* v. *Mehta & Co*, 1927 Cal 780 (781): 31 Cal W N 1030: 105 Ind Cas 568 (22 Cal 268 Dist).

(3) *Ram Komal Saha* v. *Bank of Bengal of Akyab*, (1901) 5 Cal W N 91 (98).

Note 8.

(1) *Campbell* v. *Jackson*, (1886) 12 Cal 41 (44); *Sreehurry Roy* v. *Hills*, (1866) 6 Suth W R (S C) 21 (25) [Secretary of a Government aided school can maintain an action]; *Mussoorie Bank, Limited* v. *Barlow*, (1887) 9 All 188 (191): 1887 All W N 17. See however *Northern India Trades Association* v. *Mathews*, 1866 Pun Re No 58 [Secretary of an Association cannot under S 135, sue on behalf of the Association unless it is laid down in the Articles of Association].

(2) *Kawdu* v. *Berar Ginning Co*, 1929 Nag 185 (190): 116 Ind Cas 427.

(3) (1891) 21 Cal 60 (65): 20 Ind App 139: 6 Sar 381: 17 Ind Jur 482 R & J 130 P C.

(4) *Calico Printers Association, Ltd* v. *Karim & Bros*, 1930 Bom 566 (567): 32 Bom L R 1305: 128 Ind Cas 557.

(5) *Messrs Allen Brothers* v. *Aruri Mal*, 1925 Lah 338 (339): 7 Lah L Jour 66: 88 Ind Cas 546: 26 Pun L R 441; *Ramjas Aggarwal, Ltd* v. *Mangat Ram Kinshi Ram*, (1931) 32 Pun L R 655: 1931 Notes 8 (a): 135 Ind Cas 41.

(6) *Osborne Garrett & Co, Ltd* v. *Abdulla*, 1931 Sind 178 (179): 134 Ind Cas 1170: 26 S L R 58 [Reversing 1927 Sind 263].

O. 29, R. 1, Note 8.

To enable a principal officer of a corporation to verify a plaint or a written statement, it is not necessary that permission of the Court should be obtained for that purpose; but it should be shown by a statement in the plaint or in the written statement or by an affidavit, that the person purporting to verify, is a principal officer of the corporation and is able to depose to the facts of the case.[6-a]

Where the defence raises the question of the competency of the director to sign and verify the plaint, the defendants are entitled so to cross-examine him as to expose all the facts bearing on that question.[7]

O. 29, R. 2, Note 1.

Service on corporation.

R. 2. [S. 436.] *Subject to any statutory provision regulating service of process, where* the suit is against a corporation, the summons may be served—

(*a*) *on* the secretary, or on any director, or other principal officer of the corporation, or

(*b*) by leaving it or sending it by post addressed to *the corporation* at the registered office, *or if there is no registered office then at the place where the corporation carries on business.*

[1877—S. 436 ; 1859—S. 63. *See* O. 5.]

Synopsis.

1. Service on Corporations.

1. Service on Corporations.—The mode of service provided by this rule can be availed of only in cases where there is no mode of service provided by any other statutes.[1] In the case of foreign companies "the place where the corporation carries on business" means the *principal place of business* in British India.[2] A Railway Company must be deemed to dwell at its principal office.[3] Service at the registered office of a company is essential,[4] though the Secretary may accept service elsewhere than at the registered office.[5] But a service on the solicitor of the company is not sufficient unless the company accepts service and enters appearance.[6]

The mode of service prescribed by the rule can be availed of only after the suit has been properly framed and the person on whom the service

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(6-a) *Sreenath Banerja* v. *East Indian Railway Co*, (1895) 22 Cal 268 (269).

(7) *Ram Raghubir Lal* v. *United Refineries (Burma), Ltd*, 1931 Rang 54 (55): 130 Ind Cas 843.

Order 29, Rule 2—Note 1.

(1) *Asiatic Steam Navigation Co, Ltd* v. *Tribhawandas & Co*, 1928 Sind 111 (113, 114): 108 Ind Cas 660 [Foreign Company]; *The Hope Mills, Ltd* v. *Vithaldas Pranjivandas*, (1910) 7 Ind Cas 982 (985): 12 Bom L R 730 [Company registered under the Indian Companies Act].

(2) *Asiatic Steam Nagivation Co, Ltd* v. *Tribhawandas Co*, 1928 Sind 111 (113): 108 Ind Cas 660.

(3) *Manlon* v. *Indian Branch Ry Co*, 1 Hyde 297.

(4) *Pearks Gunston & Tea* v. *Richardson*, (1902) 1 K B 91: 71 L J K B 18: 85 L T 616: 50 W R 286: 66 J P 119; *Vignes* v. *Stephens Smith & Co, Ltd*, (1909) 53 Sol J 716.

(5) In *Ex parte Railway Steal and Plant and Co Re Taylor*, (1878) 8 Ch D 183 (189, 190): 47 L J Ch 321: 38 L T 475: 26 W R 418.

(6) Re *Denver United Breweries*, (1890) 63 L T 96.

is effected must be a person entitled to receive the notice in respect of the company or the companies sued.[7] O. 29, R. 2, Note 1.

R. 3. [S. 436.] The Court may, *at any stage of the suit*, require the personal appearance of the secretary or *of* any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit. O. 29, R. 3.

Power to require personal attendance of officer of corporation.

[1877—S. 436 ; 1859—S. 63.]

ORDER XXX.

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

R. 1. [*New.*] (1) *Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.* O. 30, R. 1.

Suing of partners in name of firm.

(2) *Where persons sue or are sued as partners in the name of their firm under sub-rule* (1), *it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.*

[R. S. C., O. 48-A, R. 1.]

Local Amendment.

LAHORE.

To Rule 1 of Order 30, the following explanation was *added*:—

Explanation.—"This rule applies to a joint Hindu family trading partnership."

N.-W. F. P.

Add the following explanation:—

"*Explanation.*—The rule applies to a joint Hindu family trading partnership."

Synopsis.

1. Scope of the rule.
2. "Any two or more persons."
3. "Firm"—Meaning of.
4. Minor

(7) *India General S N and R Co v. Lal Mohan Saha*, (1915) 31 Ind Cas 85 (87): 22 Cal L Jour 241: 43 Cal 441.

O.30. R. 1, Note 1.

5. Suit against manager and owner of the firm. See O. 30, R. 10, supra.
6. "Carrying on business in British India."
7. "May sue or be sued in the name of the firm."
8. Firm as "agriculturist."
9. Suit by firm on promissory note.
10. "At the time of the accruing of the cause of action."
11. Suit against firm—Reference to arbitration.
12. Statement of names and addresses.
13. Subscription and verification.
14. Death of partner before suit.
15. Suit against individual partners.

Foreign firm. See Note 6, Pt. (2). Partners and partnership. See Note 1, Pt. (2-a) and Note 2, Pt. (1).

1. Scope of the rule.—It is a general principle of law that a plaintiff who wishes to obtain a decree against several persons must make them all parties to the suit. Where *A* makes a promise to *B*, *C* and *D* the right to enforce the promise rests with them all, under the provisions of the Contract Act, S. 45. So that all of them are necessary parties to a suit to enforce such promise.[1-a] It was accordingly held under the old Code, which did not contain any provisions corresponding to this Order, that in suits by or against firms, all the members composing the firm were necessary parties.[1-b] This Order has been newly introduced into the present Code and provides, as it were, an exception to the provisions of S. 45, in that it allows two or more partners alone to sue, provided the suit is brought *in the name of the firm*.[1] A firm as such, has no existence in law; it is a mere abbreviated name for the partners of which it consists, and not a *legal entity* as a corporation is,[2] and when a suit is brought against a firm, it is precisely as though it were brought in the name of *all* the partners.[2-a] The effect of using the name of the firm is simply to bring all the partners before the Court and the procedure indicated in this rule is adopted only as a convenient method for denoting the persons who constitute the firm at the time of the accrual of the cause of action.[3] A decree against the firm in the name of the firm has the same effect as a decree against all the

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Order 30, Rule 1—Note 1.

(1-a) *Vyankatesh Oil Mills* v. *N V Velmahomad*, 1928 Bom 191 (193): 30 Bom L R 117: 109 Ind Cas 99.

(1-b) *Gossain Gunga* v. *Dabee Dass*. (1876) 25 Suth W R 118 (119); *Srinath Pal* v. *Hari Charan Pal*, (1908) 7 Cal L Jour 266 (267); *Raj Chunder Sen* v. *Ganga Dass*, (1904) 31 Cal 487 (494): 31 Ind App 71: 8 Cal W N 442: 1 All L J 145: 14 Mad L Jour 147; *Mutu Raman Chetty* v. *Myat Nyein*, (1907-08) 4 L B R 23 (24); *Lukhmidas Khimji* v. *Purushotham Haridas*, (1882) 6 Bom 700 (702); *Poolin Behare Sein* v. *R Watson & Co*, (1868) 9 Suth W R 190 (192): Beng L R Sup Vol 904; *Yeknath Babaji* v. *Gulabchand Kahanji*, (1862-65) 1 Bom H C 85; *Koylash Chunder* v. *Ellis*, (1867) 8 Suth W R 45 (46); *Ganesha* v. *Mundi Forest Co*, (1899) 21 All 346 (347): 1899 All W N 123. See also *Michael* v. *Briggs*, (1891) 14 Mad 362 (362, 363) [Suit by a social club—Secretary cannot sue]; *The N W P Club* v. *Sadullah*, (1898) 20 All 497 (498): 1898 All W N 138, (Do.); *Devi Dayal* v. *Narayan Singh*, 1928 Lah 33 (34): 100 Ind Cas 859 [Suit by a panchayat body—All members must join].

(1) *Hari Singh* v. *Firm Karam Chand*, 1927 Lah 115 (116): 8 Lah 1: 100 Ind Cas 721: 28 Pun L R 455. See *Ramasamy Naidu* v. *Muthusamy Pillai*, (1918) 48 Ind Cas 756 (759): 35 Mad L Jour 581: 41 Mad 923: 1918 Mad W N 796; *Sheo Lal Sahu* v. *Sagar Mal*, (1917) 40 Ind Cas 108 (109): 1 Pat L W 650: 1917 Pat H C C 239.

(2) *Vallabha Dass* v. *Keshavlal*, 1927 Bom 428 (430): 29 Bom L R 660: 104 Ind Cas 94; *Gopal Dass* v. *Baij Nath*, 1926 All 238 (241): 24 All L J 235: 91 Ind Cas 930: 48 All 239; *Clark & Son* v. *Oullan*, (1882) 9 Q B 355; *Lakhmi Chand Ghandamal* v. *Gokaldas Rancordas*, 1926 Sind 75 (76): 90 Ind Cas 242; *Vyankatesh Oil Mills* v. *Velmahomed*, 1928 Bom 191 (193): 30 Bom L R 117: 109 Ind Cas 99; *Ram Parshad* v. *Anundji*, 1922 Cal 408 (409): 49 Cal 524: 69 Ind Cas 885; *Sadler* v. *Whiteman*, (1910) 1 K B 868 (889) C A.

(2-a) *Lakshmichand* v. *Gokal Das*, 1926 Sind 75 (76): 90 Ind Cas 242; *Administrator-General of Bombay* v. *Haji Sultan Ali*, 1927 Bom 255 (256): 29 Bom L R 396: 104 Ind Cas 819; *Graham & Co* v. *Kewal Ram*, (1911) 9 Ind Cas 712 (715): 4 Sind L R 196; *Western National Bank* v. *Perez, Triana & Co*, (1891) 1 Q B 304 (314); *Ram Parshad* v. *Anundji & Co*, 1922 Cal 408 (409): 49 Cal 524: 69 Ind Cas 885.

(3) *Hari Singh* v. *Karam Chand Kanshi Ram*, 1927 Lah 115 (116): 8 Lah 1: 100 Ind Cas 721 28 Pun L R 455; *Lakshmi Chand* v. *Gokal Das*, 1926 Sind 75 (76): 90 Ind Cas 242.

O. 30, R.1, Notes 1—3.

partners.[4] This is made clear by the various rules of this Order. Thus, R. 3 provides that in a suit brought in the name of the firm, the plaintiff shall, on a written demand of the defendants, declare, in writing, the names and residences of the partners and that, on such a declaration being made, the suit will proceed *as if all the partners had been named* as plaintiffs in the plaint. R. 6 provides that where persons are sued as partners in the name of their firm, they *shall appear individually* in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm. But the Order merely provides a new procedure and does not affect the plaintiff's right of bringing a suit against a firm by impleading all or any of the members as defendants thereto in conjunction with the firm.[5] Where a suit is to be brought against *A* and *B* as partners of the firm *A, B* & Co., the proper form is not to sue them as "*A B* & Co, by partners *A* and *B*" but to sue as follows:—

"1. *A, B* & Co., a firm
2. *A*, a partner of the firm
3. *B*, a partner of the firm".[6]

This order applies only to *suits* by or against partners and persons carrying on business in names other than their own. The *execution* of decrees against firms and the attachment of partnership property are dealt with in O. 21. Rr. 49 and 50.

Where a suit is filed in the name of a firm and a decree obtained, the judgment-debtor can validly make a payment of the decree amount to one of the partners and get satisfaction thereof entered.[7]

2. "**Any two or more persons**".—This rule applies only where there are *two or more persons* carrying on business in the name of a firm. One *single* person carrying on business in the name of a firm cannot sue in the name of the firm.[1] Nor can one of several partners carrying on business in the name of a firm, *sue in his own name* on a cause of action which has arisen in favour of the firm.[2]

3. "**Firm**"—**Meaning of.**—Under S. 4 of the Indian Partnership Act (IX of 1932) [S. 239 of the Contract Act, 1872], "persons who have entered into partnership with one another are called individually 'partners' and collec-

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(4) *Lakshmichand* v. *Gokal Das*, 1926 Sind 75 (76): 90 Ind Cas 242. See also *Babu Kirparam* v. *Jawahar Singh Harnamdas*, 1932 Bom 375 (378): 34 Bom L R 737 [Same rule holds good in case of an award].

(5) *Bibi Kazmi Begam* v. *Lachman Lal Sao*, 1930 Pat 239 (240): 9 Pat 717: 127 Ind Cas 575.

(6) *Ajit Singh* v. *Gunning Co*, 1925 Bom 491 (495): 27 Bom L R 998: 91 Ind Cas 989; *Premchand Ganomal* v. *Newandmal Bhemmal*, 1931 Sind 121 (122): 25 S L R 101: 134 Ind Cas 397. See *Motilal* v. *Chandmal*, 1924 Bom 155 (156): 25 Bom L R 1081: 77 Ind Cas 1055.

(7) *Yusif Mahbub & Co* v. *Sulloh Mahomed Umer Dossal*, 1926 Sind 167 (168): 92 Ind Cas 387; *Firm of Yusuf* v. *Firm of Sall h Mahmad*, 1928 Sind 37 (38): 105 Ind Cas 893. *Ganesh* v. *Hari Singh*, 1932 Lah 596 (597): 33 Pun L R 290: 138 Ind Cas 379: 13 Lah 516 [Such partner can execute for benefit of all].

Note 2.

(1) *Firm Swarath Ram* v. *Saruplal*, (1914) 25 Ind Cas 131 (132): 12 All L J 1020; *Sheolal* v. *Sagar Mal*, (1917) 40 Ind Cas 108 (109): 1 Pat L W 650: 1917 Pat H C C 239; *Mason & Son* v. *Mogridge*, (1892) 8 T L R 805; *Samrathmi Khetshdas* v. *Kasturbhai Jugabhai*, 1930 Bom 210 (210): 32 Bom L R 212: 127 Ind Cas 112; *Bhagwan Manaji* v. *Hiraji Premaji*, 1932 Bom 516 (518): 34 Bom L R 1112.

(2) *Ralliram Shewaram* v. *Budhuram*, 1925 Sind 181 (182): 17 Sind L R 324: 79 Ind Cas 914; *Subraya Kini* v. *Ramachandra*, (1910) 6 Ind Cas 438 (438): 7 Mad L Tim 432. See also *Thakurdas* v. *Golam Mophuddin*, 1882 Pun Re No 20 [Gumastha cannot sue as representing the firm].

O. 30, R.1, Notes 3—6.

tively a 'firm' ''. In the earlier part of the same section it is enacted that "partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. A "firm" is thus a short, collective name for the individual members who constitute the partners[1] and, as has been seen in Note 1 above, is not a legal entity or an artificial person as a corporation is. It follows that a firm cannot, as such, enter into a contract and be a member of a partnership[2] nor can it be a party to a reference under the Arbitration Act.[3] It cannot appear in any suit *as a firm*; if, however, a partner is made a co-defendant along with the firm he may put in a separate defence for himself and one on behalf of the firm.[4]

4. Minor.—S. 30 of the Indian Partnership Act (IX of 1932) [S. 247 of the Contract Act, 1872] provides that a person, who is under the age of majority according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such a minor in the property of the firm is liable for the obligations of the firm. The person under the age of majority cannot, under the Indian Law become a partner by contract, and cannot be one of that group of persons called a "firm", inasmuch as, a contract by a minor is void. In this view, the share of which S. 247 speaks, is no more than a right to participate in the property of the firm after its obligations are satisfied.[1] Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of O. 32 and no sanction is necessary under the provisions thereof where the matter in dispute in such suit is referred to arbitration.[2] According to Law of England a contract by a minor is only *voidable* and not void. He may be a partner though he cannot be made *personally* liable for the debts of the firm. A judgment against the firm may be executed against the partnership property including the share of the minor.[3]

5. Suit against manager and owner of the firm.—*See* O. 30, R. 10, *infra*.

6. "Carrying on business in British India".—The rule clearly indicates that an action can only be brought by or against a firm in the firm name in which the persons claiming or being, or liable as partners are carrying on business in British India.[1] A foreign firm may carry on business in British India in which case this order will apply to suits by or against it even though

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Note 3.

(1) *Ram Pratab* v. *Gaurishankar*, 1924 Bom 109 (110): 25 Bom L R 7: 85 Ind Cas 464.

(2) *Seodoyal* v. *Joharmull*, 1924 Cal 74 (77): 50 Cal 549: 75 Ind Cas 81.

(3) *Vallabhadas* v. *Keshavlal*, 1927 Bom 428 (430): 29 Bom L R 660: 104 Ind Cas 94.

(4) *Taylor* v. *Collier*, (1882) 51 L J Ch 853.

Note 4.

(1) *Sanyasi Charan* v. *Krishnadhan*, 1922 P C 237 (240): 20 All L J 409: 24 Bom L R 700: 35 Cal L Jour 498: 43 Mad L Jour 41: 1922 Mad W N 364: 30 Mad L Tim 228: 67 Ind Cas 124: 49 Cal 560: 26 Cal W N 954: 16 Mad L W 536: 49 Ind App 108.

(2) *Sukha Nand* v. *Behari Ram Ishar Das*, 1923 Lah 103 (104): 68 Ind Cas 750; *Bishambar Mal Pala Mal* v. *Firm of Ganga Sahai Nihal Chand*, 1923 Lah 212 (213): 5 Lah L Jour 5: 71 Ind Cas 754 [Suit by one firm against another —Reference to arbitration by representatives].

(3) *Lovell* v. *Beauchamp*, 1894 A C 607; *Harris* v. *Beauchamp Bros*, (1898) 2 Q B 534.

Note 6.

(1) *Vyankatesh Oil Mills* v. *Velmuhamed*, 1928 Bom 191 (193): 30 Bom L R 117: 109 Ind Cas 99.

the partners themselves are residing outside British India.[2] The partners of a foreign firm *who do not carry on any business in British India* cannot sue[3] or be sued[4] in the firm name, but must proceed or must be proceeded against *individually*.[5] O. 30, R. 1, Notes 6—7.

The question whether a firm is carrying on business within jurisdiction, is one of fact depending upon the circumstances of each case. The words "carrying on business" must be understood in their ordinary sense and not as having any special significance.[6] Thus if a firm has an office of its own within jurisdiction at which a partner or a manager is in control carrying on the business, that is sufficient to bring it within the rule.[7] If the firm has only an office within the jurisdiction, at which the business is done for the firm by an *agent*, the question whether it is carrying on business within jurisdiction depends on the *powers* and the *authority* of the agent. If the agent merely has authority to take orders and transmit them to the firm, that is not carrying on business.[8] If, however, the agent has the power to *conclude contracts on his own initiative* on behalf of the firm, the latter will be taken to carry on business through the agent within the jurisdiction.[9]

See S. 20 Note 8 for a full discussion as to the meaning of "carrying on business".

7. May sue or be sued in the name of the firm.—As has been seen in Note 1, two or more partners can sue *in the name of the firm* and it is not necessary, that the other partners should be named in the plaint as plaintiffs or should sign it.[1] A suit brought in the name of the firm cannot, therefore, be dismissed on the ground of a non-joinder of other partners; all that the defendant is entitled to, is the disclosure of the names of those partners under R. 2.[2] An addition of one of the partners after the period of the limitation, or the correction of the name of a wrong representative of the firm who has been made a party to the suit, will not amount to an addition or substitution of a new party to the suit within the meaning of S. 22 of the Limitation Act.[3]

The cause of action in respect of a contract with a firm vests in all the partners jointly, and if, after the contract, one of the partners retires and a stranger comes in, the new partnership cannot enforce the contract entered into by the old. Nor can it, by substituting the names of the old partners alter the period of the limitation for instituting the suit or avoid the bar of the limi-

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(2) *Western National Bank* v. *Perez*, (1891) 1 Q B 304; *Tarabai* v. *Chogmal*, 1932 Nag 114 (116): 28 Nag L R 118.

(3) *Vyankatesh Oil Mills* v. *Velmuhamed*, 1928 Bom 191 (193): 30 Bom L R 117: 109 Ind Cas 99.

(4) *Von Hellfeld* v. *Roechnitzer*, (1914) 1 Ch 748; *Vallabdas* v. *Keshavlal*, 1927 Bom 428 (430): 29 Bom L R 660: 104 Ind Cas 94.

(5) *Western National Bank of New York* v. *Perez Triana & Co*, (1891) 1 Q B 304; *Indigo Co* v. *Ogilvy*, (1891) 2 Ch 31: 64 L T 840: 39 W R 648 (C A).

(6) *Grant* v. *Anderson & Co*, (1892) 1 Q B 108 (117).

(7) *Worcester, etc, Co* v. *Firbank*, (1894) 1 Q B 784.

(8) *Baillie* v. *Goodwin & Co*, (1886) 33 C D 604; *Grant* v. *Anderson & Co*, (1892) 1 Q B 108.

(9) *La Bourgoyne*, (1899) A C 431; *Dunlop etc, Co* v. *Actien Gesellschaft, etc*, (1902) 1 K B 342 C A.

Note 7.

(1) *Shriram Shankerlal* v. *Madho Patil*, 1923 Nag 137 (137): 68 Ind Cas 425.

(2) *Marayya Chetty* v. *Sami Chetty*, (1915) 28 Ind Cas 210 (210): 2 Mad L W 239.

(3) *Marayya Chetty* v. *Sami Chetty*, (1915) 28 Ind Cas 210 (210): 2 Mad L W 239; *Deolal* v. *Tularam Ramsukh*, 1928 Nag 319 (321): 109 Ind Cas 785.

O. 30, R.1, Notes 7—11.

tation.[4] Where a firm continues to be known by its old name even after the original partners are dead though occasionally the name of the actual head of the firm is also added to the old name, the omission of the latter's name in a suit by the firm does not amount to any misdescription.[5] It has been held in the case cited below[6] that in a suit for libel made against a firm all the partners should join as plaintiffs.

8. **Firm as "agriculturist".**—A firm can be an "agriculturist" within the meaning of S. 2, Dekkhan Agriculturists' Relief Act (XVII of 1879), only when, by itself, or by its servants, or by its tenants it earns its livelihood wholly or principally by agriculture carried on within the limits of a district to which the Act extends. The mere fact that an individual partner or even all the partners of the firm earn their livelihood from an agricultural income does not make the firm an "agriculturist". A plaintiff suing a firm which, by itself, does not earn its livelihood by agriculture must be sued only at the place where it carries on business and not where the individual partners reside.[1]

9. **Suit by firm on promissory note.**—Where a promissory note is executed to *A*, a partner of a firm, for a debt due to the firm, *A* is personally entitled to sue on the note although the benefit of the decree would result to the partnership firm.[1] The firm is also entitled to sue on the note, though it is advisable, before suit, to get the instrument endorsed in its name.[2] Where *A* sues individually on a promissory note executed to the firm consisting of partners *A* and *B*, the correct procedure, if *B* will not join *A* as co-plaintiff, is to make him a defendant.[3]

10. **"At the time of the accruing of the cause of action".**—A suit may be brought under this rule in the name of a firm which has been dissolved before the date of the suit, provided the cause of action arose before the date of the dissolution.[1]

11. **Suit against firm—Reference to arbitration.**—Where a reference is made to arbitration in a suit in which a firm is a party, all the members of the firm who are sought to be bound, must join in making the reference; sub-R. (2) of this rule does not empower one partner alone to refer the case to arbitration so as to bind the other partners who have not agreed to, or joined in,

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(4) *Firm of Manghoomal Jethanand* v. *Firm of Aratmal Satramdas*, 1922 Sind 13 (14): 65 Ind Cas 26: 15 Sind L R 152. See also *Firm of Khanumall* v. *Karim Mahomed & Co*, 1932 Sind 78 (79) [Where a stranger is in partnership with the firm in the suit transaction, he must be on record].

(5) *Chelaram Sant Ram* v. *Kishan Chand*, (1918) 44 Ind Cas 283 (284): 3 Pun W R 1918: 155 Pun L R 1917.

(6) *Motilal Raha* v. *Indra Nath Banerjee*, (1909) 3 Ind Cas 831 (833): 13 Cal W N 1165: 36 Cal 907.

Note 8.

(1) *Dharamsey* v. *Balakrishna*, 1929 Bom 378 (379): 120 Ind Cas 889: 31 Bom L R 984: 53 Bom 787: *Premchand Ganomal* v. *Newandmal Bherumal*, 1931 Sind 121 (122): 25 S L R 104: 134 Ind Cas 897.

Note 9.

(1) *Kapurji Magniram* v. *Pannaji Devichand*, 1929 Bom 177 (177): 53 Bom 110: 30 Bom L R 1560: 113 Ind Cas 841.

(2) *Brojolal* v. *Budh Nath*, 1928 Cal 148 (150, 151): 105 Ind Cas 549: 55 Cal 551.

(3) *Bulli Mal* v. *Jhabba*, 1925 Lah 504 (505): 7 Lah L Jour 280: 26 Pun L R 699: 92 Ind Cas 569.

Note 10.

(1) *Harjibandas* v. *Bhagwandas*, 1922 Cal 390 (390): 49 Cal 394: 69 Ind Cas 286; *Pulin* v. *Mahendra*, 1921 Cal 722 (725): 34 Cal L Jour 405: 67 Ind Cas 10; *Baldeo Prasad Babu Ram* v. *Haji Ali Muhammad Usman*, (1928) 112 Ind Cas 715 (717): 1928 Notes 86 (c).

O. 30, R.1. Notes 11—15.

the application for reference.[1] A proceeding before an arbitrator under the Arbitration Act is not a suit and, therefore, the provisions of O. 30 do not apply thereto.[2]

12. Statement of names and addresses.—Both Rr. 1 and 2 provide for the disclosure of the names of partners. Under R. 1 *any party* may apply to the Court for a statement of the names and addresses of the partners to be furnished as directed by the Court. Under R. 2, *a defendant* may, on demand in writing, without recourse to Court, ask the plaintiff or his pleader to declare in writing the names and places of residence of the partners.[1] Where a statement under R. 1, or a declaration under R. 2 is made, the Court cannot direct a cross-examination on such statement or declaration nor can it direct the trial of an issue as to who were the partners of the firm at the time of the accruing of the cause of action.[2] But the statement or declaration as the case may be will be treated as embodied in the plaint and will be a necessary part of the cause of action.[3]

13. Subscription and verification.—It is quite sufficient, under the provisions of sub-R. (2), that, in suits by or against firms, the pleading on behalf of the firm is signed and verified by *one* of the partners composing the firm; it is not necessary that it should be signed by *two or more* persons, though under sub-R. (1) no suit can be brought in the name of a firm unless it consists of two or more partners.[1]

14. Death of partner before suit.—A suit may be brought against a firm in the name of the firm, even though one of the partners is dead before the institution of the suit,[1] inasmuch as the suit must be deemed to be against the surviving partners; the judgment so obtained against the firm though enforceable against the partnership property, cannot be enforced against the *private estate* of the deceased partner, unless his legal representatives are actually made parties.[2]

15. Suit against individual partners.—This rule does not affect, in any way, the operation of S. 43 of the Indian Contract Act. In a suit upon a contract made by a partner on behalf of the partnership, the promisee can compel all or anyone of the partners to perform the whole of the promise.[1] As

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Note 11.

(1) *Gopaldas v. Baijnath*, 1926 All 238 (240): 24 All L J 235: 91 Ind Cas 930: 48 All 239; *Bhagwan Manaji v. Hiraji Premaji*, 1932 Bom 516 (519): 34 Bom L R 1112.

(2) *Firm E D Sassoon & Co v. Shivaji Ram Devi Das*, 1929 Lah 228 (230): 115 Ind Cas 536.

Note 12.

(1) *Bridges & Co v. Shamsu Din & Co*, (1918) 47 Ind Cas 422: 155 P W R 1918: 105 Pun L R 1918: 78 Pun Re 78; *Abrahams & Co v. Dunlop Pneumatic Tyre Co*, (1905) 1 K B 46 (50).

(2) *Abrahams & Co v. Dunlop Pneumatic Tyre Co*, (1905) 1 K B 46.

(3) *Abrahams & Co v. Dunlop Pneumatic Tyre Co*, (1905) 1 K B 46 (51).

Note 13.

(1) *Firm Sicarath Ram v. Sarup Lal Ram*, (1914) 25 Ind Cas 131 (132): 12 All L J 1020; *Shriram v. Madho Patil*, 1923 Nag 137 (137): 68 Ind Cas 425; *U Aung Min v. Lutchumanan Chetty*, (1911) 9 Ind Cas 450 (450): 4 Bur L Tua 10; *Ramachunder v. Choonee Lal*, (1874) 12 Beng L R 35; *Robert v. Sheik Abdulla*, (1879) 5 Beng L Rep App 89; *Haji Karim Nur Mahomed v. Rahman*, 1932 Nag 137 (138): 28 Nag L R 116.

Note 14.

(1) *Baldeo Parsad v. Haji Ali Muhammad*, (1928) 112 Ind Cas 715 (717): 1928 Notes 86 (c).

(2) *Ram Pratab Brijmohandas v. Gaurishankar Kashi Ram*, 1924 Bom 109 (111): 25 Bom L R 7: 85 Ind Cas 464.

Note 15.

(1) *Muhammad Ismail v. Said-ud-din Khan*, 1927 Lah 819 (821): 104 Ind Cas 700.

O. 30, R. 1, Note 15. has been seen in Note 1, an individual partner may be sued personally along with the firm.[2]

O. 30, R. 2, Notes 1—2.

R. 2. (1) [New.] *Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.*

Disclosure of partners' names.

(2) *Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule* (1), *all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.*

(3) *Where the names of the partners are declared in the manner referred to in sub-rule* (1), *the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:*

Provided that all the proceedings shall nevertheless continue in the name of the firm.

[R. S. C., O. 48-A, R. 2.]

Synopsis.

1. Scope of the rule.
2. Disclosure of partners' names.
3. Proceedings to continue in the name of firm—See Rule 6, Note 2 below.

Suit by a dissolved firm, see R. 1, Note 10, Pt. (1).

1. Scope of the rule.—This rule applies only to suits instituted *by* and *not* against partners in the name of the firm; in other words it applies only to the case of plaintiffs suing in the name of the firm.[1] Sub-R. (2) of this rule does not control the provisions of O. 21, R. 50 and does not apply to anything that follows after the suit has reached the stage of a decree[2] nor does it in any way contradict the provisions of O. 30, R. 4 and it is therefore not necessary to join the legal representatives of a deceased partner as a party to the suit.[3]

2. Disclosure of partners' names.—An incomplete disclosure or a wrong declaration of the names of the partners is not a fatal defect to the suit; the proper procedure in such a case is not to dismiss the suit but to allow a

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(2) *Taylor* v. *Collier & Co,* (1882) 30 W R 701: 51 L J Ch 853.

Order 30, Rule 2—Note 1.

(1) *Natvarlal* v. *E D Sassoon & Co,* 1927 Bom 447 (448): 29 Bom L R 921: 103 Ind Cas 256: 51 Bom 794.

(2) *Natvarlal* v. *E D Sassoon & Co,* 1927 Bom 447 (448): 29 Bom L R 921: 103 Ind Cas 256: 51 Bom 794.

(3) *Utanka Lal* v. *Tarak Nath,* 1929 Cal 11 (14): 48 Cal L Jour 857: 114 Ind Cas 156; *Pulin Behari* v. *Mahendra Chandra,* 1921 Cal 722 (725): 34 Cal L Jour 405: 67 Ind Cas 10.

O. 30, R. 2, Notes 2—3.

further declaration making a full disclosure.[1] A suit for dissolution of a partnership existing between an individual on the one hand, and a different partnership on the other, may be instituted against such partnership without disclosing in the plaint the names of the individual partners thereof.[2]

3. Proceedings to continue in the name of firm.—*See* Rule 6 Note 2 below.

O. 30, R. 3, Note 1.

R. **3.** [New.] *Where persons are sued as partners in the name of their firm, the summons shall be served either—*

Service.

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

[R. S. C., O. 48-A, R. 3.]

Synopsis.

1. Scope of the rule.
2. Dissolution of partnership before suit.
3. Service by registered post.
4. "Person having . . . . partnership business."
5. Successive services.
6. "Principal place at which the partnership business is carried on."
7. "As the Court may direct."
8. Mortgage suit.
9. Ex parte decree against firm.
10. Notice as to capacity in which partner is sued—See Rule 5.

Deemed good service. See Note 1, Pt. (2-a).
First service on manager—Subsequent service on partners—Time for appearance to be counted from what date. See Note 5, Pt. (1).
Proviso—Dissolved firm. See Note 2.
Whether all or any of the partners are within or without British India. See Note 1, Pt. (4).

1. Scope of the rule.—This rule applies to suits against partners *in the name of their firm* and provides for the mode of service of summons in such suits. It has no application to suits against partners not brought in the name of their firm.[1] Where the firm is an existing one or has not been

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Note 2.

(1) *Lakshmansa* v. *Lakshmansa*, 1930 Bom 150(8): 113 Ind Cas 870.
(2) *Choithram* v. *Khemchand*, 1929 Sind 7 (150): 32 Bom L R 56: 124 Ind Cas 790: 54 Bom 285; *Imperial Pressing Co* v. *British Assurance Corpn*, (1913) 21 Ind Cas 836 (838): 41 Cal 581.

Order 30, Rule 3—Note 1.

(1) *Ajit Kumar Shaha* v. *Mritunjoy Kundu*, 1925 Cal 1136 (1137): 88 Ind Cas 489.

O. 30, R. 3, Notes 1—2.

dissolved to the knowledge of the plaintiff before the date of suit, there are two modes of service prescribed by this rule:—

(*a*) Upon any one or more of the partners; or

(*b*) Upon the manager of the business at the principal place thereof within British India.

A service effected in the above modes is a good service *against the firm,* and a decree can be passed against it;[2] it is immaterial that all the partners are not individually served,[3] or that all or any of them reside outside British India.[4] If the summons is not served in either of the two modes mentioned above, the service is irregular and no decree can be passed against the firm.[5] But though the firm is properly served by adopting the above modes of service, it is not sufficient to make a member who has not been *actually* served, a person "who has been individually served as a partner" within the meaning of O. 21, R. 50.[6] That rule provides that a decree obtained against a firm may be executed:-

(*a*) against the *partnership assets;*

(*b*) against any person *personally* who has been individually served with summons and has failed to appear;

(*c*) against any person *personally* who has appeared in his own name under Rr. 6 and 7 of O. 30, or who has admitted in the pleadings that he is, or who has been adjudged to be, a partner;

(*d*) *with the leave of the Court,* against any person *personally* as being a partner of the firm, even though he has not appeared or been individually served in the prescribed manner.

As to the mode of service to be adopted in cases where the firm has been dissolved before the institution of the suit and the effect of not complying with the rule of service so prescribed, *see* Note 2 below.

2. Dissolution of partnership before suit.—The proviso to this rule deals with the method of service to be adopted where the firm has been dissolved before the date of the suit. If the plaintiff, at the time of instituting the suit, is not aware of the dissolution, the proviso has no application and a service effected in one of the modes mentioned in Cl. (*a*) or (*b*) of the rule is good service against the firm, and a decree passed against it can be executed against the partners in the manner prescribed by O. 21, R. 50. If, however, the plaintiff is aware of the fact of dissolution before the date of the suit, he must, if he seeks to make any person liable as a partner, serve it on such

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(2) *Baishnab Charan* v. *Bank of Bengal,* (1915) 26 Ind Cas 866 (868): 19 Cal L Jour 581: 19 Cal W N 1008.

(3) *Gordhandas Kalyanji* v. *Gautamchand Rupchand,* 1925 Bom 331 (332): 27 Bom L R 541: 87 Ind Cas 1051; *Lakshmichand Ghandamal* v. *Firm of Gokaldas Ranchordas,* 1926 Sind 75 (76): 90 Ind Cas 242; *Ram Chandra Bose* v. *Snead,* (1871) 7 Beng L R App 58 [Service on one partner for his co-partner is good service].

(4) *Baishnab Charan* v. *Bank of Bengal,* (1915) 26 Ind Cas 866 (868): 19 Cal L Jour 581: 19 Cal W N 1008; *Adiveppa* v. *Pragji,* 1924 Bom 366 (367): 26 Bom L R 388: 80 Ind Cas 773; In re *Ide,* (1886) 17 Q B D 755.

(5) *Worcester City and County Banking Co* v. *Firbank Pauling & Co,* (1894) 1 Q B 784 (788, 790).

(6) *Mathuradas* v. *Ebrahim,* 1927 Bom 561 (592): 29 Bom L R 1296: 51 Bom 986: 105 Ind Cas 805.

person *individually*. If instead of doing so the service is effected as prescribed by Cl. (*a*) or (*b*) only, there will no doubt be a decree *against the firm*, but it cannot be executed, even with the leave of the Court, personally against the partner not individually served, under sub-R. (2) of O. 21, R. 50.[1] To this extent the proviso to this rule overrides O. 21, R. 50, which allows a decree against a firm to be executed against a partner personally with the leave of the Court even though he has not been served individually.[2] O. 30, R.3, Note 2.

Where a partner *dies* before the institution of the suit, the partnership gets dissolved under the provisions of S. 42 of the Indian Partnership Act (IX of 1932) [S. 253 of the Contract Act]. If the plaintiff is aware of the death at the date of the suit, he must, if he wishes to make the *private estate* of the deceased partner liable, implead the legal representatives as parties and obtain a decree against them.[3] But the proviso to this rule does not imply that if the plaintiff was not *aware* of the dissolution by the death of the partner, the latter's legal representatives can be treated as partners themselves and proceeded against under sub-R. (2) of O. 21, R. 50 in respect of the private estate of the deceased partner. It has accordingly been held by a Full Bench of the High Court of Madras that the fact that the plaintiff had no knowledge of the death of the partner before the suit does not affect the question of the liability of the legal representatives in respect of the private estate of the deceased partner and that the scope of O. 21, R. 50, sub-R. (2) cannot be enlarged by a reference to the rule of service prescribed by the proviso.[4] A different view has been taken by the High Court of Bombay. According to that Court the legal representatives can be proceeded against under sub-R. (2) of O. 21, R. 50, in respect of the private estate of the deceased partner.[5] It is submitted that the Bombay view is not correct. Sub-R. (2) of O. 21, R. 50 applies only to execution against a person *as being a partner* of the firm, and the legal representatives are, in no sense, the partners of the firm.[6]

In *Ellis* v. *Wadeson*,[7] Romer, L. J., observed as follows:—

"Suppose a partner dies before action brought and an action is brought against the firm in the firm's name. The dead man is not a party to the action so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a dead man can be sued

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Note 2.

(1) *Gordhandas* v. *Gautamchand*, 1925 Bom 331 (332): 27 Bom L R 541: 87 Ind Cas 1051; *Davis Wigram* v. *Cox & Co.* (1894) 1 Q B 792; *Mathuradas* v. *Morris*, (1883) 10 Q B D 436; *Mathuradas* v. *Ebrahim*, 1927 Bom 581 (587, 593, 594): 29 Bom L R 1296: 51 Bom 986: 105 Ind Cas 305.

(2) *Mathuradas* v. *Ebrahim*, 1927 Bom 581 (592): 29 Bom L R 1296: 51 Bom 986: 105 Ind Cas 305.

(3) *Ram Pratab* v. *Gauri Shankar*, 1924 Bom 100 (111): 25 Bom L R 7: 85 Ind Cas 464; *Mathuradas* v. *Ebrahim*, 1927 Bom 581 (584, 593): 29 Bom L R 1296: 51 Bom 986: 105 Ind Cas 305; *Muhammad Yusuf* v. *Mahomed Sadullah*, 1929 Mad 733 (737): 30 Mad L W 219: 57 Mad L Jour 344: 52 Mad 885: 1930 Mad W N 6: 119 Ind Cas 603.

(4) *Muhammad Yusuf* v. *Mahomed Sadullah*, 1929 Mad 733 (737): 30 Mad L W 219: 57 Mad L Jour 344: 52 Mad 885: 1930 Mad W N 6: 119 Ind Cas 603 F B. See also *Ram Narain* v. *Ram Prasad*, 1931 All 65 (69): 1930 All L J 913: 130 Ind Cas 712: 52 All 964.

(5) *Jeevaraj Laloobhai Patel* v. *Bhagvandas Gordhandas*, 1923 Bom 66 (67): 68 Ind Cas 627: 24 Bom L R 1037. See also *Mathuradas* v. *Ebrahim*, 1927 Bom 581 (593): 29 Bom L R 1296: 51 Bom 986: 105 Ind Cas 305 [Observations of Blackwell, JJ.

(6) *Muhammad Yusuf* v. *Mahomed Sadullah*, 1929 Mad 733 (736): 30 Mad L W 219: 57 Mad L Jour 344: 52 Mad 885: 1930 Mad W N 6: 119 Ind Cas 603; *Mathuradas* v. *Ebrahim*, 1927 Bom 581 (584): 29 Bom L R 1296: 51 Bom 986: 105 Ind Cas 305.

(7) (1899) 1 Q B 714: 80 L T 508: 68 L J Q B 604: 47 W R 420: 15 T L R 274.

O. 30, R. 3, Notes 2–6.

in a proper case . . . . If the legal representatives of the deceased partner are not added expressly as defendants and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets . . . . I have so far dealt with the case of the death of a partner before action. Now what happens if a partner dies between service of *writ* and the trial of the action and judgment? *In that case equally*, the *dead man's estate is not bound.* Judgment can only be obtained against the surviving partners and enforced against them and against partnership assets".

Where a suit is instituted against a firm which has been dissolved before the date of the suit, the date of the institution, for the purpose of limitation, is the date of the suit and not the date of the *service* of summons individually upon a partner, subsequent to the institution of the suit.[8]

3. **Service by registered post.**—As has been seen in Note 1, the only way in which a summons can be served in suits against a firm are those specified in Cls. (*a*) and (*b*) of the rule.[1] Therefore where service by registered post has been ordered, the registered letter should be addressed to a *partner* or to the *manager* of the business and not to the *firm name* at the place where the business used to be carried on.[2]

4. **"Person having . . . . partnership business".**—The person, "having, at the time of service, the control and management of the partnership business", must be a *servant* of the firm; a receiver or a manager appointed *by the Court* is not such a person as is referred to in Cl. (*b*) of the rule.[1]

5. **Successive services.**—Where more than one service is effected, the time for appearance by the firm runs from the last service. In a case where service was effected on the person in control of the business and five days later, upon a partner, and judgment in default of appearance was signed on the first service before the eight days had elapsed from service on the partner, the judgment was set aside.[1]

6. **"Principal place at which the partnership business is carried on".**—Where a suit is filed against a firm, service on an agent at the principal place of business of the firm within jurisdiction is good service on the firm, whether any members of the firm are within jurisdiction or not.[1] But where the mandate to the bailiff is to serve the summons *at the place of the business* of the firm on the manager or managing partner, without specifying the name of the person to be served, it is not within the competence of the bailiff to effect service by the affixture of summons at the *residence* of the managing partner.[2]

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(8) *Firm, Detaram Ratumal* v. *Firm of Vishindas Tarachand*, 1928 Sind 57 (60): 105 Ind Cas 854.

Note 3.

(1) *Harjibandas Gordhandas* v. *Bhagwandas Pursram*, 1922 Cal 390 (390): 49 Cal 894: 69 Ind Cas 236.

(2) *Harjibandas* v. *Bhagwan Das*, 1922 Cal 390 (391): 49 Cal 894: 69 Ind Cas 236 [Service of summons in suit against a dissolved firm, is by serving on the partner charged as liable as principal].

Note 4.

(1) Re *Flowers & Co*, (1897) 1 Q B 14.

Note 5.

(1) *Alden* v. *Beckley*, (1890) 25 Q B D 546.

Note 6.

(1) *Ramanathan* v. *Kalimuthu*, (1913) 18 Ind Cas 189 (191): 24 Mad L Jour 619: 37 Mad 163.

(2) *Firm of Manjimal Phagunmal* v. *Firm of Khubchand Phalumal*, 1926 Sind 208 (209): 95 Ind Cas 149.

Where the manager at the place of business refuses to accept service, a copy of the summons may be affixed on the premises.[3] O. 30, R.3, Notes 6—10.

7. **"As the Court may direct"**.—These words do not occur in the corresponding English rule. According to the latter, the plaintiff has an *option* to serve the summons upon a partner or upon the manager. Under the present rule, the plaintiff has no such option but should obtain the directions of the Court as to the method of service to be followed. If the method prescribed in each particular case is followed and service is so effected, then *prima facie* there has been good service on the firm.[1]

8. **Mortgage suit.**—A mortgage suit by or against a firm is on the same footing as other suits relating to the properties of the firm and service of summons or notice on the manager of the firm is service on all the partners of the firm.[1]

9. **Ex parte decree against firm.**—An *ex parte* decree passed against a firm after due service under this rule cannot be set aside on the allegation of a partner that *he* was not duly served. "It can never be said that a decree against the firm is *ex parte* against one of the partners because he has not appeared."[1]

10. **Notice as to capacity in which partner is sued.**—*See* R. 5, *infra*.

O. 30, R.4.

R. **4.** [New.] (1) *Notwithstanding anything contained in section 45 of the Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.*

Right of suit on death of partner.

(2) *Nothing in sub-rule* (1) *shall limit or otherwise affect any right which the legal representative of the deceased may have—*

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

Synopsis.

1. Joinder of legal representatives.

Rule, when not applicable. See Note 1, Pts. (7), (8) and (9)

Sub-Rule (2). See Note 1, Pt. (10).

Suit by surviving partners. See Note 1.

(3) *Akhoy Kumar* v. *Nagendra*, (1909) 1 Ind Cas 118 (119, 120): 13 Cal W N 490.

Note 7.

(1) *I O Caoul Choue* v. *Mehta & Co*, 1927 Cal 758 (759): 31 Cal W N 1004: 54 Cal 1057: 105 Ind Cas 356. See also *Keen Robinson & Co* v. *Lily Biscuit Co*, (1932) 59 Cal 496 (499) [But due service on partner, though without Court's directions, is not invalid].

Note 8.

(1) *Hardwarimal* v. *Atherton West*, (1911) 12 Ind Cas 629 (630) All.

Note 9.

(1) *Adiveppa* v. *Prayji*, 1924 Bom 366 (367): 26 Bom L R 388: 80 Ind Cas 773.

O. 30, R. 4, Note 1.

1. Joinder of legal representatives.—Under S. 45 of the Contract Act where a person has made a promise to two or more persons, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives and after the death any of them, with the representative of such deceased person, jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly. Where therefore a contract is made in favour of *A* and *B*, *A* alone cannot enforce the contract without impleading the legal representatives of *B*, in case *B* dies before suit. In applying this rule to cases of suits by or against *partners* in respect of partnership debts, there was, however, a conflict of opinion among the High Courts. All the High Courts except the Calcutta High Court held that in the case of such suits the legal representatives of a deceased partner need not be impleaded as parties.[1] The High Court of Calcutta held that the general rule applied to this class of suits also and that the legal representatives were necessary parties.[2] This conflict has now been set at rest by the enactment of O. 30, R. 4 modifying the operation of S. 45 of the Contract Act so far as the frame of suits relating to partnership is concerned, and making it clear that the Calcutta view ought not to prevail.[3] But the rule will enable a decree to be obtained only against the *partnership assets*, and cannot be carried further so as to alter the substantive law laid down in S. 45 and fix liability on the *private estate* of the deceased partner. If the plaintiff wishes to fix such liability, he is bound to make the legal representatives of the deceased partner also parties.[4]

There is a conflict of opinion as whether this rule applies where the suit is not brought *in the name of the firm*, but by one or more partners in respect of partnership. It was held by the Calcutta High Court in the undermentioned case[5] that the suit need not be brought in the name of the firm, and that this rule was enacted to simply uphold the view of the High Courts under the old Code, that, in suits on behalf of the partnership the legal representatives of a deceased partner were not necessary parties. The High Court of Rangoon has held that where the suit could not be brought in the firm name by reason of the firm having no name at all, this rule does not become inapplicable.[6] The High Courts of Allahabad[7-a] and Lahore,[7] the Judicial Commissioner's Court of

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Order 30, Rule 4—Note 1.

(1) *Gobind Prasad* v. *Chandrasekhar*, (1887) 9 All 486 (490, 491): 1887 All W N 133; *Debidas* v. *Nirpat*, (1898) 20 All 365 (366): 1898 All W N 73; *Motilal* v. *Ghellabai*, (1893) 17 Bom 6 (11, 14): Chitty's S C C R 336; *Aga Gulam* v. *Sassoon*, (1897) 21 Bom 412 (421); *Vaidyanatha* v. *Chinnaswami*, (1894) 17 Mad 108 (117); *Narayana* v. *Lakshmana*, (1898) 21 Mad 256 (257); *K V P L Perianen* v. *Arumuga Pather*, (1907-08) 4 L B R 99 (100); *Oodayappa Chetty* v. *Ramasamy Chetty*, (1914) 24 Ind Cas 268 (270, 271): 7 Bur L Tim 261: 8 L B R 130; *Mike* v. *Nga Kan Gyi*, (1909) 4 Ind Cas 1086 (1087): 1907-08 Stamp Act, p 3.

(2) *Ram Narain* v. *Ram Chunder*, (1891) 18 Cal 86 (90). See also *Shital Chandra* v. *Manik Chandra*, (1909) 1 Ind Cas 254 (256): 9 Cal L Jour 331: 13 Cal W N 509; *Pyari Mohan Bose* v. *Kedarnath Roy*, (1899) 26 Cal 409 (413): 3 Cal W N 271.

(3) *Mathura Das* v. *Ebrahim*, 1927 Bom 581 (585, 586, 591): 29 Bom L R 1296: 51 Bom 986: 105 Ind Cas 805; *Oodayappa Chetty* v. *Ramasamy Chetty*, (1914) 24 Ind Cas 268 (270, 271): 7 Bur L Tim 261: 8 L B R 130.

(4) *Mathuradas* v. *Ebrahim*, 1927 Bom 581 (587): 29 Bom L R 1296: 51 Bom 986: 105 Ind Cas 805; *Ram Narain* v. *Ram Prasad*, 1931 All 65 (69): 1930 All L J 913: 130 Ind Cas 712: 52 All 964.

(5) *Balkishandas* v. *Kanhya Lal*, (1913) 21 Ind Cas 509 (510): 17 Cal L Jour 648.

(6) *Maung Shwe Htein* v. *Ma Lon Ma Gale*, 1929 Rang 310 (311): 7 Rang 558: 120 Ind Cas 910.

(7-a) *Shrichand* v. *Bansidhar*, (1932) 135 Ind Cas 245 (246): 1932 All L J 219.

(7) *Hari Singh* v. *Firm, Karam Chand*, 1927 Lah 115 (117): 8 Lah 1: 100 Ind Cas 721: 28 Pun L R 455; *Moolchand* v. *Mulchand*, 1923 Lah 197 (201): 71 Ind Cas 951: 4 Lah 142.

Sind[8] and the Calcutta High Court itself in a later case[9] have held that the rule applies only when the suit is brought in the name of the firm. **O. 30, R. 4, Note 1.**

Sub-R. (2) of this rule is intended to safeguard the rights of the legal representatives in case, for instance, there should be any collusion between debtors to the estate and the surviving partners. Similarly sub-R. (2) (*b*) may enable them to claim contribution from the surviving partners under S. 43 of the Contract Act, in the event of there being a partnership liability.[10]

It follows from what has been stated in the above paragraphs that where a partner dies during the pendency of the suit, the suit does not abate but can be proceeded with by or against the firm.[11] This principle will not, however, apply unless two or more persons constituted a firm; where the sole proprietor dies, the suit will abate, unless the legal representatives are brought on the record within the limitation period.[12]

A person who sues some of the partners in their individual capacity, cannot be permitted to prove his case against them as partners of the firm.[13]

R. 5. [New.] *Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.* **O. 30, R. 5, Note 1.**

Notice in what capacity served.

[R. S. C., O. 48-A, R. 4.]

Synopsis.

1. Notice, in what capacity served.
2. Service on manager—See R. 3 above.
3. Person served both as manager and partner.
4. Appearance under protest.
5. Form of notice.

1. Notice in what capacity served.—"The object of the notice as to the capacity of the person served is obvious, namely, the Legislature intended to remove the possibility of dispute as to the character in which a particular person has been served. If there is a notice in writing, the person served is apprised of the character in which he is sought to be made liable. It is worthy of note that the language used is, not that the person served shall be *presumed* to

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(8) *Dost Muhammad* v. *Mohan Das*, 1926 Sind 81 (82, 83): 91 Ind Cas 573.

(9) *Monmohan Panday* v. *Bidhu Bhusan Roy Chowdhry*, (1918) 43 Ind Cas 309 (310): 28 Cal L Jour 268.

(10) *Mathura Das* v. *Ebrahim*, 1927 Bom 581 (586): 29 Bom L R 1296: 105 Ind Cas 305: 51 Bom 986.

(11) *Utankar Lal* v. *Tarak Nath*, 1929 Cal 11 (13, 14): 48 Cal L Jour 357: 114 Ind Cas 156; *Palin Behary Roy* v. *Abdul Majid*, (1918) 44 Ind Cas 911 (912) Cal [Decree for full amount can be passed without succession certificate].

(12) *Firm, Prabhdial Chhajju Mal* v. *Firm, Ganpatrai Ram Dial*, 1927 Lah 556 (557): 103 Ind Cas 142; *Ram Prasad Chinon Lal* v. *Anundji & Co.* 1922 Cal 408, (409): 49 Cal 524: 69 Ind Cas 885.

(13) *Ram Adin* v. *Munshi Ram*, (1915) 31 Ind Cas 209 (210 and 211): 76 Pun Re 1915: 151 Pun W R 1915.

O. 30, R. 5, Notes 1—5.

be served as a partner, but that the person shall be *deemed* to be served as a partner .... In the absence of a notice consequently, the person must be deemed to have been served as a partner, and if in reality not a partner he should proceed in accordance with R. 8''.[1] The failure to give notice under this rule will expose the plaintiff to the risk of being liable for costs in case the defendant appears under protest under R. 8.[2]

2. Service on Manager.—*See* R. 3 above.

3. Person served both as Manager and Partner.—Where there is doubt whether the person served is a partner or not, notice may be given that he is served both as a partner in the firm and as the person having the control or management of the partnership business there. This double form of notice has this advantage, namely, that if the person appears denying that he is a partner, judgment can still be signed in default of a proper appearance upon the service upon him as the manager or controller. The assets of the firm will be liable in execution.

As the Order applies only to suits, notices served on the judgment-debtor during the course of arbitration proceedings as a managing partner of the firm will not enable the decree-holder to take execution at once against him without leave of the Court under O. 21, R. 50, sub-R. 2.[1]

4. Appearance under protest.—*See* R. 8, *infra*.

5. Form of Notice.—*See* Form Nos. 23-C and 23-D of Appendix B to the English Rules of the Supreme Court.

O. 30, R. 6, Note 1.

R. 6. [New.] *Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.*

Appearance of partners.

[R. S. C., O. 48-A, R. 5.]

Synopsis.

1. Appearance of partners.
2. "All subsequent proceedings shall continue in the name of the firm."
3. Defence in suits against firms.
4. Decree in suits by or against firm.

1. Appearance of partners.—As has been seen in Note 1 to R. 1, *ante*, a firm, as such, has no existence in law. It cannot, consequently, appear as such in a suit against partners in the name of the firm. It is, therefore, enacted by this rule that the partners should appear *individually* in their own names, though all the subsequent proceedings should continue in the name of the firm. The word "individually" does not mean "in person" and, there-

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Order 30, Rule 5—Note 1.

(1) *Baisnab* v. *Bank of Bengal*, (1914) 26 Ind Cas 866 (869): 19 Cal W N 581: 19 Cal W N 1008; *Lalchand* v. *Firm, Dwaraka Dass*, 1928 Lah 528 (529): 108 Ind Cas 528.

(2) *Firm of Fateh Chand Madan Gopal* v. *Firm of Utanmal Jhaman Das*, 1926 Sind 51 (53): 89 Ind Cas 401.

Note 3.

(1) *E D Sassoon & Co, Ltd* v. *Shivji Ram Devi Das*, 1929 Lah 228 (229, 230): 115 Ind Cas 586.

fore, no partner can be compelled to appear *in person*.[1] He can appear by an agent or a solicitor or a pleader and such appearance will be an *individual* appearance within the meaning of the rule.[2] The fact that the firm has been represented by the appearance of one partner does not disentitle another partner from putting in his appearance, the reason, is that if such partner considers that his rights will not be adequately represented by the other partner who has appeared or who has been impleaded, or that his interests are adverse to that of such partner, it is just and fair that he should be allowed to appear individually and resist the claim.[3] O. 30, R. 6, Notes 1—4.

Where a partner does not appear in the suit and has not also been served individually with a summons in the suit, the decree obtained against the firm cannot be executed against him *personally* except with the leave of the Court under O. 21, R. 50, sub-R. (2). If he does appear under the provisions of this rule, execution can at once issue against him personally under O. 21, R. 50, sub-R. (1).

The only persons who can appear under this rule are persons who allege that they are partners of the firm sued and persons who are sued as partners but who deny that they are such (R. 8). A person merely served as manager cannot appear under this rule (R. 7).

2. "All subsequent proceedings shall continue in the name of the firm". —Where persons are sued as partners in the name of their firm, they should, under this rule, appear individually in their own names, but all subsequent proceedings are to nevertheless continue in the name of the firm.[1]

3. Defence in suits against firms.—Each partner appearing individually can put in a separate written statement but each written statement is the written statement of the *firm*. It is only when a person is sued personally along with the firm that he may put in a personal defence.[1] Where a person was served as a partner and not individually, and he put in a written statement in his *own name*, but there was nothing individual in the defence, it was held that there was only a technical flaw which could be corrected by the Court.[2]

Where several partners individually appear and put in separate written statements and such written statements are inconsistent with one another, the plaintiff is bound to meet all the defences and is bound to show that not one of the defences prevent a decree being passed against the firm.[3]

4. Decree in suits by or against firm.—The firm being sued in the *firm name* judgment can be passed against it only in *that name* and not against the individual partners though it may be *enforced* against them personally

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Order 30, Rule 6—Note 1.

(1) *Bridges & Co v. Shewan Din & Co.* (1918) 17 Ind Cas 422 (422): 78 Pun Re 1918: 155 Pun W R 1918: 105 Pun Rep 1918.

(2) *Lalchand v. Firm of Dwarka Das.* 1928 Lah 528 (529): 108 Ind Cas 598 [Appearance by power-of-attorney agent]: *Toulmin v. Broadsmith.* (1896) 1 Q B 386 [Appearer by solicitor]

(3) *Sital Pershad v. Peary Lall.* 1930 All 701 (702): 1930 All L J 1212: 52 All 951.

Note 2.

(1) *Ajit Singh v. Grunning.* 1925 Bom 494 (496): 27 Bom L R 998: 94 Ind Cas 969: *Pulin v. Mahendra.* 1921 Cal 722 (725): 34 Cal L Jour 405: 67 Ind Cas 10.

Note 3.

(1) *Ajit Singh v. Grunning.* 1925 Bom 494 (496): 27 Bom L R 998: 94 Ind Cas 969.

(2) *Pokhar Das Gobrani & Sons v. Sewa Ram, Girdharilal.* 1929 Sind 192 (193).

(3) Per Romer Law Jour. *Ellis v. Wadeson.* (1899) 1 Q B 714 (717): *I C Caoutchouc v. Mehta & Co.* 1927 Cal 758 (759): 31 Cal W N 1004: 54 Cal 1057: 105 Ind Cas 856.

O. 30, R. 6, Note 4.

under O. 21, R. 50. The judgment must follow the writ,[1] *i.e.*, the decree must be against the firm in the firm name and if one of the partners fails to appear no decree can be passed against him separately for default of appearance.[2] But the judgment has the effect of a judgment against all the partners as partners[3] and therefore, the assets of the firm are primarily liable to satisfy the decree.[4] Whether a particular partner is also personally liable to satisfy the decree can only be decided in execution under O. 21, R. 50.[5] A judgment entered against a firm may be a ground for a valid cause of action against an individual partner and an action may be brought upon it against him.[6]

O. 30, R. 7, Note 1.

R. 7. [New.] *Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.*

No appearance except by partners.

[R. S C., O. 48-A, R. 6.]

Synopsis.

1. Scope of the rule.

1. **Scope of the rule.**—A person served as manager is under no obligation to appear in Court unless he is a partner.[1] This rule is to be read subject to R. 5 above. It contemplates only a case where a person is served as a manager and not a case where the person served is deemed to be served as a partner.[2]

The object of the rule is to avoid unnecessary delay caused by the appearance of persons who are neither partners nor their agents.

O. 30, R. 8.

R. 8. [New.] *Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.*

Appearance under protest.

[R. S. C., O. 48-A, R. 7.]

Note 4.

(1) *Jackson* v. *Litchfield*, (1882) 8 Q B D 474.

(2) *Jackson* v. *Litchfield*, (1882) 8 Q B D 474 (478).

(3) Re *Frances Hanford & Co*, (1899) 1 Q B D 566 (570).

(4) *Adiveppa* v. *Pragji*, 1924 Bom 366 (367): 26 Bom L R 388: 80 Ind Cas 773; *Ram Prasad* v. *Anundji*, 1922 Cal 408 (409): 49 Cal 524: 69 Ind Cas 885.

(5) *Adiveppa* v. *Pragji*, 1924 Bom 366 (367): 26 Bom L R 388: 80 Ind Cas 773.

(6) *Clark & Sons* v. *Oullen*, (1882) 9 Q B D 355.

Order 30, Rule 7—Note 1.

(1) *Fatehchand* v. *Ulanmal*, 1926 Sind 51 (52): 89 Ind Cas 401.

(2) *Baishnab Charan* v. *Bank of Bengal*, (1915) 26 Ind Cas 866 (869): 19 Cal L Jour 581: 19 Cal W N 1008.

Synopsis.

1. Scope of the rule.
2. Party appearing under protest not entitled to file written statement on his own behalf.
3. Party appearing under protest if can question liability of firm.
4. Defence of party entering appearance under protest in proceeding under O. 21, R. 50.

1. Scope of the rule.—This rule enables a person who is served with summons as a partner under R. 3 to appear under protest and deny that he is a partner. The effect of such an appearance has nothing to do with the merits of the suit but nullifies the service altogether as regards the firm.[1] But the plaintiff is not precluded thereby from otherwise serving the summons on the firm. He may disregard the appearance of the person denying that he is a partner and may again effect a service upon a partner or partners or upon the manager of the business as required by R. 3, or he could contend that the person served *was a* partner at the time, the cause of action accrued, and apply on that basis either to have the appearance entered struck out, or to have the denial of partnership struck out of the appearance.[2] According to the High Court of Bombay the person protesting that he is not a partner has a right to have the issue as to whether he was a partner of the defendant firm, tried in the suit itself and not be left hanging over him until execution-proceedings are taken out against him under O. 21, R. 50.[3] On the other hand, in the undermentioned case of the Calcutta High Court, Mr. Justice Buckland was of the opinion that an inquiry of the kind prior to judgment is not within the contemplation of the rule, inasmuch as there is an express provision in O. 21, R. 50 for the decision of the question before according leave to proceed in execution.[4]

2. Party appearing under protest not entitled to file written statement on his own behalf.—A party who has been served as a partner under R. 3 and entered appearance under protest, is not entitled to file a written statement on his own behalf denying that he is a partner.[1]

3. Party appearing under protest, if can question liability of firm.—A defendant entering appearance under protest is not precluded from taking alternative defences, namely, that he is not a partner and that, assuming that he is a partner, the firm is not liable.[1] It was held in England in the under-

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Order 30, Rule 8—Note 1.

(1) *Ramanuja Chary* v. *Pohoomul*, 1926 Bom 585 (587): 50 Bom 665: 28 Bom L R 1275: 99 Ind Cas 495; *International Continental Caoutchouc Co* v. *Mehta*, 1927 Cal 758 (759): 31 Cal W N 1004: 54 Cal 1057: 105 Ind Cas 356.

(2) *Ajit Singh* v. *Crunning*, 1925 Bom 494 (496): 27 Bom L R 998: 91 Ind Cas 969; *Vithal Das* v. *Hansraj*, 1921 Bom 48 (49): 23 Bom L R 1249: 64 Ind Cas 688; *C S Ramanujachari* v. *Pohoomal*, 1926 Bom 585 (587): 50 Bom 665: 28 Bom L R 1275: 99 Ind Cas 495 [As to appearance of a person who wishes to enter appearance under protest in a summary suit under O 37 at p 588]; *Kodoomal* v. *Mangalram*, 1932 Bom 269 (269): 34 Bom L R 640: 138 Ind Cas 777 [But if plaintiff does not apply to strike off appearance under protest, it is open to Court to make provision for the costs of protesting party in the suit].

(3) *Vithaldas* v. *Hansraj*, 1921 Bom 48 (49): 23 Bom L R 1249: 64 Ind Cas 688. See, however, *Kodoomal* v. *Mangatram*, 1932 Bom 269 (269): 34 Bom L R 640: 138 Ind Cas 777.

(4) *International Continental Caoutchouc Co* v. *Mehta*, 1927 Cal 758 (759, 760): 31 Cal W N 1004: 54 Cal 1057: 105 Ind Cas 356.

Note 2.

(1) *International Continental Caoutchouc Campaigne* v. *Mehta & Co*, 1927 Cal 758 (760): 31 Cal W N 1004: 54 Cal 1057: 105 Ind Cas 356.

Note 3.

(1) *Cholumal* v. *Allibhoy*, 1926 Sind 154 (155, 156): 93 Ind Cas 380. See also In re *Malabar Forests and Rubber Co, Ltd.*, 1932 Bom 334 (335): 34 Bom L R 617: 138 Ind Cas 314 [Obiter].

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O. 30, R. 8, Notes 3—4.

mentioned case[2] that under the corresponding rule (O. 48-A, R. 7) of the rules of the Supreme Court, such a defence was not open to the defendant and this view was adopted by the High Court of Calcutta in the case cited below.[3] That rule, however, has been substituted by a new rule in 1929 under which such a defence is now permitted in England. The English case, therefore, has now been rendered obsolete in England.

4. Defence of party entering appearance under protest in proceeding under O. 21, R. 50.— *A* files a suit against a firm and serves *B* with a summons as a partner of the defendant firm. *B* appears under protest stating that he is not a partner, and a decree is passed in his absence against the firm. *A* then seeks to *execute* the decree personally against *B* under the provisions of O. 21, R. 50, sub-R. (2). *B* can, in such proceedings, defend himself on the ground that he is not a partner of the firm. He can also take any other defence that is open to him, unless, to allow him to do so, would be to negative any rule of procedure.[1]

O. 30, R. 9, Note 1.

R. 9. [*New.*] *This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.*

Suits between co-partners.

[R. S. C., O. 48-A, R. 10.]

Synopsis.

1. Scope of the rule.

Suit between partners. See Note 1, Pt. (2-a).

1. Scope of the rule.—The general rule of procedure is that a person cannot be both a plaintiff and a defendant.[1] This rule provides an exception to that rule[2] and makes this order applicable to suits between firms and one or more of the partners therein, and to suits between firms having one or more partners in common.[2-a] A suit may also lie by one firm against another

(2) *Weir & Co* v. *Mc Vicar & Co*, (1925) 2 K B 127.

(3) *International Continental Caoutchouc Co* v. *Mehta*, 1927 Cal 758 (760): 31 Cal W N 1004: 54 Cal 1057: 105 Ind Cas 856.

Note 4.

(1) *Ohhattoolal Misser & Co* v. *Naraindas*, 1930 Cal 53 (54): 56 Cal 704: 121 Ind Cas 403 [Alternative *personal* defence under U P Court of Wards Act allowed as such defence would not be a challenge of the decree itself]; *Malabar Forests and Rubber Co, Ltd*, In re, 1932 Bom 334 (335): 34 Bom L R 617: 138 Ind Cas 314. [Plea of not being a partner, and in the alternative, that partnership had no authority to borrow —Alternative plea unsustainable as challenging the decree] 1930 Cal 53 Distinguished.

Order 30, Rule 9—Note 1.

(1) *Pokhardas* v. *Sewaram*, 1929 Sind 192 (194); *Vellayappa Moothan* v. *Krishna Moothan*, (1918) 44 Ind Cas 428 (430): 34 Mad L Jour 32.

(2) *Pokhardas* v. *Sewaram*, 1929 Sind 192 (194). See also *Amba* v. *Baijnath*, (1917) 42 Ind Cas 436 (437): 167 Pun W R 1917.

(2-a) *Nagendra Iyer* v. *Muthiah Bagavathar*, 1927 Mad 1096 (1098): 52 Mad L Jour 803: 101 Ind Cas 93.

when *all* the members of one firm are members of the other.[3] The rule does not alter the *substantive law* as it existed before,[4] and does not lay down when and under what circumstances suits can be laid as between partners.[5] It only lays down the possibility of such suits and the *procedure* to be followed therein.[6] No suit will lie as between partners or between firms having common partners for recovery of monies due on accounts *without asking for accounts.*[7] O. 30, R.9, Note 1.

One of the directors of a company who has been excluded from acting as a director by the other directors can maintain an action in his own name on the ground of individual injury to himself.[8]

R. **10.** [*New.*] *Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name: and, so far as the nature of the case will permit, all rules under this Order shall apply.* O.30, R.10, Note 1.

Suit against person carrying on business in name other than his own.

[R. S. C., O. 48-A, R. 11.]

Synopsis.

1. Scope of the rule.
2. Non-resident foreigner.
3. "All rules under this order shall apply."

1. Scope of the rule.—In order to maintain a suit against a firm in the name of the firm, there must be *two or more persons* who are alleged or who claim to be partners therein.[1] It follows that a *single* person cannot constitute a firm, though he is carrying on business in a name, and style other than his own. This is made clear by the use of the words "as if it were a firm" and "so far as the nature of the case will permit" in this rule.[2] Such a person cannot, therefore, *sue* in the name of the firm, but must sue in his own name.[3] Where, however, he files a suit in the name of the firm, but is willing to amend the plaint by inserting the words "(plaintiff) carrying on business under the name and style of (firm)", the amendment should be allowed on terms that he should pay all the costs incurred up to the date of the amendment.[4] Where the title of the plaint mentioned the plaintiff as "*A*, owner of the shop *C*", there is no mis-description inasmuch as the plaintiff is *A* and not the shop *C*.[5]

(3) *Pokhardas* v. *Sewaram*, 1929 Sind 192 (194).

(4) *Mayer & Co* v. *Faber* (*No* 2), (1923) 2 Ch 421 (435, 439).

(5) *Lakshmanan Chetty* v. *Nagappa Chetty*, (1918) 45 Ind Cas 86 (87): 34 Mad L Jour 408.

(6) *Lakshmanan Chetty* v. *Nagappa*, (1918) 45 Ind Cas 86 (87): 34 Mad L Jour 408.

(7) *Lakshmanan* v. *Nagappa*, (1918) 45 Ind Cas 86 (87): 34 Mad L Jour 408; *Pokhar Das* v. *Sewaram*, 1929 Sind 192 (194); *Vellayappa* v. *Krishna Moothan*, (1918) 44 Ind Cas 428 (436, 438): 34 Mad L Jour 32 [Execution cannot be issued without the leave of the Court].

(8) *Subrahmanya Iyer* v. *United India Life Insurance Co, Ltd*, 1928 Mad 1215 (1219): 55 Mad L Jour 385.

Order 30, Rule 10—Note 1.

(1) See Notes to Rule 1 *ante*. *Samrathrai* v. *Kastur Bai*, 1930 Bom 216 (216): 32 Bom L R 212: 127 Ind Cas 412.

(2) *Rampratab* v. *Gavrishankar*, 1924 Bom 109 (111): 25 Bom L R 7: 85 Ind Cas 464.

(3) *Samrathrai* v. *Kastur Bai*, 1930 Bom 216 (216): 32 Bom L R 212: 127 Ind Cas 412.

(4) *Neogi Ghose & Co* v. *Sardar Nehal Singh*, (1931) 35 Cal W N 432 (434): 134 Ind Cas 1200: 1931 Cal 770.

(5) *Chanbasappa Malkappa* v. *Malkappa Lingappa*, 1928 Bom 366 (368): 111 Ind Cas 476.

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O. 30, R. 10, Notes 1—3.

But though a single person trading in a firm name cannot *sue* in the name of a firm, he *can be sued* in that name under the provisions of this rule.[5-a] But the business must be carried on in British India and must be an *existing* one at the time when the suit is instituted.[6] If the sole proprietor dies, no suit can be brought against him in the name of the firm, for such a suit will be only a suit against a dead person and therefore a nullity.[7] The proper form of the suit will be against the legal representatives of the deceased proprietor.[8] Similarly if he dies, pending the suit, it will abate unless his legal representatives are brought on the record within the prescribed period of limitation (90 days from the date of his death).[9]

2. **Non-resident foreigner.**—It has been held in England that English Courts cannot seek to exercise jurisdiction over a single trader residing in a foreign country, notwithstanding the fact that he carries on business within the jurisdiction.[1] In this country, it has been held by the High Court of Calcutta that, there is nothing in this rule which says anything about residence either in or without the jurisdiction of the Court, and that a Court can exercise jurisdiction over persons who *carry on business within its local limits* though they are resident outside it.[2] The same question came before the consideration of the Privy Council in the undermentioned case[3] where the Courts below had assumed they had such jurisdiction. Their Lordships of the Privy Council did not, however, decide the point but left it with the remark that the assumption appeared to their Lordships to require more attention than it had received.

3. **"All rules under this order shall apply".**—All the rules of this order relating to suits against firms have been made applicable by the latter part of the rule to suits properly laid against a person trading in a name other than his own so far as the nature of the case will permit. Thus the business must be carried on in British India and the defendant may be asked to disclose his real name and address (Rr. 1 and 2). Service may be effected as provided under the rule (R. 3) and the Court has got power to order substituted service when no person having control or management of the business can be found.[1] R. 4 will not apply" (*see* Note 1). The defendant must appear *individually* in his own name though the subsequent proceedings might continue in his assumed name. Judgment can be passed against him in the firm name and execution will issue as provided by O. 21, R. 50. Where the service has only

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(5-a) See *Bhagwan Manaji* v. *Hiraji*, 1932 Bom 516 (518): 34 Bom L R 1112.

(6) *Habib Bux* v. *Samuel Fitz & Co*, 1926 All 161 (163): 23 All L J 961: 6 L R A Civ 553: 99 Ind Cas 22.

(7) *Rampratab* v. *Gavri Shankar*, 1924 Bom 109 (111): 25 Bom L R 7: 85 Ind Cas 464.

(8) *Firm Daulat Ram Devi Das* v. *Ishar Das*, 1929 Lah 149 (150): 111 Ind Cas 706.

(9) *Ram Prasad* v. *Anundji & Co*, 1922 Cal 408 (409): 49 Cal 524: 69 Ind Cas 885; *Hari Bandhu Pal* v. *Hari Mohan Saha*, 1930 Cal 327 (328): 51 Cal L Jour 80: 34 Cal W N 36: 126 Ind Cas 118: 57 Cal 931.

Note 2.

(1) *St Gobain Chauny and Ciray Co* v. *Hoyermann's Agency*, (1893) 2 Q B 96; *Taylor Brothers & Co, Ltd* v. *A Johnson & Co*, 1917 W N 341 C A; *Maciver* v. *Burns*, (1895) 2 Ch 630; *Tarabai* v. *Chogmal*, 1932 Nag 114 (116): 28 Nag L R 118.

(2) *Sassoon & Co* v. *Angullia & Co*, (1911) 10 Ind Cas 895 (896) Cal; *M S Anguliar & Co* v. *E D Sassoon & Co*, (1912) 13 Ind Cas 705 (706): 16 Cal W N 593: 39 Cal 568 [On appeal from 10 Ind Cas 895 objection to want of jurisdiction abandoned].

(3) *Annamalai Chetty* v. *Murugasa Chetty*, (1903) 26 Mad 544 (552): 7 Cal W N 754: 13 Mad L Jour 287: 5 Bom L R 494: 8 Sar 523: 30 Ind App 220 P C.

Note 3.

(1) *Shullito* v. *Child & Co*, W N (1885) 208.

been effected upon the person having the management and control of the business, it may be that execution can issue without leave only against the property found at the business premises unless the person so traded has appeared. Where appearance has been entered or the person has been served personally or an order for substituted service has been obtained, execution may be issued against the business assets and against the defendant personally. O.30, R.10, Note 3.

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